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THE NEW PUBLIC LAW IN A GLOBAL (DIS)ORDER
A PERSPECTIVE FROM ITALY

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From *Judicial Comity* to *Legal Comity*:
a Judicial Solution to Global Disorder?

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The New Public Law in a Global (Dis)Order – A Perspective from Italy

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a "Call for Papers" and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of "Administrative Law," "Constitutional Law," or "International Law," but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper.
The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler, *Director, Jean Monnet Center for International and Regional Economic Law & Justice*
Sabino Cassese, *Judge of the Italian Constitutional Court*

Prologue:
The New Italian Public Law Scholarship

Since the second half of the 20th Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20th century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals ("Rivista trimestrale di diritto pubblico" and "Giornale di diritto amministrativo"). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled "The New Public Law in a Global (Dis)Order – A Perspective from Italy" – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law[♦].

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*
Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*
Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

♦ Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D'Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo: Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at http://www.irpa.eu/index.asp?idA=302.

FROM *JUDICIAL COMITY* TO *LEGAL COMITY*: A JUDICIAL SOLUTION TO GLOBAL DISORDER?

By Elisa D'Alterio*

Abstract

Multifarious definitions and different practices are associated with the "judicial comity" notion. Nevertheless, this paper seeks to demonstrate the existence of a "key feature" of the phenomenon. The analysis of cases illustrates that the implementation of certain judicial techniques expresses a courts' "regulating function" aimed at governing the relations between different legal systems within the global space - when the codified criteria regulating those relations are lacking or insufficient. It is an original approach, which allows us to identify the new boundaries of the phenomenon - distinguishing between the techniques that are effectively an expression of judicial comity, and those which are not – and consequently to depart from the definitions elaborated by a certain jurisprudence and literature. From this standpoint, the judicial comity produces an interesting effect of "legal comity", which can lead to a mitigation of the disorder characterizing the global space. At the same time, this perspective gives rise to some questions, for example, related to the real value of the phenomenon and the existence of extrajudicial interests behind the application of the techniques.

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Introduction

"*Iudiciaria potestas pars summi imperii*". This is how Samuel Pufendorf theorizes, in the second half of the 17th century, the autonomy and self-sufficiency of the judicial systems of States.[1] From this classical definition stem the principles of the jurisdiction of sovereign States, and the establishment of national judicial systems, closed vis-à-vis all foreign systems and values.[2] Within this context, the activity of courts is the expression of a "reluctance to refer to foreign and international law".[3]

Presently, this classical notion is widely overcome, due to the development of ultra-state legal systems, with the consequent process of a "delocalization of jurisdiction".[4] This phenomenon not only leads to the emergence of numerous global judicial bodies,[5] but above all to the implementation of a wide range of judicial practices, not expressly envisaged by any national or international law.[6] Just to mention a few, possible modalities, they may consist in: *i)*

[1] S. Pufendorf, *De iure naturae et gentium* (Libri octo (1672), VII, New York-London, 1964) C. 4 § 4.

[2] On this issue, *see* the fundamental studies of G. Gorla, *I "Grandi Tribunali" italiani fra I secoli XVI e XIX: un capitolo incompiuto della Storia politico-giuridica d'Italia* (Quaderni del Foro Italiano, 1969) and *Ibid., Diritto comparato e diritto comune europeo*, Milano, Giuffrè, 1981).

[3] On this issue, *see* E. Benvenisti, "Reclaiming Democracy: the Strategic Uses of Foreign and International Law by National Courts", 102:1 *American Journal of International Law* (April 2008) pp. 241-273. More precisely, the Author stresses that: "it wasn't so long ago that the overwhelming majority of courts in democratic countries shared a reluctance to refer to foreign and international law. These courts conformed to a policy of avoiding any application of foreign sources of law that would clash with the position of their domestic governments".

[4] On this last aspect, *see* L.H. Helfer and A.M. Slaughter, "Why States Create International Tribunals: a Response to Professors Posner and Yoo", 93 *California Law Review* (2005) pp. 899 *et seq.*; F. Orrego Vicuna, *International Dispute Settlement in an Evolving Global Society* (Cambridge University Press, 2004); K. Oellers-Frahm, "Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions", in J.A. Frowein-R. Wolfrum (eds.) 5 *Max Planck Yearbook of United Nations Law* (2001) pp. 67 *et seq.*; C.P.R. Romano, "The Proliferation of International Judicial Bodies: the Pieces of the Puzzle", 31 *N.Y.U. Journal of International Law and Politics* (1999) p. 711; T. Treves, "The Proliferation of International Tribunals: Piecing Together the Puzzle", *N.Y.U. Journal of International Law and Politics* (1999) pp. 679 *et seq.*

[5] On this point, *see* R. Mackenzie, C. Romano, Y. Shany, P. Sands, *The Manual on International Courts and Tribunals* (Oxford, Oxford University Press, 2010).

[6] Joseph H.H. Weiler describes the development of the judicial bodies at the global level in the following terms: "(…) one sees an initial stratum of horizontal, dyadic, self-help through mechanisms of counter-measures, reprisals and the like. This is still an important feature of enforcement of international obligation. Then, through the century, we see a consistent thickening of a triadic stratum – through the mechanisms with which we are all familiar – arbitration, courts and panels and the like. The thickening consisted not only in the emergence of new area subject to third party dispute settlement but in the removal of optionality, in the addition of sanctions and in the general process of "juridification". Dispute settlement, the hallmark of diplomacy, has been replaced, increasingly, by legal process especially in the legislative and regulatory dimensions of international law making. And there is, here too, a

the recognition of the jurisdiction and implementation of the decisions of judges belonging to supranational systems; *ii)* the dialogue between courts for solving transnational cases; *iii)* the resort to foreign or global law; and *iv)* in the cross-citation between courts belonging to different judicial systems.[7]

Jurisprudence and literature associate all these practices with the phenomenon of the *judicial comity*. Some elements they share are: *i)* the spontaneous and discretional nature of these techniques; *ii)* the need to solve (potential or actual) contrasts between different judicial systems; and *iii)* the inadequacy of normative criteria for solving these contrasts. In this connection, both judges, and scholars indifferently speak of "transnational judicial cooperation",[8] "judicial cosmopolitanism",[9] or "judicial dialogue".[10]

Actually, the notion of *judicial comity* is far more complex than it might appear. Research on this subject has indeed labeled under this expression a wide range of juridically diverse definitions and practices, thus creating much confusion and a questionable overlapping of significations. In this sense, "despite ubiquitous invocation of the doctrine of comity, its meaning is surprisingly elusive".[11]

A number of basic misconceptions underlie this circumstance. One concerns the limitation of the many attempts to define or classify this doctrine preferring an abstract notion of *judicial comity* to the study of its true essence, or empirical manifestation. This approach led to place under this label diverse practices, thus developing a long set of definitions. Albert Einstein's famous thesis "it's theory that determines what we observe", or the Chinese claim that "two

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third stratum of dispute settlement which may be called constitutional, and consists in the increasing willingness, within certain areas of domestic courts, to apply and uphold rights and duties emanating from international obligations" ("The Geology of International Law – Governance, Democracy and Legitimacy", 64:3 *ZaöRV* (2004) pp. 550-551).

[7] *See* J.S. Martinez, "Towards an International Judicial System", 56 *Stanford Law Review* (2003) p. 429; E. Benvenisti, "Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts", 4 *European Journal of International Law* (1993) p. 175.

[8] A.M. Slaughter, "Judicial Globalization", 40 *Virginia Journal of International Law* (2000) pp. 1103 *et seq*.

[9] R.A. Posner, *How Judges Think* (Cambridge-London, Harvard University Press, 2008) pp. 347 *et seq*.

[10] G. Martinico, *The Dark Side of the Constitutional Dialogue* (Jean Monnet Working Paper, 19-20 May 2008).

[11] J.R. Paul, "Comity in International Law", 32 *Harvard International Law Journal* (1991) pp. 1 *et seq.*; ibid., "The Transformation of International Comity", 71:3 *Law and Contemporary Problems* (2008).

thirds of what we see lies behind our eyes" perfectly epitomize one of the most common "mistakes of the researcher".[12]

The use of terms such as *judicial comity* is in fact attributable to a more general trend, or "fashion", of resorting to abstract concepts to describe sets of practices or institutions very different from one another (see the widespread and misleading use of other definitions such as "judicial dialogue", "judicial cosmopolitanism", "global federalism of judges", etc.).[13] This tendency is indeed questionable, since it does not allow an in-depth examination of the true nature of certain legal phenomena.[14] In this sense, these labels are only "chimeras".

Furthermore, the notion of *judicial comity* cannot be analyzed separately, but in relation to the global space properties. In this space, judicial systems "meet and clash",[15] generating "movements" that are difficult to classify and regulate.

The present paper aims at demonstrating, first of all, how and why the *judicial comity* can be regarded as the expression of the courts' activity for governing the relations between systems, when the codified criteria regulating those relations are lacking or insufficient. It is a very original approach to the analysis of the phenomenon, because it allows understanding the real reasons for the adoption of the judicial practices associated with the *judicial comity*. In other words, what is the importance of these mechanisms? What is their main function? *Cui prodest*? Only a few studies deal with these problems; furthermore, none of them analyses in depth the nexus between the phenomenon of *judicial comity* and the need to regulate the relations among legal systems within the global space.

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[12] The expression "mistake of the researcher" is used with that meaning by F. Benvenuti, "Lo Stato regionale", IV *Scritti giuridici* (1977) p. 3307.

[13] For instance, the term "judicial dialogue" is used with many meanings: Allan Rosas indeed recognizes five modalities of judicial dialogue. *See* A. Rosas, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue", 2 *European Journal of Legal Studies* (2007) pp. 1 *et seq.*

[14] With reference to point 13 above, how is it possible that the term "judicial dialogue" is used to describe both the reference to foreign law, and the enforcement of foreign judgments? They are, in fact, two very different legal disciplines. It is, therefore, a clear-cut example of a misleading definition. In the light of the analysis developed in this paper, the same conclusions would hold true in relation to the definition of "judicial comity".

[15] These terms are drawn from S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (Roma, Donzelli, 2009).

Accordingly, this analysis demonstrates how some of the practices generally attributed to this phenomenon cannot be properly considered an expression of *judicial comity*, because they do not perform the above mentioned regulatory function. This is a highly original attempt, which departs from previous studies. To this end, the appraisal of the specific judicial mechanisms, the in-depth examination of the value of these practices, and especially the identification of a regulatory function by courts, constitute the major steps in this analysis.

What's more, the *judicial comity* produces an interesting effect of *legal comity*, which can affect the development of a "global legal order" or, at least, lead to a mitigation of the disorder presently characterizing the global space. Also this thesis is quite interesting, insofar as it highlights how judges contribute to a "global and legal harmonization". The paper employs the *legal comity* notion in order to distinguish this phenomenon from that defined "judicial globalization".[16] In fact, while the "judicial globalization" concept deals with the development of a "community of courts", the *legal comity* notion concerns the effect arising from the use of "common judge-made rules" regulating the relations between legal systems.

Nevertheless, these theses are faced with the limit of the variability and non exhaustiveness of the judicial techniques taken into account, due to the difficulty of analyzing the overall typification of the relations between systems at the global level, together with the relative decisions and practices adopted by judges for their regulation.[17] For this reason, the paper does not aim at reconstructing and systematizing all the different types of relations between systems (Santi Romano),[18] or even at conjecturing a theory of relations between elements of the legal systems (Massimo Severo Giannini)[19] in the global space. The constant proliferation of ultra-state systems, and the different orientations of national and ultra-state courts constitute hardly classifiable variables. Also in this light, the *legal comity* notion is quite original, because it only focuses on the mitigating effect which the adoption of judicial practices

[16] Slaughter, *supra* note 8.
[17] For more details on data related to the *judicial comity*, *see* para. 2.
[18] S. Romano, *L'ordinamento giuridico* (II ed., Firenze, Sansoni, 1977).
[19] M.S. Giannini, "Gli elementi degli ordinamenti giuridici", 2 *Rivista trimestrale di diritto pubblico* (1958) pp. 219-240.

produces on global disorder, without upholding the growth of a "global judicial order" or of a "brave new judicial world".[20]

These introductory considerations suggest how this paper is organized. Paragraph 1 concisely illustrates the origins of the term *comity*, and its subsequent developments within the judicial domain. In paragraph 2 the need to avoid starting from a pre-established definition of *judicial comity* calls for an analysis of data relating to this phenomenon in its concrete manifestations, by taking into account a number of significant cases singled out according to the use of this expression or similar notions by courts for the solution of both national, and ultra-state cases.[21] This paragraph, moreover, identifies the reasons for which jurisprudence and literature associate all the examined practices with the *judicial comity*. The opening of the Pandora's box, discussed in paragraph 2, requires that a careful examination of the real value of the *judicial comity* be carried out in paragraph 3. On this point, scholars have elaborated a great number of interpretations, but none of them is really exhaustive. Hence, the analysis of functions under paragraph 4 is very illuminating, and represents the core of this paper. In fact, it illustrates how the application of certain judicial mechanisms may be interpreted as the expression of a regulatory function by courts. Judges regulate the relations between legal systems, by creating and applying *ad hoc* mechanisms. The exercise of this function is therefore the true essence of the phenomenon, leading to further research. In the light of such a result, paragraph 5, taking into account the examined practices, distinguishes between those that may be considered a manifestation of *judicial comity* – as they are an expression of the above mentioned regulatory function of courts -, and those that are not attributable to this phenomenon.

