

# The Italian Constitutional Court and Comparative Law A Premise

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*In recent years there has been increased attention towards the use of foreign law in the decisions of Supreme Courts. In particular, in the United States legal scholarship has debated whether Constitutional Courts should refer to a wider constitutional culture when carrying out constitutional interpretation.<sup>1</sup> Notwithstanding the fact that many of the arguments are of a normative nature and the tone of the debate is often quite passionate<sup>2</sup>, it might be useful to extend the object of research by considering the experience of a civil law system such as Italy.*

*This essay will thus examine the use of foreign law by the Constitutional Court in Italy going on to make some general considerations on the emergence of a broader constitutional culture which leads to Supreme Courts using foreign law.*

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<sup>1</sup> See. S. Choudhry, *Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind.L. J. 819 (1999); Note, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harv. L. Rev. 2049 (2001); R. Teitel, *Book Review: Comparative Constitutional Law in a Global Age*, 117 Harv. L. Rev. 2570 (2004); V.C. Jackson, *Foreword Comment: Constitutional Comparisons, Convergence, Resistance, Engagement*, 119 Harv. L. Rev., 109 (2005); J. Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Entry Ports*, 115 Yale L. J. 1564 (2006); R. Dixon, *A Democratic Theory of Constitutional Comparison*, 56 Am. J. Comp. L. 947 (2008).

<sup>2</sup> See R. Posner, *How Judges Think*, 347 ff. (2008).

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### I. THE USE OF FOREIGN LAW BY THE ITALY'S SUPREME COURTS

There is ample literature on the use of foreign law by Italian Supreme Courts. One should bear in mind that in Italy there are three “Supreme” Courts: the Court of Cassation (*Corte di cassazione*) for civil and criminal matters; the State Council (*Consiglio di Stato*) for administrative matters and the Constitutional Court (*Corte costituzionale*) for judicial review. The studies that have been carried out many concern the case law of the Court of Cassation and the Constitutional Court. With regard to the former,<sup>3</sup> one should underline that comparisons with other Supreme Courts might be misleading given the fact that in the Italy all citizens have a right to lodge an appeal in the Court of Cassation and therefore the latter delivers a significant number of decisions every year.<sup>4</sup> Notwithstanding that the judgments of the Court of Cassation are well reasoned (twenty pages being the average length), given the fact that it has to deliver between twenty and thirty thousand judgments there is little space for citing foreign case law.

On the contrary, the use of foreign law by the Italian Constitutional Court is of much greater interest,<sup>5</sup> not only because it delivers a large, but reasonable number of judgments every year,<sup>6</sup> but also because it addresses themes that are focused on constitutional interpretation.<sup>7</sup>

<sup>3</sup> On the use of comparative law by the Italian Supreme Court of Cassation see M. Taruffo, *The Use of Comparative Law by Courts*, in Italian National Reports to the XIVth Congress of Comparative Law, 51 (1994); A. Somma, *Le corti italiane e l'uso complementare dei modelli normative extratestuali nel processo di armonizzazione del diritto comunitario*, in *L'uso giurisprudenziale della comparazione giuridica*, Quad. Riv. Trim. dir. proc. civ. 25 (VII, 2004).

<sup>4</sup> According to the Statistics Office of the Supreme Court of Cassation 20,799 judgments were published in 2000; 19,111 in 2001; 19,929 in 2002; 21,707 in 2003; 26,522 in 2004; 31,177 in 2005; 29,641 in 2006 and 29,776 in 2007.

<sup>5</sup> See. V. Zeno-Zencovich, *Il contributo storico – comparativo nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?*, Dir. Pubbl. comp eur. 193 (2005); L. Pegoraro, *La Corte costituzionale e il diritto comparato nelle sentenze degli anni '80*, Quad. cost. 601 (1987, III); L. Pegoraro, P. Damiani, *Comparative law in the Judgements of Constitutional Courts*, in A.M. Rabello and A. Zanotti (eds.), *Developments in European, Italian and Israeli Law*, 131 (2001); L. Pegoraro, *L'argomento comparatistico nella giurisprudenza della Corte costituzionale italiana*, in G.F. Ferrari, A. Gambaro (eds.), *Corti nazionali e comparazione giuridica*, 477 (2006).

<sup>6</sup> According to the data published on the website of the Italian Constitutional Court [www.cortecostituzionale.it](http://www.cortecostituzionale.it) these are the number of decisions:

In order to fully understand the significance of this use of foreign law one should bear in mind some of the distinguishing features of the Italian legal system.

First, in Italy, as is in other civil law systems based on the French model, no distinction is made between binding and persuasive precedent. In principle, case law is merely persuasive, although a series of secondary rules have tended to obscure this distinction.<sup>8</sup> In any case no foreign judgment can be cited on the basis of its precedential effect,<sup>9</sup> given the fact that the decisions of the Italian Constitutional Court are not considered binding precedents. However, as we shall see, the Italian Constitutional Court has been “forced” to deliver decisions that are not in line with its own precedents, but with those of the European Court of Human Rights (ECHR). The fact is that the distinction between binding and persuasive effects does not combine at all well with the use of binding precedents in civil law systems because judgments go from quasi-binding to blandly exhortative.

Second, Italian court judgments rarely contain citations. Starting from the Enlightenment reforms of the 18th Century citations were expressly prohibited. Art. 118 of the implementing provisions of the Civil Procedure Code still provide that in writing a judgment “citation of legal scholars shall be omitted”. This provision does not foresee a sanction and there are doubts as to whether this rule applies to judgments delivered by the Constitutional Court, however

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1998	229	242
1999	297	174
2000	398	194
2001	321	126
2002	401	135
2003	248	134
2004	279	167
2005	284	198
2006	276	187
2007	292	172
Year	Orders	Judgments

<sup>7</sup> One should, however, bear in mind that the Italian Constitutional Court also resolves jurisdictional disputes between the State and the Regions, where the use of comparative law is practically impossible, and decisions of this sort amount to nearly half the judgments delivered by the Constitutional Court every year.

