

# CONSTITUTIONS, OPENNESS AND COMPARATIVE LAW\*

## *Constituciones, apertura y Derecho comparado*

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### ***Abstract***

Openness and resistance are essential keywords to understand the essence of the so-called post-totalitarian constitutionalism. Indeed, according to Carrozza, there are three critical points that marked the evolution of Western constitutionalism. First, the distinction between constituent power and constituted power; second, the notion of the constitution as “higher law”, which ushers in the possibility of the judicial review of legislation; third, the tension between universal aspirations and national/territorial identities. This article will deal with constitutional openness understood as one of the pillars of post-totalitarian constitutionalism.

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***Keywords***

Constitutional Law; openness; comparative law.

***Resumen***

La apertura y la resistencia son palabras clave esenciales para comprender la esencia del llamado constitucionalismo post-totalitario. De hecho, según Carrozza, hay tres puntos críticos que marcaron la evolución del constitucionalismo occidental. Primero, la distinción entre poder constituyente y poder constituido; segundo, la noción de la constitución como «ley superior», que abre la posibilidad de una revisión judicial de la legislación; tercero, la tensión entre las aspiraciones universales y las identidades nacionales / territoriales. Este artículo tratará sobre la apertura constitucional entendida como uno de los pilares del constitucionalismo post-totalitario.

***Palabras clave***

Derecho constitucional; apertura; Derecho comparado.

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**SUMARIO: I. INTRODUCTION: OPENNESS AND POST-TOTALITARIAN CONSTITUTIONALISM. II. THE CONCEPT OF OPENNESS ADOPTED IN THIS ESSAY AND SOME OF ITS MANIFESTATIONS IN COMPARATIVE CONSTITUTIONAL LAW. III. INTERNATIONALISATION OF CONSTITUTIONS AND OPENNESS. IV. VALUE-BASED OPENNESS AND MODERN CONSTITUTIONS.**

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## I. INTRODUCTION: OPENNESS AND POST-TOTALITARIAN CONSTITUTIONALISM

Paolo Carrozza's reflections on Kelsen's work and his never-ending influence over the community of constitutional lawyers<sup>2</sup> are a piece of a broader puzzle. Carrozza's article is but a segment of a long thread of works in which he has dealt with the interaction between national (constitutional) and supranational/international legal systems, especially after WWII. Openness and resistance are essential keywords to understand the essence of the so-called post-totalitarian constitutionalism. Indeed, according to Carrozza, there are three critical points that marked the evolution of Western constitutionalism. First, the distinction between constituent power and constituted power; second, the notion of the constitution as "higher law", which ushers in the possibility of the judicial review of legislation; third, the tension between universal aspirations (redolent of the Enlightenment's rationalism) and national/territorial identities. Building on these three central pillars, Carrozza introduced what he termed the "openness" of Western constitutions (especially in Europe):

"This new 'openness' in Western, and in particular European constitutionalism, is well described by Zagrebelsky. For him, the mildness and softness of the constitution is explicable in terms of its determination to express the aspiration of living together – to arrange the cohabitation of principles and values, which, if conceived in an absolutist way, would be irreconcilable. In order to lend concreteness to these sentiments, we must re-introduce two distinctions that twentieth-century Western constitutionalism sought to elide: the separation between the law meant as the narrow legal rule 'posited' by the legislator and human rights as inherent in individuals – and the separation between the law and justice, the latter conceived of as an aspiration based on the reconciliation of deep principles of political morality. The 'openness' in post-modern constitutionalism may be intended, according to Spadaro, as precisely the re-awakening and re-sensitization of the legal/political system to a superior human aspiration

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<sup>2</sup> Paolo Carrozza, "Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes", in this issue.

to justice, one that challenges the closure of a positivist legal/political system in which justice is reduced to formal legality. Not relativism, but reasonableness and proportionality, is the leitmotif of post-modern constitutionalism”.<sup>3</sup>

Openness, in this essay, indicates a constitutionally-sanctioned responsiveness of the national system towards external legal sources. In other words, the legal order is not tightly isolated from the norms that are not produced by the law-making actors empowered by the constitution (which, accordingly, come with the seal of democratic legitimacy).

