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FOREIGN PRECEDENTS IN CONSTITUTIONAL LITIGATION. THE ITALIAN CONSTITUTIONAL COURT AND COMPARATIVE LAW: A TALE OF TWO COURTS (1)

TABLE OF CONTENTS: 1. Introduction. – 2 The Empirical Research. – 2.1. Methodology. – 2.2. Quantitative Results. – 2.3. The Evolution in the Explicit Method of Citation. – 2.4. The «Hidden» Influence of Foreign Law. – 3. Concluding Remarks..

1. Introduction.

Reference to foreign precedents by Courts, and, for what matters the most for purposes of this study, by Constitutional Courts, is a growing phenomenon, which increasingly raised the attention of legal scholars in recent years (2). Such phenomenon is often presented to be

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(2) Among the most recent publications, see T. GROPPI and M.-C. PONTHOREAU (eds.), *The Use Of Foreign Precedents By Constitutional Judges*, Hart Publishing, Oxford and Portland, 2013; see also G. CANIVET, M. ANDENAS and D. FAIRGRIEVE, *Comparative Law Before The Courts*, British Institute of International and Comparative Law, 2005.

one of the effects of the «dialogue» between Courts (3), of "transjudicial communication" (4) and of «judicial globalization» (5).

Reasons for such spreading are many. The main driver must be identified in the fact that national legal orders, facing similar problems, consider foreign law in order to find better solutions to such problems (6). Moreover, according to many the use of foreign law is closely linked to globalization, which fostered the circulation and transplant of legal models (7).

Anyway, it is well known that the practice of citing foreign precedents varies steadily across countries. In a particularly small number of cases, reference to foreign law by Courts is considered and provided for in legislation: this is the case of South Africa (8). But even if one does not consider recognition in legal texts and examines uniquely legal practice by the Courts, positions diverge widely. Countries can be divided into two broad groups. In the first one (where countries such as Australia, Canada, Ireland, Israel and South Africa fall), the use of foreign precedents is widespread: often over or close to the majority of the decisions taken by constitutional judges. In the second group of countries (such as Austria, Germany, Hungary, Russia, but also Belgium, France and Spain), reference to foreign precedents and even to foreign law is much more rare (often below 5% of the decisions) (9). It is not only a matter of quantity, but also of quality of

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(3) See S. HARDING, *Comparative Reasoning and Judicial Review*, in *Yale Journal of International Law*, 2003, Vol. 28, p. 409 et seq.

(4) Among the first ones, see A.-M. SLAUGHTER, *A Typology of Transjudicial Communication*, in *U. Richmond L. Review*, 1994, Vol. 29, p. 99 et seq.

(5) See A.-M. SLAUGHTER, *Judicial Globalization*, in *Virginia Journal Of International Law*, 2000, Vol.40, p. 1103 et seq.

(6) S. CASSESE, *Legal Comparison by the Courts*, in *Piélagus*, no. 9, 2010, p. 21 et seq., at 22.

(7) See G.F. FERRARI and A. Gambaro, *Le Corti nazionali ed il diritto comparato. Una premessa*, in Id. (ed.), *Corti nazionali e comparazione giuridica*, Edizioni Scientifiche Italiane, 2006, p. VII et seq., at XI.

(8) See L. PEGORARO, *La Corte costituzionale italiana e il diritto comparato. Un'analisi comparatistica*, Clueb, 2006, at 65.

(9) See T. GROPPI and M.-C. PONTHOREAU, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, in ID.

the reference: in the first group of countries, the use of foreign precedents is an important part of a wider and more developed legal reasoning (10). Lastly, it must be remarked that the divide between the two groups follows closely the common/civil law divide: courts using wide references to foreign law in their reasoning are usually common law ones (with the remarkable exception of the US).

The few studies conducted on the use of foreign precedents and foreign law by the Italian Constitutional Court suggest it falls without any doubt in the second group of countries. But where exactly in the spectrum of possible types of «use» – a term voluntary intended to be as broad as possible (11) – of comparative law?

Assessments on the point varies. Some observers share the opinion that the Italian Court falls in an intermediate level of such spectrum (12). Yet, an influential essay, published in 2005 by Vincenzo Zeno-Zencovich, concluded that the study on the use of a comparative method by the Italian Constitutional Court was a «research on nothing» (13). Such provocative thesis was followed by a debate, in which Antonio Baldassarre, Professor of Constitutional Law and former President of the Court, suggested that a deeper understanding of the Court interaction

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(eds.), *The Use Of Foreign Precedents By Constitutional Judges*, cit., p. 411. Not all the countries quoted in the text have been the object of the contributions collected in the just cited book. For a comparative analysis of Belgium, France, and Spain, see L. PEGORARO and P. DAMIANI, *Il diritto comparato nella giurisprudenza di alcune Corti costituzionali*, in *Diritto Pubblico Comparato ed Europeo*, 1999, p. 411 et seq.

(10) For a distinction between a «strong» and a «weak» method of reference to foreign precedents, see A. LOLLINI, *Il diritto straniero nella giurisprudenza costituzionale: metodi «forte» e «debole» a confronto*, in *Riv. Trim. Dir. Pubbl.*, 2012, p. 1023 et seq.

(11) See T. GROPPI and M.-C. PONTHOREAU, *Introduction. The Methodology Of The Research: How To Assess The Reality of Transjudicial Communication?*, in ID. (eds.), *The Use Of Foreign Precedents By Constitutional Judges*, cit., p. 1 et seq., at 5.