According to a general approach, is it possible to speak of the development of a *legal comity*? And how would it relate to the *judicial comity*? How would it contribute to mitigate global disorder? These are a few critical questions analyzed in paragraph 6, and which, in

[20] A.M. Slaughter, "A Brave New Judicial Order", in M. Ignatieff (ed.) *American Exceptionalism and Human Rights* (Princeton University Press, 2005) pp. 277 *et seq*.

[21] The selection of cases was made taking into account jurisprudence of national and ultra-state courts, in the frame of relations falling within the same legal level (the so-called horizontal relations), as well as those between diverse legal levels (the so-called vertical relations). Moreover, these cases relate to issues of importance to publicists.

paragraph 7, in turn lead to a number of conclusions concerning the interests and the real reasons for the adoption of the *judicial comity* techniques.

1. From *comity* to *judicial comity*: origins and developments

The term *comity* derives from Sanskrit, and it means "to laugh".[22] These semantic origins already explain the use of this term in relation to certain phenomena. In a famous work by Umberto Eco, laughter is described as an instrument aimed at "dismantling the opponents' sternness".[23] This function is also upheld in an interesting scientific research, which demonstrates that laughter and fear manifest themselves in the same way. In fact, when human beings laugh they show their teeth - the same facial expression adopted by animals when they fear an aggression from the man or animal facing them.[24]

Therefore, laughter can be considered a "relational instrument" allowing a proper and balanced management of those relations, which might involve a negative impact on the protection of certain interests. This semantic origin, moreover, explains the meaning of the Latin term "*comitas*" (*com*-(*is*)-*itas*), which refers to relations characterized by "courtesy", "mutual respect", or "mutual convenience".

This term was first used with regard to the *ius gentium*, in ancient Rome (*comitas gentium*), and the subsequent development of the *ius commune*, in the Middle Ages.[25] In these instances *comity* points to the existence of a common cultural and legal heritage, not translated into written norms and thus mainly spontaneous in nature.[26] The existence of this substratum

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[22] The Latin term "*comitat-comitas*", referring to the expression "*comis*", is composed by "com" and "smis". This suffix derives from the Sanskrit "*smayate*", corresponding to the verb "to laugh". On this issue, *see* M.W. Lien, "The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and 'Breard' Scenarios", 50 *Catholic University Law Review* (2001) pp. 591 *et seq*.

[23] U. Eco, *Il nome della rosa* (Milano, Bompiani, 1980) p. 479. On the origins of laughter, see H. Bergson, *Laughter. An Essay on the Meaning of the Comic* (New York, Macmillan, 1914).

[24] A similar interpretation is formulated by F. Nietzsche in *Menschliches, Allzumenschliches*, 1878 (en. vers., *Human, all too Human*, 1984).

[25] On Roman law, *see*, in particular, P. Stein, *Roman Law in European History* (Cambridge University Press, 1999). On Medieval law, instead, *see* P. Grossi, *L'ordine giuridico medievale* (Roma Bari, Laterza, 2006).

[26] *See* R.C. van Caenegem, *European Law in the Past and the Future* (Cambridge, Cambridge University Press, 2002).

aims at balancing the strong legal pluralism characterizing the actual life of the Roman Empire and, later on, of the Sacred Roman Empire - by governing those aspects removed from the scope of individual systems, or the relations existing between them.

This same harmonizing and balancing function of *comity* also characterizes the Modern Age, where this expression is used in connection with relations among States ("international comity", or "comity of nations").[27] Immanuel Kant himself, in his book *For a Perpetual Peace*, employs this concept to explain the idea of a "federalism among free States".[28] Therefore, the term *comity* evolves as a principle underlying international relations, and is considered the basis of conflict of laws, as emerges in the well-known studies of Joseph Story.[29] The "courtesy between States" must in all cases be based upon mutual respect - hence the link between *comity*, and the reciprocity principle, which in turn is to protect the sovereignty of States.[30]

Only in contemporary times is this term employed - with new meanings - in the courts' activity (hence, *judicial comity*), and appears for the first time in US jurisprudence (*Guyot v. Hilton*, 1895. See also the extension of the so-called "comity clause").[31] Already in the above mentioned studies of Joseph Story, *comity* is considered in relation to the judicial activity, with special reference to cases wherein Anglo-Saxon courts implemented decisions or the laws of other national legal systems.

Nonetheless, the use of this term both by judges, and doctrine is far from clear-cut. Just to mention some examples: at times, *comity* is associated with the recognition of decisions of courts belonging to other systems, or else to the application of the law of different legal systems.

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[27] On this point, *see* Paul, *supra* note 11.
[28] I. Kant, *Zum ewigen Frieden* (1795).
[29] J. Story, *Commentaries on the Conflict of Laws* (Boston, 1834).
[30] The reciprocity principle has been at the basis of international relations, as of the Peace of Westphalia. This principle is founded on a perfect parity and an absolute independence of sovereign States, and it constitutes the premise of the mutual support and exchange of favors between nations. Furthermore, reciprocity inspires the majority of international trade agreements, as well as those stipulated within the frame of the World Trade Organization (WTO).
[31] In the United States it is primarily the Constitution that regulates the relations between national courts. More precisely, Section 1 of Article IV - defined "comity clause", or "full faith-credit clause"- establishes that "Full Faith and Credit shall be given to the public Acts, Records, and Judicial Proceedings of every other State". It is therefore a mechanism which recognizes the decisions of judicial bodies, and applies only between the local courts of the U.S. States.

While in other instances, the term is linked to the deference mechanism among jurisdictions.[32] This term is also used beyond the strictly judicial framework, as "positive comity", which refers to relations between market governing and control authorities within reticular systems,[33] and thus pertains to the ambit of administrative law studies.[34]

The multifarious meanings assigned to the term *comity* are a clear indication of one of its major critical aspects. *Comity* is indeed a polysemic expression, utilized in diverse ambits (Roman law, Medieval law, history of international relations, philosophy of law, private and procedural international law, administrative law, public law, etc.), with heterogeneous meanings. Even in its more specific declension of *judicial comity* it appears like an "open" term, hardly referable to a precise institute, or legal principle.

Consequently, what are the *judicial comity* techniques? Which are their main features? Why are they ascribable to that phenomenon? Do they share common elements? Is it possible, or useful, to trace back a definition?

2. **A Pandora's Box: a multitude of definitions and techniques**

Countless are the decisions wherein judges utilize techniques and definitions referable to the *judicial comity* expression for solving cases where two legal systems enter into contact.[35] The analysis of these data is necessary for the purposes of this study. The cases taken into consideration add up to nearly 82.[36] In about 40 cases, the *judicial comity* notion or similar expressions are directly used by judges in the implementation of specific judicial techniques; in

[32] *See* para. 2, which follows.
[33] On "positive comity" there exist *ad hoc* OECD "Reports" (http://www.oecd.org/dataoecd/40/3/2752161.pdf.).
[34] Lastly, within the United Nations, even an "inter-institutional comity" has been recognized amongst its internal bodies, in the sense that the activity of one body must not interfere with that of another.
[35] The cases from which the diverse judicial techniques herein examined were taken are decisions of different types of courts (constitutional, ordinary, etc.) belonging to different legal levels (national, supranational, global). Clearly, this case survey is far from exhaustive or complete, given the synthetical nature of this paper. However, the criteria considered are the most significant, and for the most part relate to rather well-known decisions.
[36] This number takes into account a broader analysis carried out as a three-year research now published in E. D'Alterio, *La funzione di regolazione delle corti nello spazio amministrativo globale* (Milano, Giuffrè, 2010). Therefore, this paper only quotes the most significant cases out of the total cases examined in the book.

about 42 cases, instead, courts do not mention the *judicial comity*, but apply judicial mechanisms defined by scholars as an expression of this phenomenon.[37]

The first applications regard the relations between national systems. The notion of *judicial comity* appeared for the first time in a decision taken at the end of the 19th century,[38] with reference to the execution by the US system of a French court judgment. Lacking any provision regulating this case,[39] the US Supreme Court ruled that: "comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons as are under the protection of its laws" (point 164). Consequently, the *judicial comity* would include a reciprocity principle or technique,[40] which allows one system to apply the decision of a foreign judge, only when the

[37] The decisions are quoted in footnotes - in order to allow further research - and concern the judicial mechanisms more systematically applied by courts.

[38] *Hilton v. Guyot*, 159, US 113 (1895). The case is analyzed by G.B. Murr, "Enforcing and Resisting Judgments", in D.J. Levi (ed.) *International Litigation. Defending and Suing Foreign Parties in US Federal Courts* (American Bar Association, 2003) pp. 341 *et seq*. The term *comity* is also used by American courts in several other cases. For instance, *see* some recent decisions of the US Supreme Court: *PT Pertamina v. Karaha Bodas Company, LLC*, No. 07-619 (2007) and *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd*., No. 07-618 (2007). On this point, some scholars note that "in the century or so since *Hilton*, (…) comity analysis has become 'canonical'. As long as foreign courts respect minimal jurisdictional and due process requirements, American courts 'almost always enforce' their judgments without re-examining the merits. They do so even with respect to claims they would have rejected, as an original matter, as against public policy. Although American law allows courts to reject foreign judgments that violate public policy, this is a 'very narrow[]' exception, one that American judges reserve for 'rare case[s]', such as situations 'where the original claim is repugnant to fundamental notions of what is decent and just' in the domestic forum". M. Movsesian, "Judging International Judgments", 48:1 *Virginia Journal of International Law* (2007) pp. 106-107.

[39] "The effect to be given to foreign judgments is altogether a matter of comity in cases where it is not regulated by treaty" (point 166).

[40] Note that a "reciprocity principle" is also applied in banking-financial field, in relation to the regulation of banking-financial services' circulation among EU Member States and States not belonging to the EU. Furthermore, reciprocity is a traditional principle of GATT-WTO negotiations (on this point *see* the European Court of Justice case-law: in particular, *"Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM)" and "Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC" and "Giorgio Fedon &Figli SpA" and "Fedon America Inc." v. EU Council and ECC Commission*, 9 September 2008, joined cases 120/06 P and 121/06 P). Conversely, a mutual recognition criterion is applied to the circulation of banking-financial services within the EU. *See*, in particular, E. Waide Warner, "A 'Mutual Recognition' and Cross-border Financial Services in the European Community", 55:4 *Law and Contemporary Problems* (1992) pp. 7 *et seq.*

judicial system of that judge recognizes and directly enforces the decisions (and the law) of the first system, assigning to it "full credit and conclusive effects".[41]

The implementation of the "effects test"[42] also falls within the framework of relations between national systems. According to this mechanism, a judicial system may decide on acts carried out in another country, provided that they have, or might have effects within the territory under the jurisdiction of the reference system. This theory has been associated with the *judicial comity* phenomenon, as far as it allows the extra-territorial exercise of the jurisdiction, in order to regulate a case of contact between different systems.[43]

In summary, the reciprocity principle is a technique related to the recognition and implementation of the decisions of courts belonging to other systems, while the effects test is a mechanism which regulates the intervention of a court (or even of the legislator) on decisions or acts of another system. They may be considered "judicial integration techniques", which are therefore related to those definitions recognizing in the *judicial comity* a "principle by which the courts of one jurisdiction may accede or give effect to the laws or decisions of another";[44] or more generally, "a practice among political entities (as nations, States, or courts of different jurisdictions), involving mutual recognition of legislative, executive and judicial acts".[45]

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[41] Note that also the courts of other States have mentioned the *comity* principle with regard to the recognition and application of foreign judgments. In particular, we recall the *Beals v. Saldanha* case (*Beals v. Saldanha*, [2003] 3 S.C.R. 416, SCC 72), where the Supreme Court of Canada established the direct enforcement of foreign judgments, in the presence of a "real and substantial connection between the foreign jurisdiction and the subject matter giving rise to the claim". A thoroughly dissimilar position is the one ensuing from the jurisprudence of the Supreme Court of Hong Kong, which in the *Nanus Asia* case (*Nanus Asia Co. v. Standard Charter Bank*, 22 September1988 H.K.C. Lexis 410) rules out both the direct, and indirect extra-territorial effectiveness of a decision by a U.S. court, because of the profound differences existing between their respective judicial systems.

[42] For instance, this technique is used in the *Yahoo!* case: Tribunal de Grande Instance de Paris, Ordonnance de référé, 22 May, 2000; United States District Court Northern District of California San Jose Division, n. C-00-21275, 00-21275 JF and n. C-00-21275 JF; United Stated Court of Appeal for the Ninth Circuit, n. 01-17424; United States Supreme Court, *Orders in pending cases*, Order list no. 547, 30th May, 2006.

[43] *See* Martinez, *supra* note 7.

[44] Definition drawn from the *West's Encyclopedia of American Law*.