The Italian constitution belongs to a group of constitutions that Mortati called “constitutions born from the Resistance”.<sup>4</sup> These constitutional documents were designed with a clear intent to reject and bypass all the “values” (or anti-values) that had characterised the totalitarian era. In this group of “constitutions born from the Resistance”, Mortati also included other specimens, like the French constitution (IV Republic) and the German one. As Carrozza<sup>5</sup> pointed out, there are some possible additions to this group, most notably the Portuguese, Spanish and Greek constitutions drafted in the 1970s.

This value-laden aspect is peculiar to many constitutions that emerged from the Resistance. They resulted from a political compromise among very different democratic forces. These forces had, as their only point in common, the rejection of totalitarianism. Some of these constitutions (including the Italian one) advocate the need for new societal models and abound in declarations of principle, reflecting the wish to break with the past. In some cases, these so-called “promised revolutions”<sup>6</sup> have remained solely on paper. One of the prominent members of the Italian Constituent Assembly, Piero Calamandrei, bitterly acknowledged as much with regard to many provisions of the Italian constitution, a few years after it came into force.<sup>7</sup>

<sup>3</sup> Paolo Carrozza, “Constitutionalism’s Post-modern Opening”, in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2007) 169 et seq. 182.

<sup>4</sup> Costantino Mortati, *Lezioni sulle forme di governo* (Padua, Cedam, 1973), at 222 et seq.

<sup>5</sup> Paolo Carrozza, “Constitutionalism’s Post-modern Opening” cit., at 180.

<sup>6</sup> Calamandrei wrote about a “promised revolution”, as opposed to the failed revolution that had been sought by the Leftist forces, hinting at a more radical rupture with the past. Piero Calamandrei, “Cenni introduttivi sulla Costituente e i suoi lavori”, in Piero Calamandrei and Alessandro Levi (eds), *Commentario sistematico alla Costituzione italiana* (Florence, G. Barbèra, 1950), now in Piero Calamandrei, *Scritti e discorsi politici* (Florence, La Nuova Italia, 1966) vol. II, 421 et seq.

<sup>7</sup> Piero Calamandrei, “La Costituzione e le leggi per attuarla”, in AA.VV., *Dieci anni dopo: 1945-1955* (Rome-Bari, Laterza, 1955), reprinted in *Opere giuridiche* (Naples, Morano, 1965) III, 553 et seq.

The programmatic character of these documents did not just point to new ways of shaping the values and premises of the social life within the national boundaries. The original drafters of these constitutions born from the Resistance proposed the codification of values that should inspire the life and contribution of their nations to the international community. In this latter sense, these constitutions displayed a feature of outward-looking openness.

## II. THE CONCEPT OF OPENNESS ADOPTED IN THIS ESSAY AND SOME OF ITS MANIFESTATIONS IN COMPARATIVE CONSTITUTIONAL LAW

As mentioned earlier, openness is one of the distinctive traits of these constitutions. It is possible to find the seeds of this constitutional stance even earlier, looking back at the process that, in the thirties, Mirkiné-Guetzévitch called the “internationalization of modern constitutions”.<sup>8</sup> In other words, openness apparently belongs to the core of the “nouvelles tendances du droit constitutionnel” that emerged in the inter-war period.<sup>9</sup> Something similar might be argued with regard to the connection between flexibility (in this context understood as ability to adapt) and constitutionalism. This connection has been explored in the literature, with specific attention to what scholars term “evolutionary constitutionalism”.<sup>10</sup>

Constitutional openness might present itself in different forms. Constitutions can signal a system’s permeability to general international law only (customary international law and general principles), or also to treaty law. Among the constitutions that open up to treaty law, some treat human rights treaties with special regard, due to the subject-matter affinity between the constitutional and international documents. The constitutions of Spain and Portugal, as explained below, are good examples.