(12) See L. PEGORARO, *L'argomento comparatistico nella giurisprudenza della Corte costituzionale italiana*, in G.F. Ferrari and A. GAMBARO (a cura di), *Corti nazionali e comparazione giuridica*, cit., p. 477 et seq., at 499-505. See alsoG.F. Ferrari and A. Gambaro, *Le Corti nazionali ed il diritto comparato. Una premessa*, cit., p. xi.

(13) V. ZENO-ZENCOVICH, *Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?*, in *Diritto Pubblico Comparato ed Europeo*, 2005, p. 1993 et seq.

with foreign law should take into account the «implicit» or «hidden» influence of the latter (14).

The «hidden» or «underlying» influence of foreign law has long been identified as a crucial element for a fuller understanding of cross-judicial fertilization (15). In a globalized and interconnected world, the lack of awareness of foreign law is getting less and less likely and «hidden» influence is growing. Yet, assessing this type of influence faces even stronger difficulties than the one of measuring explicit reference to foreign jurisprudence, requiring also extra-judicial research (16).

The empirical research conducted in this survey suggests that the «much ado about nothing» approach to the use of foreign law and precedents by the Italian Constitutional Court must be questioned. On the one hand, the "explicit" reference to foreign law, albeit being still rare, has improved from a "quality" point of view: the most recent judgments referring to foreign law are often based on a broader legal reasoning than in the past and refer to some of the most relevant issues brought in front of the Court. On the other hand, there is a «second tale» – the one of the «hidden» influence of foreign law on the Italian Constitution – which has not been told yet. This survey tries to open this field of research, examining two sets of data from which one can infer such «underlying» influence: the cases in which foreign law is quoted by the parties, as an argument to persuade the Court, but the Court does not explicitly (i.e.: in the text of the judgment) take into account such arguments, and the cases for which a specific Comparative Law

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(14) See the reply of A. BALDASSARRE, *La Corte costituzionale italiana e il metodo comparativo*, in *Diritto Pubblico Comparato ed Europeo*, 2006, p. 983 et seq., and the counter-reply of Zencovich himself: V. ZENO-ZENCOVICH, *Una postilla ad Antonio Baldassarre*, in *Diritto Pubblico Comparato ed Europeo*, 2006, p. 992.

(15) P. RIDOLA, *La giurisprudenza costituzionale e la comparazione*, in G. ALPA (eds.), *Il giudice e l'uso delle sentenze straniere*, Milano, Giuffrè, 2006, p. 15 et seq., at 24.

(16) See T. GROPPI and M.-C. Ponthoreau, *Introduction. The Methodology Of The Research: How To Assess The Reality of Transjudicial Communication?*, cit., at 7.

Department established within the Court prepared comparative law dossiers.

2. The Empirical Research.

2.1. Methodology.

Italian studies on the use of comparative law by judges have been traditionally focused on private law (17). Empirical studies on the use of foreign sources – both foreign law and Court decisions – by the Italian Constitutional Court are few. Lucio Pegoraro published several surveys on the issue: a first one, taking into account the period 1980-1987, dates back to the end of the 80s (18); the second one, published in the 90s together with Paolo Damiani, examines the Italian Constitutional case-law between 1993 and 1998 (19); a third one analyses the period 2000-2005 (20).Vincenzo Zeno-Zencovich's 2005 survey, mentioned above, is more comprehensive (examining a longer period, from early 70s until 2004) (21).

None of these surveys use electronic data based research. The present survey builds on past researches, but integrates them in three ways, in order to have, at the same time: *a*) a *complete* set of data; *b*) a

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(17) See A. PIZZORUSSO, *La comparazione giuridica e il diritto pubblico*, in *L'apporto della comparazione alla scienza giuridica*, edited by R. SACCO, Milano, Giuffrè, 1980, p. 62.

(18) L. PEGORARO, *La Corte costituzionale e il diritto comparato nelle sentenze degli anni '80*, in *Quaderni Costituzionali*, 1987, p. 601 et seq.

(19) See L. PEGORARO and P. DAMIANI, *Il diritto comparato nella giurisprudenza di alcune Corti costituzionali*, cit., at 425-429. This survey compares the Italian Constitution Court use of foreign law with the one taking place in other countries, such as US, Canada, Spain, Belgium and France.

(20) See L. PEGORARO, *La Corte costituzionale italiana e il diritto comparato. Un'analisi comparatistica*, Bologna, CLUEB, 2006.

(21) V. ZENO-ZENCOVICH, *Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?*, cit., p. 1993 et seq.

coherent set of data; *c*) data tracking also the "hidden influence" of foreign law on the Italian Constitutional Court.

a) This report takes into account data assembled in previous researches. Yet, it does not simply collect already existing data. For the period 1990-2012, a survey using the Italian Constitutional Court electronic data base was conducted. Key words have been selected taking into account the most recurrent words used in the judgments analyzed in the surveys conducted in the past. For example, the practices of the 80s show that the Italian Constitutional Court often refer to foreign law in a very generic way: expressions such as «the experience of other countries» or «foreign legislations» have often been used. This suggested using not only country specific key words, but also generic ones (22).

The result is a set of data which covers the period 1970-2012. For the period 1970-1989, only existing data have been collected, based on the direct reading of the judgments by the different authors. For the period 1990-2012, the survey is based on the use of the electronic data base, but it is integrated with data coming from existing surveys. The combination of the two methodologies aims at diminishing as much as possible the unavoidable margin of error (due to the discretion in the choice of key words and the potential incompleteness of electronic databases) (23).

b) Since different authors might have used diverging methodologies in selecting the cases, the judgments included in previous surveys have been double-checked, in order to pick out those which were corresponding to different collecting criteria. For example, in some cases the reports quoted above considered as an example of

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(22) Some of the key words selected for this survey were generic (such as «common law»; *legislazione straniera* [foreign legislation]; «foreign countries»), while other were country specific (Germany, *Bundesverfassungsgericht*; German; United States; Supreme Court, Great Britain; British, English; France; *Conseil Constitutionnel*; French; Spain; Spanish; *Tribunal constitucional*).

