TEACHING ANGLO-AMERICAN LAW: MOVING AWAY FROM THE DISTINCTION BETWEEN COMPARATIVE PRIVATE LAW AND COMPARATIVE PUBLIC LAW*

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This paper aims to propose some suggestions toward teaching of Anglo-American law. Moving away from the distinction between private law and public law, the approach suggested focus on the terms of interaction between the Federal Courts and State Courts , which is a central and decisive issue for Anglo-American law. The paper then proceeds to illustrate the new trend in federal common law, meaning no longer the law created by the Federal Supreme Court, which applies to the entire Nation, but also the law created by State Courts, which are increasingly authorized, in certain limited circumstances and through the exaltation of constitutional principles and values, to develop federal common law. The case law mentioned in support of this approach seems, moreover, to lend itself to a comparison with the European experience, where the dialogue among Courts is turning out to be an excellent instrument for the implementation of fundamental rights.

I have chosen this topic after several years of teaching Anglo-American Law at the Law School of the University of Salerno.

Anglo-American Law is an area which many students find fascinating and which provides fertile ground to describe the recent trend moving away from the distinction between private law and public law, as well as the need to conduct a general analysis on the basis of other postulates.

Focusing our attention on the US experience, the approach that I find most appropriate for teaching this topic involves two main overarching areas: firstly, the relationship of dual jurisdiction (federal jurisdiction and the jurisdiction of the individual states) and, secondly, the corollary of the first, the importance of the common principles and values justifying the parallel concordance of action between the two jurisdictions,

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· Paper presented in Palermo on June 12 , 2015, at XXIII Bi-Annual Colloquium of the Italian Association of Comparative Law (AIDC).

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allowing ultimately for the creation of federal common law not only by the Federal Courts, which goes without saying, but also by the State Courts.

Indeed, the elevation of common principles and values to the level of new decision-making parameters applied by Courts not only facilitates the harmonization of law through the development of federal common law, but also helps us to better grasp the obsolescence of the dichotomy between comparative private law and comparative public law and, in any case, its uselessness for purposes of creating rules on case law origins.

Before delving into convergences and differences between State Courts and the Federal Courts and the creation of federal common law, which today has become possible – specifically through the application of constitutional principles and values – also through the State Courts, it is first of all necessary to demonstrate that the use of classifications and segmentations in law is utterly inadequate[1]. Therefore, it is essential to point out, as a preliminary remark, that the dichotomy between comparative private law and comparative public law must be superseded. The critical nature of the distinction between comparative public law and comparative private law that exists at this point regardless of the legal system or subject matter addressed by the comparative analysis is particularly pronounced in US law where the importance of the interdisciplinary approach is not only well-accepted but has been viewed favorably and applied for many years.

The use of other disciplines within the social and humanistic sciences is considered indispensable in order to understand and resolve legal issues[2]. There was at least one scholar who, many years ago, gleaned the importance, especially for a comparative law scholar, of viewing the law as part of a social-cultural context "in the broad sense of the term that includes politics, the economy, the society, custom and

[1] On the US judicial system, *see* M. Comba, *Gli Stati Uniti d'America*, in *Diritto costituzionale comparato*, edited by P. Carrozza, A. di Giovine, G.F. Ferrari, 76; moreover, the insignificance attributed to the distinction between public law and private law is also based upon and explained by the concept of "rule of law" which does not conceive of, unlike civil law, the superiority of the authority with respect to private autonomy. A. RIPOSO, in G. Morbidelli, L. Pecoraro, A. Riposo, M. Volpi, *Diritto pubblico comparato*, IV ed., Giappichelli, Turin, 2012, 231. The public function as a "duty" in European legal systems and as a "right" in the USA is explained by G. Cofrancesco, F. Borasi, *Separazione dei poteri e cultura dei diritti*, Giappichelli, Turin, 2014, 80 *et seq. See* also *Atlante di diritto pubblico comparato*, G.F. Ferrari (Ed.), Utet, Milan, 2010.

[2] *See* N. Luhmann, *Law as social system*, in 83 N.W. L. Rev., 136 (1989).

culture" which latter element is also to be construed strictly, as an expression of "aesthetic taste"[3].

Indeed, starting from the end of the 1950s, various forms of interdisciplinary combinations have been applied to the study of law, such as the economic analysis of law[4], linked to the criteria of efficiency and analyses of incentives, such as the legal process, aimed at conducting a close analysis of the decision-making process, or even law and society that considers the impact of rules on society or critical legal theory that seeks to suggest a legal reconstruction by focusing on voices and values relegated to the margins of dominant legal thought[5]. Lastly, let us also consider the Law and development movement, in which scholars hold the view that uniform rules in developing countries, including in strictly economic areas, are possible only if action is taken while refraining from underestimating the importance of cultural development[6], and therefore law may contribute toward economic growth in developing areas only where democracy and human rights are simultaneously promoted[7].

Returning to the dichotomy between "comparative private law" and "comparative public law " and considering the two terms of comparison individually, we

[3] These are the words of praise expressed by Gino Gorla for Prof. Merryman, in the presentation of the Italian version of his text on "The tradition of civil law. In the analysis of a common law jurist", J. H.Merryman, *La tradizione di civil law. Nell'analisi di un giurista di Common Law*, Giuffré, Milano, 1973.

[4] The success of the economic approach to law, aimed at using the criterion of efficiency and the analysis of «incentives» to assess, explain and prescribe legal rules in any field of law, has institutionalized this area in study programs at all law schools starting from the 1980s; however, it is necessary to say that even if using economic criteria of efficiency and therefore criteria that are not related to the interpretation of the rule, the study of law and economics pursues the goal of re-elaborating broad categories.

[5] U. Mattei, *Il modello di common law*, Giappichelli, Torino, 2014, 235. *See generally* H.M. Hard, Jr. & Albert M. Sachs, *The Legal Process: Basic Problema in the Making and Application of Law*, edited by W.N. Eskridge, jr.& P. P. Frickey, 1994, 138-140; *see* J. R. Hackney, Jr., *Guido Calabresi and the Construction of Contemporary American Legal Theory*, in 77 Law and Contemporary Problems, , 2014, 45; W. Fisher, *Introduction to Duncan Kennedy*, in *The Canon of American Legal Thought*, D. Kennedy & W. W. Fisher III. (Eds.), Princeton University Press, 2006, 650 ff.