[45] Definition drawn from the B.A. Gamer (ed.), *Black's Law Dictionary*, ed. III, 2006, p. 114.

A different instance regards the reference technique, also called "mutual consideration" technique,[46] applied by national and ultra-state courts within the relations between systems of different judicial levels. For solving cases mostly dealing with the protection of fundamental rights, courts at times resort to the reference to decisions - or generally to the jurisprudence - of other courts,[47] or even to the law of different systems, by virtue of their "persuasive authority".[48] Thus, judges state that "the international comity dictates that American courts enforce out of respect for the integrity and competence of foreign tribunals".[49] In this light, also the "respectful consideration", intended as a technique for settling a dispute, is considered as a form of *judicial comity*.[50] Moreover, the reference is made both in the horizontal,[51] and in the vertical[52] direction, thus generating a "circulation of legal arguments" between various legal levels.[53]

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[46] This technique is also called "comparative method". *See* B. Markesinis and J. Fedtke (eds.), "The Judge as a Comparatist. The Danger of Using Foreign Law", 80:11 *Tulane Law Review* (2005) pp. 119 *et seq*.

[47] On reference to other courts' jurisprudence or specific decisions, *see* two well-known decisions of the South Africa Supreme Court, and of the International Court of Justice, respectively: *S. v. Lawrence*, 1977 (4) S.A. 1176, and *Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007, ICJ, no. 91. Regarding the first decision, the South African judges refer to the U.S. Supreme Court jurisprudence regarding the "judicial review of legislation", as well as to the Indian Supreme Court jurisprudence on fundamental rights. With respect to this latter, the entire decision is characterized by numerous references to the parallel decision of the International Criminal Tribunal on former Yugoslavia.

[48] *See*, for example, the well-known decision *Roper v. Simmons*, 125 S. Ct 1183 (2005), where the U.S. judges refer both to international treaties provisions, and to the British system, where the death penalty was abolished even before its adoption of the relevant international rules. This reference to foreign systems, the Court stresses, "(...) does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom". Also the "anti-comity" considerations emerging from the *dissenting opinion* of judge Scalia are of great interest.

[49] *Roby y Corporation of Lloyd's*, 996F 2d 1353, 1363 (2d Cir. 1993).

[50] This definition is used in the case *Sanchez Llamas v. Oregon*, 549 U.S. (2006). *See* also the *Mitsubishi* case: "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context". (*Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth Inc.*, 473 U.S. 614, 629 (1985)).

[51] That is, between systems belonging to the same legal level, as mentioned in the *S. v. Lawrence* case.

[52] The reference is "vertical", when it occurs between systems belonging to different legal levels - consider cases where national courts refer to ultra-state courts' jurisprudence. A significant example is that of the Israeli Supreme Court, which in many instances refers to the jurisprudence of the European Court of Human Rights (ECHR) regarding the protection of fundamental rights.

[53] A. Lollini, *The Circulation of Legal Arguments: Comparative Method and Foreign Law in South African Constitutional Jurisprudence*, paper presented at the Conference on "Judicial Competition between International/Supranational and Domestic Courts", Pisa, 7 May, 2009.

Nevertheless, the reference technique does not take into account the actual contrast among systems. In fact, it is a thoroughly spontaneous and discretional practice aimed at "harmonizing judicial solutions". Naturally, the "consideration" must relate to a case or question similar to the one being judged. This mechanism is associated with the *judicial comity* phenomenon, because it is an instrument of the "judicial dialogue".[54] In this light, courts "do not stand in a position of authority vis-à-vis one another", they have a dialogue "not because of any mandate held by their counterpart - because of its power - but out of a sense of comity or respect".[55]

"Court to court agreements", too, are particular techniques, which developed within the frame of transnational disputes in the banking field. On the basis of these techniques, judges belonging to different systems and empowered to solve the same case, resolve, through an *ad hoc* agreement or protocol, the structure of the Parties' interests, in the lack of any appropriate international treaties, or guidelines.[56]

To the above mentioned techniques must further be added a number of principles and criteria, which solve the relations between systems in contact with each other, on the basis of a "deference" logic. Despite their respective peculiarities, also these mechanisms have been considered an expression of the *judicial comity*, provided that "when the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of

[54] On the judicial dialogue, *see* the recent work edited by F. Fontanelli, G. Martinico, and P. Carrozza, *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Europa Law Publishing, 2010).
[55] R.B. Ahdieh, "Between Dialogue and Decree", 79 *New York University Law Review* (December 2004) p. 2056, relating to the *Nafta Panel* activity.
[56] An example of these court-to-court agreements are the "Cross-Border Insolvency Cooperation Protocols". These protocols are the result of negotiations between courts, carried out within the frame of a number of proceedings of global importance related to banks, mostly since the Nineties. In this respect, we recall, in particular, the *Maxwell* case (*Maxwell Communication Corp. v. Barclays Bank (In re Maxwell Communications Corp.*), 170 B.R. 800 (Bankr. S.D.N.Y. 1994)). On this point, *see* S.R. Swanson, "Comity, International Dispute Resolution Agreements, and the Supreme Court", 21 *Law & Policy in International Business* (1990) pp. 333 *et seq.*; and also A.M. Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004) pp. 94 *et seq*.

international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal".[57]

Also some doctrinal definitions of the *judicial comity* refer to this interpretation**,** when they maintain that "courts and tribunals should defer, where appropriate, to other courts and treat their procedures and decisions with courtesy and respect",[58] or that the *judicial comity* would consist in "deference not to foreign law or foreign national interests, but specifically to foreign courts".[59] Still along the lines of this interpretation, some point out that "the comity model contemplates a systematic deference by domestic courts to international tribunals".[60]

This set of techniques - based on a deference logic - operates through a general mechanism of subsidiarity, under which the application of a system depends upon the satisfaction of certain conditions which, according to the criteria taken into account, have a diverse nature (convenience/appropriateness, equivalence, conclusiveness, respect of the *due process of law*, exhaustion of remedies).[61]

Amongst these principles emerges, for example, the "*forum non conveniens*".[62] It is a "doctrine" of Anglo-Saxon origin - mainly utilized by the U.S., Canadian and British courts -

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[57] Decision *Southern Pacific Properties (Middle East) (SPP) v. Egypt*, 3 ICSID Rep. 112, 129 (1985). *See* A. ROSAS, *With a Little Help from my Friends: International Case-Law as a Source of Reference for the EU Courts'*, 203 *The Global Community: Yearbook of International Law and Jurisprudence*, pp. 230 *et seq.* (2005). In this sense, *see* also the cases of the Arbitration Tribunal envisaged by the Czech-US and Czech-Dutch BIT: *Czech Republic v. CME Czech Republic B.V.*, 42 I.L.M. 919, 967 (2003); *CME Czech Republic B.V. v. Czech Republic*, 13 September, 2001; *Lauder v. Czech Republic*, 3 September, 2001.

[58] This is the interpretation of Y. Shany, who specifies that *comity* is a "general legal principle, which might be applicable in cases of jurisdictional competition (…). According to this principle, which is found in the domestic conflict of laws of many countries (mostly from common laws systems) courts in one jurisdiction should show respect and demonstrate a degree of deference to the laws of other jurisdictions, including the decisions of judicial bodies operating in these jurisdictions" (in *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, Oxford University Press, 2003, p. 260).

[59] Slaughter, *supra* note 8, p. 1112. Quite interesting is also the thesis of judge Scalia on the *Hartford Fire Ins. Co. v. California* case, 509 U.S. 764, 817 (1993), where he draws a distinction between *judicial comity* and "prescriptive comity".

[60] Movsesian, *supra* note 38, p. 71. The reference relates to both jurisdiction, and jurisprudence.

[61] It is worth noting that, in general, the singling out of the competent court also involves determining the applicable law - presumably, the rules of the system to which said court belongs. *See* A. Del Vecchio, *I tribunali internazionali tra globalizzazione e localismi* (Bari, Cacucci Editore, 2009) pp. 278 *et seq.*

[62] *See Owusu v. Jackson*, 19 June 2002, Court of Appeal, ILP 2003, p. 813.

which can be activated by the Parties upon demand.[63] This principle allows a court to defer its jurisdiction to a foreign judge, who is deemed more entitled to resolve the dispute, on the basis of a "*forum non conveniens* test", or also of a "balancing test".[64]

A further specific technique is the equivalence criterion, mainly applied by the Court of Strasbourg in the relations between EU laws, and the European Convention on Human Rights system.[65] According to this criterion, when two systems are "in competition" with one another, the EU system applies, if it can provide fundamental rights with a protection equal to the one guaranteed by the Convention.[66] This mechanism recalls the *modus operandi* of the "*Solange* doctrine", formulated by the Federal Constitutional Court of Germany (*Bundesverfassungsgericht* - BverfG) with reference to the verifiableness, at the national level, of EU acts.[67] Following to this doctrine, the German Court declared to abstain from verifying the compatibility of EU acts with its national constitutional principles "provided that" (*Solange*) the EU system guarantees a protection equal to the one they benefit under German laws.[68]

More simple techniques are: the exhaustion of jurisdictional remedies,[69] whereby a global court may intervene only if all national jurisdictional remedies are exhausted;[70] and the

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[63] On the "*forum non conveniens*", *see*, in particular, P.J. Carney, "International Forum non Conveniens, Section 1404.5. A Proposal in the Interest of Sovereignty, Comity and Individual Justice", 45 *American University Law Review* (December 1995).

[64] This doctrine is used in the following decisions: *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Dow Chemical Co. v. Castro Alfano*, 786 S.W. 2d 674 (1990). In these decisions, the courts singled out a set of parameters, which characterize the "*forum non conveniens*" test.

[65] For instance, *see Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, ECHR, no. 45036/98.

[66] Regarding the *Bosphorus* case, the Court decides that: "the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time 'equivalent' to that of the Convention system" (par. 165).

[67] On this point, *see* N. Lavranos, *Towards a Solange-Method Between International Courts and Tribunals?*, in T. Broude e Y. Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Oxford, Hart, 2008) p. 217.

[68] *See* decisions *Solange I*, 29 May 1974, BVerfGE and *Solange II*, 22 October 1986.

[69] "The doctrine of exhaustion of remedies prevents a litigant from seeking a remedy in a new court or jurisdiction until all claims or remedies have been exhausted (pursued as fully as possible) in the original one. The doctrine was originally created by case law based on the principles of comity" (http://en.wikipedia.org/wiki/Exhaustion_of_remedies).

[70] For instance, the technique is used in *The Loewen Group et a. v. United States of America*, 26 June 2003, ICSID, Case No. ARB (AF)/98/3,. The case is analyzed in H.P. Monaghan, "Article III and Supranational Judicial

conclusiveness technique, according to which when diverse ultra-state systems are conflicting, the court applies the one that, differently from the other, "may involve decisions that are final and binding" (para. 27), on the grounds of "mutual respect and comity" considerations.[71] Another interesting instance is the implementation of the subsidiarity mechanism with reference to the compliance with the conditions of the *due process of law*. Therefore, should two systems conflict (in particular, EU order *versus* UN system),[72] that system is enforced, which offers the most substantial guarantees.[73]

This group may include as well the margin of appreciation, the counter-limitations and the interposition techniques. The first technique - based on the implementation of specific tests -[74] envisages that, in the relation between the ECHR system and Member States, the national system applies when, regarding a given case, it proves to be more suitable for regulating and deciding a

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Review", 107:4 *Columbia Law Review*, (May 2007) pp. 833 *et seq.*; Ahdieh, *supra* 55, pp. 2029 *et seq*. The most interesting passage of the decision of the Arbitration Tribunal (constituted within the ICSID) relates to the nature of the Mississippi Court decision regarding the possibility for the plaintiff to invoke the global court jurisdiction. According to the judge, the national decision does not constitute a final decision (para. 143). Thus, given the non-exhaustion of national remedies, the Tribunal deems it cannot decide. This assessment is only partially based upon the ruling of the NAFTA provisions, as it is mainly based on considerations of a discretional nature. In particular, the Tribunal notes that, should it adopt a decision, this could give rise to a conflict of decisions between national and global judicial bodies.

[71] For example, the doctrine is applied in the decision of the Permanent Court of Arbitration (*ex* art. 287 Unclos), *The Mox Plant Case. Ireland v. United Kingdom*, 24 June 2003. More precisely: "in the circumstances, and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties".

[72] Note that there aren't codified rules aimed at regulating this type of relationship.

[73] For instance, this principle is implemented in the well-known *Kadi* case*:* 3 September, 2008, ECJ - Grand Chamber, joined causes 402/05 P e 415/05 P. More recently, *see Kadi v. Commission*, 30 June 2010, Court of First Instance, cause 85/09.

[74] Actually, the recognition of the margin of appreciation depends on the results of general and specific tests. The excessive discretionality of the judges of Strasbourg in adopting the tests, and the excessive vagueness of this method emerge quite clearly: "(…) doctrines like subsidiarity and the margin of appreciation seem too vague (…). Even in the European context, critics complain about how malleable these doctrines are. (…) In the European Convention on Human Rights context, the margin of appreciation doctrine has more bite, but it too is ill defined in a notoriously uncertain way; as one commentator notes, the Court has not applied it 'identically to every article' of the Convention, 'nor even to different parts of the same article'". Movsesian, *supra* note 38, p. 112.

cultural and social matter.[75] In this context, the State system enjoys a "margin of appreciation", which allows adopting derogatory measures with respect to the ECHR provisions, and envisages the implementation of national jurisdictional remedies.[76] However, this implementation is subordinated to the Court of Strasbourg's assessment of the adequateness of the national provision to the pursued objective.