(23) See T. GROPPI and M.-C. PONTHOREAU, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, cit., p. 411.

comparative analysis also judgments referring to historic precedents (sometimes dating back to Roman law or to the *Code Napoléon*). For purposes of consistency in the set of judgments examined, those using this type of reference to historic national or foreign precedents are not taken into account (24).

As for the object of the survey, it must be specified that not only foreign judgments, but also, more generally, foreign sources (such as foreign laws, codes, and Constitutions) are taken into account. This choice originates from two reasons. First, as data will show, the Italian Constitutional Court refers to foreign law equally – if not more – than what it does to foreign precedents. The second reason is methodological: «given that the law generated by legislatures, judges, and, indeed, by scholars do not represent self-contained worlds, courts should have recourse to all» (25). A fuller comparative methodology should not take into account only foreign judge-made law, but, in general, foreign sources of law.

On the contrary, the use of international and EU law is not included in the research; yet, as it will be seen, it can be useful for purposes of explaining the use of foreign precedents (Section 3).

c) Lastly, the analysis aims at tracking the «hidden influence» of foreign law on the Italian Constitutional Court. There are a number of factors which can cooperate in shaping such influence. Two sets of data will be more specifically analyzed.

First, in a number of cases the parties or the judges bringing a case in front of the Italian Constitutional Court use foreign precedents in order to motivate their thesis. In the majority of these cases, the Court

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(24) This is the case of the judgments no. 91/1973 and no. 153/1979. Paradoxically, these two judgments – drafted by the same judge, Volterra – have both been considered to be an excellent example of comparison, as the reasoning is very well developed and discusses deeply the different solutions: see V. ZENO-ZENCOVICH, *Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?*, cit., p. 18. Yet, the comparison is a historic one. The same criteria has been used in excluding judgment no. 72/1996, in which the comparison is with laws dating back to the XIX century.

(25) S. CASSESE, *Legal Comparison by the Courts*, in *Piélagus*, cit., at 24.

simply ignores these arguments in its decision. This shows that the Court is aware of a foreign precedent, but it chooses not to make a reference to it within its decision.

Second, as in many other countries, also in Italy there is a specific "Comparative Law Department", composed of young lawyers from many different countries. This office prepares a number of comparative law reports, at the request of the judges, on a subject which is going to be discussed by the Court. Yet, only seldom an echo of these researches can be read in the judgment. In the majority of the cases, these reports stay in the back, play a "hidden influence" on the decisions; this part of the "hidden influence", though, can be measured and tracked, on the basis of the number of reports prepared every year.

2.2. Quantitative Results.

Table 1: Number of Decisions and Citations to Foreign Sources (CFSs)

Year	***Total Decisions per year***	***Cases with CFSs***	***No. of the case(s)***
1970	205	0	-
1971	210	0	-
1972	224	0	-
1973	189	0	-
1974	301	1	No. 226/1974
1975	251	0	-
1976	275	0	-
1977	168	0	-
1978	87	1	No. 20/1978
1979	155	1	No. 117/79
1980	198	4	No.60/1980;

			no.68/1980; no. 72/1980; no. 123/1980
1981	205	3	No. 25/1981; no. 96/1981; no. 140/1981
1982	266	2	No. 63/1982; No. 145/1982
1983	377	1	No. 252/1983
1984	309	3	No. 120/1984; No. 138/1984; No. 300/1984
1985	386	1	No. 161/1985
1986	319	0	-
1987	641	1	No. 71/1987
1988	1165	2	No. 364/1988; No. 1085/1988
1989	596	0	-
1990	595	0	-
1991	521	0	-
1992	497	1	No. 392/1992
1993	513	0	-
1994	493	3	No. 116/1994; No. 341/1994; No. 372/1994
1995	541	3	No. 286/1995; No. 313/1995; No. 358/1995
1996	437	3	No. 379/1996; No. 223/1996; No. 370/1996
1997	471	3	No. 52/1997; No. 349/1997; No. 428/1997
1998	471	0	-

1999	471	0	-
2000	592	0	No. 531/2000
2001	447	0	-
2002	536	1	No. 155/2002; No. 469/2002
2003	382	2	No. 49/2003; No. 303/2003
2004	446	1	No. 2/2004
2005	482	0	-
2006	463	2	No. 61/2006; No. 104/2006
2007	464	1	No. 341/2007
2008	449	1	No. 102/2008
2009	342	1	No. 311/2009
2010	376	2	No. 250/2010; No. 270/2010
2011	342	1	No. 32/2011
2012	316	1	No. 13/2012
Total	17.174	46	

The data above show that the reference to foreign law and precedents is very rare: when it reaches its peak, the number of judgments referring to foreign law is 4 per year.

Moreover, there is no clear evolution or increase in this practice. During the 70s, this type of reference is almost unknown: only 3 times in the whole decade. After that, there have been some phases in which legal comparison appeared to become a more common use; suddenly followed by phases in which it disappears. For example, between 1980 and 1985 the Italian Constitutional Court uses this technique in a more regular way, 3 or 4 times per year. In the following 8 years, though, there are only 3 cases. Again, in the years 1994-1997 this type of legal comparison becomes more frequent (3 per year), while in the period 1998-2001 it is not used. In the last decade, though, this diversity in

records seems to stop: there is at least one judgment referring to foreign law per year (except 2005), and there are no «peaks» (1 or 2 judgments per year). This somewhat uneven evolution should not come as a surprise: it must be born in mind that the lack of increase over time in foreign law use by civil law Constitutional Courts is a general trend (26).

