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The sidelining of foreign precedents and the Italian hesitation on "alieni juris"[1]

O uso marginal dos precedentes estrangeiros e a hesitação italiana quanto ao 'alieni juris'

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Abstract

The article describes the characteristics of the Italian Constitution starting from the socio-historical background to the elaboration of the constitutional text as a compromise between three different points of view: those of the Christian Democrat, the Socialist and the Communist parties. Furthermore, the compromise achieved was supported by some of the most important leaders of Italian juridical culture and internationally famous economists; eminent politicians, together with a group of Catholic professors. The second part of the article develops the role of the Italian Constitutional Court and the choice to quote foreign law or foreign case law: from the empirical research arises the fact that the judge decides to refer to foreign case law when his own system fails to provide clear and satisfactory solutions. Thus, foreign case law is an instrument for the evolution of the judicial legal order, suitable for bridging gaps and antinomies. What undoubtedly emerges is a functional use of foreign decisions by the Constitutional Court: they can be useful to underline the unreasonableness of the contested rules, to put constitutional principles in a persuasive perspective, to reinforce the argument. But it is a kind of comparative silence, at least at a judicial level: the comparative analysis is actually (almost) absent from the style of the motivation of the Italian Constitutional Court's decisions.

Keywords: Italian Constitution, Italian Constitutional Court, foreign law, foreign case law.

Resumo

O artigo descreve as características da Constituição italiana a partir do contexto sócio-histórico de elaboração do texto constitucional como um compromisso entre três pontos de vista diferentes: o da democracia-cristã, o socialista e o dos partidos

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comunistas. Além disso, o compromisso alcançado foi apoiado por alguns dos líderes mais importantes da cultura jurídica italiana e por economistas de renome internacional; políticos eminentes, em conjunto com um grupo de professores católicos. A segunda parte do artigo trata da função do Tribunal Constitucional italiano e do modo de tratar a lei ou jurisprudência estrangeiras: a partir de pesquisas empíricas emerge o fato de que o juiz decide referir à jurisprudência estrangeira quando seu próprio sistema não fornece soluções claras e satisfatórias. Assim, a jurisprudência estrangeira é um instrumento para a evolução da ordem jurídica no âmbito judicial, adequado para colmatar lacunas e antinomias. O que, sem dúvida, emerge é um uso funcional das decisões estrangeiras pelo Tribunal Constitucional: elas podem ser úteis para sublinhar a irracionalidade das normas impugnadas, para colocar os princípios constitucionais em uma perspectiva persuasiva, para reforçar o argumento. Mas é um tipo de silêncio comparativo, pelo menos a nível judicial: a análise comparativa é, de fato, (quase) ausente do estilo da motivação das decisões do Tribunal Constitucional italiano.

Palavras-chave: Constituição italiana, Tribunal Constitucional italiano, Direito estrangeiro, Jurisprudência estrangeira.

The constitution and the legal system: cultural and historical origins

The first Italian Constitution was the Statuto Albertino, granted in 1848 by Carlo Alberto to the kingdom of Piedmont and Sardinia. When Italy was unified under Vittorio Emanuele II the Statuto Albertino became the basic law of the nation and remained in force until 1948. Conformed on the liberal Belgian Constitution of 1831 (which had been inspired by French democratic theory), the Statuto vested all legislative power in the elected representatives of the people. What is more, no Court could refuse to enforce a law or strike it down as unconstitutional because this would have been seen as a violation of the principle of separation of powers.

The Italian Constitution of 1947 marks the transition from liberal state to democratic state, from Monarchy to Republic with the referendum of February 2nd, 1946. With this choice the Italian people appointed a constituent assembly to develop a Constitution which would give voice to all the cultural identities that were contributing to create a new constitutional charter. The final result was a compromise between three different points of view: those of the Christian Democrat, the Socialist and the Communist parties. Furthermore, the compromise achieved was supported by some of the most important leaders of Italian juridical culture: Calamandrei, Tosato, Mortati, Perassi; and internationally famous economists; eminent politicians, like De Gasperi and Togliatti together with a group of Catholic professors, including Moro, Dossetti and La Pira. It was the common experience of fascist persecution which led to the success of the enterprise: in fact, after a long and tricky debate the Constitution was approved with 453 votes for and just 62 votes against, demonstrating an (almost) unanimous support and therefore how successful the process of mediation throughout the various parties had been. Articles 126 and 129 provided for a Constitutional Court which resembles the Court created by the Austrian Constitution of 1920.