[6] *See Law and Development Perspective on International Trade Law*, Cambridge University Press, 2011, www.lawanddevelopment.net.

[7] K. Davis & M. Trebilcock, *The Relationship between Law and Development: Optimists vs. Skeptics*, in vol. 56 J. Comp. L. (2008), 895. Read about the modern approaches, suggested by Matías Siems, such as socio-legal and numerical comparative law, in M. Siems, *Comparative Law*, Cambridge University Press, 2014, and more specifically M. Siems, *The End of Comparative law*, in *Journal of Comparative Law*, V. 2, 133-150 (2007). Most of the approaches have also been explained in *The Oxford Handbook of Comparative Law*, M. Riemann e R. Zimmermann (Eds.), Oxford University Press, New York, 2006, 305-868.

can say that traditionally, the study of comparative "private law" has been used to demonstrate the deep divides between the civil law tradition and the common law tradition, while public law has been used to indicate forms of government.

Nowadays, the study of differences between the civil law tradition and the common law tradition has been superseded by a search for convergences and, from this new standpoint, the dogmatic aspect of private law no longer has true meaning in the analysis of law going forward. Public law may perhaps have some sort of autonomy with regard to its meaning in connection with what is known as administrative law, but what is certain is that such classifications have no meaning for purposes of the evolution of law, especially in Anglo-American law with reference to, first and foremost, judge-made law[8].

The weakness of categorizations in law is also concordant with the rejection of conceptualism expressed in the American scholarly doctrine, which is radicated in functional case law that is closely focused upon an understanding of facts[9], nor can it be denied that, similarly, in comparative methodology, American scholarly doctrine has always been characterized by an anti-dogmatic tendency[10].

However, there exist many scholarly research papers that address various forms of distinctions drawn[11]: at times, they have been drawn at the level of interests, and other times have been based upon a more interesting but also more problematic analysis affirming that private law is a set of rules aimed at corrective justice that is counterposed to public law which is, instead, aimed at offering distributive justice[12].

Another definition, which is very familiar to us as civilians, is the definition holding that private law concerns relationships between private individuals or entities whereas public law governs relationships where the State is party on account of its sovereignty; another definition which generalizes the latter one, is that private law is characterized by horizontal relationships between parties at the same level, whereas

[8] In fact, U.S. Law does not distinguish between public law and private law to the degree that civil law does. *See* G. KLASS, *Contract Law in the United States*, 2012, Kluwer Law International, The Netherlands, 269.

[9] The forerunner of all anti-formalist schools is O. W. Holmes, *The Path of the Law*, in *Collected Legal Papers*, New York, Harcourt, Brace § Howe, 1920, 180, posing as the basis for any reasoning that law is more a product of social experience than deductive logic.

[10] G. Autorino, *Diritti fondamentali e "cross fertilization": il ruolo delle Corti Supreme,* in Diritto pubblico comparato ed europeo, 2014, IV, 2057.

[11] R. Michaels and N. Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, in vol. 54 *The American Journal of Comparative Law*, 843 (2006). Ulpiano already referred to the level of interests in the third century AD.

[12] This position clearly has no future since tort law and contract law serve a function of distributive and corrective justice.

public law is characterized by relationships between parties of superior level and parties of inferior level.

Today, these terms would help us arrive at a mere notionistic knowledge or a number of aspects related to legal systems other than our own and perhaps would justify an understanding of public law without private law, but never the opposite. This is because the positioning of a private law institution within a constitutional law framework has become an assumption that is explicitly expressed in court judgments. Copyrights and commercial contracts cannot be understood without knowledge of the 8th section of art. 1 of the US Constitution or, better yet, the validity of the commerce clause[13] which requires legislative and case law uniformity on all matters pertaining to commerce. In the US experience, which is unique on account of its jurisdictional duality, even the contract, an instrument which is virtually unanimously regarded as governed by private, is the result of a combination of assessments of a socio-economic and public law nature. The branch of private law and the distinction setting it apart from public has historically played a more important role in Europe than in the United States[14]. The perception of private law is different in each legal tradition, and perhaps the only broadly shared opinion is the idea that the area of contracts is typically governed by private law. But this identification of the branch of private law has recently made a comeback solely for purposes of delineating its scope of application, where European law has higher ambitions of uniformity or encounters greater obstacles: contracts, torts, family and inheritance law[15].

However, it is necessary to observe that the positioning within public law of a private law institution for purposes of arriving at a "constitutional" legitimation provides systemic gratification that is useful for teaching purposes, especially where the analysis is limited to the internal system, but an in-depth comparative analysis demonstrates right away that the analysis must go beyond the consistency between public law and private

13 The *Commerce clause* is very flexible for purposes of recognizing the different relationship between state power and federal power but also for understanding the inextricable nexus between public law and private law. It is precisely this clause that allows federal law to govern all contractual matters, as well as a large portion of civil liability matters.

14 J. H. Merryman, *The Public-law/Private Law Distinction in European and Americna Law*, in vol. 17 J. Pub.L., 3 (1968); Id., *La tradizione di civil law nell'analisi di un giurista di common law*, Giuffrè, Milano, 1973.

15 G. Alpa, *European Private Law: Results, Projects and Hopes*, in vol. 14 Eur. Bus. L. Rev., 379-380 (2003).

law, especially when the research focuses on the Anglo-American experience, where we witness a full-fledged convergence of public law and private law which forces us to move the analysis to another front and, in other words, controlled autonomies and freedoms, dictated by shared principles and values[16].

The need to be inspired by common principles and values has been recently interpreted by authoritative Italian scholarly doctrine as the expression "crisi della fattispecie", a sort of crisis in the area of categorization of legal notions.

With such expression, civil lawyers intend to refer to a particular situation described abstractly by the lawmakers originally responsible for the production of certain legal effects. It follows that the above-mentioned expression indicates, in advance, that if a specific event of this type occurs, this will produce certain legal effects.

Indeed, considering that the method of subsuming the actual fact within a theoretical institution is a process that is extraneous to the Anglosaxon legal tradition, the "crisi della fattispecie", recently reproposed by Natalino Irti, in parallel with the exaltation of values[17], is a notion that has been well-accepted by comparative law scholars for some time. The latter are familiar with the approach followed by common law lawyers and, therefore, aware, of the inadequacy of the criterion of the "institutions" and the frequent need to base any actions or analyses upon actual concrete experience.