Yet, the quantitative data have to be read together with some qualitative specifications. For example, during the 80s and until at least the mid-90s the vast majority of references to foreign law and precedents are extremely generic. It is true that this type of reference can still be found in the early years 2000, but it never occurred in the last five years, when, on the one hand, the identification of specific countries becomes the rule, and, on the other hand, also countries which were not quoted in the past start being referred to.

It is useful to give account of the vagueness of the expressions used in some of the references. More than half of these generic expressions (14 out of 26) refer to the «experience of other countries», «the majority of the countries» or «some EU countries» (No. 20/1978; No. 60/1980; No. 68/1980; No. 25/1981; No. 145/1982; No. 161/1985; No. 286/1985; No. 428/1997; No. 155/2002; No. 469/2002; No. 49/2003; No. 379/2004; No. 61/2006; No. 104/2006). In 9 cases reference is to«foreign legislations» (No. 96/1981; No. 63/1982; No. 358/1995), «foreign legal orders (No. 120/1984; No. 116/1994), «modern legislations» (No. 52/1997), «constitutional case law of other countries» (No. 531/2000) and«comparative law» (No. 117/1979 and No. 2/2004). Occasionally, the Court used some more creative expressions, such as «mature democracies» (No. 341/1994), «countries of ancient and consolidated liberal tradition» (No. 313/1995) and «other

(26) See T. GROPPI and M.-C. PONTHOREAU, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, cit., p. 430.

Western constitutions» (No. 379/1996), or refers to a «comparative law perspective» (no. 364/1988) (27).

Table 2: Citations of foreign precedents per country

	No.	No. of judgment
Generic Reference	26	No. 20/1978; No. 117/1979; No. 60/1980; No. 68/1980; No. 25/1981; No. 96/1981; No. 63/1982; No. 145/1982; No. 120/1984; No. 161/1985; No. 364/1988; No. 116/1994; No. 341/1994; No. 286/95; No. 313/1995; No. 358/1995; No. 379/1996; No. 52/1997; No. 428/1997; No. 531/2000; No. 155/2002; No. 469/2002; No. 49/2003; No. 2/2004; No. 379/2004; No. 61/2006; No. 104/2006
France	11	No. 72/1980; No. 252/1983; No. 138/1984; No. 300/1984; No. 329/1992; No. 286/95; 370/1996; No. 250/2010; No. 270/2010; No. 32/2011; No. 13/2012
Germany	11	No. 72/1980; No. 140/1981; No. 252/1983; No. 71/1987; No. 1085/1988; No. 329/1992; No. 303/2003; No. 250/2010; No. 270/2010; No.

(27) According to G. DE VERGOTTINI, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione*, Bologna, Il Mulino, 2010, this type of generic reference does not constitute a case of use of comparative law by the Court.

		32/2011; No. 13/2012
United Kingdom	8	No. 1085/1988; 329/1992; No. 372/1994; No. 370/1996; No. 250/2010; No. 270/2010; No. 32/2011; No. 13/2012
US	6	No. 226/1974; No. 123/1980; No. 1085/1988; No. 329/1992; No. 303/2003; No. 13/2012
Spain	3	No. 250/2010; No. 32/2011; No. 13/2012
Switzerland	2	No. 72/1980; No. 329/1992
Austria	1	No. 13/2012
Australia	1	No. 329/1992
Belgium	1	No. 72/1980
Canada	1	No. 329/1992
Japan	1	No. 226/1974
Pakistan	1	No. 329/1992
Singapore	1	No. 329/1992
Sud Africa	1	No. 329/1992

The Italian Constitutional Court takes into account mostly the experience of four countries: two of civil law (France and Germany, 11 cases each), and two of common law (United Kingdom – 8 – and United States – 6 –). Traditionally, these countries have been regarded as examples and exporters of legal models by the Italian legal scholarship. Anyway, reference to civil law countries is significantly stronger than the one to common law ones. While reference to these countries does not seem to change much over time (first references date back to the late 70s or early 80s, last ones can be found in the most recent judgments of the last few years), the case of Spain looks peculiar. It has been referred

to 3 times, only in the last 3 years, and never in the past. Some other countries have been occasionally quoted, but this seems to be more a peculiarity of the particularly broad comparative method used in the specific judgment in which they are mentioned (judgment No. 329/1992 alone refers to Australia, Canada, Pakistan, Switzerland, South Africa).

The Italian Constitutional Court tends to take into account foreign law, more than foreign precedents: an attitude probably connected to the fact that it operates within a civil law system. Anyway, some of the judgments in which the effort to use a comparative law methodology is stronger (such as No. 329/1992 and No. 13/2012) refer both to foreign law and foreign cases.

Table 3: Citations of foreign law and foreign precedents

	Reference to Law	**Reference to Judge Made Law**
No. 226/1974	**X**	
No. 72/1980	**X**	
No. 123/1980		**X**
No. 140/1981	**X**	
No. 138/1984;	**X**	
No. 252/1983	**X**	
No. 300/1984		**X**
No. 71/1987		**X**
No. 1085/1988	**X**	**X**
No. 329/1992	**XXXXXXX**	**XXX**
No. 372/1994		**X**
No. 370/1996	**XX**	
No. 303/2003	**X**	
No. 250/2010	**XXXX**	
No. 270/2010	**XXX**	
No. 32/2011	**XXXX**	
No. 13/2012	**XXXXX**	**XX**

As far as the subject of the judgment is concerned, during the 80s and the 90s it has been observed that the majority of the cases involved criminal law (28). In the most recent years, judgments using foreign law often relate to one of the main current problems in the area of human rights, i.e. immigration (No. 32/2011, No. 250/2010), or cases involving the implementation of EU law (such as judgment No. 270/2010, about merger controls), or particularly timely and debated issues (such as the referendum on the electoral system, decided with judgment No. 13/2012).