The "counter-limitations" technique is instead adopted by the EU member States' courts in relation to the implementation of EU law, when in contact with national systems. Given the general prevalence (the so-called "primacy") assigned to EU laws upon national systems, there exist nonetheless some cases where the impact of said laws on the basic principles of the national constitutional systems, or on human rights, requires that the national judge be given the "last word".[77] Hence, basic principles and fundamental rights constitute a "minimal threshold" to which the supranational system gives way.[78]

Original variations of this mechanism have been applied by the *Bundesverfassungsgericht* (BverfG) to solve contrasts between the German system and the EU order. In particular, this Court has devised two different criteria: the limit of "*ultra vires* acts",[79] whereby the primacy of the EU system is challenged in cases in which a European act is issued outside the competences of the EU; the "control of national identity",[80] under which the primacy of the EU system is not recognizable, should the European act affect the "national identity" of the State within which the

[75] Margin of appreciation doctrine is applied, for instance, in the decision *Handyside v. The United Kingdom*, 7 December 1976, ECHR, n. 5493/1972.
[76] The margin of appreciation may act as a coordinating criterion among jurisdictions, in particular, between that of the Strasbourg Court, and those of the courts of the Council of Europe Member States, when the national derogatory measure corresponds to a jurisdictional order. There are, however, cases where the national measure does not necessarily stem from the judicial authority, but from government acts, or even legal acts. Hence, the margin of appreciation doctrine plays the more general function of co-ordinating the European Convention on Human Rights system, and the national systems, recognizing to the latter a leading role.
[77] *See*, for example, the decision of the Polish Constitutional Court, K 18/04, and the decisions of the Italian Constitutional Court n. 183/1973, and n. 232/1989, as well as Order n. 454/2006. For an analysis of these jurisdictional acts, *see* Cassese, *supra* note 15, pp. 53 *et seq*.
[78] *See* A. Albi, "Supremacy of EC Law in the New Member States. Bringing Parliaments into the Equation of 'Co-operative Constitutionalism'", 3 *European Constitutional Law Review* (2007) pp. 25-67.
[79] *See* the "Brunner" case and the recent decision "Mangold Urteil", adopted on July 6, 2010.
[80] *See* 2 be 2/08, 30/06/2009, Absatz-Nr (1-421).

act is enforced.[81] In both cases, the national system is applicable instead of the supranational one.

"Interposition" is a technique created mainly by the Italian Constitutional Court,[82] which, in cases of conflict between the national system and the ECHR system, allows said Court to have the "last word" in determining the applicable system,[83] since it considers supranational rules as "interposed rules" - not directly prevailing as EU laws, and whose conflict with domestic rules requires a constitutional review.[84]

The wide range of the above-mentioned techniques clearly shows the existence of several differences between the various groups of mechanisms. Why do judges and scholars, despite these differences, link all these practices to the phenomenon of *judicial comity*? The following are some of the main reasons emerging from the analysis of the previous cases and the quoted literature.

i) Each practice is characterized by a discretional and voluntary nature. At times, they are mere jurisprudential techniques; other times, in the face of legal provisions, they are an elaboration of evaluation parameters, of their modification and discretional enforcement.[85] In these cases - when there exists a legal provisions limitation - judges have nonetheless a vast discretional margin, because of the heterogeneity of the rules, but above all of the lack of general rules of a global value. Indeed, all these techniques have a flexible nature and do not aim at

[81] For more details, *see* S. Cassese, "L'Unione europea e il guinzaglio tedesco", 9 *Giornale di diritto amministrativo* (2009) pp. 1006 *et seq*.

[82] Italian Constitutional Court, no. 348 and 349/2007. *See* also the work of C. Lavagna, *Istituzioni di diritto pubblico* (Torino, UTET, 1979) pp. 383 *et seq*.

[83] This mechanism requires that, should a national provision conflict with a European Convention on Human Rights one, the judge must raise a constitutional review, so that the Court may perform a double check on both the compatibility of the European Convention on Human Rights provision (the so-called "interposed norm") with the Constitution (ex Article 117, para. 1), and the legitimacy of the censured provision with regard to the supranational one. As a result of the interposition of the international treaties provisions (amongst which the European Convention on Human Rights), ordinary laws must therefore abide by the supranational norms, which, in turn, must respect the Constitution.

[84] In general, it is interesting to note that the subsidiarity mechanism - in its diverse declensions of convenience, conclusiveness, equivalence, exhausting of remedies, respect for the *due process of law*, margin of appreciation, counter-limitations, and interposition - applies to cases of actual contrast between competing systems.

[85] Consider the above mentioned margin of appreciation technique, as under para. 2 of Article 10 of the European Convention on Human Rights.

establishing hierarchies or stable relations between systems. For this reason, in their enforcement they never establish relations of absolute superiority or subordination among judicial systems.

ii) All these practices differ from both the conflict of laws rules, and the ultra-state choice of forum rules. In the first instance, the norms govern only cases of conflict between national systems, operate in certain sectors (within private law), correspond to national codified parameters, and have a different content depending on the legal system considered.

As regards the ultra-state rules, applied to resolve conflicts between national jurisdictions,[86] they have several limitations related to their scope, as well as to their fragmentation, segmentation and reduced effectiveness.[87] Furhtermore, only few ultra-state rules govern relations among ultra-state regimes, or, vertically, between national and ultra-state systems.[88] In these cases, however, there emerges the lack of "common rules, which - pertaining to the general international law - may be imposed upon any State, in determining the

[86] For example, *see* the The Hague Convention of 5 October, 1961, on the competence of the authorities, and the law applicable to the protection of minors; the Brussels Convention of 27 September, 1968, on the jurisdictional competence, and the enforcement of decisions regarding civil and commercial matters; the Rome Convention of 19 June, 1980, on the law applicable to contractual obligations. More recent is the The Hague Convention of 30th June, 2005, on the recognition of agreements on the choice of a court for civil and commercial matters. We furthermore suggest: the *Leuven-London Principles on Deciding and Referring Jurisdiction in Civil and Commercial Matters*, of 2000, elaborated by the *International Law Association*, as well as the discipline regarding international litispendency in the ALI-UNIDROIT principles concerning transnational civil procedure.

[87] *See*, *Decision of the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, Appeals Chamber of the International Tribunal for the Former Yugoslavia, *Rivista di diritto internazionale* (1995) pp. 1016 *et seq.*, where the tribunal notes that "(…) in international law, every tribunal is a self contained system (unless otherwise provided)". On "self-contained regimes" notion, *see*, in particular, A. Lindroos and M. Mehling, "Dispelling the Chimera of Self-Contained Regimes. International Law and the WTO", 16:5 *The European Journal of International Law* (2006) p. 858.

[88] For example, *see* Article 282 of UNCLOS, which envisages a deference mechanism vis-à-vis the judicial systems of regional-supranational regimes, to which the Parties have adhered, and capable of making final and binding decisions. *See* also Article 35 of the European Convention on Human Rights, which regulates the subsidiarity mechanism, that is at the basis of the operation of the judicial system of Strasbourg; Article 26 of the Convention establishing the ICSID, which envisages the exclusive use of that jurisdiction, when it is competing with others, except if the Parties have not determined differently; Article 2005 of NAFTA, which regulates the hypothesis of a conflict between the jurisdiction of the *Nafta Panels*, and that of the *Dispute Settlement Body* of the WTO. These examples of ultra-state norms regulating relations between jurisdictions have in any case an application limited to the reference system; thus, they do not have a general value. Moreover, Parties may derogate from these rules, which are not shared by other ultra-state judicial systems.

jurisdictional competence of their own judges".[89] Moreover, at the ultra-state level, a trend not to apply said rules can be noted. In particular, there appears to be "a wider trend to erode or circumvent the application of jurisdiction-regulating rules through emphasizing differences between related claims in order to justify the existence of multiple proceedings".[90] This series of limitations and problems related to the application of national conflict of laws rules and ultra-state rules forces judges to draw up new parameters for the resolution of disputes between judicial systems at the global level. In this sense, they exercise a "creative" or "reformative function".[91]

iii) These practices basically take place in cases of a competition between judicial systems. The adoption of the various techniques presupposes either a contrast (even a potential one) between jurisdictions or final sentences, or the existence of two parallel proceedings by diverse judicial systems, or yet an analogy with cases previously dealt with by other courts (as in the reference occurrence). Hence, in certain instances, techniques operate as instruments for solving "judicial conflicts", and in others as a means for reaching a better solution of the case. In general, they are "decision techniques".

iv) Another reason regards the origin of practices, which are associated with a "courts' inherent authority to manage their proceedings in accordance with principles of justice and efficiency".[92] The observance of said principles is important as far as the implementation of

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[89] Furthermore, the fragmentation of the norms co-ordinating the relations amongst jurisdictions and national systems cannot find any form of composition, given the lack of general international law rules, which govern, *in nuce*, the scope of the jurisdiction of each different country. *See* F. Marongiu Buonaiuti, *Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in materia civile* (Napoli, Jovene, 2008) pp. 18-20.

[90] Y. Shany, *Similarity in the Eye of the Beholder. Revisiting the Application of Rules Governing Jurisdictional Conflicts in the Lauder/CME Cases*, Research Paper no. 10, International Law Forum of the Hebrew University of Jerusalem Law Faculty, July 2007.

[91] "(...) courts of justice have not only 'conservative functions' to preserve the existing legal rules; they also have 'reformative functions' to do justice to the citizens governed by the legal system". U. Petersmann, "'Constitutional Justice' Requires Judicial Cooperation and 'Comity' in the Protection of 'Rule of Law'", in F. Fontanelli, G. Martinico and P. Carrozza (eds.) *Shaping Rule of Law Through Dialogue*, *supra* note 54, p. 7.

[92] The text so continues: "(…) At other times, the exercise of comity can be viewed as intimately linked to the inherent judicial discretion possessed by courts in determining an effective timetable for their proceedings and in considering the persuasive weight of the authorities submitted by the parties". Y. Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford, Oxford University Press, 2007) p. 172.

these techniques concerns sectors pertaining to public law, and in many instances to the protection of fundamental rights.[93]

v) A further aspect deals with the assessment activity carried out by courts in relation to a different system, which can be defined as "judge judging judges", and is instrumental to the effectiveness of the judicial technique.[94]

vi) A last reason consists in the "mutual consideration", or "respect for", or "recognition" among courts, to which is connected the "courtesy" attitude, that many scholars link to the *judicial comity*.

The opening of Pandora's Box[95] thus reveals the existence of a variety of fairly distinct judicial techniques, associated with the *judicial comity* general phenomenon according to different modalities. However, the identification and the analysis of these practices clarify the content of the "container", but not its features (value) and uses (functions). What is the importance of these mechanisms? Are they mere "courtesy rules", or do they have a different value?

3. **A question of value**

The assessment of the value of the different *judicial comity* practices has led some scholars to wonder whether these mechanisms are: *i)* simple "attitudes" of the courts; *ii)* the expression of politically relevant choices; or else *iii)* the implementation of a principle of law - just to mention only some possibilities.[96] This kind of investigation involves, for certain aspects, the difficulty to

[93] Consider the above mentioned *Handyside* e *Kadi* cases.

[94] The "judge judging judges" activity takes into consideration quite heterogeneous elements, regarding, for example, i) the jurisdictional protection level offered by the different system; ii) the existence of a mutual recognition between systems, and the sharing of institutional and cultural values; and iii) the best solution of the case. This synthesis shows that the assessment parameters do not correspond to objective standards. On this point, *see* Slaughter, *supra* note 56, p. 91.

[95] The Pandora myth is drawn from Hesiod, *The Works and the Days*.

[96] J.R. Paul, too, in his *Comity in International Law*, *supra* note 11, notes that "comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or considerations of high international politics concerned with maintaining amicable and workable relationships between nations".

"have the planets and the universe stay together",[97] due to the complexity of reconciling a variety of meanings with the need to single out a specific value.

The *judicial comity* techniques may be considered, in the first place, as forms of the so-called "judicial behaviourism".[98] The activity of judges may in fact be studied on the basis of their behavior, through the instruments of psychology (*forensic psychology*). The object of this analysis is the "mental disposition" of judges, who, according to some scholars, would affect the solution of certain cases.[99] Recent research, for example, goes so far as to analyze "how the judges think" - to quote the title of one of the last works of Richard A. Posner.[100]

The *judicial comity* practices may also reflect precise political strategies. This view is shared by those who define *comity* as a "mutual convenience", and maintain the existence of basic interests underlying the adoption of these practices. According to S. Maljean Dubois and J.C. Martine: "(*la*) *justification morale tirée du 'mutual respect' et de la comity (…) est particulièrement incertaine et contingente; elle ne repose que sur l'appréciation discrétionnaire de considérations d'opportunité*" ["the moral justification, which can be drawn from the mutual respect and the comity (…) is particularly uncertain and contingent. It rests upon the discretional evaluation of considerations regarding their appropriateness"].[101] In this light, the *judicial comity* is "as a bridge (…) meant to expand the role of public policy, public law, and international politics in the judiciary".[102] This is the pattern followed by studies on the "reputation" of courts, and on the adoption of "judicial tactics".[103] In particular, global courts need the States'

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[97] This expression is drawn from Cassese, *supra* note 15, p. 7, who, in turn, quotes B. Simma (and D. Pulkowski), "Of Planets and the Universe: Self-Contained Regimes in International Law", *European Journal of International Law* (2006) pp. 483-529.