This kind of openness, well-researched in the literature,<sup>11</sup> can perform two constitutionally relevant functions. On the one hand, it may lock-in the original pact codified in the constitution, referring to an external constraint to guarantee the rights enshrined in the *Verfassung*. The Dutch case is

<sup>8</sup> Boris Mirkiné-Guetzévitch, *Les Nouvelles tendances du droit constitutionnel* (Paris, Giard, 1931), at 48 et seq.

<sup>9</sup> *Ibidem*.

<sup>10</sup> Giuseppe Martinico, *Lo spirito polemico del diritto europeo. Studio sulle ambizioni costituzionali dell’Unione* (Rome, Aracne, 2011), at 27 et seq.

<sup>11</sup> Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures” (2006) 19 *Leiden Journal of International Law* 579 et seq.

emblematic from this perspective. In the Netherlands, the constitutional reform of 1953 introduced, among other things, Article 94<sup>12</sup> of the *Grondwet*, which empowers national judges to disapply national law in conflict with international treaties, primarily the European Convention of Human Rights. This is the process described above as “lock-in,” buttressing constitutional rights through external legal instruments. On the other hand, constitutional openness can also perform a transformative function, injecting new blood into the constitutional text. For instance, reference or openness to human rights treaties entail an automatic updating of the list of rights included in a constitutional text, dictated by the potential evolution of the international source, and make the domestic source more adaptive to the new needs of the society. Again, the Dutch example is crucial and the openness of the *Grondwet* has been cited as reason why amendments to its first part are ultimately unnecessary.<sup>13</sup>

The elasticity (or porousness) of the original text knows some limitations, of course. Many of these constitutions contain a group of core principles that cannot yield to external pressure. A breach of these principles would be tantamount to misplacing the axiological foundations of their legal orders. At the national level, constitutional law scholars describe this set of principles in different ways, e.g., the “Republican form” (“*forma repubblicana*”<sup>14</sup>) in Italy and the eternity clause (“*Ewigkeitsklausel*”<sup>15</sup>) in Germany.<sup>16</sup>

The degree of openness of a constitutional document does not flow only from its provisions on the domestic effects of external laws, but also from its rules on participation in the international community. These latter norms reflect an axiological continuity between the principles and values that

<sup>12</sup> “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions”. On constitutional openness in the Netherlands see: Barbara Oomen, “Strengthening Constitutional Identity Where There Is None: The Case of the Netherlands” (2016) 77 *Revue interdisciplinaire d’études juridiques* 235 et seq. Gerrit Betlem and André Nollkaemper, “Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation” (2003) 14 *European Journal of International Law* 569 et seq.

<sup>13</sup> See Barbara Oomen, “Strengthening Constitutional” cit., at 245 and Janneke Gerards, “The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It” (2016) 77 *Revue interdisciplinaire d’études juridiques* 207 et seq.

<sup>14</sup> Art. 139 of the Italian constitution.

<sup>15</sup> Art. 79 paragraph (3) of the Basic Law (Grundgesetz-GG) for the Federal Republic of Germany.

<sup>16</sup> For an overview of these clauses, see Francesco Palermo, *La forma di stato dell’Unione europea. Per una teoria costituzionale dell’integrazione sovranazionale* (Padua, Cedam, 2005).

govern the life of a national polity and those that characterise the international community. In other words, “open” constitutions have never accepted that the promotion of their fundamental values stop at their borders. In fact, even when the constitutional provisions expressly refer to “citizens”, the constitutional courts have frequently extended the effects of these norms to non-citizens, most often in the field of fundamental rights protection.<sup>17</sup> Open constitutions seek to govern the activity of domestic actors even beyond the national territory, promoting the national values in the post-national field. In this context, the Italian example is symptomatic of a broader trend.<sup>18</sup>