2.3. The Evolution In The Explicit Method Of Citation.

The analysis of the Italian Constitutional Court use of foreign precedents must take into account quantitative data; yet, it would be incomplete without a qualitative examination of the approach used by the Court.

There are few studies setting forth a taxonomy of the different approaches used by Constitutional Courts in using foreign law. Two are particularly relevant for purposes of this study.

Andrea Lollini suggests a binary model: Courts can make a «strong» use of foreign law – in which a foreign case is selected, the *ratio decidendi* (different from the one which can be found within the national legal order) is identified and applied to the national context – and a «weak» use – in which foreign cases are used as examples, having a persuasive force, and being able to better focus (as a useful mirror) the features of the national legal system (29).

The Italian Constitutional Court hardly ever makes a «strong» use of foreign law and precedents, looking for the *ratio decidendi* outside the national legal order (only one such example can be found); on the

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(28) See L. PEGORARO, *L'argomento comparatistico nella giurisprudenza della Corte costituzionale italiana*, cit., at 486-487.

(29) See A. LOLLINI, *Il diritto straniero nella giurisprudenza costituzionale: metodi «forte» e «debole» a confronto*, cit., at 1031-2 and 1041.

contrary, foreign cases are useful examples in order to better defend a legal solution in an increasing number of judgments.

A second distinction suggested by legal literature can be useful in order to better identify the features of the methodology used by Italian Constitutional Court.

According to Tania Groppi and Marie-Claire Pontherau, citations of foreign precedents can be distinguished in three categories. First, they can be used as a «guiding horizon»: in order to illustrate the possible options for the judgment. Second, they can be used as a «probative comparison». Third, they can be used *a contrario*: identifying examples not to be cited (30).

The judgments of the Italian Constitutional Court do not show a high variety of approaches. The first approach, often used by common law Courts, is never adopted. In a couple of cases, the Italian Court used the third type of approach: it identifies a foreign example but argues it is different from the case in front of it and claims it cannot be applied (No.60/1980; No. 63/1982). Both cases date back to the early 80s. In the majority of the cases, the Italian Court uses foreign law and precedents as persuasive examples, in a «probative comparison way».

Even though the purpose of the reference to foreign precedents does not evolve over time, the way through which such purpose is pursued does evolve, and remarkably. Three phases can be identified.

Since mid-70 and during the 80s, a very general reference to the activity of other countries – not specifically identified – is the typical kind of reference one can find in the judgments.

In a second phase, the Italian Constitutional Court starts identifying more clearly the laws and the cases of specific countries it is referring to. The two techniques coexist for a long time, as the practice of using very generic references does not disappear until mid-2000.

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(30) See T. GROPPI and M.-C. PONTHOREAU, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, cit., at 424-6.

A remarkable exception is judgment no. 329/1992, the most ancient case referring both to foreign law and foreign precedents, as well as to a high number of foreign countries: not only France, Germany, UK and US, but also Switzerland, Australia, Canada, Pakistan, Singapore and South Africa. The case originated from the confiscation of a cargo owned by the Government of Nigeria, authorized by the Tribunal of Pisa and upon request of Nigerian companies to whom the Nigerian Government owned some money (the Nigerian companies were, on the other side, debtors of some Italian firms). The confiscation had been repealed by the Ministry of Justice, as a national law dating back to 1926 did not authorize acts of confiscation on the goods of a sovereign State, without the authorization of the Ministry itself. The reasoning of the Italian Constitutional Court takes into account a general trend, in all the aforementioned countries, marking the progressive abandonment of concept of «absolute» State immunity from enforcement measures to a more limited and «restrictive» approach. Applying this type of approach, the Italian Court declared the national law to be unlawful in the part in which it made State immunity broader than what international law recognized.

This judgment is probably the one in which the comparative method is used in the most extensive and deepest way by the Italian Constitutional Court, not only because of the number of foreign examples which are taken into account, but especially for the way in which such comparative reasoning constitutes the grounds of the decision itself (a «strong» use of foreign law, following Lollini's taxonomy). Yet, this case is, under many respects, exceptional, because it dealt with an issue – State immunity – object of international law and because there was a growing number of decisions in national foreign Courts which showed that a new consensus on a restrictive approach about State immunity was emerging (31).

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(31) On the emergence of common principles about State immunity, marking a more restrictive approach from the past, and how these principles coalesced into the 2004 United Nations Conventions on Jurisdictional Immunities of States and Their Property, see A. REINISCH, *European Court Practice Concerning State Immunity from*

During the years 2000, an elaborated use of foreign law is more common than in the past. Instead of selecting one or two examples, the Court takes into account a variety of cases.

In judgment no. 250/2010, the Court was assessing the legitimacy of a national law about immigration, requiring the application of a monetary sanction when a foreign individual enters into the national borders without the permissions asked for by the Italian law. The Court considered this solution to be legitimate. Its reasoning is grounded on principles set forth in the Italian Constitution. Yet, the Court used the comparative argument in a «weak way» or as a «probative comparison»: it supported its reasoning by citing other legislations applying monetary sanctions to illegitimate immigration (France, Germany, Spain and United Kingdom are mentioned). Also in judgment no. 32/2011, concerning exactly the same provision about immigration, the Court used a comparative reasoning to strengthen its arguments (the foreign laws quoted in this judgmentare exactly the same as in judgment no. 250/2010).