[98] "Behaviourism" is a school of psychology, created in 1913 in the United States by John Watson (1878-1958). This theory was also applied to the judicial ambit.

[99] This analysis is contained in Markesinis and Fedtke, *supra* note 46, pp. 119 *et seq*.

[100] Posner, *supra* note 9.

[101] S. Maljean Dubois and J.C. Martine, " L'Affaire de l'Usine Mox devant les tribunaux internationaux", *JDI*, (2007) p. 450.

[102] W.T. Worster, "Competition and Comity in the Fragmentation of International Law", 34 *Brooklyn Journal of International Law* (2008), available in www.ssrn.com/abstract=1332403,123.

[103] E. Benvenisti and G.W. Downs, *Lawmaking by International Tribunals: Conditions, Impact and Democratic Legitimacy*, 12, a paper presented at the International Conference "Beyond Dispute: International Judicial

compliance, which is necessary for their operation, above all with reference to the execution of their decisions which would otherwise turn out to be "toothless".[104] To this end, they must increase their "reputation", in the aim of being considered "high reputation courts". Thus, acts of "non-compliance", or the adoption of "risky judgments" may negatively impact upon their "reputation". The *judicial comity* would therefore be an act of "compliance", or in other terms a "proactive strategy", based on the cooperation among courts, designed to improve the enforcement of the rule of law.[105] This interpretation, however, leads to provocative (and yet reliable) readings - as the one which recognizes the development of a new "political and judicial system", where a small *élite* of judges defines political and cultural values, exercising an influence at the global level. In this light, the term "juristocracy"[106] was used, or in stronger terms, "tyranny of the judges".[107]

Lastly, the *judicial comity* practices may express a law principle of a global nature.[108] This approach is adopted both in the aforementioned studies of Joseph Story, and in more recent works, as the ones of Joost Pauwelyn. According to this Author, the *judicial comity* is a principle establishing the interconnection among systems within the framework of a "fairly coherent international legal system respected by tribunals, regardless of their specialty, although they may conflict over jurisdiction, they do not seek to impose differing norms".[109] It would therefore be a principle inherent to the global system, from which there would stem "reciprocal rather than

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Institutions as Law-makers", Heidelberg, 14-15 June, 2010, and *ibid.*, "National Courts, Domestic Democracy, and the Evolution of International Law", 20:1 *European Journal of International Law* (2009) pp. 59 *et seq*.

[104] On the "judicial reputation", with particular reference to the U.S. Supreme Court, *see* K. Hall, *The Supreme Court in the American Society. Equal Justice under the Law* (North Carolina State University, 2000).

[105] G. Sgueo, "Proactive Strategies in the Global Legality Review", 1 *Rivista trimestrale di diritto pubblico* (2010) p. 50.

[106] R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007). *See* also E.A. Posner, *The Perils of Global Legalism* (University of Chicago Press, 2009).

[107] H. Kissinger, *Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century* (New York, Simon & Schuster, 2001).

[108] This interpretation emerges in the considerations of Worster, *supra* note 102.

[109] *See* J. Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands", 25 *Michigan Journal of International Law* (2004) p. 903.

integral obligations".[110] Hence, this interpretation maintains that the *judicial comity* is a legal principle, and above all that the existence of a global legal system is also recognizable. However, there exist some limits: the juridical principle, in fact, has a mandatory and coercive nature, which is hard to recognize in the *judicial comity*.[111] More cautious seems the definition according to which the "reciprocal comity is a kind of Kantian imperative, a golden rule, which thus addresses itself more emphatically to all courts than other normative models".[112]

All these interpretations are as appropriate as they are critical. None of them is exhaustive, and, at the same time, none can be excluded. One could indeed assert that the *judicial comity* practices arise as simple courtesy attitudes in the relations among courts, which in many cases can be interpreted as true political strategies, or even as the implementation of a legal principle, due to their systematic and recurrent modalities of application. This synthesis demonstrates that the diverse interpretations do not compete with one another, and shifts the attention on the real purposes of the *judicial comity* practices.

4. **The "Key Feature": the regulatory function of courts**

In order to find the "key feature" of *judicial comity*, the analysis of its functions has a certain relevance. Some scholars have recognized several functions to this phenomenon: the protection of fundamental rights,[113] the establishment of alliances between different judicial systems,[114] the

[110] J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

[111] As evidenced by the US judges in the *Somportex case*, "although more than courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience, and to the rights of persons protected by its own laws" (*Somportex Ltd. v. Phila Chewing Gum Corp.*, 453, F.2d, 435, 440 (3d Cir. 1971)). We also recall the definition of *comity* provided by the *Encyclopedia of Public International Law*: "in the public international law the notion of comity (*comitas gentium, courtoisie internationale, Völkercourtoisie*) embraces those acts, practices and rules of goodwill, amity and corteous treatment habitually observed by States in their mutual intercourse without the conviction that any legal obligation is involved. By definition, the rules of comity lack a legal nature" (P. Macalister – Smith, *Comity*, in R. Bernhardt (ed.) *Encyclopedia of Public International Law* (I, 1992) p. 671.

[112] L. Weinberg, "Against Comity", 80:53 *George town Law Journal* (1991) p. 23.

[113] T. Endicott, "'International Meanings'. Comity in Fundamental Rights Adjudication", 92 *International Journal of Refugee law* (2001) pp. 280 *et seq*.

[114] Martinez, *supra* note 7.

defense of State sovereignty,[115] a higher efficiency and economy of legal proceedings at the global level,[116] the enforcement of a control-system among courts (in this sense, a "conditional comity" definition has been used),[117] the implementation of the globalization process,[118] the seizure of a worldwide power by judges,[119] and the maintaining of the trade-business balance.[120] Although these interpretations are very interesting, they tend to place under the *judicial comity* label very complex phenomena, neglecting its more simple and direct contents.

A content requiring a particular attention - and to which this paper attaches a certain interest - regards the relation between the *judicial comity* mechanisms and the fragmentation of international law. In this perspective, the *judicial comity* may be interpreted as a form of reaction by the courts vis-à-vis the lack of hierarchies among the diverse systems at the global level. This fragmentation or, in other terms, this "global (dis)order" creates the need for the courts to elaborate techniques and criteria for ruling and harmonizing relations among contrasting systems. In this light, the *comity* expresses itself not so much in the courtesy relation among courts, as in the creation and adoption of harmonious and flexible techniques for regulating relations among legal systems. According to an authoritative interpretation, this would be a particular modality for implementing the "indirect rule".[121]

This interpretation grasps the "key feature" of this phenomenon. On the contrary, the other above mentioned theses merely emphasize the possible general purposes of the *judicial comity*, without investigating the nature of such activities, nor the actual function that underlies their adoption. Furthermore, the goals, underscored by the above mentioned interpretations, strictly depend on specific cases. Actually, the adoption of a judicial mechanism (eg. the margin of appreciation), at times may pursue the goal of improving the protection of fundamental rights

[115] P.B. Stephan, *Open Doors*, pp. 8-9, available at www.ssrn.com/abstract=1276030.
[116] Shany, *supra* notes 58 and 92.
[117] The *judicial comity* may be interpreted as a control-system, that may be based also on the information exchange among courts. Benvenisti, *supra* note 3.
[118] Slaughter, *supra* note 20.
[119] R. Bork, *Coercing Virtue. The Worldwide Rule of the Judges* (Washington, AEI Press, 2003).
[120] In this regard, *see*, for instance, the application of the reciprocity principle within the WTO agreements.
[121] Cassese, *supra* note 15, p. 101.

(see the *Sunday Times* case);[122] other times, it a means for safeguarding the sovereignty of a State (see *Hanyside* case).[123] However, in both cases courts perform a regulatory function of the relations between regimes. In this sense, the exercise of this activity constitutes a recurrent element or, in other words, the "key feature" of the phenomenon. The interpretation provided herein does not entirely rule out the validity of the other versions. The exercise of a regulatory function by courts may, in fact, pursue different goals, as in the just mentioned example. Nevertheless, the other interpretations do not pay attention to this feature, since they focus on general purposes and not on this fundamental property of the *judicial comity* techniques.

From this standpoint, the *judicial comity* techniques should be considered in relation to the specific characteristics of global space. In this context, the legal systems "meet and clash",[124] originating "movements" that are difficult to classify and regulate. According to the above considerations, it is possible to maintain that the *judicial comity* techniques are actual "operational models", created and used by judges in order to regulate the relations between systems within the global space, in the absence of normative criteria governing these relations, or when they are insufficient or inadequate.

In practice, how do these techniques operate as criteria for regulating the relations between systems?

Paragraph 2 above describes the general features of the various techniques, according to the cases taken into consideration (and quoted in the footnotes). From a different perspective, it is worth underlining that each single practice introduces a mechanism for regulating the relations between systems. A brief explanation of their operation -in terms of "regulatory mechanisms"- follows.

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[122] *See The Sunday Times v. United Kingdom*, 26 April 1979, ECHR, (Series A No 30), 2 EHRR 245. Here, the court does not recognize the margin of appreciation, declaring that the act adopted by the British authority does not comply with the requirement of the "need in a democratic order" (so called "necessity test"). Therefore, the exception to the freedom of thought, protected by the ECHR, isn't legitimate.

[123] *See* para. 2.

[124] These terms are drawn from Cassese *supra* note 15.

i) The reciprocity principle states that a system recognizes and allows the direct enforcement of another system, as far as also this latter recognizes and allows the direct enforcement of the former.

ii) The "effects test" allows the application of a certain system in the place of the prescribed one *ratione territorio,* provided that the acts being judged have produced effects in the first system, and that certain guarantees are respected.

iii) The subsidiarity criterion conditions the enforcement of a system in competition with another to the fulfillment of certain terms (appropriateness of the *forum non conveniens*, guarantee of an equivalent protection, conclusiveness, exhaustion of jurisdictional remedies, respect for the guarantees of the *due process of law*). In particular, the *forum non conveniens* criterion concerns relations between national regimes, and recognizes the application of the most appropriate system for the settlement of a dispute. The equivalence principle regards relations between supranational regimes, and allows the application of a system only if it provides a protection of fundamental rights equivalent to that of the other competing regime. The conclusiveness criterion is usually applied to relations between global and supranational systems, and requires the enforcement of that system which, between the two in competition, is able to guarantee the adoption of final and binding decisions. The exhaustion of jurisdictional remedies mechanism allows the application of a global system only when all jurisdictional remedies provided by the competing national system have been exhausted. The *due process of law* criterion recognizes the application of that system which, in the contrast between global and supranational regimes, ensures a better compliance with the *rule of law* principles.

iv) The margin of appreciation and the counter-limits all involve that, in general, a system prevails on the other, allowing however a margin for the application of the latter under certain conditions (e.g. protection of fundamental values, necessity of the provision, intangibility of certain constitutional values and principles).

v) The interposition technique implies that one system generally prevails on the other, with the limitation that the latter may raise the issue of a constitutionality review.[125]

This short review of criteria allows distinguishing some basic co-ordinates of the judicial regulation of relations between systems, first of all, at the horizontal level.[126] A logic of "equal conditions" or "equipollence" emerges, to which an "interchangeability" amongst systems is subordinated (see the mechanisms of reciprocity, "effects test", *forum non conveniens* and largely also the equivalence one). At the vertical level,[127] a logic of "pre-eminence" - but, technically, not of "superiority" - of national and supranational systems over the global ones seems to prevail (see the subsidiarity mechanisms in their various declensions - excluding the equivalence one - which generally operate to the detriment of global systems: i.e. the conclusiveness criterion, the exhaustion of jurisdictional remedies mechanism, the *due process of law* criterion). There further exists a logic of "primacy" - and not "supremacy" - of supranational systems over domestic ones, which however guarantees the intangibility of certain national principles and values (see the margin of appreciation doctrine, the counter-limits mechanism, the interposition technique, the limit of *ultra vires* acts, the control of "national identity").

5. **The new boundaries of the *judicial comity***

Not all the judicial practices examined in paragraph 2 may be defined as a direct expression of the courts' regulatory function. Despite the different opinion of certain jurisprudence and literature,[128] it is possible to underscore several reasons for which some mechanisms cannot be entirely defined a manifestation of *judicial comity*.

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[125] Also the direct effectiveness (or direct effect) is a judicial technique, which presupposes the general prevalence of a legal system on the other. The first elaborations of this doctrine are ascribable to the jurisprudence of the ECJ, despite the fact that Italian judges have, for example, recognized this same effectiveness also to the decisions of the ECHR (*see*, in particular, Corte di Cassazione italiana, sez. pen. I, 1 Dicember, 2006, n. 2800).