Nowadays, because of their constitutional openness, national constitutions do not provide an exhaustive list of fundamental rights. According to Saiz Arnaiz,<sup>19</sup> this textual deficiency motivates the reference to international and supranational law, to ensure the protection of certain constitutional goods. For instance, in Italy, it was thought that the general clause of protection of fundamental rights of Article 2 of the Constitution is an “open” norm.<sup>20</sup> This reading of Article 2 has allowed the Constitutional Court to recognize and guarantee new and “third generation” rights (the right of privacy, the right to a healthy environment, the right to participation in cultural heritage) and keep the Constitution up-to-date with respect to evolving principle of individual protection (“*principio personalista*”).

### III. INTERNATIONALISATION OF CONSTITUTIONS AND OPENNESS

In the 1990s, commenting upon some provisions of the constitutions of Central-Eastern European countries, Eric Stein noted “paradigm of progressive internationalization of constitutions”.<sup>21</sup> That trend participated in a broader pattern of constituent processes influenced in part or in whole by the

<sup>17</sup> This is the Italian case, for instance, see decision no. 432/2005, available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>18</sup> See: Antonio Cassese, “Modern Constitutions and International Law” (1985) *Revue des Cours* III, 331.

<sup>19</sup> Alejandro Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución Española* (Madrid, CEPC, 1999).

<sup>20</sup> Art. 2 of the Italian constitution: “The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed”.

<sup>21</sup> Eric Stein, “International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?” (1994) 88 *American Journal of International Law* 427 et seq., at 429.

international community,<sup>22</sup> which lie at the origin of what Cope now terms “intermestic constitutionalism”<sup>23</sup>.

The case of the Central-Eastern European constitutions and the cases of the German and Italian constitutions share the same attitude of openness, as recalled, among others, by Cassese and Stein.<sup>24</sup> Within this trend of internalisation of modern constitutions, the case of the Republic of Weimar represented a starting point. The Preamble of the Weimar constitution makes it clear that its origins lie in the atrocities of World War I: (“The German people, united in its tribes and inspired with the will to renew and strengthen its

<sup>22</sup> Andrea Lollini and Francesco Palermo, “Comparative Law and the ‘Proceduralization’ of Constitution-Building Processes” in Julia Raue and Patrick Sutter (eds.), *Facets and Practices of State-building* (Leiden, Boston, MA, Brill/Martinus Nijhoff, 2009) 301 et seq.

<sup>23</sup> “Intermestic constitutionalism demonstrates how international and domestic constitutionalism can exist side-by-side, that is, how a single constitution can be at once transnational and indigenous. More important, intermestic constitutionalism shows that under certain conditions, these dual influences will methodically impact the two main components of constitutions – human rights provisions and structural/institutional framework; transnational forces tend to affect human rights, and indigenous influence tends to dominate structural arrangements. The idea that both international and domestic forces can influence constitutions is hardly new, but the notion that these forces simultaneously impact constitutional components in predictably distinct ways is novel”, Kevin L. Cope, “The Intermestic Constitution: Lessons from the World’s Newest Nation” (2013) 53 *Virginia Journal of International Law* 667, 670.

<sup>24</sup> Antonio Cassese, “Modern Constitutions” cit., at 351. In the words of Stein: “Antonio Cassese conjures up another, related correlation between the efforts to establish democracy following the defeat of an authoritarian system in a war and revolution, on the one hand, and what he terms ‘the opening of state constitutions’ to the international community generally and international law in particular, on the other. Writing in 1985, he perceived four historic stages: the first extending from 1787 to World War I; the second, from the Weimar Constitution of 1919 to World War II; the third, from the French Constitution of 1946 to the late 1950s; and the fourth starting in the early 1960s. The United States Constitution of 1789, written after a revolutionary war against a monarchy, was the first milestone on this historic continuum ... After more than a century, and another war and revolution against a monarchy the short-lived democratic Weimar Constitution of 1919 made ‘generally recognized rules of international law’ a part of federal law. This formula was extended (after still another war) in the 1949 Basic Law of the Federal Republic of Germany so as to make general international law superior to legislation and directly invocable by individuals ... The 1931 Constitution of the democratic, socialist Spanish Republic took the lead by establishing for the first time in history the precedence of treaties over ordinary legislation, enforceable by a Constitutional Court—a solution embraced in substance after almost half a century of war and dictatorship by the new Spanish Constitution of 1978. The Constitutions of 1946 and 1958 restructuring post-World War II democratic France carried on the idea of treaties’ superiority over legislation, subject, however, to the perplexing new requirement of reciprocity—a pattern followed by the Francophone countries of Africa”, Eric Stein, “International Law in Internal Law” cit., at 427-429.