In judgment no. 270/2010, an Italian law providing for a specific exception to the usual procedure about merger control was challenged. According to the Court, it was legitimate to provide for such exception when specific and relevant general public interests were involved. In so ruling – hence, again, using comparative law as a «probative comparison» – the Italian Constitutional Court engaged in an in-depth discussion of the French, German and British laws about mergers, all admitting some exceptions to the general rules when reasons of general interests were involved (even though the definition of such interests can vary across countries).

Another judgment making an extensive use of a comparative methodology is judgment no. 13/2012. This judgment is different from those examined above in that it is not about a constitutional matter. It was adopted by the Court within its competence on judging whether a

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Enforcement Measures, in *European Journal of International Law*, 2006, Vol. 17, No. 4, 803.

referendum through which the electorate would be asked to decide whether to abrogate a law could be admitted or not. The law which was asked to abrogate was the electoral one, which had abrogated the previous one. The legal problem the Court had to deal with was the one of whether, would the referendum repeal the existing law, such repeal would revive the law that had been previously repealed, in the absence of a specific provision reviving it. The negative answer of the Court came after the examination of a number of foreign solutions, both coming from legal texts and case laws (UK, France, Spain, US and Germany are referred to), and all excluding that a legal act previously repealed could revive unless a normative act would explicitly revive it. Also in this judgment, though, the legal grounds of the decision are found in the national legal principles, while the comparative argument has a supportive role.

The analysis above shows that even though, from a quantitative point of view, the frequency in the use of foreign law and precedents is still very rare, from a qualitative point of view there was a tremendous evolution in the activity of the Court.

First of all, in the most recent cases, the Italian Court considers a variety of legal families. Hence, it avoids one of the crucial risks of legal comparison: the one of «cherry-picking», referring only to those examples which are useful and functional to its reasoning (32).

Second, it examines more deeply the solutions adopted in the legal orders to which it refers, showing a more sophisticated and mature use of the comparative methodology.

Judgments adopted in the last five years are distributed in a regular way and constitute a rather homogenous a set of examples, in that they all make a similar use of foreign law: broad (taking into

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(32) S. CASSESE, *Legal Comparison by the Courts*, cit., at 24, arguing that «A good comparison must not take into account only one or two foreign legal systems, chosen because they belong to the same area or region, or because they share the same values, or simply because they have a common language. A court – like any good comparatist – should consider the various legal "families" and weight the different solutions».

account a high number of foreign precedents and foreign laws) and using comparative law as a «probative argument». None of these judgments ends up declaring the national law to be unlawful.

It could be considered to be a paradox that the example in which the Italian Constitutional Court makes the «strongest» use of foreign precedents, which constitute the very grounds of its decisions, date back to twenty years ago. Judgment No. 329/1992, examined above, can be regarded as an exception in the past practice of the Court. Yet, such exception can be easily explained on the basis of the issue involved. In this case, the Italian Constitutional Court was dealing with the scope of State immunity: an issue for which international law was crucial and about which other national Courts had been debating in the years just before the judgment of the Italian Court. Hence, conditions for a dialogue between national Court were particularly strong.

2.4. The «Hidden» Influence Of Foreign Law.

A fuller picture of the Italian Constitution Court's reference to foreign law must take into account also its «hidden» influence.

The existence and significance of a «hidden» use of foreign law by Constitutional judges is commonly recognized. Yet, such recognition is the tip of an iceberg, for two intertwined reasons: first, a number of practices can fall within this label; second, most of these practices are very difficult to track and measure.

In the following pages, some of these «hidden» practices will be recalled, and two of them will be (tentatively) measured.

First of all, there is an implicit use of foreign law in the judgments. As many judges pointed out, the mere fact that a Court does not explicitly quote a foreign legal system does not mean that the reasoning of a judgment cannot be deeply influenced by a foreign model. According to Antonio Baldassarre, the judgment no. 170/1984 – which set forth the basis for the interaction between the Italian legal

order and the EC one – was most evidently influenced by the model, developed in the US case law, defining the interactions between Federal States in the first phase of their evolution, as well as by the position that the German *Bundesverfassungsgericht*was developing in the same years (33). Other areas in which, even though not clearly stated, the knowledge of foreign precedents and laws has been pivotal is the one of privacy (34). This type of «implicit» use of foreign law, albeit extremely significant, is particularly difficult to identify and verify (35).

A second source of «hidden» influences comes from the legal background of constitutional judges. Those with an academic background show a stronger attitude to engage in comparative methodologies (36). This can be a key factor, effectively influencing the use of foreign law (37).

There are two more sources which can be used in order to understand the «hidden» use of foreign law.

The first one sheds a negative light on the overall interaction of the Italian Constitutional Court with foreign law. It is the number of cases in which foreign law was not raised by the Court, but brought in front of it. In the Italian legal system, proceeding concerning the constitutionality of a law can start in two different ways. In the first one, during the course of a trial, a court requests the Constitutional Court to

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(33) See A. BALDASSARRE, *La Corte costituzionale italiana e il metodo comparativo*, cit., at 989.

(34) *Ibidem*.

(35) Another example considered by Antonio Baldassare as a case of implicit reference appears to be a case of explicit reference: in judgment no. 364/1988, about the *ignorantia legis non excusat* in penal law, it is clearly stated that «also from a comparative point of view, such principle has never been stated in an absolute way» and that the Italian law is the only one which was not providing any exception to it, after also the Portuguese law had been amended (point 5 of the decision).

(36) See A. EJIMA, *A Gap Between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents*, in T. GROPPI and M.-C. PONTHOREAU (eds.), *The Use Of Foreign Precedents By Constitutional Judges*, cit., p. 273 et seq., at 290.