The new Italian Constitution did not represent a simple act of breaking with the past but was an instrument to set right some problematic aspects of it and an attempt to overcome them with the will to refute any manifestation of violence. The principle of separation of powers represents the fundamental basis of the entire construction of the constitution and the founding fathers did their best to bridge any kind of possible gap between the "Charter of rights" and the "Charter of powers", mainly wishing to free future generations from the trauma of dictatorship. In doing so, they did not want to break with Italian juridical and civil traditions and they intended to give a new light to the liberal ideal avoiding the former experience; to recognize the authority of the Catholic Church and at the same time to build a secular State and try to regain the aspirations to political and personal freedom which were diminished during the fascist era. The 1947 draft of the Constitution reflected the nation's changed political climate. Many of the economic rights were deleted, the political rights of the citizen were strengthened, the independence of the Constitutional Court was made more definite.

The first fifteen years of activity of the Italian Constitutional Court were characterized by the need to remove all those rules which were inconsistent with constitutional principles, particularly those of equality and democracy.

The discontinuity with the past, with the monarchy and the fascist experience can be identified, for example, in article 1, where the Italian state is defined as a "democratic republic", or in 139, where the "republican form of government cannot be subject to constitutional review", or again in 54, which requires fidelity to the Republic representing an emblematic container of various principles and values allowing for the preservation and continuity of Italian cultural traditions.

When the Republican Constitution came into force, the main goal of jurists was to avoid forms of subjectivism, which could compromise the certainty and fairness of the juridical system, and thereby grant the neutrality of law. In Vittorio Emanuele Orlando's perspective, the Republican Constitution finds its foundation in a certain kind of normativism that could be considered worthy of respect because of the sincerity and ingenuousness which inspired it. The idea was to recognize that an assembly of men capable of managing the almost divine power of articles consisting of a few printed lines was able to both solve arduous questions of the political life of the State and realize precepts with obligatory effect for the future. At the same time, the hypothesis of a rule of law as a satisfactory criterion to legitimize the State and embodied in the notion of power as a "force exercised in the name of law" could produce new theories intended to take into account the "transitional moment" towards a new way to understand law. In fact, the theory of Institutionalism marks the moment of crisis of the rule of law because of the distrust in the ordinary legislator and the need to overcome juridical positivism, that is to move from a kind of *Staatslehre* to a *Verfassungslehre*. The above theory is emblematic of a period in which the State is not purely "objective" because law is first of all a structure, and social organization is the first expression of law. From the impersonal character of law, bound to formality and neutrality, arises the assumption that whatever is institutionalized is considered to be law and leads to a strengthening of the formal character of law itself.

But, waiving the juridical method which characterized Vittorio Emanuele Orlando's formalism involves, on the one hand, a gap with the former culture bound to dogmatic elaborations; and on the other, an embarrassing awareness that law is also a tool to reach goals which are external to law.

Foreign influences on the Italian constitutional text

The French revolutionary and Napoleonic eras deeply influenced the development of both constitutionalism and institutions in Italy: in fact, the Statuto Albertino itself was strongly marked by the constitutional model of the French Restoration, together with the Italian debate and solutions promoted by scholars politically expert. Periods of Italian institutional reconstruction have been crossed by the first and second French Constituent Assembly (1945-1946), while the Fourth Republic was a constant point of reference during the beginning of the republican constitutional experience. A similar kind of influence determined a common opinion on the origin of the crisis of the liberal democracies in the first post-war period, on the dangers of governmental uncertainty and weakness, on the need to extend all the formal declarations and statements related to social rights.

On January 1st, 1900, the German civil code came into force and in the same year the first international congress of comparative law took place in Paris; what happened in Italy has to be seen against the backdrop of the European events in this historical period. In fact, Italian juridical culture started to move away from French influence towards the German Pandectist approach: the German model started to spread because of an awareness of a kind of historical authenticity and certainty, in its strong authoritative impact. For this reason, Italian culture believed in a juridical system which was potentially coherent and self-sufficient, based on postulates granting a firm juridical order, where rules settle and shape facts. While Italy followed juridical formalism, Germany started to criticize dogmatism and, in the same period, new and innovative trends arose in France, where German thought was used to develop and improve French Law (the comparative method was one of the most useful tools of modernization).