[126] Reference is made to the decisions pertaining to the relations between national systems only, or between ultra-state systems only.

[127] On the metaphor of verticality, *see* P. Costa, "Immagini della sovranità fra medioevo ed età moderna: la metafora della verticalità", 31 *Scienza e politica* (2004) p. 9.

[128] *See* para. 2.

In particular, the recognition and enforcement of judgments set by courts belonging to other regimes, the technique of mutual consideration, and the "court to court agreement" cannot be considered as techniques with the same "ruling capacity" that characterizes the other judicial mechanisms.[129]

As regards the recognition and enforcement of judgments set by courts belonging to other regimes, this is the first practice associated with the regulatory function of relations between regimes by the courts (see the above mentioned "Hilton v. Guyot" case). However, these mechanisms have been eventually encoded in norms. At present, the recognition and the enforcement of national judgments are regulated by the conflict of laws rules, and by various international conventions and EU regulations.[130]

Conversely, the regulatory framework for the recognition and enforcement of judgments of ultra-state courts is more complex. In some cases, there is a specific discipline regulated by international treaties;[131] in others, a well-established jurisprudence;[132] however, in yet other cases there still remains a "legal gap", which allows discretionary and differentiated practices. The most obvious examples of the latter hypothesis are the quoted cases *Medellín* and *Dorigo*, where, in relation to the problem of the effectiveness of a ultra-state court's decision, the judge of nationality – American and Italian, respectively - establishes in the former case the exclusion of the recognition, and in the latter the direct effect of the judgment.

These techniques are, therefore, regulatory mechanisms regarding relations between legal orders; but, at present, they are placed at the edge of the phenomenon under investigation, insofar as, at least for the recognition and enforcement of national courts' decisions, there exist specific laws. At any rate, it cannot be ignored that this practice, at least in the beginning, originated

[129] We refer to the other above-mentioned mechanisms with a stronger "ruling capacity": reciprocity principle, effects test criterion, subsidiary mechanism, *forum non conveniens* criterion, equivalence principle, conclusiveness mechanism, exhaustion of remedies criterion, due process of law principle. *See* para. 4.
[130] On this point, *see* para. 2.
[131] For example, the implementation of the International Court of Justice sentences is ruled by the Statute of said Court and by its Founding Convention.
[132] *See* the case-law on the recognition and execution of the EU judges' sentences in the systems of the EU Member States.

spontaneously in the form of a mechanism created by the courts for the purpose of regulating relations between legal systems.

As regards the technique of reference or mutual consideration, it is quite clear that such a mechanism fulfills a regulatory function only indirectly. The relevant profiles are at least two. First of all, in the case of both the "soft reference", and the so-called "hard reference",[133] the court merely considers the jurisprudence or a specific decision of another court as an argument *ad adiuvandum*, and not to explicitly resolve the contrast.

Secondly, the technique of reference is not intended to solve a current conflict between legal regimes, as this practice is normally enforced in proceedings where there is not a specific contrast between systems. The implementation of this mechanism, however, affects to some extent the level of relations between regimes, recognizing the existence of legal systems that can serve as models for others. In these cases, the policy underlying such a mechanism does not involve a logic of "interchangeability", nor of supremacy, or primacy. It is a principle - more flexible than others - according to which that system is applied (or the decision, or rule, or legal principle drawn from that legal order) which is "exemplary" in relation to a particular issue discussed in the dispute under consideration. In addition to the interchangeability, supremacy and primacy coordinates (*see above*), also a "principle of exemplariness" can be noticed.[134]

Finally, with regard to the "court to court agreement" the courts - confronted with a dispute with competing legal orders - adopt an agreement aimed at defining the interests of the parties. In these cases, there are no rules that allow the identification of the applicable system; therefore, the adoption of a legal agreement is a solution implying a dialogue and a harmonization between jurisdictions. It is important, however, to clarify that the "court to court agreement" governs the relationship between the two legal systems in contact with each other only insofar as it

[133] "Soft reference" means the reference to a specific jurisprudential current of a different court, without referring to any specific decision (*see* the *S. v. Lawrence* case, *supra* note 47). While "hard reference" applies to a systematic reference to the contents of a specific decision of a different court (*see* the *Bosnia and Herzegovina v. Serbia and Montenegro* case, *supra* note 47).

[134] The "exemplary" character may be recognized also in a decision adopted by another judicial body, because it contains principles, criteria or mere assessments particularly suitable to solve a given question, as emerged in the *Bosnia v. Serbia* case.

establishes an assessment of interests between the parties in the form of a "protocol". Even in this case, a new logic underlies the operation of this regulatory mechanism, which is not based on a general and abstract criterion (as the equivalence, primacy, or exemplary criteria), but on mere negotiation.

In the light of the above considerations, it is clear why the above mentioned techniques cannot be correctly considered as an expression of *judicial comity*. In summary, these techniques have either been codified at a later time, losing their spontaneous nature (see the recognition and enforcement of judgments adopted by courts belonging to other regimes); or do not solve the actual contrasts between legal regimes (see the mutual consideration mechanism); or still, merely define an assessment of the parties' interests, without establishing general criteria for regulating the relations between judicial systems (see the court to court agreement technique). On the contrary, the subsidiary mechanisms (*forum non conveniens*, equivalence, conclusiveness, respect of the due process of law), the margin of appreciation doctrine, the interposition mechanism, the counter limits criterion, and the effects test doctrine - as widely underscored[135] - are manifestations of *judicial comity*, because their implementation corresponds to a regulatory function of the relationship between judicial systems, where legal parameters are lacking or, more precisely, inadequate. In this sense, new boundaries of *judicial comity* emerge.

This interpretation raises a number of questions: is there a need for a regulation at the global level? Which are the effects of the regulatory function of courts? In what terms is it possible to refer to a development of a *legal comity*?

6. The *Legal Comity*: a new model for regulating global disorder?

The scenario of the relations between the legal systems within the global space is indeed quite complex.[136] These relations were studied mostly following two directions - e.g. by distinguishing them into vertical, and horizontal relations. As regards all the vertical relations, suffice to think to those between State systems and international law. Scholars have, for example, elaborated

[135] *See* para. 4.
[136] For a general perspective, *see* J.-J. Roche, *Théories des relations internationals* (Paris, Montchrestien, 1999).

different approaches, as the so-called "monistic", and "dualistic" approaches. The monistic theory has two major versions. The first one maintains the supremacy of national law over international law (Jellineck).[137] The second one is based, instead, on the primacy of international law on national law (Kelsen).[138] These two stances assert the existence of only one legal system, which would include both national systems, and the international system, with a precise hierarchy of laws.

The dualistic theory (Triepel),[139] instead, recognizes the distinction between systems, and rules out all hierarchical relations. For example, according to this approach, the effectiveness of ultra-state rules depends upon their integration in the national system, and it is in this position that these rules fall within the hierarchy of internal sources.[140] Following to this interpretation, "a (…) joint supremacy of international and national law is not possible. Should both exist, they cannot but necessarily rule over 'different territories'".[141]

As far as horizontal relations are concerned, the much debated issue of the fragmentation of international law arises, which can in turn be associated with the existence of numerous ultra-state regulatory regimes, characterized by impervious and hardly communicating systems.[142]

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[137] G. Jellinek, *Die rechtliche Natur der Staatenverträge*, 1880.

[138] H. Kelsen, "Sovereignty and International Law", 48 *Georgetown Law Journal* (1960) pp. 627 *et seq*. To this second trend can be referred, within the frame of the relations between the EU Member States' systems, and the EU system, the well-known decisions *Costa-Enel* and *Simmenthal*, of the ECJ (*F. Costa v. Enel*, 15 July 1964, C-6/64 and *Simmenthal*, 9 March 1978, C-106/77).

[139] E. Triepel, *Volkerrecht und Landesrecht* (Leipzig, 1899).

[140] Still as regards the relations between the EU Member States' systems, and the EU system, this approach emerges in the Italian Constitutional Court's decision (*Costa c. Soc. Edison-Volta ed Enel*, 7 March 1964, n. 14).

[141] Triepel, *supra* note 139, p. 30. Intermediate theses are instead those which recognize, for example, "transnational relations" between subjects of a different nature and legal level, beyond the boundaries of national territories. *See* R. Keohane and J. Nye, *Transnational Relations and World Politics* (Harvard University Press, 1972).

[142] On the fragmentation of international law, *see* the *Report of the Study Group of the UN International Law Commission* (*Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*) 13 April 2006, A/CN 4 /L 682, which analyses, in particular, the possibility of defining international law as a unitarian legal system - though the most recent studies evidence the greatly fragmented nature of this system. This debate is thoroughly examined by P.M. Dupuy, "A Doctrinal Debate in the Globalization Era: On the 'Fragmentation' of International Law", 1 *European Journal of Legal Studies* (April 2007), which can be consulted in www.ejls.eu. *See* also A. Fischer-Lescano, G. Teubner, "Regime Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law", 5 *Michigan*

Indeed, each regime has rules, bodies, and, in some cases, judges of its own. Very seldom these systems provide for connection measures, and in the rare case where they envisage *ad hoc* rules, they do not appear to be coordinated with those of the other systems. Each regime tends to protect a specific interests structure, which by and large is in conflict with the others.[143]

From this viewpoint, the global space is characterized by a marked legal pluralism. It is a "complex space",[144] dominated by a "situation of co-existence of different legal systems",[145] where there are some forms of "cooperation without sovereignty", and "organizations without a centre".[146]

All in all, these approaches and interpretations - which are here very synthetically mentioned - point to the existence of a "global disorder", on which literature is since long trying to offer clear-cut explanations.[147] Therefore, apart from the diversity of the theories, their basic feature reflects the existence of a wide range of legal systems (national, regional, supranational, global) amongst which there are no predetermined, stable and codified relations owing to the

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Journal of International Law (2004) p. 999; E. Benvenisti and G.W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law", 60 *Stanford Law Review* (2007) pp. 595 *et seq*.

[143] For example, in order to assert the right to the free circulation of a service within the EU, one addresses the European Court of Justice. In the same instance, should it be necessary to assert the fundamental right of a worker, who might be have been discriminated, one applies to the Strasbourg Court.

[144] M.P. Chiti, *Lo spazio giuridico europeo*, available at http://www.astrid-online.it/Riforma-de/Studi-e-ri/Archivio-23/Lo spazio-giuridico-europeo.pdf.

[145] This expression belongs to A.M. Hespanha, *Panorama histórico da cultura jurídica europeia* (II ed, Lisboa, Publicações Europa-América, 1999).

[146] S. Cassese, *Lo spazio giuridico globale* (Roma-Bari, Laterza, 2003) pp. 3 *et seq*.

[147] The legal fragmentation, which characterizes the global space can be interpreted in different ways. Some scholars believe that it is a negative element, as far as it allows for forms of power centralization in the hands of some States (B. Kingsbury, *International Courts and Global Order*, paper for the International Conference and 3d Workshop on "Beyond Dispute: International Judicial Institutions as Law-Makers", Heidelberg 14-15 June, 2010), and it produces a "democratic deficit" of the global judicial bodies (A. von Bogdandy and I. Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, paper for the International Conference and 3d Workshop on "Beyond Dispute: International Judicial Institutions as Law-Makers", Heidelberg 14-15 June, 2010 – Italian translation: *In nome di chi? Giurisdizione internazionale e teoria del discorso*, Torino, Treuben, 2010). On the contrary, other scholars maintain the it is this very fragmentation which partly justifies the nature and operating modalities of ultra-state courts, as in this fragmentation a function equivalent to that of the separation of powers within States can be recognized (S. Cassese, *Comments on the Paper by Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*", paper for the International Conference and 3d Workshop on "Beyond Dispute: International Judicial Institutions as Law-Makers", Heidelberg 14-15 June, 2010).

lack of uniform regulatory instruments, and more in general of a homogeneous global institutional framework.[148]

However, the need arises to regulate these relations.[149] This need is felt not so much by governments or national parliaments, or even by the "executive bodies" of international organizations, as within the jurisdictional activity of courts. If, on the one hand, it is true that national and ultra-state systems are trying to overcome fragmentation through different devices - for example, "by constituting networks of common bodies, referring to the rules of other systems, developing common principles, replacing bilateralism with multilateralism, and establishing interactions" - on the other hand, "all this is not enough".[150] Actually, these practices do not regulate or resolve contrasts between systems: they simply constitute mere cooperation instruments. Since, however, judges (at the various national and ultra-state levels) are instead asked to resolve concrete disputes, acting in a sort of "frontier region", it is quite clear that it has fallen upon them to regulate these relations. In carrying out this activity, courts adopt operational modes or instruments, which - as evidenced - are in part drawn from rules or pre-existent juridical mechanisms, and in part created *ex novo*.