<sup>8</sup> There is an unwritten rule according to which if ordinary judges deliver a judgment on the basis of a precedent of the Court of Cassation then the judge in question is exempted from providing detailed motivations, on the contrary if the judge does not intend to follow a precedent of the Court of Cassation, he can do so, but his dissenting judgment has to be well reasoned otherwise he risks disciplinary action.

<sup>9</sup> See. R. Poster, *op. cit.*, 348.

the custom of courts over the last three centuries has been that of not citing legal scholars.<sup>10</sup>

As a result the citations contained in Italian court judgments, including those of the Constitutional Court, are limited to the precedents of that same court and have the intent of demonstrating that the court is coherent. The same style is used by the European Court of Justice (ECJ).

Quantitative studies show that citations of foreign case law and scholarship in the judgments of the Italian Constitutional Court are limited in comparison with other Constitutional Courts. More specifically, no foreign legal scholar has ever been cited, but this should come as no surprise given the fact that no Italian scholar has ever been cited either!

Research carried out on judgments delivered by the Italian Constitutional Court between 1980 and 1987 have shown that on average recourse to foreign law is made no more than five times a year. It should be noted that these references are nearly always to statute law rather than case law. In subsequent years and up to 1998 recourse to comparative law has actually decreased. Of the over one thousand judgments examined only a dozen or so contained citations of foreign law. Of those there is a slight prevalence of issues concerning criminal law. For example with regard to a provision of the Italian Penal Code that punishes anyone who is in unjustified possession of altered keys or picklocks references are made both to French and English law (Theft Act, 1968) and the Constitutional Court comes to the conclusion that because a similar offence is provided for in other countries this provision cannot be considered irrational.<sup>11</sup> Considering this quantitative data, the impression is that research on citations of foreign law in the case law of the Italian Constitutional Court is a “study of nothing”. One should however bear in mind that there are quite a few generic references that, notwithstanding the lack of precise citations of statute and case law, demonstrate that the Constitutional Court is aware of the prevailing trends in other European legal systems especially in the field of human rights. The fact that there are more generic references than precise citations is, however, strictly related to the fact that the case law of Italian courts, rarely contained citations as outlined above. Finally, one should bear in mind that the above-mentioned quantitative data may be classified in two different ways depending on whether one examines the style adopted by other Constitutional Courts,<sup>12</sup> or one makes a comparison between citations of foreign case law and citations of domestic scholars.

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<sup>10</sup> G. Gorla, *I precedenti storici dell'art. 12 disp. Preliminari c.c. 1942. un problema di diritto costituzionale?*, in *Studi in memoria di C. Esposito*, (1971).

<sup>11</sup> See Corte cost. sent. 370/1996.

<sup>12</sup> The data for this comparison can be found in U. Drobning and S. van Erp (eds), *The Use of Comparative Law by Courts* (1999).

## II. THE RELATIONSHIP BETWEEN THE ITALIAN CONSTITUTIONAL COURT AND THE EUROPEAN COURTS

There is no doubt that, on one hand, the European Union does not have its own Constitution and, on the other, the Italian Constitution does not contain a provision similar to Art. 10, para. 2 of the Spanish Constitution which states that “the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain”.<sup>13</sup> However all this is marginal given the fact that there are strong reasons for stating that in Europe there is a close interdependence between the three levels of judicial review.

The first level of judicial review is of course domestic and does not have the same features in all the Member States of the European Union or the Council of Europe. Italy has had a system of judicial review since 1956. The system is centralised i.e. the model adopted in most continental European countries.<sup>14</sup> In other words Italy has a tradition of judicial review and of interpretation of the Constitution by the Constitutional Court. Although, from a strictly formal standpoint, its decisions are not binding on civil, criminal and administrative judges they are always scrupulously observed.<sup>15</sup>

The second level of judicial review is constituted by the European Court of Justice (ECJ). The relationship between domestic law and European law is of course based on a principle of supremacy of the latter with respect to the

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<sup>13</sup> More generically Art. 10, para. 1 states that “The legal system of Italy conforms to the generally recognized principles of international law.”, while Art. 11 provides the following “Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends”. These two provisions have generally been interpreted in such a way as that most scholars claim that the 1948 Constitution does not need to be amended in order for the founding treaties of the European Union and the European Convention on Human Rights to have a direct effect within the Italian legal system. Furthermore, from a political standpoint the need has never been seen to hold a referendum to decide on Italy’s signing up to these treaties and subsequent amendments.

<sup>14</sup> See M. Cappelletti, *Judicial Review in the Contemporary World* (1971).

<sup>15</sup> In the 1960s the Court of Cassation did try to maintain exclusive jurisdiction with regard to the proper interpretation of statute laws on the basis of the argument that the Constitutional Court could only declare a specific provision unconstitutional and thus null and void, but it could not declare a provision in pursuance of the Constitution if interpreted in a certain way. This resistance has been overcome. The Constitutional Court now delivers judgments in which is indicated the way a certain provision is to be interpreted so as to be compatible with the Constitution and these interpretations are followed without exception by all ordinary judges.

former. Given that, from a formal standpoint, there is no European Constitution the impact of this principle on the case law of the Italian Constitutional Court is marginal. Some scholars argue that the Constitutional Court could carry out judicial review of community law, but in practice this has never happened. The fact is that European law and the correlated case law of the ECJ rarely interfere with judicial review at domestic level.<sup>16</sup>

The situation is exactly the opposite with regard to the case law of the European Court of Human Rights. Formally community law has nothing to do with the European Convention on Human Rights due to the fact that the European Union is not a signatory to the convention, however Art. 6, para. 2 of the Charter of Nice (i.e. the Charter of Fundamental Rights of the European Union) states that community law shall respect the ECHR, thus unilaterally binding the European Union. Furthermore, it also contains a harmonisation clause which obliges the community institutions to construe provisions concerning human rights in the light of the case law of the ECHR. It is common knowledge that the Charter of Nice was solemnly proclaimed, but it does not have a binding effect and the treaty amendment process that should give it legal value has still not yet been concluded. However, once a certain trend has been determined the court decisions become “law in action” even if they are not yet “law in the books” and, in fact, the Court of Justice in Luxembourg follows the principles of the ECHR as interpreted by the Court in Strasbourg.<sup>17</sup>

What was foreseen and has occurred is that there has been a collision between the case law of the Italian Constitutional Court and the case law of the ECHR in the area of property rights especially with regard to the way compensation is to be determined.