In Italy the crisis of formalism which overwhelmed Vittorio Emanuele Orlando is attributed by Giuseppe Capograssi to the German influence of Jellinek's thought, which was careful to promote a kind of "temporality" far away and independent from the dogma of law. In fact, Jellinek underlines this hidden (because of time 'lost' by formalism) temporal flux believing that juridical rules are effective not only if they are the result of a legislative process, formally correct within a certain constitutional order, but also if the rules are in force, "living" in the system as a whole. Consequently, in order to recuperate time lost through formalism and preserve the system within a view of continuity, one of the found-

ing fathers and eminent Italian scholars proposed a sort of "material", "living" Constitution as an answer to this attempt. This other face of the Constitution represents the fundamental core consisting of purposes and politically organized forces of that social group which at a particular historical moment can interpret the collective interest of the political community. The material Constitution can provide the criterion to imprint the nature of "legality" on the whole system, but taken together with the formal Constitution we have two sides of the same coin: the formal can be seen as the sponsor of the material, giving certainty and stability to it, while the "material" is careful to create a strong connection between the State and the community.

Carl Schmitt was another German scholar who clearly influenced the thought of Costantino Mortati, at a time when both of them were faced with the challenge of the crises of liberal States created by increasing pressure from social forces. The juridical thought of Schmitt could be considered a theoretic-theological construction where the final decision is supported in its own right, without any other higher legitimation, without considering any legal criterion. In this perspective, the political decision transcends the pluralistic division of society, inclined to grant homogeneity in a pluralistic society of institutions and organized groups.

The Italian Constitution is written, "rigid" (because it cannot be changed through an ordinary law but only through a special parliamentary proceeding, art. 138 Const.) and "long" because it holds a detailed setting out of governmental relationships, the sovereignty of powers, the bill of rights[3] The bill of rights consists of the first twelve articles of the Constitution, but the list of rights and duties is developed in the entire constitutional text in order to cover all the different aspects of human life: this means individual and social expressions, like family, education, economic and political organizations and so on. The second part of the Italian Constitution is divided into six titles dedicated to the parliament, to the Head of State, to the Government, to the judiciary, the local government, the constitutional guaranties; within these guaranties the Constitutional Court plays a fundamental role in closing the constitutional system.

To sum up the fundamental core of the Italian Constitution it could be said that it can be identified in the democratic, "personal" (that is related to person), labour, solidarity, secularity, autonomy, supra-nationality principles.

The democratic principle is fixed in art. 1 Const. (where it is established that "sovereignty belongs to the Italian people") but crosses the entire constitutional framework, finding three different means of application: the institutions of "direct" democracy (e.g. referendum, popular legislative initiative), the institutions of "participative" democracy (e.g. parties or trade union actions), the institutions of "representative" democracy (e.g. parliament, regional council,...). The inviolability of the bill of rights (art. 13 and so on) has its source in the primacy of the "person" and the personal principle finds its main expression in art. 2 Const. (where human rights are declared "inviolable") and 3 Const. (which refers to "the full development of a person"). Although in the Italian Constitution there is no rule similar to that of the German *Grundgesetz* (which establishes the intangibility of human dignity), the constitutional texture of person is based on the respect of his or her dignity as the freedom of self-definition and protection against any form of violation. In this perspective, the labour principle represents a projection of the personal principle in the labour field, according to art. 1. The principle of solidarity arises from the catalogue of constitutional duties: the duty to work (art. 4), to vote (art. 48), to defend the homeland (art. 52), to contribute to public costs through fiscal imposition (art. 53), to be faithful to the Republic (art. 54). More generally, this fundamental principle is founded in art. 2, where inviolable rights are linked to inalienable duties of political, economic and social solidarity, in order to pursue goals of substantive equality (art. 3, co. 2 Const.), to redistribute wealth and offer equal opportunities to people suffering disadvantage. From this point of view arises the character of "intervention" of the Italian State which follows the German historical experience of the Weimar Republic (in 1919) and Roosevelt's New Deal (1933-1939). Furthermore, on this point, there was a common draft between some European Constitutional experiences: the French Constitution of 1947, the Fundamental Law of the German Federal Republic of 1949 and the Italian Constitution shared the ideal of a social democracy as a goal to pursue with the participation of public powers. Nowadays this is a sensitive point of potential disagreement between the formal and the substantive ("material") Constitution.