Reich in liberty and justice, to serve peace inward and outward and to promote social progress, has adapted this constitution”), and so did Article 227 of the Treaty of Versailles, the wording of which spoke of “a supreme offence against international morality and the sanctity of treaties”.<sup>25</sup>

This combination of factors generated a series of norms designed to attract into the constitutional discipline both the internal and external dimensions. On the one hand, Article 4 of the Weimar constitution acknowledged that “the generally recognised rules of international law are valid as binding elements of German Reich law”. Another relevant provision is Article 162, which states that “the Reich advocates an international regulation of the rights of the workers, which strives to safeguard a minimum of social rights for humanity’s working class”.

Provision such as Article 162 are based on the attempt to create a parallelism of values between the domestic and international spheres: “the Reich advocates an international regulation of the rights of the workers, which strives to safeguard a minimum of social rights for humanity’s working class”. Another important novelty, that inspired the Spanish constitution of 1931, was the progressive involvement of the parliament in the foreign affairs.<sup>26</sup>

Indeed, the Spanish constitution of 1931 contained a number of interesting provisions, starting with Article 7 (“The Spanish State shall abide by the universal norms of international law, including them in its positive law”<sup>27</sup>). Above all, of note is Article 65, which considered “all international conventions ratified by Spain and registered in the League of Nations and in the nature of international law” as “a constitutive part of Spanish legislation”. This way, the Spanish constitution created a clear obligation for the national

<sup>25</sup> The Versailles Treaty June 28, 1919: Part VII, Art. 227, text available at: [avalon.law.yale.edu/imt/partvii.asp](http://avalon.law.yale.edu/imt/partvii.asp)

<sup>26</sup> Antonio Cassese, “Politica estera e relazioni internazionali nel disegno emerso alla Assemblée Costituente” in Ugo de Siervo (ed), *Scelte della Costituente e cultura giuridica. I: Costituzione italiana e modelli stranieri* (Bologna, Il Mulino, 1980) 505 et seq., at 519. See Art. 35: “Reichstag establishes a standing committee for foreign affairs, which also meets when Reichstag is not in session, after the term is expired or after Reichstag has been dissolved, until a new Reichstag meets for the first time. Their sessions are not public, unless two thirds of its members vote to hold a public session. Reichstag furthermore establishes a standing committee to safeguard the rights of parliament juxtaposed Reich government, for the time when parliament is not in session [or], after a term has expired or Reichstag has been dissolved, until a new Reichstag has assembled. These committees have the status of inquiry committees”.

<sup>27</sup> Spanish constitution of 1931. An English version is available here: [http://production.clincencenter.illinois.edu/REPOSITORYCACHE/30/Q5yIX5tC8600tRU2W626ZM-1501ZBw60Lh1f87D7C8Pw62oP797cB900ax15KOQ4USxKCS3zEF197LguMwL-8S8IIKWOR8nd2cUcuNyiAvp33\\_19231.pdf](http://production.clincencenter.illinois.edu/REPOSITORYCACHE/30/Q5yIX5tC8600tRU2W626ZM-1501ZBw60Lh1f87D7C8Pw62oP797cB900ax15KOQ4USxKCS3zEF197LguMwL-8S8IIKWOR8nd2cUcuNyiAvp33_19231.pdf)

legislature to act in compliance with international law. This arrangement resulted, as Cassese stressed,<sup>28</sup> in transforming a possible violation of international law into a breach of the constitution (a constitution guaranteed by the establishment of a constitutional court, the “Tribunal de Garantías Constitucionales”).