Irti delineates the crisis in the area of categorization of legal notions on the basis of two arguments: the criteria of judicial decision making go beyond the law, and use

16 In any case, any comparative investigation aimed at noting the peculiarities of a foreign notion or system, and at making a comparison with others or with our own, shows, particularly in this latter case, that even "classic" notions of private law, because they are commonly considered as (for instance, the contract and ownership) inserted within a legal context of which we are unconsciously aware, and therefore where studies are directed a foreign experience, the study of what is commonly known as "public law" becomes a necessity.

17 G. Alpa, *European Private Law: Results, Projects and Hopes*, in vol. 14 Eur. Bus. L. Rev., 379-380 (2003). While Irti's fascinating reconstruction is fully acceptable where it is transposed to the US experience, it is necessary to refer the perplexities raised by a lawyer who, in an analysis limited to the Italian legal system, considers values not suitable to provide rules on infinite situations that life presents, especially in consideration of the fact that the judge cannot be capable of managing such broad discretionarily, also in consideration of the difficulties of associates in being able to predict the prospects of legal proceeding. Along these lines, *see* A. Cataudella, *Nota breve sulla «fattispecie»*, in Rivista diritto civile, 2015, 2, 245 et seq. However, it should also be said that even though on the Italian panorama civil law practitioners continue to struggle to accept the crisis of categorization, in Labor law and Company law, the problem has been virtually entirely resolved.

"constitutional rules that appear to be rules without categories[18], as well as values identified through supreme criteria which «lurk within and fall under constitutional rules»[19]. In light of these two postulates and the phenomenon where parties no longer present to the court events related to circumstances and facts, but rather «economic transactions», existential positions (being born and dying), the intermingling and tangling of interests and needs", the judge does not make his decision by identifying the particular legal category (*fattispecie*) but rather on the basis of values[20].

Therefore, if we take as our starting point the fact that common principles and values inspire law and if we go beyond the idea that there is a mutual compensation between public law and private law, it is necessary to start from the assumption that there is no relationship of subordination of one with respect to the other, even if attention is more often than not focused on the impact of public law on private law and not vice-versa [21]. Moreover, if on the one hand the values of public law exert pressures on private law, private laws often lend substance to constitutional guarantees, especially those concerning human rights[22].

Principles today – as observed by the historian Giovanni Marino in a short but highly incisive essay that inspires the reader - possess light "that burns" the rule, going

18 In other words, «rules that do not satisfy the hypothetical model «if A, then B» but assign unconditional laws», lay down unconditional laws, principles and rules of civil society, protect interests and collective/public assets.

19 N. Irti, cited above, p. 41.

20 Irti, citing the words of Benedetto Croce says: «a judgment of value does not assign predicates, but rather reacts to a real life situation». *See* B. Croce, *I «giudizi di valore nella filosofia moderna»*, in *Saggio sullo Hegel*, 4 ed. Bari, 1948, 399. These conclusions were reached some years ago when Irti announced the "crisis of categorization", meaning the crisis in "legislative provisions" (…) and " the law has become more fluid and principles have replaced the law. The judge no longer says law but rather rights that it is steeped in and comprised of values. This is how judgments become taken over by values" (…)"used as elastic and rubbery things, that are born and then decline, are balanced and placed, one by one, within a hierarchy". For further reading on the nihilistic view of N. Irti, *Diritto senza verità*, Rome- Bari, 2011, 68.

21 On this point, *see* R. Bin, *I principi costituzionali: uso e applicazioni*, in *Roma e America. Diritto romano comune*, n. 42/2013, p. 215. *Contra.* M. Tushnet, *Governance and American Political Development*, in Law and New governance in the EU and US, edited by G. de Barca & J. Scott, Hart Publishing Oxford and Portland, Oregon, 2006, 381.

22 M. Moran, *The Mutually Constitutive nature of Public and Private law*, in *The goals of private law*, A. Robertson and T. Hang Wu (Eds.), Oxford an Portland Oregon, 2009, 26.

well beyond the Prof. Betti's intents for which principles were instrumentalized by jurists in order to guarantee the application and enforcement of the relevant legal provisions[23].

In parallel with principles, what are important today are the balancing of private and public interests, between state and federal interests, in consideration of the dichotomy between rules and standards[24], where standard means "a general reasonableness requirement applied to a simple factual situation"[25].

Therefore, starting from these assumptions, the teaching of Anglo-American law (also including the analysis of any individual legal phenomenon), must focus first and foremost on the convergences of the Federal Courts and the State Courts, which is a central and decisive issue for Anglo-American law.

The intent is then to show the new trend in federal common law, meaning no longer the law created by the Federal Supreme Court, which applies to the entire nation, but also the law created by state courts, which are increasingly authorized, in certain limited circumstances and in light of the exaltation of constitutional principles and values, to develop federal common law.

Federal common law is the product of the application of various forms of balancing, which call for the identification of the interests involved, the assessment of which must be conducted taking into account values which are first identified through the realization of fundamental human rights[26].

It is solely through reference to fundamental human rights and constitutional principles or clauses that it is possible to carry out an adequate balancing the scope of which may cover the entire territory of the United States. Take, for example, the historic

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[23] Giovanni Marino asks whether the deficit in the textual approach is a sign of the emergence of a new, other and different "legal reason". G. Marino, *Testi che dicono principi*, in *Roma e America. Diritto romano comune*, n. 42, 2013, 209 and in particolar 219. *See* E. Betti, *Diritto romano*, I, Cedam, Padova, 1935, 4.

[24] In the rules and standards discussion, great contributions have been provided by Duncan Kennedy in one of the first works on the Critical Legal Studies Movement. *See* D. Kennedy, *Form and Substance in Private Law Adjudication*, vol. 89 Harv. L. Rev. 1685, (1989).

[25] *See* A. I. Muchmore, *Jurisdictional Standards (and Rules)*, in Vand. J. Trasnat'L., vol. 46, 178 (2013); T. A. Aleinikoff, *Constitutional Law in the Age of Balancing*, in Yale Law Journal 96, 942. (1987).