The implementation of these judicial techniques produces a *legal comity* effect, as far as to this expression is assigned the meaning of a harmonization and co-ordination among the different legal systems. In other terms, *legal comity* would point to that mitigating effect, which the adoption of the above mentioned practices would produce on global disorder. Hence, *judicial comity* would indicate that general phenomenon according to which courts, at various judicial levels, spontaneously adopt a set of techniques, with a view to regulating the relations amongst systems, in the lack of adequate parameters. On the contrary, the *legal comity* would correspond

[148] The lack of this institutional frame makes it impossible to elaborate codes, or more generally rules, which may govern the relations between different legal systems according to a federal system model. *Cf.* C.H. Koch jr., "Judicial Review and Global Federalism", 54 *Administrative Law Review* (2002) pp. 492-511. *See* also J.A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, 2005) p. 266.

[149] *See* S. Cassese, "La funzione costituzionale dei giudici non statali. Dallo spazio globale all'ordine giuridico globale", 3 *Rivista trimestrale di diritto pubblico* (2007) pp. 609-626.

[150] Cassese, *supra* note 15.

to the ordering and harmonizing effect deriving from the adoption of these practices.[151] In other words: the egg is to the hen as *judicial comity* is to *legal comity*.

The recourse to this terminology does not aim at creating another "myth" or "chimera", but is only aimed at recalling the connection between this effect and the more general phenomenon of *judicial comity*, distancing ourselves from other definitions, which recognize the existence of a hierarchical and established global order. The *legal comity* notion, in fact, would only indicate the legal harmonization effect deriving from the enforcement of the *judicial comity* techniques, without recognizing any project for the implementation of a global judicial order by courts.[152] This assumption is perfectly compatible with the global space features, defined as a "fluid or liquid order"[153] by jurists and social scientists.[154] Under this perspective, the global space is a non-hierarchical, diffused, and fluid reality. Within this context, the judicial techniques analyzed so far constitute "communicability" forms, or even mechanisms acting as "bridges" between legal systems.[155] In this light, the global space, as for instance the European legal space, has been considered as a "system of systems".[156] However, unlike the European Union's context (where the "law community" is recognizable),[157] this space is deprived of a common "constitutional frame".[158]

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[151] The ordering and harmonizing effect depends on the systematic trend which characterizes the application of these techniques. Moreover, these mechanisms regulate cases otherwise not solvable, because of the lack – or inadequacy – of codified parameters.

[152] *See* A. Stone Sweet, "Judicialization and the Construction of Governance", 32:2 *Comparative Political Studies* (April 1999) p. 164.

[153] Some scholars define the global space as an "acephalous world". S. Roberts, "After Government? On Representing Law Without the State", 68:1 *Modern Law Review* (2005) pp. 18 *et seq*.

[154] These terms are drawn from Cassese, *supra* note 146. *See* also the definition of "liquid reality" by Zygmunt Bauman (*Liquid Modernity*, Cambridge, Polity Press, 2000). The implementation of judicial techniques by the courts may therefore be interpreted, in a social science perspective, as a reaction to global disorder, inspired by principles of "friendship" and "solidarity". The legal comity notion perfectly evokes this idea of harmonization.

[155] Cassese, *supra* note 146.

[156] More exactly, some scholars recognize a "governance without government". *See* J.N. Rosenau and E.O. Czempiel (eds.), *Governance without Government. Order and Change in World Politics* (Cambridge University press, 1992).

[157] This definition emerges in the jurisprudence of the ECJ. In particular, we recall the well-known cases of *Les Verts*, *Costanzo* and *Hoechst*.

[158] We note that the UNO, for example, includes numerous national systems, some supranational ones (i.e. those stemming from the UN Conventions, as the one on the Law of the Sea - Unclos), but it does not include a series of

But, is it always true that the *judicial comity* techniques produce a harmonization, or even a *legal comity* effect? Is it a perfect cause-effect relationship?

In the *Saturnalia*, Macrobio expressly asks himself if "*ovumne prius exiterit an gallina*", and he states that "*ovum prius a natura factum iure aestimabitur*".[159] However, as subsequent studies have stressed, this answer transforms into a paradox when one speculates on the origin of the egg. This consideration seems to perfectly fit the relation between *judicial comity* and what in this paper is defined as *legal comity*. A different interpretation postulates that *judicial comity* corresponds to a form of competition, and not of cooperation, between courts.[160] Along this line, there are also some studies proving how the adoption of the above mentioned techniques may produce solutions which are detrimental to the *rule of law*, and also "protectionist". In these cases, the *judicial comity* would then be considered a hindrance to the establishment of a "global order".[161] Also the classical "internationalist" approach would, under other aspects, disprove the starting assumption, by indeed recognizing the pre-existence of an international system, based on agreements between States and on the activity of international organizations. And within this frame falls the activity of ultra-state tribunals, established by these very organizations, or by

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global systems (for example, the WTO). Furthermore, the recognition of a "global legal heritage" appears problematic, in spite of the well-known theories on the existence of a "universal public law". In fact, both at the national, and ultra-state levels, the single systems uphold divergent and irreconcilable legal interests and values.

[159] Ambrogio Teodosio Macrobio, *Saturnalia,* VII, 16.

[160] Worster, *supra* note 102, pp. 135 *et seq*.

[161] *See* decision *Loucks v. Standard Oil Co*., 120 N.E. 198, 201-202 (N.Y. 1918), which states that "the misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles". Among these "troubles" there would also be some consequences on the *rule of law*. For example, the application of foreign law - and consequently of the judicial remedies envisaged by the relevant system - might produce complications regarding the burden of proof, or envisage reparation regimes less favourable for the injured party. In other terms, it would turn out to be an "obvious injustice of reciprocal remedial collapse" (Weinberg, *supra* note 112). In the *Aramco* case (*EEOC v. Arabian American Oil Co*. (*Aramco*), 111 S.Ct. 1227 (1991)), the U.S. Supreme Court, in the lack of a precise measure, rules out the extraterritoriality of Title VII of the *Civil Rights Act* of 1964, denying to an American worker (even if of Arab origins) employed by a branch of the "Aramco" group in Saudi Arabia, the guarantees envisaged for in that provision. In this case, the Court enforces a "presumptive comity", by recognizing the application of the Arab system. Hence, the judges have given no bearing to the lack, in said system, of adequate protection measures for workers. In fact, unlike the *Mox Plant* and *Kadi* decisions, the judges have not adopted the subsidiarity mechanism, as they did not take into consideration the level of guarantees assured by the other system. It is quite clear, then, that in this case the application of *comity* did not result in the guarantee of a better judicial protection, but in a "discriminatory and substantively damag(e) to the rule of law" (Weinberg, *supra* note 112, p. 3).

means of *ad hoc* conventions. In this perspective, the judicial dialogue techniques, as well as the *judicial comity* ones, would be the effect of a pre-existent order; in other words, the hen would come before the egg, (recalling the above mentioned paradox).

7. **Conclusions**

This paper has sought to provide an original interpretation of the *judicial comity*, first of all by analyzing both its origins (para. 1), and a series of significant judicial techniques, which jurisprudence and literature associate with this phenomenon (para. 2). In particular, the analysis of the value (para. 3), and of the functions related to the application of the *judicial comity* practices pointed to the existence - at the global level - of a "regulatory function" implemented by courts, concerning the various relations between legal systems (para. 4).

This approach has allowed to overcome the scarcely coherent - and at times also rather generic - use of the *judicial comity* notion, upheld by jurisprudence and literature - which have associated this expression with numerous and quite diverse activities, without paying any particular attention to the existence of a common denominator, and of distinct purposes. Consequently, this paper has appreciated the existence of practices not exactly definable as an expression of *judicial comity*, on the basis of specific parameters (para. 5). Lastly, the recognition of the *judicial comity* regulatory function has allowed to identify the *legal comity* phenomenon as the harmonizing effect deriving from the adoption of the *judicial comity* practices (para. 6).

These interpretations give rise to some important questions: *i)* why do judges regulate the relations between legal systems? Is it only a simple need for order? *ii)* Why do they mostly prefer to implement *judicial comity* techniques, instead of applying the national conflict of laws rules, or the choice of forum rules provided by international treaties? *iii)* To put it simply: *cui prodest*?

i) The judicial regulation of the relations between legal systems fulfils a simple need: to seek the best solution to transnational and ultra-state cases.[162] In fact - as already underscored - the application of the *judicial comity* techniques counterbalances the insufficiency or inadequacy of normative criteria for solving these types of contrasts, since it allows the identification of the court having jurisdiction and/or the law applicable to the case. Therefore, the *judicial comity* can also have the function of guaranteeing a better jurisdictional protection to citizens, above all when, for example, the due process technique is applied.[163]

It is interesting to note that, at the global level, only courts may perform such a function. Indeed, no other institution – be it parliament, or government - could succeed in effectively regulating the relations between different legal systems. In fact, at least three limits can be clearly perceived. First, the difficulty of identifying a "legislator" capable of regulating the relations between legal systems at the global level. National parliaments or even the ruling bodies of the international organizations fail to establish uniform and global rules, which are applicable to all States and ultra-state systems. In fact, in the first instance rules would be effective only within the State which enacted the rule; in the latter, the rules would not be binding on non-Members, nor on the supranational systems outside the organization. And the establishment of an *ad hoc* "global legislative body" empowered to dictate rules with a universal efficacy would be extremely complex: how could it be set up? How should it be composed if it is to ensure the application of uniform, impartial and universal rules? Should its composition be intergovernmental, private, or "representative of the people"?[164]

Second, the codification of normative parameters for the regulation of relations between legal regimes could likewise pose some difficulties: should parameters be hierarchical or flexible? How to prevent their wording from being affected by political and national interests? What would be the legal instrument for their adoption? Could it be feasible to elaborate a "global code" aimed at regulating relations between different legal systems?

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[162] This is mainly the position of Shany, *supra* notes 58 and 92.
[163] *See* para. 2.
[164] For instance, *see* the European Parliament composition.

Third, the effectiveness and "justness" of general and codified parameters could be rightly questioned. Certainly, a "global codification" of parameters could not take into account the relativity of certain cultural issues inherent to the specific features of each legal system. Suffice, for instance, to think to the margin of appreciation doctrine, the implementation of which strictly depends on the features of the legal system in question, and could affect the protection of fundamental rights.[165]

At the global level, relations between legal regimes must be regulated by flexible and impartial criteria, not subjected to codification.[166] In this connection, the role of courts is remarkable. In fact, they do not, or would not, represent governmental and political interests, and they base their decisions on principles of justice and impartiality. Moreover, courts are able to discern the features of the different regimes through "judge-judging-judges" activities, in their endeavour to adapt regulatory techniques to concrete cases.[167] Thus, courts are capable of establishing flexible and malleable principles aimed at regulating multifarious, heterogeneous and continually developing relations between regimes at the global level. The exercise of this activity has even been considered a new configuration of "judicial activism".[168]

ii) In the cases taken into account judges apply *judicial comity* techniques instead of directly implementing the *lex fori*[169] or, more generally, the conflict of laws rules,[170] because these practices are extremely flexible, allow for numerous variations, and – as extensively highlighted – are aimed at regulating and harmonizing the relations between legal systems belonging to different levels. On the contrary, the *lex fori* and the conflict of laws rules only

[165] *See* para. 2.
[166] Nevertheless, some scholars suggest the elaboration of *ad hoc* (normative) provisions: "(…) the only means to counter possible active and passive collisions of jurisdictions lies (…) in the hands of the states concluding dispute settlement agreements, namely by including specific provisions to this effect, such as provisions on subsidiarity or exclusivity of dispute settlement agreements". Oellers-Frahm, *supra* note 4, p. 88.
[167] The expression is drawn from Slaughter, *supra* note 56, pp. 91-94.
[168] On the judicial activism, *see* M. Shapiro, "Judicial Activism", in S.M. Lipset (ed.) *The Third Century* (Standford California, Hoover Institution Press, 1979); more recently, L. Goldstone, *The Activist. John Marshall, Marbury v. Madison and the Myth of Judicial Review* (New York, Walker & Company, 2008).
[169] The *lex fori* definition refers to the laws of the jurisdiction in which a legal action is brought.
[170] *See* para. 2.

consider relations between States and cannot be applied to the regulation of relations between national and ultra-state systems, or only between ultra-state systems.

Courts, moreover, prefer adopting *judicial comity* techniques to implement the global norms regulating relations between legal systems envisaged by some international treaties.[171] Given that only few cases of contrast between legal regimes are ruled by international treaties,[172] such rules are in any case too fragmented, and do not cover all types of contrast. In this regard, the application of the counter-limits doctrine is a significant example. In cases of contrast between the EU system and the Member State's system, the national court must disapply the domestic rule that conflicts with the EU rule.[173] Should there be any doubts on the legitimacy or the interpretation of the EU rule, the court may refer the preliminary question, envisaged by the art. 234 ECT (now 267 Lisbon Treaty), to the European Court of Justice.[174] Nevertheless, there are several cases regarding fundamental rights or constitutional values[175] in which Member States' courts did not resort to the preliminary ruling procedure,[176] but preferred to asses the question themselves, or have "the last word", by giving precedence to the application of national rules. To this end, national courts have created the above mentioned counter-limits doctrine (the operation of which is described in para. 2 and 4), in order to justify the application of the national system instead of the EU one, in cases in which national constitutional values may be

[171] *See*, for instance, the article 23 of the WTO "Dispute Settlement Understanding - DSU", that establishes the application of the WTO regime in relation to all disputes covered by the WTO Agreements, also when another legal regime is applicable ("when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding"). Therefore, it can be defined a "general conflict clause". *See* G. Marceau, "Conflicts of Norms and Conflicts of Jurisdictions. The Relationship Between the WTO Agreement and MEAs and other Treaties", 35 *Journal of World Trade* (2001) pp. 1081 *et seq*.