This issue is of the utmost interest because the case law of the Italian Constitutional Court was based on an ample number of precedents.

The position adopted by the Italian Constitutional Court in determining the compensation to be given to a person whose property has been expropriated for public use goes back to the 1950s when most legal scholars sustained that the level of compensation had to correspond to the maximum the public administration was able to provide in the context of general public interest.

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<sup>16</sup> The case law of the European Court of Justice has had a much greater impact on that of the civil, criminal and administrative courts. In this case the principle of supremacy of community law is scrupulously respected by the Italian Courts much in the same way as binding precedents. For that matter the European Court of Justice has introduced a principle of tort liability of Member States when their Courts delivered judgments that infringe the interests of their citizens in violation of precedents of the Court of Justice itself.

<sup>17</sup> See R. Arnold, *The different Levels of Constitutional law in Europe and Their Interdependence*, in J. Nergelius et al. (eds.), *Challenges of Multi-level Constitutionalism* 101,111 (2004).

This criterion was first developed by German scholars under the Weimar Constitution. The Constitutional Court adopted this criteria in a series of judgments that it delivered over several years (see Judgments 61/1957; 33/1958; 41 and 67/1959), however it did underline that compensation should not be merely symbolic or apparent and it has to be serious (see Judgment 5/1980 and Judgment 223/1983).<sup>18</sup>

The adjectives used left room for the Court to deliver decisions that were often quite different from one another (sometimes due to variations in its composition). This led the lawmaker to adopt criteria that kept compensation as low as possible, without provoking the Court to declare it not to be serious and therefore in contrast with Art. 42, para. 3 of the Italian Constitution. For decades this issue was at the core of various judgments delivered by the Constitutional Court which acted as an arbiter without, however, adopting a framework of rules that could actually be referred to.

More recent legislation (Art. 37, Presidential Decree no. 327/2001) has established that in the case of expropriation of land suitable for building half the compensation should be based on the market value of the land and half on the basis of the tax value (which is much lower than the market value). In this way compensation is reduced by 40%.

This law was a good way of testing the rationality of decades of case law of the Constitutional Court: in fact it came under judicial review. The Court, however, declared the law not to be in violation of the Constitution stating that the criterion for calculating compensation was constitutionally legitimate (judgment 283/1993). More specifically, the Court affirmed that the “principle of serious compensation” would only be infringed if «in determining the compensation, one did not take into account the characteristics of the property that is being expropriated and used other criteria». In fact, on one hand, Art. 42 Cost. «does not guarantee to the person who has been expropriated a compensation that corresponds exactly to the value of the property in question but, on the other, compensation cannot be merely symbolic and derisory, but must be fair, serious and adequate». This reflects the fact that the «mediation between common interest, which justifies expropriation, and private interest expressed by the property cannot be based on an indefectible and rigid quantitative criterion, but is affected by the overall context in which it is historically positioned and also by the specific expropriation procedure given that the lawmaker is not obliged to determine one single criterion that is to be applied to all types of expropriation».

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<sup>18</sup> The constitutional provision one has to refer to is Art. 42, para. 3, according to which Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.

### III. THIS IS WHERE THE ITALIAN DEVIATION HAS GOT TO

It was not difficult to understand that a solution of this sort could not be seriously taken into consideration by any other European country given that it was the result of a purely domestic tradition and a rather twisted case law devoid of guiding principles.

What brought about a reconsideration of the whole issue was a judgment delivered by the ECHR. The latter, in deciding on an issue of expropriation (Case Scordino v. Italia 2006) clearly noted the existence of a defect within the Italian legal system with regard to compensation for expropriation and this gave the Court of Cassation the chance to urge the Constitutional Court to reconsider its case law.

The ECHR's critical observations were two-fold. First of all, it stated that placing a ceiling on the amount of compensation to be granted by the public administration at a certain moment in time is unlawful if it does not consist of a sum «that is reasonable when compared to the value of the property» therefore although the market value is not necessarily the only criterion that can be used in the light of the First Protocol of the ECHR this does not mean that there is a discretionary power in determining the compensation. In fact alternative criteria can only be justified by specific policies aimed at redistributing wealth related to certain categories of property and does not give a discretionary power of judgment, therefore in the case of «isolated expropriation», even when this is in the public interest, only full compensation can be regarded as reasonably related to the value of the property.

Since the criteria for calculating compensation for expropriation provided for under Italian law would result in the payment in all cases of a sum significantly below the market (or venal) value, the European Court has declared that Italy is under a duty to put an end to a systematic and structural breach of Article 1 of the First Protocol to the ECHR, also in order to avoid additional rulings against the Italian state in a significant number of materially identical disputes pending before the Court.

The Constitutional Court therefore reexamined the legislation that it had previously judged to be in pursuance of the Constitution and changed its position completely (Judgment 348/2007). The Court was extremely careful in defending its previous judgments in consideration of the period during which they were delivered and it also underlined the fact that it was not bound by the case law of the ECHR, however, notwithstanding this obvious “defence” of its previous decisions the Constitutional Court totally upheld the principles established by the Strasbourg Court thus rejecting its own case law of the last half a century. The same can be said for a subsequent and less elaborate decision delivered by the Court (Judgment 349/2007).

Another interesting case concerns a recent order of referral of the Court of Cassation<sup>19</sup> with which the latter raised the issue of a mother's right to give her child her own surname.