[26] Criticisms have been raised on the fact that the assessment of interests often does not use principles and values that may justify the application of the same rationale also to subsequent cases. Such as in the case *Youngberg v. Romeo*, 457 U.S. 307 (1982), involving treatment of a mentally retarded person involuntarily committed to a state hospital, where the Court did not make a serious effort to place the interests of non-parties on the scale, understanding if Romeo could represent all patients and the State hospital all institutions. In resolving the dispute, the interests of Romeo were attributed a lower weight than those of the hospital. The same criticism was raised in the case *Goldberg v. Kelly*, 397 U.S. 254 (1970).

case Brown v. Board of Education[27] where the decision was based upon the intolerability of racial discrimination. The mere composition of the interests involved would not have allowed for the creation of federal common law[28].

The use of constitutional clauses and/or principles[29] is the keystone not only to allow for overrulings but also to gain an understanding of the legitimacy of creating case law rules that can have validity beyond state borders, especially where they originate, as seems to have occurred over recent years, from a State Court.

When the attention is later focused on fundamental rights, such as respect for human dignity, the right to life, the one-way actions by courts, whether they be state or federal courts, is even more facilitated by the wording of the Bill of Rights of the Constitution[30]. The centrality of common principles and values allows the State Courts to create federal common law and develops in parallel with the process of revitalization that started in Europe with the signing of the ECHR and has been the focus of renewed attention with the England's adoption of the *Human Rights Act*[31].

The relationship between federal jurisdiction and state jurisdiction, let us reiterate, also clarifies the postulates to justify different rules, since they express substantive equality. But from the current perspective of comparative law scholars, who reflect first

[27] 347 U.S. 483 (1954).
[28] *See, e.g. Griselda v. Connecticut*, 381 U.S. 479 (1965); *Living v. Virginia* 388 U.S. 1 (1967); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).
[29] A very interesting issue that arises in connection with the subdivision between constitutional rights and private law rights is the horizontal or vertical application of constitutional guarantees, which hinges on the matter of whether they are limited to the sphere of action of the State or whether they exert an influence on private law or, in other words, on instruments available to the individual citizen. In the US system, the vertical effect of constitutional rights applies, while the full horizontal effect is found in the isolated experience of Ireland where the Constitution establishes that damages may be claimed from private individuals who have constitutionally protected rights. A significant portion of new constitutional regimes have not embraced either of the two solutions (vertical and horizontal application of constitutional principles) and preferred to adopt the idea that constitutional rights are a form of mandatory influence on private law institutions, what is defined as indirect horizontal effect and what is found in Canada, South Africa, Israel and the United Kingdom after the Human Rights Act 1998. In this regard, some scholars support the full integrity of private law.
[30] See N. Robinson, *The Universal declaration of human rights: its origin, significance, application and interpretation*, American Society of International law, New York, 1958; G.F. Ferrari, *Atlante di Diritto pubblico comparato*, G. F. Ferrari (Ed.), *supra* note 1, 382.
[31] On the "incorporation" of International Human Rights into Domestic Constitutions see When- Chen Chang and Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, in *The Oxford Handbook of Comparative Constitutional Law*, edited by M. Rosenfeld, A. Sajó, Oxford University Press, 2012, 1167.

and foremost upon meeting points and on the possible mutuality of legal experiences (where the cultural and social substrate is ready) attention tends to be more focused on the validity of legal rules that are federal in scope, and the problem of justifying the creation of such rules by Courts, which issue is amplified where federal common law is created by State Courts[32].

An initial balance is achieved through the combination of two principles that are apparently contradictory but in fact concordant: first that federal law constitutes subsidiary law and therefore it is supplementary and auxiliary in nature with respect to state laws[33] (Amendment X to the U.S. Const.), and, secondly, that federal law is the Supreme Law of the Land on the basis of the Supremacy clause, pursuant to which state judges are bound to enforce federal law (Art. VI U.S. Const.).

These two aspects involve the issue of so-called federal common law, or in other words the scope of federal judge-made law; now, this is not the proper time to retrace all of the vicissitudes of federal common law, in its traditional meaning as "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands"[34].

The issue of federal common law originating from "federal" sources has been the focus of keen interest on the part of legal scholars: understanding when a federal court, in issuing an appellate judgment in a case that was first heard by a state court, may or may not follow its own precedent, create a federal case law rule or follow a state rule, and in such latter case, understanding whether the search for the state rule must go beyond a mere reading and application of legislative provisions and also include state case law precedents.

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[32] The activity of State Courts has been called new judicial federalism, especially to the extent that the State Supreme Courts began to address hot-button issues such as abortion, school finance, same-sex marriage. In this area, see G. Alan Tarr, *State Supreme Court*, in *Judge made federalism?*, H. P. Schneider, J. Kramer, B. Caravita di Toritto (Eds.), Nomos, Baden-Baden, 2009, 202.

[33] *See* the Tenth Amendment which provides: « powers not delegated by the Constitution to the United States nor prohibited by it to the states are reserved to the states respectively, or to the people (the residual powers clause)». On the secondary nature of federal law, see the in-depth study by B.D. Coleman, *Civil-izing Federalism*, in 89 Tulane Law Review, 307 (2014).

[34] R.H. Fallon, D. J. Meltzer, D.L. Shapiro, Hart and Wechsler's, *The Federal Courts and the Federal System*, 5th ed., 2003, 685. Everything originates from the Rules of Decision Act (first section 34 of the Judiciary Act 1789, now part of 28 United States Code) which provides: «state laws shall govern in cases where they apply except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide».

In this brief paper, we assume that a balance has been achieved between these two counterposed pressures, even though the scope of federal common law that emanates from Federal Courts[35] is in a constant state of flux.

We seek, instead, to show that the categorizations of law – as mentioned above – do not assist us in understanding how State Courts make Federal Common Law or, in other words, uniform law that applies throughout the entire national territory.

The intention is to grasp whether there may be criteria usable by the State Courts or whether they must resort to new postulates.

Many scholars have sought to identify the criteria that are used by State Courts but let me anticipate that any attempt to apply classifications ends up depriving of meaning this phenomenon that has developed precisely as a result of the need to implement constitutional principles, through a process of putting oneself in the position of the Federal Supreme Court, which personifies the supreme guarantor of constitutional rights[36].