Finally, certain other provisions accorded an important series of competences to the Spanish parliament in the field of foreign affairs (e.g., authorization to the ratification of international treaties, declaration of war<sup>29</sup>). Another example of the external openness of the modern constitutions is obviously visible in the German Basic law. Its preamble starts by acknowledging the responsibility of the German people “before God and man” and affirming “the determination to promote world peace as an equal partner in a united Europe”.<sup>30</sup> Article 25 recognizes the primacy and precedence of the general rules of international law over the national norms. Also in the practice, thanks to techniques like the famous “*Völkerrechtsfreundliche Auslegung*”<sup>31</sup> the German legal system has shown to be very open to the influence of international law.

A third wave of constitutional internationalisation is championed by the Spanish and Portuguese constitutions. These constitutions introduced a fundamental distinction between the general category of international treaties and that particular group of international treaties devoted to human rights protection. As for Portugal, the fundamental provision is Article 16 of the constitution,<sup>32</sup> which recognizes that international human rights treaties have a complementary role to the Constitution. This provision accords an interpretative role to the Universal Declaration of Human Rights, seemingly excluding other conventions like the European Convention of Human Rights, but the Portuguese Constitutional Court often used the ECHR as an important auxiliary hermeneutic tool for interpreting the Constitution, leaving the

<sup>28</sup> Antonio Cassese, “Politica estera e relazioni internazionali” cit., at 510-511.

<sup>29</sup> See Art. 77.

<sup>30</sup> German Basic Law, Preamble. <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

<sup>31</sup> “According to this technique, any German law should be construed as far as possible in conformity with international law, parallel to the established method of interpretation to comply with EU law (‘Europarechts konforme Auslegung’). This mode concerns any norm in national law, since any norm must be in conformity with the international law obligations of Germany”, Philipp Dann and Marie von Engelhardt, “The Global Administrative Order Through a German Lens: Perception and Influence of Legal Structures of Global Governance in Germany” (2011) 12 *German Law Journal* 1371 et seq., at 1386.

<sup>32</sup> Art. 16 Constitution: “1. The fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law. 2. The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights”.

matter unresolved.<sup>33</sup> A similar provision is Article 20, paragraph 1 of the Romanian Constitution: “Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to”.

Finally, the most important confirmation of human rights treaties’ special ranking in Spain is Article 10.2,<sup>34</sup> acknowledging that these treaties provide interpretive guidance in the application of human rights-related constitutional clauses (even if the Constitutional Court specified that this does not implicate that human rights treaties have a constitutional status<sup>35</sup>). An example particularly interesting to study constitutional openness to international human rights treaties is the Czech case. Before the Czech Euro amendment, Articles 10 and 87 of the Constitution<sup>36</sup> distinguished between international treaties in general and international human rights treaties, affording the latter with supra-statutory rank, without clarifying whether international human rights treaties belonged to the constitutional block. At the same time, Article 87, para. 1<sup>37</sup> of the constitution empowered the constitutional court to declare the unconstitutionality of laws conflicting with international human rights treaties. After the Czech Euro amendment,<sup>38</sup> the new Article 10 of the constitution abandoned such a distinction and now grants all international treaties a super-statutory but still sub-constitutional rank<sup>39</sup>, at least, from a formal

<sup>33</sup> On Portugal see: Francisco Pereira Coutinho, “Report on Portugal”, in Giuseppe Martinico and Oreste Pollicino (eds), *The national judicial treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Groningen, Europa Law Publishing, 2010) 351 et seq., at 360.