The issue has already been examined in the past by the Constitutional Court which had declared the question of constitutional legitimacy to be inadmissible<sup>20</sup>, underlying the fact that if it declared the provision that establishes that children take the surname of their father «a series of options would remain open, therefore the decision would be manipulative thus going beyond the powers of the Court.

This time round, however, the Court of Cassation underlined that the ECHR had applied the principle of equality between spouses with regard to acquisition and transmission of the family name (*Ünal Tekeli v. Turkey*, application no. 29865/96; *Stjerna v. Finland*, application no. 18131/91; *Burghartz v. Switzerland*, application no. 16213/90) and that the ECJ has deemed discriminatory the prohibition for a Spanish citizen with dual citizenship to give his children a double surname (father's and mother's) (Case C-148/02). Referring to above-mentioned judgments 348 and 349/2007, the Court of Cassation argued that the same reasoning should be applied to the issue of the family name to be given to children, due to the fact that the entering into effect of the Treaty of Lisbon will give legal effect to the Charter of Nice which provides for absolute equality between men and women. The strongest argument, however, was when the Court affirmed that “in the context of contemporary legal systems the rules governing the attribution of surnames to children that exist in Italy appear to be utterly isolated notwithstanding the fact that the options available in other countries are different from one another”. For these reasons, despite the previous judgment of inadmissibility of the Constitutional Court, the Court of Cassation considered the issue worthy of a reexamination.

The Constitutional Court has not yet delivered its judgment, but traditionally referral orders coming from the Supreme Court of Cassation are given great consideration.

#### IV. TECHNIQUES AND METHODS OF RESEARCH

The examples that have been cited transmit the impression that the Constitutional Court and the Court of Cassation do not give importance to comparative law, but to the case law of the European Court of Human Rights (and the European Court of Justice). In truth, however, arguments concerning

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<sup>19</sup> Court of Cassation, First Civil Bench; Order no. 23934/2008.

<sup>20</sup> Constitutional Court Judgment no. 61/2006.

the isolation, in an international context, of certain rules adopted in Italy requires more careful attention.

The fact is that the ECHR is notoriously influenced in its interpretation of the European Convention by the trends to be found in the case law of the Member States therefore when, in the field of human rights, the case law of a certain country appears to be isolated with respect to common Western legal traditions then it is highly likely that these provisions will meet with the disapproval of the ECHR. When teaching the theory on the circulation of models one usually underlines that ideas spread more easily if they are based on a homologous formant.<sup>21</sup> A scholarly writing may be easily inspired by prior scholarly pieces on the same topic in another country where the critical mass of scholarly ideas is denser. Furthermore, the traditional rules of scientific honesty impose one to quote the sources one has used in writing a paper or book. As a result, one simply has to take a quick glance at the citations found at the bottom of a page to have an idea of the mainstream ideas the writer adhered to.

Case law is not easily traced, to count express quotations is not always a good tool of inquire.

The fact is that not only the style, but also the content of judicial decisions responds to their authoritative function and this explains why the citations (when permitted) concern the authority on which that particular decision of the court is based; an authority from which the motivation acquires greater authoritativeness.

Some years ago Basil Markesinis<sup>22</sup> used the well known methods and techniques of Shepard and his Citation Index to measure the impact scholarly writings in the field of comparative law have on the case law of the English Courts and of other common law countries. The results were disappointing.

It is, however, disputable whether it is correct to use those methods and techniques. In common law countries judges cite other judges and they obviously have a preference for judges from their own country given that in this way their authoritativeness is unlikely to be put in doubt. Sometimes they cite judges of other common law countries, but they very rarely cite judges coming from other legal traditions for reasons specular to those related to citing judges from their own country.

It is common knowledge that the motivation of a judgment does not correspond to the intellectual itinerary that was followed i.e. it does not reveal its sources of inspiration.

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<sup>21</sup> See R. Sacco, *Introduzione al diritto comparato*, 147 ff. (5th ed. 1992).

<sup>22</sup> See B. Markesinis, *Comparative Law in the Courtroom and Classroom - The Story of the last Thirty-Five Years* (2003).

A logical consequence of this is that a reconstruction of the circulation of ideas based on what is actually written in the decision must inevitably be excluded.

When one examines the case law formant – including judgments of Constitutional Courts – one must bear in mind that the propagation of ideas takes place at a level that is not revealed in the text of the judgment.

In reality constitutional case law is essentially a reflection and an evolutive explicitation of the values contained in the Constitution. In the Western World, these values are not conceived as autochthonous given the fact that most of the traditions of thought they derive from – be they religious, philosophical or political – are essentially cosmopolitan. What may be peculiar to a certain constitutional text is how a specific issue is addressed or the way different values are balanced, but today it certainly does not make sense to believe that there is one single interpretation to be given to a constitutional provision. At one time, this way of thinking found a justification in the methodological dogma according to which judicial interpretation was strictly bound to the text and thereby to the morphology of the sentences that composed it. Today, however, a similar approach is very rare because it would mean that constitutional values have no importance, an assertion that is supported by few in Europe and that, in the United States, is strictly related to the scholarship of original understanding.

Comparative law thus has a dual task:

first, that of clarifying the path followed by guiding ideas given the fact that in Europe, as a norm, the influences and sources of inspiration are multiple and there are diverse channels of divulgation;

second, that of maintaining an ample number of paths of communication on the basis of the conviction that this circulation of ideas is an enrichment. On the whole Italy, especially in the last few centuries, has been an open experience, much more open than many other countries. There has been stolid refusal of diversity, but it has been quite marginal. At the most, the preference for a comforting provincialism has led to some veiled positions. Moreover, these resistances have sometimes had a beneficial effect because they maintain the need to make a critical selection of what can be learnt from the outside world. Indeed, critical selection has been carried out in comparative studies and not only.