State Courts' objectives and, in other words, that of correctly interpreting federal law and that of achieving national uniformity in the interpretation of federal law, are

[35] The main judgments that reconstruct in summary form the evaluation of federal common law are: *Swift v. Tyson*, *Erie Railroad Co. v. Tompkins* and *Clearfield Trust Co. v. United States*. As Judge Friendly of the federal Court suggested "the Hegelian dialectical has been here at work – with Swift v. Tyson the thesis, Erie the antithesis, and the new federal law the synthesis"(H. J. Friendly, *In Praise of Erie – and of the New Federal Common Law*, vol. 39 N.Y.U.L. Rev., 407-408 (1964). However, it is by now commonly agreed that the Erie case did not intend to deny federal common law, but rather to discourage the phenomenon of forum shopping and to prevent an unjust administration of justice due to the parties' diversity of citizenship to avoid the unfair administration of laws in cases heard by federal courts because of the diversity of citizenship of the parties. The words of Alex Mills are emblematic: « the status of private law in federal courts moves from (pre-Erie) federal common law, to (Erie) apparently exclusively state law, to (Clearfield Trust) a matter of (contentiously) shared federal and state competence, with the boundary to be determined by application of subsidiarity principles». *See* A. Mills, *Federalism in European Union and the United States: subsidiarity, private law, and the conflict of law*, in vol. 32 U.Pa. J. Int'l L., 425 (2010). Moreover, relations between State Courts and Federal Courts reflect substantive policy concerns. *Ives v. South Buffalo Railway* and its expansion of habeas corpus relief for state prisoners after the Civil War are prime examples of policy-based jurisdictional reforms.

[36] D. H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards Judges Should Use to Ascertain Federal Law*, in vol. 40 Wm. Mary L. Rev., 1143 (1999), highlights that discretion rests with the State Courts in complying with federal common law, particularly to the extent that there is no univocal guidance provided by the same. Consequently, where there is no univocal guidance, state courts should decide questions of federal law the way the think the Supreme Court would decide them.

strictly interrelated and implicitly promote impartiality, predictably and conditions for the implementation of constitutional principles[37].

Indeed, State Courts, despite being focused on offering solutions that are not "original" but rather offer stronger safeguards for the protection of the person and his/her interests, in accordance with constitutional principles such as the establishment clause and due process law, benefit from a local perspective that at times better lends itself to acknowledging such gaps in the legal framework[38]. This phenomenon, which leads to the generation of uniformity from the ground up so to speak, occurs in many other legal contexts as well. Merely by way of example, take for instance the Spanish experience, where the *derecho foral* or the *derecho autonomico*, cannot create laws that apply at the national level, but rather they constitute models for state law, participating indirectly in the creation of uniform law applicable throughout the national territory.

The relationship between state courts and federal courts reproposes the issue of dialogue between local sources and centralized sources, between local law and global law[39], where the latter is not the objective to be reached *tout court* but rather the phenomenon, which is at times predominant, that must be managed or aspired to in accordance with certain common of principles and values, considering that, at times, local sources may be more appropriate for interpreting such values.

References to a number of case laws precedents are certainly useful, but we should not take for granted a number of notions which I believe are worthwhile to retrace very briefly.

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[37] In this way people can rely on the law with greater confidence. *See,* also, G. Alan Tarr and M. C. Aldis Porter, *State Supreme Courts in State and Nation*, Yale University Press, New Haven and London, 1988, 8. The authors affirm that "State Courts must not only give precedence to federal law over State law, but also interpret that law in line with the current rulings of the U.S. Supreme Court". *See Smith v. State* 24250 2d 262, 696 (Miss. 1970) , the Court was required "to follow the decisions of the Supreme Court of the United States in which that Court has construed similar statutes involving the First Amendment to the Constitutional of the United States".

[38] R. M. Cover & T. A. Aleinikoff, *Dialectical Federalism Habeas Corpus and the Court*, in 86 Yale L.J., 1050-1052 (1977). The Author demonstrates that the uniformity of law, or better uniform laws present greater impetus in favor of the protection of human rights where they emanate from local sources, such as state sources, that are more capable of respond to values.

[39] Moreover, this matter was a topic covered at the XVII Biennial Conference of the Italian Association of Comparative Law; for an extensive bibliography, *see* the conference documents in *Global law v. Local law, Problemi della globalizzazione giuridica*, C. Amato and G. Ponzanelli (Eds.), Giappichelli, Torino, 2006.

Federal law does not aspire to being complete, unlike state laws[40]. The basic underlying rule – that is well-known to all - is that federal law must be applied if the case involves federal issues; therefore, in these circumstances, federal courts have, to a greater or lesser extent depending on the circumstances, created case law rules that constitute part of what is defined as federal common law. However, the opportunity may be taken in other circumstances as well, which are, moreover, the most controversial cases or, in other words, where the Federal Court has jurisdiction in diversity citizenship cases.

The issue is strictly related to the issue pertaining to the jurisdiction issue, which is clearly the condition which must be met in order for the Court to hear the case.

The issue at this point is to understand under what circumstances it may be concluded that state courts, meaning local sources of law, may be entitled to issue a decision on a dispute and, in the same context, may create uniform rules that are applicable at the national (federal) level given that the general rule provides that (with the exception of antitrust suits, where federal jurisdiction is always exclusive) when a federal law is silent or, in other words, does not provide otherwise, the state courts always have concurrent jurisdiction. Therefore, in order for federal courts to have exclusive jurisdiction, a precise law specifically providing for such exclusive jurisdiction is necessary[41]. It follows that state courts have concurrent jurisdiction with federal courts also with reference to many disputes concerning federal issues, just like federal courts have concurrent jurisdiction with state courts on many cases concerning state law issues.

If the jurisdiction is concurrent and, therefore, the State Court may hear the case, the State Court must hear the case and may never refuse to do so based upon a justification that it must be resolved on the basis of federal law; and, if necessary, State Courts must therefore follow federal laws, just as Federal Courts, if necessary, must follow state laws (like in the famous case Erie Railroad Co. v. Tompkins).

What is fundamental to this analysis is to bear in mind in general terms the most recent case law views in which Federal Courts delineate the scope of federal common law and to see to what extent they can justify federal common law made by State Courts (without the distinction between public law and private law playing any role whatsoever).

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40 The federal law is interstitial in nature and rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states.

41 Many cases declare that "in absence of a plain indication to the contrary (…) Congress when it enacts a statute is not making the application of the federal act dependent on state law". *See Jerome v. United States,* 318 U.S. 101,104 (1943).

Traditionally, Federal Common law is broken down into two sub-categories depending upon whether it is created on the basis of the federal policy or federal laws or constitutional provisions.