<sup>34</sup> Art. 10 Constitution: (2) “The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain”.

<sup>35</sup> Tribunal Constitucional, Judgment 30/1991, available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es).

<sup>36</sup> Art. 10 (previous version) of the Czech Constitution: “Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law”.

<sup>37</sup> Art. 87, para. 1 (previous version) of the Czech Constitution: “The Constitutional Court resolves: (a) the nullification of laws or their individual provisions if they are in contradiction with a constitutional law or an international agreement under Article 10 [international human rights treaties]”. On this: Oreste Pollicino, *L’allargamento ad est dell’Europa e rapporti tra Corti costituzionali e Corti europee. Verso una teoria generale dell’impatto interordinamentale del diritto sovranazionale?* (Milan, Giuffrè, 2010), at 104.

<sup>38</sup> Constitutional Act 395/2001 Coll.

<sup>39</sup> See Michal Bobek and David Kosař, “Report on the Czech Republic and Slovakia”, in Giuseppe Martinico and Oreste Pollicino (eds), *The national judicial treatment of*

point of view. The Czech constitutional court adopts a very broad reading of the European Convention of Human Rights and considers it, alongside other human rights treaties, superior to other international treaties<sup>40</sup>.

In fact, the Czech constitutional court read the new constitutional provisions creatively, *de facto* rewriting them. It has arrogated for itself the power to review the validity of national legislation in light of the ECHR,<sup>41</sup> in spite of the new text of the Constitution. In 2002, the Czech constitutional court said that: “[t]he inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the [CCC], that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms”.<sup>42</sup> By dint of this reasoning, therefore, the constitutional court concluded that “the international human rights treaties have retained their constitutional status”.<sup>43</sup>

#### IV. VALUE-BASED OPENNESS AND MODERN CONSTITUTIONS

The pattern of constitutional openness described by Cassese produced revolutionary effects, especially in re-defining the function of the general principles in these domestic orders.

In comparative law, the idea of general principles is frequently associated with that of openness, since general principles are “open” norms in at least three senses. First, principles feature what Betti called a “surplus of axiological meaning” (“*eccedenza di contenuto assiologico*”).<sup>44</sup> That is, compared to other norms principles have a markedly “expansive power” (“*vis expansiva*”) and indefinite content. Second, principles are also open since they often act as a bridge between two different normative systems (e.g., law and morality), connecting positive law and natural law.<sup>45</sup> Third, principles serve an opening function when they connect the domestic and international legal systems, a function that emerged starkly after World War II. However, if general principles have been traditionally connected with the idea of openness,

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*the ECHR and EU Laws: A Comparative Constitutional Perspective* (Groningen, Europa Law Publishing, 2010), at 133.

<sup>40</sup> Judgment of 15 April 2003 (I. ÚS 752/02).

<sup>41</sup> Judgment of the CCC of 30 November 2004, Pl. ÚS 15/04; Judgment of the CCC of 22 March 2005, Pl. ÚS

<sup>42</sup> 45/04.

<sup>43</sup> Judgment of the CCC of 25-06-2002, Pl. ÚS 36/01, <http://www.usoud.cz/en>

<sup>44</sup> Michal Bobek and David Kosař, “Report on the Czech Republic” cit., at 135.

<sup>45</sup> Emilio Betti, *Teoria generale della interpretazione* (Milan, Giuffrè, 1955) II, at 850.