From this standpoint, the Italian Constitutional Court would appear to have a middle-of-the-road position in the international context where an important debate is taking place, a debate that as a premise we shall briefly summarise herein.

V. RECENT AND REMOTE CAUSES OF THE USE OF FOREIGN LAW  
BY CONSTITUTIONAL COURTS

The publication in English of no less than five books<sup>23</sup> on judicial recourse to comparative law demonstrates a strong scholarly interest for this topic, which is not necessarily focused on the Anglo-American world. Striving to understand the reasons for this, one can highlight two relevant factors one of a general structural nature and one of a more contingent nature, but functionally linked to the former.

However banal this assertion may seem, from an institutional standpoint there can be no doubt that globalisation has fostered the propagation and transplant of models and rendered the comparative approach more attractive, even in countries – and University systems – that have been traditionally self-sufficient and impervious to the outside world.

The apparently fortuitous event that provoked all this can be none other than the recourse to comparative law (and indeed international law) made by the US Supreme Court in the first few years of the new century. This may appear to be a simplistic interpretation, but it is difficult to deny that the references made in *Lawrence v. Texas* and *Roper v. Simons*<sup>24</sup> provoked a heated scholarly debate with regard to constitutional interpretation not just in the United States, but throughout the English-speaking world and beyond. The constitutional case law of South Africa, Canada and Israel was already the object of study and well known in the mid 1990s, but the scholarly debate was quite limited. It was only with the US Supreme Court that this topic – up until then ignored by most commentators – became of worldwide interest. It is, however, true to say that while this issue was dealt with in an eminently comparative perspective in most Western countries, in the United States this issue was addressed in the context of domestic constitutional law thereby giving new lymph to the confrontation of ideologies that goes back to the Warren Court.

Notwithstanding this, there is no doubt that the comparative trend was the result of a shift in the case law of the US Supreme Court that began in 1997, although one could argue that the timing was due to factors related to the global context. What we are referring to are not the generic dynamics of social interaction, the transformation of the way human society is organised, the secular cycles of development, the projection on the entire planet of Western

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<sup>23</sup> See B. Markesinis, *op. cit.*; G. Canivet, M. Andenas, D. Fairgrieve (eds.), *Comparative Law before the Courts* (2004); B. Markesinis, J. Fedtke, *Judicial Recourse to Foreign Law, A New Source of Inspiration?* (2006).

<sup>24</sup> See G.F. Ferrari, *La comparazione giuridica nella giurisprudenza della Corte suprema degli Stati Uniti d'America*, in G.F. Ferrari, A. Gambaro (eds.), *op. cit.*, 307.

modernity or the reconfiguration of power in a planetary dimension – to recall just some of the meanings that are given to the term globalisation in politological and socio-economic literature<sup>25</sup> – but the nature of constitutional law and the distinguishing features of constitutional interpretation in a globalised world.

Today it is taken for granted (at least in Europe) that constitutional law is to be considered an “open composition” of fundamental principles the content of which is dynamically determined through the ceaseless balancing of values. In other words, an essential nucleus is defined through reciprocal adaptation and constant determination of the respective limits. Constitutional Courts are at the centre of this dialectic process that discursively involves the entire society in a collective effort.<sup>26</sup> Furthermore, it is a foregone conclusion (again at least in Europe) that constitutional interpretation cannot be the result of formalistic parameters based on a rigidly normativistic approach or on dogmatically closed logical processes that lack evaluative criteria. On the contrary, it should enhance the historical element i.e. the open confrontation between various opinions concerning the actuality, the evaluation of alternative solutions and their composition and not the choices made those subjects that originally exercised imperative power. All this opens up considerable space for the use of the comparative method due to the fact that the latter makes concrete reference to historical character of legal systems. This approach is no longer restricted to the dimension of political institutions i.e. it is not aimed at searching for static ontologies, but a fluid equilibrium that is constantly reviewed. On one hand, the application of the comparative approach to constitutional case law allows one to avoid voluntaristic subjectivism and, on the other, it ensures that one maintains an elevated critical capacity with regard to the evolution of the legal system in question, without closing evaluative criteria within the new dogmatism based on a kind of supra state axiological system. In this way one favours the dialectic of pluralism (of ideas and implementation) and demonstrates the limits of closed and abstract evaluative criteria that is a prisoner of its own originalism or moral rigidity far from the real world.

As acutely argued by some scholars, it is also true to say that comparative law is potentially subversive<sup>27</sup> with respect to the traditional constitutional orders

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<sup>25</sup> See D. Held, A. McGrew, *The Great Globalization Debate: An Introduction* (2000). In the area of law P. Grossi, *Globalizzazione, diritto, scienza giuridica*, F.it. 152 ff. (2002).

<sup>26</sup> See e.g. G. Zagrebelsky, *Diritto per valori, principi o regole (a proposito della dottrina dei principi di R. Dworkin)*, Quad. fior. st. pens. giur. Mod. 888ff (2002) and A.A. Cervati, *A proposito di metodi valutativi nello studio del diritto costituzionale*, Dir. pubbl. 707 (2005) as well as P. Häberle, *Stato costituzionale*, Enc. giur. XXX (2000).

<sup>27</sup> H. Mui-Watt, *La fonction subversive du droit compare*, Rev. int. dr. comp., 2000, 503 ff.

because, in terms of jurisdiction, it is in contrast with the system introduced after the Peace of Westphalia.<sup>28</sup> However, comparative law is the keystone for overcoming the contradictions and vicious circles of state constitutional systems without imposing uniform globalised visions. It is an instrument of interpretation that is consubstantial to the discursive method. Moreover, it has a dimension that goes well beyond state borders and is capable creating an interrelation among different constitutional heritages.

With the end of the East-West division in 1989 and, more visibly, from the mid 1990s onwards European constitutional scholarship and case law rapidly spread to the East. This was due to their intrinsic merits, the potential attraction of the European Union from an economic and political standpoint, but also the advanced constitutional protection at domestic, supra-national and international level. At the same time comparative law grew in importance in American scholarship. Up until then the latter had always been sure and proud of its genetic and historical uniqueness and quite introverted. In a certain sense the United States was withdrawn within its own traditional opposing schools of thought considering itself to be a model that respected the axiological heritage of the West and that had already been amply propagated.