[172] We refer to: Article 282 of UNCLOS; Article 35 of the European Convention on Human Rights; Article 26 of the Convention establishing the ICSID; Article 2005 of NAFTA. *See* para. 2 above.

[173] *See Costa c. Enel*, 15 July 1964, ECJ, cause C 6/64, in which the European judge establishes the "primacy" of the EU law over Member States' law.

[174] Or to the Court of First Instance within specific matters established by the Tribunal Statute (art. 256, par. 3, Lisbon Treaty).

[175] *See* para. 2.

[176] Note that the preliminary ruling procedure is a remarkable example of conflict of laws rule, provided by the EU law, as regards the relationship with Member States systems.

challenged by EU acts.[177] In this sense, *judicial comity* techniques are applied when both national and ultra-state conflict of laws rules are not - or cannot be - applied.

To hold that such techniques operate only as an exception to the conflict of law rules codified in national or international law, however, would be a simplistic view of the phenomenon. In certain cases, in fact, *judicial comity* mechanisms are an original elaboration of codified parameters by the courts, which reinterpret and enhance these rules through the creation of specific tests (see the margin of appreciation or exhaustiveness of remedies doctrines);[178] in other cases, courts create regulatory parameters from scratch (see the *forum non conveniens* or the equivalence principle).

The added value of the *judicial comity* techniques - in comparison with the above mentioned codified rules - corresponds mostly to their variety and flexibility, based on at least two factors. In the first place, the general consideration applies that "judicial law is a lighter one compared to the legal law, as it is capable of modifying itself".[179] In the second place, *judicial comity* techniques may be applied by courts belonging to any legal systems.[180] Accordingly, the *judicial comity* techniques may be defined as "global rules of recognition" - to evoke the well-known expression of H.L.A. Hart.[181]

In this light, the judicial techniques taken into account are: *i) recurrent*, even if extremely flexible; *ii) original*, but for certain aspects also comparable to some "classical" procedural rules

[177] Some scholars define the application of these judicial techniques as a form of "silent integration". *See* G. Martinico, *L'integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo* (Napoli, Jovene, 2009).

[178] For instance, the margin of appreciation doctrine is drawn from the art. 10 of the ECHR, although its application is characterized by the resort to "tests" entirely created by judges. *See* para. 2 above.

[179] M.R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni* (Il Mulino, Bologna, 2002) pp. 201-2 and 230.

[180] On the contrary, the above-mentioned codified rules can be applied only by the judicial bodies provided by the international treaty taken into account or, in the case of the application of national conflict of laws rules, by the national court.

[181] These are rules necessary for the development of ordinary law, from which the latter derives its validity. In this case, these rules would correspond to rules of coexistence amongst diverse legal systems. *See* H. L.A. Hart, *The Concept of Law* (II ed., Oxford, Clarendon Press, 1994) pp. 94 *et seq.* (according to whom, the "rule of recognition (…) introduces, although in embryonic form, the idea of a legal system: for the rules are now not just a discrete unconnected set but are, in a simple way, unified").

(consider the *lis alibi pendens*, the *res judicata*, etc.);[182] *iii) spontaneous*, even if sometimes referable to certain mechanisms envisaged by norms;[183] *iv) fairly "universal"*, even if, in some hypotheses, conditioned by the type of court or of relation between systems which is being considered.[184]

Lastly, the implementation of the *judicial comity* techniques concerns mostly cases belonging to the constitutional and administrative law (protection of fundamental rights, environment, *due process of law*, freedom of movement, public order, *Internet*, etc.), for which national conflict of laws rules are not provided.[185] However, the application to these cases of the conflict of laws rules – or also the choice of forum clauses envisaged by international treaties – would not be effective. These codified parameters, in fact, would not allow judges to make any balancing of the interests underlying these sectors, in order to identify the applicable regime. Just to mention an example: in the *Kadi* case,[186] the European Court of Justice could not have determined the applicable regime on the basis of the conflict of laws criteria (e.g. domicile of the

[182] On this point it is possible to note that, although the *judicial comity* is applied to hypotheses "comparable to those in which the (…) *lis alibi pendens* and *res judicata* rules are applied -the crucial difference being, however, that application of comity cannot normally justify total abdication of jurisdiction by the comity-affording court because such an act would exceed that court's scope of authority" (Shany, *supra* note 90). *See* also of the same author, *supra* note 92, pp. 176-177, where he points out that "a crucial difference exists, however, between the resort to strict jurisdiction-regulating rules [*lis alibi pendens* and *res judicata*] and the application of judicial comity in their stead. Whereas the application of strict jurisdiction-regulating rules normally results in the termination of the proceedings before one or more of the judicial bodies involved, application of comity normally cannot justify total abdication of jurisdiction by the comity-affording court because such an act would exceed that court's scope of authority. Instead, application of comity is more circumscribed, meaning it may result merely in the postponement of court hearings and/or the granting of due consideration to the decisions of the other courts. Still, a different effect may be attributed to comity in cases of discretionary jurisdiction exercised by a seized court (e.g., when national court proceedings are governed by the *forum non conveniens* rule). The court may decide here that consideration of comity support a decline of jurisdiction on its part, in whole or in part".

[183] *See* above.

[184] Consider, for example, the principle of equivalence applied to the specific relations between the EU system and the European Convention on Human Rights system, or even to the counter-limits doctrine regarding the relations between the EU system and national systems.

[185] For a general perspective, C. Moellers, *Transnational Governance Without a Public Law? Transnational Governance and Constitutionalism*, in C. Joerges, I.J. Sand and G. Teubner (eds.) *Transnational Governance and Constitutionalism* (Oxford, Hart, 2004) p. 329.

[186] *See* para. 2.

parties, the place where the infringement occurred, the citizenship of the individual, etc.),[187] owing to the need to consider the existence of general public interests (peace and international security) as well as the protection of fundamental rights. Thus, the court has created a specific parameter based on the respect for the due process of law: in other words, that system is enforced, which offers the most substantial guarantees in comparison with the other conflicting regime. This criterion subordinates the identification of the applicable regime to a balance between different fundamental interests (in this case, fundamental rights *versus* peace and international security);[188] this balance would not have been possible, had the conflict of laws rules been applied.[189]

iii) Last, but not least: *cui prodest*? In assessing the value of the *judicial comity* (para. 3), the most interesting thesis taken into account is the one which defines *comity* as a "mutual convenience" mechanism, referring to the adoption of political strategies by the courts (see the well-known "strategic theory of judicial behavior").[190] In our view, this is the most persuasive interpretation of the value of the *judicial comity* phenomenon.[191]

Just to mention some examples. The application of the "equivalence doctrine" by the Strasbourg Court aims at maintaining a political balance in the relationship between the EU and the ECHR systems, avoiding the overlap between the different institutions, without however affirming any form of supremacy.[192] The "reciprocity principle" aims at both balancing the political and trading relations among States, and at protecting the sovereignty of the State from

[187] They are well-known examples of conflict of laws rules. Within the European context, some other examples can be drawn from EC Regulation no. 44/2001.
[188] Had the UN system provided for due process guarantees at least equivalent to those envisaged in the EU system, the claim would have been rejected.
[189] The automatic application of conflict of laws rules, as well as their "stringent nature", do not allow for any balance, that is instead indispensable in cases regarding public or administrative law issues.
[190] *See* Posner, *supra* note 9, pp. 19 *et seq.*, which analyses nine theories of judicial behaviour.
[191] Some sentences of the *Hilton v. Guyot* decision confirms this interpretation: "there is no obligation recognized by legislators, public authorities, and publicists to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of States, *ex commitate, ob reciprocam utilitatem*" (point 166).
[192] Note that the Lisbon Treaty has established the EU accession to the ECHR.

the interference of global regimes.[193] Also the margin of appreciation, interposition, and counter-limits doctrines aim at guaranteeing the sovereignty of States from the interference by the supranational systems to which they belong. These techniques are, in fact, a means to reserve "the last word" and, more generally, the control of Member States over politically and socially sensitive areas. In this sense, the *judicial comity* techniques may be considered a control instrument - hence, some scholars uphold the existence of a "conditional comity".[194]

There are many "beneficiaries" of the *judicial comity*: first of all, States.[195] On this point, Eric Posner's opinion is remarkable, when he refers to a thesis, which "(…) sees international tribunals as practical devices for helping States to resolve limited disputes when the States are otherwise inclined to settle them. The courts help resolve bargaining failures between States by providing (within limits) information in (within limits) an impartial fashion. On this view, courts are agents of States, and they are subject to the control of States. It follows that States will submit to the jurisdiction of tribunals where doing so serves their interest and will withdraw or reduce cooperation if and when tribunals disappoint their expectation".[196]

Also international organizations benefit by the implementation of the *judicial comity* techniques, insofar as the application of these practices aims at maintaining a balance among global regimes.[197] Private entities may in turn be guaranteed by the enforcement of the *judicial*

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[193] Particularly significant cases are: the decisions of *Medellín* (*Medellin v. Texas*, 552 U.S. (2008) (No. 06-984), and *Aramco* (*supra* note 161), where it clearly appears that the *judicial comity* takes on a political significance. In the first case, the decision of the U.S. Supreme Court not to apply the decision of the International Court of Justice (*Avena* decision) clearly fulfils the interest to avoid changing the delicate mechanisms concerning to the death penalty, which some American States - such as Texas - still continue to firmly support. In the second case, the U.S. judges' decision to rule out the extra-territoriality of the U.S. law (*Civil Rights Act* of 1964) while recognizing, instead, the application of the Arab law, shows an attitude of great caution in handling U.S. relations with Saudi Arabia. In this connection, it was remarked that: "this is a vivid example of how 'comity' can mean accommodation to values repugnant to this country". For more details on these cases, *see* M.E. McGuiness, "International Decisions: Medellin v. Texas", 102 *American Journal of International Law* (2008) p. 622, and Weinberg, *supra* note 112, p. 31.

[194] Benvenisti, *supra* note 3.

[195] *See* most of all cases in which reciprocity principle, margin of appreciation doctrine, counter-limits mechanism, interposition criterion are applied.

[196] He adds: "(…) effective courts cannot exist without supporting government institutions, non such institutions exist at the international level". Posner, *supra* note 106.

[197] For instance, *see* the operation of the equivalence principle.

comity techniques only in certain cases (see the *Kadi* case).[198] Lastly, also the courts can be directly interested in applying the *judicial comity* techniques, when these practices are likely to increase their "reputation".[199]

This "political" or "utilitarian" approach to the analysis of the *judicial comity* phenomenon is indeed compatible with the *legal comity* thesis, since it recognizes that the legal harmonization is a mere effect, and not the unique aim of the application of *judicial comity* techniques.[200] In this sense and insofar as it allows a form of legal harmonization,[201] the *legal comity* phenomenon could be viewed as an example of the exceptional benefit deriving from the fulfillment of political (or simply utilitarian) interests.

It is also true that even fragmentation may yield some benefits. In this context, the heterogeneous nature, the different cultural and juridical background, as well as the diverse *modus operandi* of the national and global judicial bodies coexist freely, giving rise to "a Babel of judicial voices".[202] Fragmentation, furthermore, guarantees pluralism and a more democratic assessment, as it would avoid the centralization of power in the hand of specific regimes.[203] As Carl Gustav Jung said: "in all chaos there is a cosmos, in all disorder a secret order".[204]

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[198] *See* para. 2.
[199] *See* para. 3.
[200] For a different position, *see* the theories on the judges' contribution to the growth of the "global legal order".
[201] *See* para. 6.
[202] This expression is drawn from R. Higgins, "A Babel of Judicial Voices? Ruminations from the Bench", 55:4 *International and Comparative Law Quarterly* (2006) pp. 791 *et seq*. With a particular reference to the nature of the global judicial bodies, there still exists a historical debate. The major problem concerns the lack of a unitarian position regarding the singling out of the characteristics which turn a judicial body into an international tribunal. In this respect, different theories were developed - as the "pluralistic", "relativistic", and "monistic" theories - as well as that "of the jurisdictional authority attributive system". *See* A. Cassese, *Diritto internazionale* (ed. by P. Gaeta, Bologna, Il Mulino, 2006). The thesis presently more convincing is that of "the system within which the effects of the jurisdictional authority are primarily produced". On this issue, E. Cimiotta, *I tribunali penali misti* (Padova, Cedam, 2009) pp. 47-56.
[203] We refer to the opinion of authoritative scholars, according to which fragmentation has a function equivalent to that of the separation of powers within States (Cassese, *supra* note 147).
[204] C.G. Jung, *The Archetypes and The Collective Unconscious. Collective Works of C.G. Jung* (vol. 9, part 1, 2nd ed. 1968) p. 32.