Let me spend a moment on the first scenario – which is the most complex for analysis purposes - where the opportunity to develop federal common law is envisaged when the United States are party to a lawsuit or when federal property/ownership rights or interests are at stake. However, on several occasions, the Federal Supreme Court has demonstrated that it is not sufficient for the United States to be party to a lawsuit in order for a federal common law to be applied; it is the nature of the interests involved that is the critical issue.

In Milwaukee v. Illinois (1981), the Court established that Federal common law can govern interstate pollution caused by the states or their agencies, moreover going beyond what had already been provided under the Federal Water Pollution Control Act Amendments of 1972, and this conclusion was reached on the basis of the right to health that had to be protected. On the other hand, in the well-known case (dating back to 1943) Clearfield Trust Co. which concerned the counterfeiting of a government check payable to a private citizen but cashed by a retail store (Clearfield Co.), the Court – on the basis of the commerce clause - stated that the "desirability of a uniform rule is plain" since the issuance of commercial paper by the United States is on a vast scale, commonly occurring in several states. Commercial banking practices call for greater uniformity and the opportunity for uniformity is simple and necessary.

The importance of the interests involved, however, may also give rise to a restriction in the applicability of the federal rule in favor of the state rule where the matter is federal but the case involves state interests. For instance, in a dispute that concerned a loan made by the Small Business Administration to Mr. and Mrs. Yazell, where a flood in Texas had led to the foreclosure of the chattel, the Court established that, with regard to the case involving family-property arrangements issues, there were no federal interests that justified the limitation of state law[42]. In Yazell, where "family and

[42] See *United States v. Yazell,* 382 U.S. 341 (1966) which departed from the decisions issued by the lower courts during the previous phases of such proceedings There is federal interest which requires that the local law be overridden in this case in order that the Federal Government be enabled to collect in supervention of the state law of coverture. It is not necessary to decide whether the state law applies by reason of adoption by federal or *ex proprio vigore*.

family –property arrangements" were at issue, there was no federal interest that justified invading the "peculiarly local jurisdiction" of the States.

The criterion of federal interests, which allows us to retrace the work done by the Federal Courts in creating federal common law as well as the applicability of the local rule, through the negative criterion, such as in the case United States v. Yazell, turns out to be insufficient where it is necessary to justify the creation of federal common law by State Courts.

The possibility for State Courts to create a rule of federal common law[43], moreover, is in line with the approach followed in the study of transnational law, for which the phenomenon of cross-fertilization, where constitutional principles play a central role, is emblematic[44].

The Small Business Administration made a disaster loan to Yazell, and to his wife, who is respondent here, following flood damage to their shop in Lampasas, Texas. The loan was individually negotiated. The chattel specifically made reference to Texas law in several respects. After default by Yazells on the note, and foreclosure of the mortgage, the Government brought this suit against the Yazells for the deficiency. Respondent, Mrs Yazell, moved for summary judgment on the ground that, under the Texas law of coverture, she had no capacity to bind herself personally by contract on the facts of this case, and hence the contract could not be enforced against her separate property. During the negotiation of the loan, the SBA had at no time indicated an intention that the Texas law in this regard would not apply, nor had the SBA required respondent to have her disability of coverture removed pursuant to Texas law.

[43] The doctrine on the matter of the power of State Courts to create a federal common law is not all that copious with respect to the extensive literature on the matter of federal common law. In any case, such literature must be read in conjunction with a number of important contributions, even if they are dated *See* Andrew A. Matthews, Jr., *The State Courts and the Federal Common Law*, vol. 27 Alb. L. Rev., 73, (1963); ID., *Authority in State Courts of Lower Federal Court Decisions on National Law*, vol. 48 Colum. L. Rev., 943, (1948); R.M. Cover & T. A. Aleinikoff, *Dialectical Federalism: habeas Corpus and the Court*, vol. 86 Yale L.J., 1053, (1977). There is some author who is not in favor to recognize this power to State Courts: *see* L.Kramer, *The Lawmaking Power of the Federal Courts*, vol. 12 Pace L. Rev.., 265 (1992).

[44] The exaltation of human dignity as an essential factor in the dialogue between Conventions and Supreme Courts is acknowledged with close attention by G. Autorino, *Diritti fondamentali e "cross fertilization": il ruolo delle Corti Supreme, supra* note 10, 2063. Another very interesting ruling is that issued by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* (2003) that highlights the distinctive role played by State Supreme Courts in American Federalism. In Goodridge, same-sex couples challenged Massachusetts's marriage law, which forbid the issuance of marriage licenses to same-sex couples, on the basis of the argument that this restriction violated the Massachusetts Constitution. Even if historically marriage is a matter addressed at the state level, the consequences of this decision have been that opponents of same-sex marriage proposed a federal constitutional amendment that would define marriage in the United

It is also important to point out that there is no relationship of reciprocity between state action and federal action, and therefore if it is possible for state courts to create law qualificable as federal common law, it cannot be deemed acceptable for a Federal Court to create state law or, in other words, law that is valid to the limited extent to which it is applied within the limited territorial area of the state (this is different from applying a local rule); it would be another question altogether if federal courts called upon to resolve a state issue (for example, on the basis of diversity citizenship jurisdiction) were to apply a rule of federal common law.

What is certain is that the Supremacy clause[45] is the instrument which entitles State Courts to apply federal common law rules that Supreme Court precedent establishes, but not to create a new rule. Nonetheless, it is at times possible to glean from the Supremacy clause power on the part of State Courts to create federal common law; let it be understood, however, that we are not referring to a direct assignment of power, since it would be illogical to assign to State Courts the power to create the law to which the Clause dictates they are bound.

Nor can it be argued that the power in question is delegated by Congress or by the Constitution [46], since Congress itself has no power to dictate rules to State Courts[47]; moreover, the grant of a mandate would entail an obligation on the part of State Courts to make federal law which is unthinkable, nor indeed would a discretionary mandate be conceivable since it would essentially give rise to a justification for refusal[48].

Another interpretation suggested by the scholarly doctrine is to grant to State Courts such power through the Tenth Amendment, and as a result what was not delegated to the United States continues to rest with the States. Consequently, the creation of a federal common law, which is not expressly mentioned in the Constitution,

States as the union of one man and one woman. *See* A. Tarr, *State Supreme Courts in American Federalism*, in H.P. Schneider, J. Kramer, B. Caravita di Toritto, *Judge made federalism?*, Nomos, Baden-Baden, 2009, 194-195.