It is not by chance that the discovery by America of the ideological and institutional efficiency of European legal systems and their success in a global world was made by the Federal Supreme Court. Obviously the approach was uncertain as is typical when one discovers a phenomenon that is potentially capable of dissolving traditional categories even when it is incorporated and assimilated into the latter.

What we are referring to is not merely a generic return of interest for the comparative approach in judicial decision-making (*richterliche Rechtsfindung*), but a phenomenon that started and grew within the context of constitutional case law and then spread to other sectors. Constitutional interpretation is the first to discover this i.e. that it can be reflected in a certain number of images, more recent and partially different, but similar and more dynamic in horizontal circulation and in vertical combination. For the moment it senses the potentialities of the new horizon, but it takes a step daunted by the possible consequences of its use on a vast scale. It is aware of the possibility of overcoming formalistic positivism without running into iusnaturalism. It perceives the chance of a discursive confrontation on a global scale as an anchor for judicial discretionality which had been guarded closely for over half a century by anti-majoritarian difficulty, but at the same time it is aware of the

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<sup>28</sup> P. Ridola, *La giurisprudenza costituzionale e la comparazione*, available at [www.associazionedei costituzionalisti.it/materiali/anticipazioni/giurisprudenzacomparata,2](http://www.associazionedei costituzionalisti.it/materiali/anticipazioni/giurisprudenzacomparata,2).

difficulties deriving from the substitution of consolidated techniques of reasoning used rigorously in a domestic arena.

Outside the American context, similar difficulties have been encountered, but to a much lesser extent given the custom of dialectic exchange consolidated by decades of multi-level constitutionalism and thanks to peculiar situations such as those of Switzerland, Yugoslavia and Israel, countries traditionally open to comparative case law.

It may appear to be a paradox but with the osmosis of constitutional interpretation that began at the end of the millennium the United States is the hegemonic nation that is most in difficulty with the propagation of models in judicial decision-making. This has not occurred by chance: the prototype of constitutional rigidity and judicial review which has evolved in a context of proud self-sufficiency capable of developing a constitutional law composed of a systematic series of doctrines that faithfully reflect an ideological heritage that is one in its own. With the end of democratic expansionism and the successful conclusion of what Samuel Huntington defined as the third wave of democratisation,<sup>29</sup> the United States should have taken advantage of its benign hegemony but, on one hand, it has been besieged by hostile forces that threaten its security and, on the other, it has been torn between a proud, messianic isolationism<sup>30</sup> and a full integration into the international community.

In any case, judicial recourse to foreign law is an open issue, particularly pregnant in the context of constitutional interpretation, that cannot yet be definitely defined given the fact that its bidirectionality – in terms of the relationship between the United States and the rest of the world – depends on the settling of questions that are far more complex.

## VI. SOME RECENT CLASSIFICATIONS

The most recent book on this topic, written by Basil Markesinis, proposes a classification of the way recourse can be made to foreign law that deserves critical attention and can be used as a starting point for discussion.<sup>31</sup> According to Markesinis' classification countries can be divided into three groups.

The first group includes countries that have constitutional provisions that explicitly allow judges to look abroad for an integrative interpretation of domestic law, especially in certain sectors of constitutional law. Only South Africa can be assigned to this group given that Section 35 (1) of the 1993

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<sup>29</sup> S.P. Huntington, *SP Democracy's Third Wave*, (2) *Journal of Democracy* 13 (1991).

<sup>30</sup> A. Frachon, D.Vernet, *L'Amérique messianique* (2004).

<sup>31</sup> B. Markesinis, J. Fedtke, *Judicial Recourse to Foreign Law*, *op. cit.*, 23 ff.

Constitution and then Section 39 of the 1996 Constitution – with provisions that are not identical, but whose diversity has been ignored by the courts<sup>32</sup> – not only allow, but encourage judges to make recourse not just to international human rights, but also to foreign case law.

The second group comprises those countries where supreme court judges make a corrective interpretation of legal texts that clearly state the contrary, but they carry out these adaptations because the law-maker has not yet intervened and they are requested by public opinion i.e. the legal transition is speeded up by the judiciary in coherence with the sentiments of society. This group only includes the Federal Republic of Germany as it emerged after World War II, in particular with regard to decisions concerning freedom of association and information and those of the 1950s concerning equality between men and women. These decisions were *contra legem* with regard to ordinary statute law, but in pursuance of the Constitution.<sup>33</sup> The *summa* of this approach is the judgment delivered by the Federal Constitutional Court on 14th February 1974<sup>34</sup>, which, in interpreting the *freiheitlich-demokratische Grundordnung* contained in art. 21 (2) GG, periodically determines corrections to written law.

The third and final group of countries includes those that allow for more adventurous judicial interpretations<sup>35</sup> i.e. countries that do not just adapt the legal text to changes in society, but actually push society in a direction that is considered controversial i.e. towards more advanced positions of public opinion thus transforming judges from mere applicators (or “adapters”) of the law (*Normanwender* to use the German expression<sup>36</sup>) to creators of law (*normsetzende Instanz*). Emblematic examples belonging to this group are the Supreme Courts of the United States (especially with regard to treatment of different races and protection under the First Amendment) and Israel (in particular with regard to *locus standi* and justiciability).

In addition to encountering the inevitable difficulties of classifications having a universalistic aim, Markesinis’ tripartition has problems of logical method. In fact despite having the merit of introducing categories that are extremely useful, he does not address other issues related to taxonomic parameterisation, which in fact can only be dealt with by using extremely complex techniques and cannot be included in a single omnicomprehensive system.