The secularity principle is established in art. 8, which defines a more relativistic conception of democracy, more appropriate to a multiethnic and multicultural society. The principle of autonomy (art. 5)

[3] The Statuto Albertino was a "flexible" Constitution because it could be overridden by a simple legislative act or a royal decree; furthermore it was a short constitutional bill without any rule on judicial review.

– especially normative autonomy – describes the decentralized structure of the Italian State recognizing the autonomous power of local governments (Regions, Communes,…). Finally, the principle of supranationality (art. 11) opens Italy to normative interstate processes and to European law, stating the supremacy of EC law with the constitutional case n. 183/1973.

The historical period 1926 to 1935 represents a new starting point, a new way of looking towards the future, characterized by the new tendency to amplify the range of analysis by searching for a fundamental common core of different legal orders and taking into account the circulation of juridical models such as *civil law* and *common law*. The Italian system is a unified system of civil law (that is, of codified statutory law) and the sources of law are mainly written: there are several codes (civil, criminal, civil procedure, criminal procedure,...) and a large number of statutes.

Precedents are used but they are not a real "source" of law because their force is just persuasive. Until the 1950s Italian judges interpreted the law in conformity to the Constitution as long as it was not in contrast to it, in defence of the unity and of the logical coherence of the entire juridical system. From the 1970s onwards it was felt that there were new needs overturning the principles of positivism. Judges turned their attention to the private individual, towards the recognition and defence of his rights, to compensation for injuries and damage.

Judicial decisions traditionally are not a source of law in Italy and they are supposed to affect only the parties in the case at hand. Italian democracy, heavily influenced by the example of France and the writings of French scholarship, has regarded legislative supremacy as a fundamental principle; consequently, only the legislature, which speaks for the people, is supposed to make law.

However, the role of judicial precedent in the Italian system is not that of a source of law, nor is it a mere virtual authority. Instead, drawing strength over time through the interpretive activity of judges, it does not have prognostic pretensions and therefore it does not have a definitive character, limiting itself to the present. In this way, precedent constitutes an indicator for the predictability of the juridical consequences of conduct or of an act, assuring therefore the certainty of the law. It will be realised in the certainty of the action through the law, in an ethical and utilitarian perspective, so as not to reduce it to pure appearance. The value of the certainty of law and in law indicates the need for the individual to be in a position to know the consequences of his own actions so as to avoid intervention by the authorities, the arbitrariness of power which identifies itself in the principle of constitutionality.

In Italy the uniformity of court decisions comes by means of living law, meaning the settled interpretation of the higher courts and successive adaptation by the lower courts. Since living law is the concrete symbol of the evolution of leading case shift, it constitutes one of the parameters which the Court can refer to in the evaluation of the constitutional legitimacy of a law. Therefore, living law is placed as the representative of a precise cultural context but is supported by the element of the precedent and, thus, is made concrete on the basis of the acts that are "crystalized" through it.

Particular difficulties arise in the search for suitable criteria for identifying a sufficiently homogenous and constant standpoint capable of producing living law. For this purpose, precedent plays a fundamental role because it contributes to the concretization of the living law itself. Since the decision of a judge is the result of a choice influenced by a surrounding socio-cultural environment, the existence of a consolidated standpoint constitutes a limit to the discretion of the Constitutional Court. It will have to evaluate the constitutional legitimacy of a law interpreted according to the standpoint of the Courts on the basis of living law. On the other hand, it represents a parameter, a value on which the relationship between a decision and the actual exercising of jurisdiction is founded.