<sup>45</sup> On this debate see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1977).

comparative law shows that this has not always been the case.<sup>46</sup> The debate on codification in continental Europe clearly shows that, for a certain period, general principles were associated with the necessary closure of a legal system, especially in those systems where the civil codes were considered an expression of legal nationalism.<sup>47</sup> The debate on the general principles of law in the Italian Civil Code (dated 1942 and drafted under the fascist regime) is emblematic from this point of view.<sup>48</sup>

Article 12 of the preliminary provisions to the Italian Civil Code (listing the criteria for legal interpretation) was drafted precisely to prevent recourse to the principles of natural law.<sup>49</sup> About this provision, Guastini argued that, originally, systematic interpretation played a marginal role.<sup>50</sup> Therefore, systematic interpretation was considered an option of last resort, exploitable only in exceptional cases. Scholars also noted that, according to the original scheme of the Italian Civil Code, systematic interpretation was an act of integration rather than interpretation strictly understood.<sup>51</sup> After the entry into force of the Italian Constitution, many of the provisions of the same Civil Code (including Article 12 of its preliminary provisions) were constructed in light of the new constitutional principles; this new arrangement changed the function of the general principles within the legal order.<sup>52</sup> Previously serving as “lids” closing up a legal system (no reference outside the Code was allowed, not even to natural law), principles then became engines of openness, connecting domestic and international law. Systematic interpretation (often combined with consistent interpretation<sup>53</sup>) is no longer considered an option of last resort for the interpreter. In this light, constitutionalism has favoured the emergence of a kind of “osmotic law”<sup>54</sup> or, as I have tried to

<sup>46</sup> Giorgio Del Vecchio, “Les bases du droit comparé et les principes généraux du droit”, (1960) 12 *Revue internationale de droit comparé* 493 et seq.

<sup>47</sup> Paolo Grossi, *A History of European Law* (MA Blackwell Malden, 2010), at 154 et seq.

<sup>48</sup> Livio Paladin, “Costituzione, preleggi e codice civile”, (1993) 19 *Rivista di diritto civile* 19 et seq., at 23.

<sup>49</sup> *Ibidem*.

<sup>50</sup> Riccardo Guastini, *Le fonti del diritto. Fondamenti teorici*. (Milan, Giuffrè, 2010), at 347 et seq.

<sup>51</sup> *Ibidem*.

<sup>52</sup> Livio Paladin, “Costituzione, preleggi” cit.

<sup>53</sup> Roberto Bin, “L’interpretazione conforme. Due o tre cose che so di lei”, (2015) *Rivista AIC*, available at: [http://www.rivistaaic.it/download/1hafJKHfCYy\\_JgI3rY-OwnyoMtsDqwTgP48qIqNjX4t4/1-2015-bin.pdf](http://www.rivistaaic.it/download/1hafJKHfCYy_JgI3rY-OwnyoMtsDqwTgP48qIqNjX4t4/1-2015-bin.pdf)

<sup>54</sup> Antonio Ruggeri, “Dimensione europea della tutela dei diritti fondamentali e tecniche interpretative”, (2009) *Federalismi*, available at: [www.federalismi.it/ApiMostra-Doc.cfm?Artid=14806&content=Dimensione+europea+della+tutela+dei+diritti+fondamentali+e+tecniche+interpretative&content\\_author=Antonio+Ruggeri#.U-yBp-N\\_s44](http://www.federalismi.it/ApiMostra-Doc.cfm?Artid=14806&content=Dimensione+europea+della+tutela+dei+diritti+fondamentali+e+tecniche+interpretative&content_author=Antonio+Ruggeri#.U-yBp-N_s44)

explain elsewhere, “complex” law (because it is based on a constitutional synallagma<sup>55</sup>). How is this possible, and how is this related to that openness (or opening<sup>56</sup>) described by Carrozza?

A possible explanation flows from the axiological continuity that exists – or should exist – between the domestic and the international levels, and the efforts made to construct a better society, even at the international level. The opening of the legal order to its surrounding laws, and the converse attempt to project its founding principles outwards characterize the current contingency of coexistence of different (but intertwined) legal orders.

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<sup>55</sup> Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (Abingdon, Routledge, 2012).

<sup>56</sup> He seems to use these two words in a fungible manner: Paolo Carrozza, “Constitutionalism’s Post-modern Opening” cit., at 182.

# CONSTITUTIONS, OPENNESS AND COMPARATIVE LAW

*Constituciones, apertura y Derecho comparado*

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