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<sup>32</sup> See A. Rinella, *La Corte costituzionale del Sudafrica: il contributo del diritto comparato al consolidamento della democrazia*, in G.F. Ferrari, A. Gambaro (eds.), *op. cit.*, 379.

<sup>33</sup> See B. Markesinis, *op. cit.*, 30 ss

<sup>34</sup> BVerfGE 34, 269.

<sup>35</sup> See B. Markesinis, *op. cit.*, 40 ss.

<sup>36</sup> BVerfGE 96, 394.

First of all, only the first of the three groups is precisely delimited over time: this is mainly due to explicit provisions that constitutionalise the comparative and/or internationalist method, thus safeguarding it from ideological or methodological criticisms. The fact that only one country can be included in this category demonstrates the fact that this is an exceptional case strictly related to a *sui generis* constitutional transition, typical of a system where the clash of civilisations was avoided thanks to the immense maturity of South Africa and probably also to the attention paid by public opinion throughout the world. In fact the latter needed to be reassured with regard to the composition of very different visions of the world one substantially colonial the other based on an advanced culture of integration. The international sanctions that preceded the constituent process are testimony of the fact that events in South Africa were closely followed and, in a certain sense, this implied the acceptance of the paradigms of international and/or foreign law. In other words there was a search for a reasonable compromise that would be acceptable not only to the domestic population, but also to the international community. This historical uniqueness, however, sublimes the methodological principle, providing an example of an utterly monistic approach (although only with regard to fundamental rights and not to constitutional interpretation as a whole) as explicitly provided for in the South African Constitution.

The second and third categories of Marquesinis, in truth, differ from a quantitative standpoint. Rather they represent interpretative extremes on the same plane i.e. the aggregation poles of the same phenomenon, which are difficult to describe from a synchronic standpoint. These two categories require the application of the “time factor” which the British scholar continuously refers to.

As a consequence the case law of the United States Supreme Court may come under both categories. The correct interpretation is the one that from a synchronic standpoint takes into account the cycles of constitutional interpretation with particular regard for the due process clause, an oracular or metaphorical clause which determines the evolution of the constitutional order as well as legal system as a whole. When the due process clause is contracted into a procedural provision, the Supreme Court tends not to play a central role in determining the evolution of constitutional law. The Court positions itself within the perimeters of majoritarian consensus evoking the “anti-majoritarian difficulty” to placate the classic objections to judicial activism. On the contrary, during those phases where the due process clause has a substantive dimension which exalts judicial discretionality in terms of content as well as the capacity to compose the axiological contents and thereby judicial creativity, the Court places itself at the forefront with respect to public opinion and the Legislature assuming the responsibilities of a

driving force and sometimes even bears the burden of unpopularity, anticipating the interpretative evolution on the basis of domestic or international political considerations that society has not intuited or assimilated. Desegregation and racial integration in the fifties and sixties are emblematic, but the case law on the rights of defendants and detainees in the sixties and seventies, abortion in the mid-seventies and more recently the death penalty are just as indicative.

German case law also moves along the same plane from one end to the other of the liberal democratic order which can be filled with values deriving from social consensus that anticipates legislative or constitutional amendments. Bearing in mind the different historical-institutional context characterised by a constitution “without a sovereign”, the Weimarian period provides a good example of creative deviation from the founding consensus of the constitutional pact given that the principle of equality was interpreted in such a way as to empty of significance an entire part of the Constitution itself<sup>37</sup> although this was done without indicating the new equilibriums of the material constitution.

Markesinis and Fedtke’s classification is thus dishomogeneous because the first of the three categories is based on positive constitutional law, while the other two are based on case law, which differs only in the degree of judicial creativity, and therefore they depend on a high level of ideology. Furthermore, these two categories need to be adjusted from a diachronic standpoint which obviously means historicising them, but at the same time this attenuates the differences between the two, thus underlining their quantitative character. Most of all, however, this approach underestimates an essential element of judicial recourse to foreign law: whether the comparative method is used by Supreme Courts within the ordinary judiciary or by Constitutional Courts i.e. whether it is used for civil and criminal law cases or for cases concerning, *sensu lato*, constitutional law. In other words what changes the terms of the issue and imposes specific taxonomies for judicial recourse to foreign law is constitutional law. In fact, the terrain in which a new judicial sensibility emerged and to which scholars have paid exasperated attention is constitutional law.

Constitutional interpretation differs profoundly from legislative interpretation as is singularly clear to English judges.<sup>38</sup> Techniques of interpretation concerning principles result in a balance of values obtained through the search for the essential contents of rights and the definition of their limits. The normativistic formalism found in the dynamism of the relationship between fact and norm is overcome and substituted by a positivism that is diverse,

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<sup>37</sup> See G.Volpe, *Il costituzionalismo del novecento*, 78 ff. (2000).

<sup>38</sup> See *Lord Bingham in Matthew v. The State* [2004] 3 WLR 812, 543.

dynamic, historicised and discursive, which perennially involves not only the courts, but society as a whole. These techniques are typical of constitutional law or at least of the constitutional case law of the higher courts in various countries. Comparative law plays a primary role when these techniques are used because it crosses the territorial and ideological borders of the single legal systems and puts a strain on the dogmatised abstractisms that tend to put the various techniques of interpretation into hierarchical order using a deductive method. Furthermore, comparative law adds dialectic content to metaphorical figures that would otherwise be merely remitted to judicial creativity.

The end of the East-West divide and the advent of a globalised political order that is still in search of an equilibrium have opened Pandora's box. One might make a hypothetical judgment: without these events recourse to foreign and/or international by ordinary civil and criminal courts would have moved down a much slower and involuted path, not dissimilar to the one followed up until recently.

#### VII. A POSSIBLE INTERPRETATION

If this premise holds true, one might attempt to make a classification (all be it provisional) given that the whirl of ideas and flurry of tension provoked by the mass of case law and scholarly literature are far from dying down.