The Italian judiciary system

The judiciary is structured on a national basis and divided into several branches: "ordinary courts" are vested with "ordinary jurisdiction" and are civil, criminal or both; there are also administrative courts and "special administrative courts" which review the legitimacy of administrative provisions and acts. The organization of the higher Courts is quite complex: there is a Constitutional Court with 15 members (five are appointed by the President of the Republic, five are elected by the judiciary and five by the parliament) whose term is nine years; this Court is placed outside the ordinary judiciary and it has an autonomous role in the system. The judges are selected from a restricted category of legal practitioners with a high level of training and experience. These are judges or retired judges from the highest levels of the judiciary (*supreme magistrature*) – that is, the Supreme Court (*Corte di Cassazione*), the Council of State (*Consiglio di Stato*), and the Court of Auditors (*Corte dei Conti*) – law professors and lawyers with at least twenty years of experience in legal practice.

Its main task is to check the constitutional legitimacy of statutes, so that, if a statute is in contrast with a constitutional rule, it is invalidated by a judgement of the Constitutional Court with *erga omnes* effects (that is a form of abrogation of the statute). The judgement of the Constitutional Court has to be delivered with a justified opinion, approved by the Court itself before being delivered. But a law cannot be directly challenged before the Court by any party; questions of a law's constitutionality can only be raised by judges (a quo) in the course of applying that law. This kind of constitutional review is called "incidental" because the question of a law's constitutionality arises as an "incident" to ordinary legal proceedings, and is certified to the Court by the judge in the course of applying that law.

The Court of Cassation is the Supreme Court of the ordinary judicial system; its members are appointed by the Consiglio Superiore della Magistratura according to bureaucratic conditions and it has civil and criminal chambers which decide with a written opinion. The Court of Cassation has to check whether the substantive and procedural law is correctly applied by inferior courts (considering that the Court does not deal with the facts of the case; it must only check the correctness of the law's application to those facts).

The Consiglio di Stato is the Supreme Court in the hierarchy of administrative courts. It has to review in appellate and final degree the legitimacy of administrative acts with a justifying opinion.

In the Italian system dissenting opinions are not allowed: in fact, decision making takes place in secret and the positions taken by the members have to be secret (art. 276 code civ. Proc., art. 473 code crim. Proc.). In this sense the Constitutional Court decides with "one right answer", and not only because dissenting or concurring opinions are not permitted, but because the final decision is considered the only right conclusion resulting from a set of given premises.

> One argument for allowing dissenting opinions is that they would encourage clearer majority opinions, because they would need to respond directly to the arguments presented by the dissenters. Moreover, criticism of the decisions of the Court might move away from simplistic claims that the judges have simply prejudged the issues and towards reasoned debates focusing on substantive legal arguments. This would dispel the notion that a group of judges may have prevailed based solely on the force of their number, or based on preconceived ideas.
>
> On the other hand, some fear that dissenting opinions would lead to an excessive "personalisation" of constitutional judgments, to the exposure of individual judges to external pressures, as well as to undermining the authority of the decisions of the Court and a reduced incentive for judges to seek the broadest possible consensus for the decisions of the Court (Reppublica Italiana, n.d.).

Furthermore, it is thought in some quarters that the Italian political system lacks transparency, so that the introduction of the *dissenting opinion* could well allow a step in the right direction in this regard.

Citation of the foreign law or foreign case law by the ordinary courts

The reason why the Italian Constitutional Court decided to set aside foreign judicial cases in its decisions cannot be ignorance of the foreign approach on some specific subjects, considering the educational background of the judges. Of course, the final decision represents the highest possible compromise and helps to prevent sensitive questions, difficult cases (e.g. abortion) from being handled with a plain, visibly personal opinion; furthermore, foreign points of view in certain, particular fields are often subject to interpretation, making it more difficult to reach a useful compromise.

> The practices of the Court may vary depending on the styles and attitudes of the President and the other judges, but the basic goal is to achieve the broadest possible consensus among the judges. For this reason, discussions are sometimes extended to look for compromise solutions, or at least solutions that avoid sharp divisions within the Court. All judges present during the deliberations must vote for or against any proposal put to the vote; they may not abstain. Furthermore, all the judges present at the beginning of the discussion on a case, either at the public hearing or in closed session, must take part in deliberations until the end and cannot, as is often the case in political assemblies, "leave the room" to effectively abstain from voting. Normally the judge who has served as the rapporteur on a case is responsible for drafting the opinion of the Court, and is known as the *giudice redattore*, or author of the opinion. Not infrequently, the rapporteur may be in the minority, but the general practice is nevertheless for him to draft the Court's opinion along the lines of the majority view. On the rare occasions when the dissenting rapporteur prefers not to write the Court's opinion, the President entrusts the task to another judge from among the majority, unless he chooses to draft it himself (Reppublica Italiana, n.d.).