45 U.S. Const. Art. VI, cl. 2.

46 *See* T. W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U. Chi. L. Rev., 40 (1985), who on the matter of federal common law produced by Federal Courts argues that «federal courts have power to make federal common law when Congress or the framers of the Constitution have conferred power on the federal courts to fashion federal rules of decision in order to round out or complete a constitutional or statutory scheme».

47 *See Alden v. Maine*, 527 U.S. 706, 752 (1999).

48 *See* A. J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153, U. P. *Law Review*, 868-869 (2005).

would also fall under the jurisdiction of the States[49]. This explanation is rather simplistic and inadequate and it would be preferable to think that State Courts regularly take part in the development of federal common law and, in other words, that they make federal common law too[50] to the extent that they are an instrument of fortification of federal sovereignty in that it is necessary and proper to implement a congressional act[51] and to improve the effectiveness of a statute.

By favoring this latter approach, the new rule would help implement a pre-existing rule that Court States are under a duty to honor [52]. Therefore, its admission would be envisaged to the extent that it is the expression of participation in the development of federal common law[53]. In these terms, it would amount to a means to fortify federal sovereignty[54] and would turn out to represent the perfect concordance mentioned above – between U.S. Const. Art. VI, cl. 2., X amendment and XIV amendment[55].

The Federal Court itself has held that State Courts, in applying a state decision, may not do so without making federal common law themselves and this often happens when they specify a rule set forth in a federal court precedent, such as in the case Silvestrein v. Northrop Grumman Corp. which was decided by the Superior Court of New Jersey.

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[49] This is one of the interpretational proposals raised by L. Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U.L.Rev. 860 (1989). In any case, this may never be a power emanated by Congress since Congress has no authority whatever to regulate the jurisdiction of state courts. One example is provided by the decision in *Alden v. Maine*, 527 U.S. 706 (1999) where it is explained that Congress could ask the State Courts to adapt their jurisdiction in order to comply with federal requirements where the concern procedural matters.

[50] A. J. Bellia Jr., *State Courts and the Making of Federal Common Law*, *supra* note 48, 827.

[51] L. Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Review, 268, (1992).

[52] On the matter of whether or not the new rule is retroactive, *see* Teague v. Lane, 489 U.S. 288 (1989) where the Supreme Court established that the old rules apply retroactively on habeas review while new rules do not.

[53] A.J. Bellia Jr., *State Courts and the making of Federal Common Law*, *supra* note 48, 839.

[54] L. Weinberg, *Federal Common Law*, in 83 Nw. L.Rev. 809-814 (1989). Take for instance the various Federal Supreme Court decisions that held that State Courts must enforce the Sherman Act (1890), the earliest antitrust law of the United States and, if necessary, make federal law to do so, reinforcing what was already contemplated by Congressed in the Sherman Act.

[55] Nonetheless, there are difficulties in demonstrating that federal common law, produced by State Courts may produce effects beyond the borders of the United States, especially since there would be a lack of jurisdiction.

The Court of New Jersey (in the case Silvestrein v. Northrop Grumman Corp.) went even further specifying a rule created by the Federal Supreme Court in the case Boyle v. United Technologies Corp.

The case Boyle v. United Technologies Corp.[56] concerned the liability of the company that had supplied helicopters to the federal government. The helicopter had crashed due to a design defect and had caused the death of the copilot of the US Marines. The Court argued that federal common law would replace the state law only if the question had concerned a uniquely federal interest (and in such case "the civil liabilities arising out of the performance of federal procurement contracts" to be of "uniquely federal interest"). The Court states that liability for design defects in military equipment cannot be imposed when the equipment conforms specifications approved by the government. The non-applicability of state tort laws was established without however specifying whether such rule was limited to military contractors or extended to nonmilitary government contractors as well.

This rule of law establishing that "liability for design defects in military equipment cannot be imposed when the equipment conforms specifications approved by the government" was specified and therefore completed by the Appellate Division of New Jersey Superior Court according to which the rationale underlying the decision in the Boyle case could also be applied to nonmilitary contractors by characterizing the principles underlying the defense as extending beyond the military context establishing that "the government must have flexibility to trade safety for economic considerations in all of its contracts"[57]. The case decided by the Court of New Jersey (Silvestrein v. Northrop Grumman Corp.), concerning the damages suffered by an employee who had been driving a postal vehicle, rolled over after being struck by a car, expanded the scope of the federal rule to the context of nonmilitary contracts because «the government must have flexibility to trade safety for economic considerations in all of its contracts».

It is clear that in this case, the Court of New Jersey, in expanding the types of contracts subject to the federal rule, is making federal common law.

In another case in Minnesota, Johns v. Harborage I, Ltd.[58], the Supreme Court of Minnesota in a lawsuit concerning the liability of a former employer, and the possibility of attributing liability, attributed liability to the successor employer (because it was

56 487 U.S. 500 (1988).
57 The quoted wording was expressed by A. J. Bellia Jr., *State Courts and the Making of Federal Common Law*, *supra* note 48, 848.
58 *Johns v. Harborage I, Ltd*, 664 N.W., 2d 291, Minnesota (2003).

affiliated with the previous one) even though it had signed a contract that released it from this type of liability. The issue concerned discriminatory claims and even through the Court followed this principle: "continuity of business is a key factor in determining whether an employer is a successor-employer for liability purposes"[59], the federal common law applied is based upon the desire to stigmatize discriminatory conduct.

In a recent case in California[60], where Fair Political Practices Commission sued Agua Caliente Band of Cahuilla Indians, alleging that the tribe violated the California Political Reform Act due to the fact that it had failed to provide certain campaign-related disclosure[61], the California Superior Court rejected the defense, which was based upon the doctrine of tribal sovereignty, arguing that tribal sovereign immunity applies only where activities concern tribal self-governance and economic development and not where activities affect the governance and development of another sovereign. Honoring tribal sovereignty runs up against an implicit limit consisting of the need to honor federal sovereignty. In this judgment, the combined provisions of the First Amendment, art. 4, section 4 (the Guarantee Clause) and the Tenth Amendment of the United States Constitution, give the Fair Political Practices Commission the authority to enforce the Political Reform Act against the Tribe and, therefore, restricts state law, construed broadly.

These are just a few examples that demonstrate that State Courts create federal common law not only by expanding the scope of the pre-existing federal common law rule, but also restricting the state law rule.