With regard to the normative base for the use of international or foreign law to interpret the founding values of democratic constitutionalism, explicit provisions contained in the constitution are unique in their kind. The structural permeability of the constitutional system (i.e the extroversion according to which the axiological element is predetermined by the framers of the constitution, but the dynamic definition in terms of living law may be the result of recourse to external elements) is very unusual and in all likelihood related to irrepeatable historical events that assume relevance from another taxonomic standpoint.

All other constitutional provisions<sup>39</sup> that explicitly make reference not only to principles (sometimes placed in a list), but also to value systems which qualify the entire constitutional order and are indicated as parameters of interpretation for constitutional or ordinary courts cannot be put on a par with the institutionalised monistic clause contained in the South African Constitution. Having said this one should take into account the respective bills of rights and the position attributed to international law and, in particular,

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<sup>39</sup> Examples being Art. 20, German Const., Art. 1, Spanish Const. or, with reference to more recent constitutions, Art. 2, Russian Const., Art. 9, Hungarian Const., Art. 9.3. Moldovan Const. and Art. 1, Ecuadorian Const.

human rights conventions. In any case the axiological heritage at the basis of the discursive method is domestic, although it may be integrated by regional human rights conventions and international agreements together with their related judicial instruments and case law acquis.

The same taxonomic parameter can be used to determine a family of cases in which the courts are allowed to use the comparative method or they arrogate unto themselves this function in order to fill in lacunae and/or because of the historical conformation of the system of legal sources. The case of Yugoslavia after World War II is emblematic from this point of view: the introduction of a decentralised system of heterogeneous derivation obliged the Courts to search for ways of integrating the applicable law which was incomplete or discontinuous due to the institutional events of each of the territorial entities involved.<sup>40</sup>

In descending order in terms of normative justification, one must cite those countries where, at a certain point in time, judicial recourse to comparative law is introduced regardless of constitutional or legislative provisions. This may be due to cultural reasons, openness to external influence or linguistic aptitude. This may occur explicitly (as in the cases of Canada, Switzerland and Israel) or criptically.

A classification based on the etiogenesis of the phenomenon allows one to point out the following causations: marked pluralism and asymmetry (in the case of Canada) or structural plurilinguism (as in Switzerland); a constituent process of transition to democracy after a period of totalitarianism or an accelerated decolonisation process (South Africa); traditional monolithicism brought to face forced internationalisation or at the end of a period of exceptionalism as in the case of the United States.

A taxonomy that is based on the object of judicial comparison i.e. on the nature of the foreign law that is used, cannot be based just on the case law formant, but also on the legislative and the academic formants. The case law formant is the one that brings about the fall of national borders, discursive dialectic and the creation of communication circuits within the constitutional state according to the legal theory of "law in action" according to which the dogmatics are dissolved into the search for a positivism of a different nature. This formant is thereby the most suitable for constitutional interpretation, as well as for receptive cross fertilisation and hybridisation in general. The legislative formant is closer to the traditional comparative approach, especially in the field of civil and criminal law. The third is more refined and has an integrative character with respect to the other two formants and is present in those countries where the comparative approach is most advanced and

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<sup>40</sup> See G.A. Benacchio, *La ex-Yugoslavia*, in G.F. Ferrari, A. Gambaro (eds.), *op. cit.*, 41.

mature, such as Canada, Israel and, limited almost exclusively to scholarly writings in English, the United Kingdom.

In terms of judicial recourse, this method of classification must have regard for the possible equiparation between foreign law and international law. Despite their greatly differing legal nature and effects they are often assimilated due to the multi-level integration between the two in some continents. Finally another element of importance is whether the diachronic or synchronic method is used. If one uses the diachronic method then either one makes occasional citations or one carries out a systematic reconstruction, while the synchronic method is easier to implement and allows for more linear evaluations of homologous elements, however, one should not underestimate the fact that common law judges prefer the diachronic method.

Depending on the content of the foreign law the courts make recourse to, one may distinguish between the practice of citing just one country as an exemplar and that of referring to a number of different legal systems. In the case of the former, unless there is a historical link between the “borrower” and the “lender” or peculiar circumstances concerning the institute under scrutiny, this means that as a comparatist the court intends to exercise significant discretionality when deciding the case. This is the technique preferred by the European Court of Justice, a master in taking out of its “storeroom of ideas” what it considers most convenient to legitimate the reasoning it has used to decide the case.<sup>41</sup> The second technique is used much less and only when there is a turning point in the case law with regard to particularly important topics or when there is a genuine desire to carry out thorough normative and axiological research. This method is more scientific and therefore if the results are not unanimously conclusive the court that has made the comparison risks being proved wrong.

Another element one has to take into consideration is the weight and effectiveness of the citations. These may range from erudite citations of provisions which are an end in themselves and have no impact on the reasoning of the court and citations in the *obiter dicta* which only have relevance with regard to the motivational background and finally citations that are an integral part of the motivation and are thus a source of inspiration for the judge that wrote the decision. In all these cases foreign law is a tool not a master i.e. it does not have binding effect. The extreme opposite is of course binding precedent, which is only possible within the context of legal systems that have a common tradition and where there is a link between the respective supreme courts.

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<sup>41</sup> See G.F. Ferrari, *I diritti tra costituzionalismi statali e discipline transnazionali*, in Id. (ed.), *I diritti fondamentali dopo la carta di Nizza*, especially 86 ff. (2002).

With regard to the effects deriving from judicial recourse to foreign law, the ideological significance is ambiguous and its functionalisation is neutral: in some cases it may serve as a way of confirming the constitutionality of a contested provision by reinforcing a noted argument, especially when traditional categories are under strain and there is a need to find supportive elements that are different than usual, in other cases, recourse to innovative foreign law may be used to radically change consolidated positions or for an overruling.

Considering the tendential neutrality of recourse to foreign law one may affirm that this is done either to preventively legitimate a constitutional order that is *statu nascenti* or quite recent (as is the case of South Africa) or it is aimed at redefining constitutional interpretation with respect to consolidated methods and results.