The process of decision-making in the Court is rigorously collegial because each judge can develop his

own opinions and all judges can consult all the documents at their disposal; this means that the "giudice relatore" who is responsible for drafting the opinion of the Court does not have any privilege over the rest of the judges. Furthermore, even if the dossier with all the relevant documents for the decision at hand is arranged by the assistants of the "giudice relatore", each judge can suggest to refer to a specific legal scholarship and/or judicial cases. Finally, the full opinion of the Court is subject to a collegial reading before its final drafting and signing. Antonio Baldassarre (President of the Constitutional Court in 1995) proposed in his "camera di consiglio" the introduction of dissenting and concurring opinions, but the conclusion was a "proposal of postponement" (...predictably *sine die*). Of course, the possibility of publishing the opinions of the constitutional judges can favour the quoting of foreign judicial cases because in the public arena each judicial opinion needs to support its position by referring to the majority of jurists, to other legal orders, to the historical evolution of the facts and so on, whilst one single opinion by the Court as a whole has a kind of self-endowed "mark of sacredness". Consequently the Court's opinions do not appear as the result of a process directed towards "discursive rationality" but as a "discovery of the (procedural) truth" (Baldassarre, 2006, p. 986). From these considerations it emerges that the final opinion of the Court represents the achievement of the best compromise from all the different judges' positions: this way of proceeding, on the one hand, implies a possible internal incoherence of opinions and a breakaway from taking a strict position on hard cases; and, on the other hand, avoids referring to foreign judicial cases and foreign interpretations because of the considerable difficulty of finding a consensus on them. In this sense, the opinion of the Court is the final word on a controversy as it is not subject to any "public check".

Sometimes it is necessary to refer to the foreign case law when this helps in the process of adjudication. We can discern two different hypotheses:

Article 14 of the Law n. 218/1995 states that "the decision to consider foreign law is made by the judge"; Article 15 sets out that "foreign law is enforced according to its own (the foreign law itself) criteria of interpretation". This seems to require an understanding of the practices and processing of legal scholarship.

In these cases, it is possible to say that it is simply a task of pure textual exegesis, with no opinion concerning merit or opportunity, except in cases involving conformity of the foreign juridical frame to which a judge refers with Italian law (Vigoriti, 2004).

The cross-reference to the foreign law can be demanded as a result of adherence to an agreement governing uniform law. Above all it is a question of specific matters, that is to say matters which do not involve the whole body of Italian judicial decisions.

The cross-reference to the foreign law can be determined by specific international acts, as the one of The Hague of 1985.

The cross-reference to the *foreign law* is a cultural choice made by the judge, is a voluntary remittal and is often determined by the need to increase the level of persuasion of the decision made (Groppi and Ponthoreau, 2013; Ferrari and Gambaro, 2010; De Bellis, 2013).

Furthermore, the subject of comparative law is often used as matter to reinforce a final decision. In this sense, it is possible to understand the following Italian decisions of the Constitutional Court:

Decision n. 91/73: the subject is the institution of donation between consorts and the reference to the foreign law is connected with historical arguments. In its considerations, the Court refers to the French civil code, as well as to the Austrian, Swiss, German, Mexican, Brazilian and Venezuelan codes...

Decision n. 344/92: this concerns the institution of adoption and the guardianship of juveniles and the Court merely proposes a reference to the decree in which the judge a quo refers to the Dutch and the German laws (and even to the European Convention of 1974) to support his own opinions.

Decision n. 431/00: contains a reference to foreign law (particularly to German, Austrian and Swiss law) by the judge a quo, with the purpose of supporting his own opinion regarding bankruptcy.

Decision n. 536/02: concerns the right to hunt and, in considering factual and legal aspects, the judge turns to foreign law. The persuasive spirit of the reference is clear: "As further demonstration of the unreasonableness of the provision… the defence refers to the French Rural Code".

The judge refers to foreign law in cases characterized by elements of internationalization or transnationalization with regard to the Italian system. Specifically, decision n. 364/88 can be seen as containing an embryo of criminal Community law intended to harmonize values based on solidarity rather than those of a patrimonial nature (as often happens with Community law)[4].