In light of what we have sought to illustrate above, this approach to the teaching of Anglo-American law seems, moreover, to lend itself to a comparison with the European experience, where the dialogue of Courts is turning out to be an excellent

[59] For further analysis on this matter, *see* John H. Matheson, *Recent decisions of the Minnesota Supreme Court: the limits of business limited liability: entity veil piercing and successor liability doctrines*, 31 Wm. Mitchell L. Rev. 411 (2004-2005).

[60] *Fair Political Practices Commission v. Agua Caliente Band of Cahuilla Indians*. No. S1213832; decided December 21, 2006.

[61] The Fair Political Practices Commission governs numerous aspects of the state and local electoral system. The determinant issue is whether or not the Indian Tribe is immune from lawsuit under the long-standing principle of Indian Sovereign Immunity. Therefore, this case includes the following issue: Can a California state exercise jurisdiction over a federally recognized Indian tribe in an action by the Fair Political Practices Commission to enforce campaign contribution reporting requirements under the Political Reform Act?

instrument for the implementation of fundamental rights[62]. The phenomenon of cross-fertilization, through which Courts cite foreign judgments in order to support their own decisions, is affecting all European Courts and other courts as well[63].

Recently, even US Courts, which are clearly trained to engage in comparisons on an ongoing basis, are turning their attention to across the ocean[64], further confirming that principles and values are the basic instruments necessary for the resolution of disputes and for the development of uniform laws.

The enhanced multi-level awareness demonstrated in the protection of constitutional rights and, in particular, in fundamental rights has accentuated the phenomenon of cross-fertilization, or, in other words, the dialogue between European Superior Courts and other courts[65], and has involved as party to the dialogue even the

62 The Constitution of the United States is a forerunner in recognizing many rights that only after many years – one hundred fifty years later – have been received recognition of equivalent value in Europe. Reference is made to the European Convention for the protection of human rights and fundamental freedoms (CEDU) signed in Rome in 1950 and ratified in a number of jurisdictions many years later, such as England, only in 1998, through the Human Rights Act which, moreover, does not recognize the European Court of Human Rights. On the various critical issues related to the incidence of the Court of Strasbourg and the Court of Luxembourg, see G.F. Ferrari, *Rapporti tra giudici costituzionali d'Europa e Corti europee: dialogo o duplice monologo?*, in *Corti nazionali e Corti europee*, G. F. Ferrari (Eds.), Edizioni Scientifiche italiane, Napoli, 2006, VII and T.E. Frosini, *Brevi note sul problematico rapporto tra Corte Costituzionale italiana e le Corti Europee*, in *Corti nazionali e Corti Europee*, cited above, 365.

63 *See* T. Kadner Graziano, *Is it Legitimate and Beneficial for Judges to use Comparative Law?* and G. Samuel, *Comparative Law and the Courts: What is Comparative and What is Law*, in Courts and Comparative Law, edited by M. Andenas, D. Fairgrieve, Oxford, 2015. For a detailed analysis of the case law, *see* N. Jayawickrama, *The Judicial Application of Human Rights Law*, Cambridge University Press, Cambridge, 2002.

64 Moreover, the matter of federal *common law* is of keen interest to those who analyze the possible development of a European federal common law which, like the federal common law, is focused on the lawmaking power of the Court of Justice and on the content of Union and Community judge-made rules. The federal common law entails serious constitutional questions that strike the heart of both systems. *See* B. R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245- 1248, (1996). The term European Federal Law refers to the set of concepts, principles and rules that do not emanate from a provision of primary or secondary Community law. Union and Community concepts, principles, and rules of decisions formulated by the Court of Justice that are not clearly suggested from the face of a provision of primary or secondary Community law. *See* K. Lenaerts, K. Gutman, "*Federal Common Law" in the European Union: A Comparative Perspective from United States*, in *The American Journal of Comparative Law,* vol. LIV, *7* (2006)*;* A. Mills*, Federalism in European Union and the United States: subsidiarity, private law, and the conflict of law*, 32 U.Pa. J. Int'l L. 369 (2010).

65 For instance, in South Africa, reference to decisions issued by foreign Courts is based upon an express provision or, in other words, art. 39, sect. 1 of the Constitution of South Africa (dated 1993) which provides: «Courts must take into account the principle of international law (…) and «may take into consideration the case law of foreign Constitutional Courts».

Federal Supreme Court, such as in the emblematic case Lawrence v. Texas[66]. In such case, the Federal Supreme Court declared unconstitutional a criminal law of the State of Texas that punished sodomy as a crime[67], not by citing the binding precedent or, in other words, Bowers v. Hardwick which laid down the principle of equality between heterosexual couples and homosexual couples, but rather by going well beyond that and, in their words, citing a judgment issued by the European Court of Human Rights of 1981 and, in particular, the principle of personal freedom[68]. The judgment in the Lawrence case expressly held that the prior decision issued in the Bowers case had not taken into adequate consideration the principle of individual freedom and indicated that consensual conduct falls within the freedoms protected by the constitutional principle of due process enucleated by the Fourteenth Amendment of the United States Constitution.

The US model therefore seems to be emerging from its shell of self-referential isolation[69]. The constitutional principles and flow of values in decisions by Courts, wherever they may be, appear to mark a convergent movement toward the harmonization of law, where any form of categorization of legal notions (such as that consisting of the dichotomy between private law and public law) is never used to safeguard human rights and fundamental freedoms.

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66 For further analysis, *see* K. Lenaerts, K. Gutman, "*Federal Common Law" in the European Union: A Comparative Perspective from United States*, in *The American Journal of Comparative Law,* vol. LIV, 2006*, 7;* A. Mills, *Federalism in European Union and the United States: subsidiarity, private law, and the conflict of law*, 32 U.Pa. J. Int'l L., 369 (2010).

67 The penal code of 1973 of the State of Texas punished as crimes sexual relations between adults of the same sex, even when they took place within the intimacy of the home.

68 Reference is made to the case *Dungeon v. United Kingdom*, 45 Eur ct. H.R. (1981) which distanced itself from the case, overturning a previous decision made by the same court in 1986 in the case *Bowers v. Hardwick* despite the fact that it held as constitutional a similar law of the state of Georgia.

69 *See* V.C. Jackson, M. Tushnet, *Comparative Constitutional Law*, Foundation Press, New York, 1999.