(37) See T. GROPPI and M.-C. PONTHOREAU, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, cit., at 414.

review the constitutionality of a statutory provision which it is required to apply. In the second way, the Court is seized «directly»: the Government can start a constitutionality proceeding against a Regional law or a Region can do the same against a State law or the law of another region. The following table takes into account the cases where a Court brings a foreign example in front of the Constitutional Court, or when the Government or a Region do the same. Sometimes, it is the parties involved in the trial from which the constitutionality proceeding started that try to intervene in the constitutional proceeding and raise some foreign precedent in order to influence the Court's decision.

Table 4: Cases in which it is the first instance Court or the party which raises a foreign precedent

Judgment	***Court***	***Party***
No. 151/1990	**x**	
No. 27/1991	**x**	
No. 233/1994		**X (Region)**
No. 399/1998	**x**	
No. 323/1998		**x**
No. 449/1999	**x**	
No. 405/1999		**x**
No.431/2000	**X**	
No. 415/2002	**X**	
No.536/2002		**X**
No. 448/2002	**X**	
No. 204/2004		**X (Government)**
No. 379/2004		**X (Region)**
No.434/2004	**X**	
No. 345/2005		**X**
No. 49/2005		**X (committee promoting referendum)**

No. 172/2006		**X**
No. 349/2007		**X**
No. 411/2007	**X**	
No. 109/2008	**X**	
No. 143/2009	**X**	
No. 262/2009	**X**	
No. 151/2009	**X**	
No. 138/2010	**X**	
No. 325/2010		**X (Region)**
No. 274/2011		**X (Government)**
No. 299/2012		**X (Region)**
No. 230/2012	**X**	
Total: 28		

As the table shows, the practice of parties raising foreign cases in front of the Court is a recent one (almost the totality of the cases occurred in the last 15 years). Yet, the Italian Constitutional Court almost never considered such growing demand from the parties, practically ignoring it (38).

The last «hidden» influence of foreign law is the establishment and the activity of a Comparative Law Department. Opposite to the last examined source (showing a negative attitude of the Court towards foreign precedents raised by the parties), this is a potential driver of positive influence on the Court's knowledge and use of foreign law.

The first Italian office preparing comparative law dossiers was established in 1987, upon the initiative of the then President of the Court La Pergola (39). During the years, it has been reorganized as a

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(38) A similar attitude can be found in the activity of the Austrian Court: see A. GAMPER, *Austria: Non-cosmopolitan, but Europe-friendly – The Constitutional Court's Comparative Approach*, in T. GROPPI and M.-C. PONTHOREAU (eds.), *The Use Of Foreign Precedents By Constitutional Judges*, cit., p. 213 et seq., at 224.

(39) See A. BALDASSARRE, *La Corte costituzionale italiana e il metodo comparativo*, cit., at 990.

department at the premises of the Court. Its main task is the one of preparing comparative law dossiers, upon request of the judge instructing a specific case (even though in some specific cases the dossiers have been requested after the discussion) (40). Requests often concern decision involving rights and the application of EU law (41).

Table 5: The preparatory activity of the Department of Comparative Law

No. of the dossier and date	**Requesting Judge**	**Judgment**	**Reference to comparative law in the judgment**
Comp. 3, February 1989	Baldassarre and Cheli	229/1989	
Comp. 4, January 1990	Spagnoli	438/1990	
Comp. 9, April 1992	Baldassarre	368/92	
Comp. 13, December 1993	Mirabelli	188/94	
Comp. 19, June 1996	Granata	238/96	
Comp. 20, October 1996	Onida	327/1997	
Comp. 25, October 1997	Zagrebelsky	412/97	

(40) Interview with Paolo Passaglia, Comparative Law Department of the Italian Constitutional Court.

(41) Interview with Paolo Passaglia, Comparative Law Department of the Italian Constitutional Court.

Comp. 31, April 1997	Vassalli	342/97	
Comp. 32, September 1999	Zagrebelsky	518/2000	
Comp. 35, May 2000	Guizzi	293/2000	
Comp. 36, May 2000	Flick	158/2011	
Comp. 49, November 2001	Zagrebelsky	379/2001	
Comp. 53, April 2002	Vari	233/2002	
Comp. 54, May 2002	Onida	284/2002	
Comp. 56, May 2002	Contri	469/2002	yes
Comp. 59, October 2002	Zagrebelsky		
Comp. 60, October 2002	Zagrebelsky	494/2002	
Comp. 62, January 2003	Onida	49/2003	yes
Comp. 66, April 2003	Marini	233/2003	
Comp. 72, October 2003	Mezzanotte	303/2003	yes
Comp.	Capotosti	2/2004	yes

73, November 2003			
Comp. 81, April 2004	Onida	389/2004	
Comp. 82, May 2004	Bile	184/2004	
Comp. 86, October 2004	Onida	262/2004	
Comp. 87, November 2004	Flick	382/2004	
Comp. 93, December 2005	Finocchiaro	61/2006	yes
Comp. 97, May 2006	Silvestri	249/2006	
Comp. 102, December 2006	Flick	26/2007	
Comp. 103, May 2007	Napolitano	341/2007	yes
Comp. 104, June 2007	Flick	322/2007	
Comp. 115, November 2008	Finocchiaro	151/2009	
Comp. 121, July 2009	Silvestri	277/2009	
Comp. 132, March 2010	Criscuolo	138/2010	
Comp.	Tesauro	227/2010	

135, April 2010			
Comp. 136, June 2010	Tesauro	270/2010	yes
Comp. 137, June 2010	Cassese		
Comp. 148, July 2011	Tesauro	150/2012	
Comp. 155, December 2011	Criscuolo	337/2011	
Comp. 156, December 2011	Cassese	13/2012	yes
Comp. 160, May 2012		230/2012	
Comp. 163, September 2012	Criscuolo	272/2012	

As the table above shows, since its inception the Italian Comparative Law Department prepared a considerable amount of dossiers (41). Within the much wider variety of studies prepared by the office, the Table tracks only the dossiers explicitly prepared upon request of a judge, in a functional connection with a case. The data show that the work of the Department increased over time: 30 out of 41 dossiers have been prepared in the last decade. Only occasionally such preparatory work resulted in an explicit comparative law reference in the judgment: 8 cases since 2002.

Possible explanations for this relatively low use of comparative knowledge are several. First, when the Court decides that the law is legitimate (and even more when it rejects the case on procedural grounds), also the reasoning is more succinct and it is less likely that it would take into account foreign law comparisons (see judgments no.

337/2011; no. 379/2001; no. 293/2000; no. 342/1999, no. 412/1997; no. 327/1997; no. 368/1992; no. 438/1990).

Second, dossiers are often asked on highly debated issues, such as same sex marriage (Comp. 132, March 2010) or medically assisted procreation (about which two dossier were prepared: Comp. 115, November 2008 and Comp. 148, July 2011). In this area, the possible explanation is not specific to the use of foreign precedents, but stems from the evolution in the activity of the Court in the last years: about this type of ethical issues, the Court adopted an attentively balanced attitude (42). Reference to foreign countries' laws and cases would have entailed a deeper debate and a more intrusive intervention.

Lastly, comparative law documentation can sometimes show convergence within national legal systems; in other cases, it can reveal a number of different options. When the first case occurs, the use of foreign law can easily help structuring the majority opinion within the Court. Judgments about mergers controls (no. 270/2010) and the electoral referendum (No. 13/2012) fall in the first hypothesis. When comparative law shows that diverging solutions can be adopted, the possibility of divisions in the Court is higher (43). Hence, in a system where dissenting opinions are not admitted, also the path for using comparative law is limited (44).

3. Concluding Remarks.

At the beginning of this survey, we recalled that, according to some observers, analyzing the Italian Constitutional Court's use of foreign precedents – considered to be rare and irrelevant – would be a

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(42) See S. CASSESE, *La giustizia costituzionale in Italia*, in *Riv. Trim. Dir. Pubbl*., 2012, p. 603 et seq., at 615-6.

(43) Interview with Paolo Passaglia, Comparative Law Department of the Italian Constitutional Court.

(44) For a discussion on dissenting opinion, see S. CASSESE, *Lezione sulla cosiddetta opinione dissenziente*, in *Quaderni costituzionali*, 2009, pp. 973 et seq.

«much ado about nothing» exercise. At the outset, we suggested that there might be «two tales» to be followed in the analysis: the tale about the explicit reference to foreign law and the one about the «hidden» use and influence of foreign law.

As for the first one, even if the number of judgments referring to foreign law and cases is still low, the Court uses it more often than in the past, showing that a comparative methodology starts being regarded as one stable probative argument that the Court can use. Moreover, the type of reference has been evolving over time: the number of legal systems taken into account has increased, they are more deeply discussed, and reference is not only to foreign law but, more specifically, to foreign judgments. Overall, the Court seems to use a more mature comparative methodology.

The «hidden» use of foreign law reveals mixed evidence. On the one hand, the Italian Constitutional Court is assisted by a specific department, producing a number of comparative law dossiers to be used for some specific decisions. Hence, there is evidence that the Court takes into account foreign sources in its decision-making process, even though it does not explicitly refer to it in its judgments. On the other hand, it is increasingly common that the parties refer to foreign cases in their reasoning, using them as an argument to convince the Court. The latter, though, regularly ignores such suggestions.

The assessment of the Italian Constitutional Court's use of foreign precedents is certainly more complex than a mere irrelevance one. The Court does not seem to be in the lowest line of the spectrum, also compared to the other courts operating in a civil law system. Merely from a quantitative point of view, it uses a comparative methodology in a higher number of cases than, for example, Austria (45). From a qualitative point of view, its methodology is improving dramatically. As

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(45) According to A. GAMPER, *Austria: Non-cosmopolitan, but Europe-friendly – The Constitutional Court's Comparative Approach*, cit., at 221, from 1980 to 2010 the judgments referring to foreign law were 60; yet, only in 16 cases out of 60 it is the Court which is quoting, while in the other ones it is the parties.

for the «hidden» use of foreign law materials, known by the Court but not explicitly used, it is remarkable.

Nevertheless, an enquiry on the reasons for the limits of such use might suggest two possible explanations. First, as some observers argue, the much more impressive use of EU and international law (46) by the Constitutional Courts might compete with the reference to foreign precedents, so that «vertical» dialogue between judges narrows the space for «horizontal» dialogue between Courts (47). Second, the lack of a core instrument – the dissenting opinion – might have a crucial impact on the use of foreign law: the use of a truly comparative methodology entails considering a number of options, something which flaws in the face of the necessity of finding a nearly unanimous agreement, typical of the Italian Constitutional Court, while the arguments in favor of a different foreign option might better be channeled through the dissenting opinion (48).

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(46) About the Italian Constitutional Court's use of EU and foreign law, see S. CASSESE, *La giustizia costituzionale in Italia*, cit., at 612.

(47) T. GROPPI and M.-C. PONTHOREAU, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, cit., at 430-1.

(48) See A. BALDASSARRE, *La Corte costituzionale italiana e il metodo comparativo*, cit., at 985.