[4] See German law: *BVerfG*, December 18th, 1953.

Reference to extra-state models is not an exception in the common law system because it is an open system, but one of the main problems in Italy (and also in France) is the weight of linguistic hedges[5]. Furthermore, there is a trend towards a kind of wariness about using clauses and general principles and sometimes their application is hidden (Alpa, 2001, p. 495ss). What emerges from research is that the nature of the precedent is not binding but nevertheless has a fundamental role because it can constitute the heart of judicial dialectic (Monateri and Somma, 1999).

What emerges is the spread of a mixed law, public and private, arising from the dismissal of public functions, the penetration of private law into public law in civil law systems, and the split between public and private law in the common law system. Even if some decisions are taken with an eye to foreign models, the judge does not openly show the sources of his argument. Furthermore, he quotes "laws, rules and principles", but he "leaves the scholars' quotations out"[6].

Particularly with regard to Community law, it is possible to see a process of "hybridization", which is a direct and indirect influence (of the Community law) of the reception of foreign experiences. In this sense, the judicial decisions of the Court of Justice and of the European Court of Human Rights can be seen as useful "legal formants" for understanding fundamental principles, allowing foreign experience to enter the national system, even as a Community law rather than foreign law (...sometimes it seems that the judge uses European sources in a "nationalized" form)[7].

The Italian Constitutional Court has very rarely used the judicial decisions of other countries to help them to arrive at judgements and, when they have, they have seldom specified clearly the role of the foreign decision. Italian scholarship of recent decades confirms this kind of trend regarding the scant use of the comparative method, as can be seen from several studies on this subject. In his presentation submitted to the 14th International Congress of Comparative Law in Athens in 1994, Taruffo clarified the role of the Italian judge concerning the use of the foreign case law as follows: "It cannot be said that the use of comparative law is usual and normal in the work of the Italian lawyer" (Taruffo, 2014).

In fact, considering this particular aim, it is necessary to stress that the development of the comparative method in Italy is determined, above all, by private legal scholarship: "It is undeniable that in the modern comparative context, the role of the public law scholars has been that of the 'poor relation'" (Pizzorusso, 1980). When the national codes are discussed, the main debates are about how to realize the connection between civic duties and the politico-normative instruction of the Regime. In fact, in Italy a new attitude can be seen in the pages of the Civil Law Review (*Rivista di diritto civile*), published in 1909: Italian scholarship will not be closed within a kind of "national exclusivism" and will look at foreign legislative activity, but this will happen together with a proper and natural propensity to pay attention to Italian thoughts.

> *Perché anche di un indirizzo ha bisogno ormai la nostra produzione scientifica di diritto civile; occorre che essa si faccia prettamente italiana. Fino a trent'anni or sono essa risentiva troppo dell'influenza francese, oggi tende a cadere soverchiamente sotto quella germanica; ed è invece necessario ormai che la nostra scienza del diritto civile attinga alle fonti della vita, dei bisogni, dei costumi, dei sentimenti italiani. Intendiamoci: non è una specie di nazionalismo della scienza, che noi vogliamo instaurare: la nostra Rivista si terrà anzi lontana da ogni esclusivismo nazionale: i risultati degli studi e dell'attività legislativa degli stranieri vi troveranno larga ospitalità; e ne è una prova il contenuto di questo primo fascicolo: ma l'influenza benefica, che nessuno può disconoscere a tutte le idee della scienza, a tutti i portati della pratica, da qualunque parte essi vengano, non basta a distruggere la necessità che la nostra scienza civilistica sia fondata su materiali italiani, sia opera di intelletti italiani. Ecco perché in questa Rivista daremo largo campo alla rassegna della legi-slazione, che via via si forma e si prepara in Italia: questo materiale facile a sfuggire all'attenzione di chi troppo agevolmente si innamora delle teoriche, che illustri scrittori ultramontani fondano sopra disposizioni legislative, sopra concezioni della vita e sopra*

[5] It is different in the common law system: see Decision House of Lords, White v. Jones (1995).

[6] Decision n. 404/88: there is a reference in the "considerato in diritto" concerning the right to habitation: "In the early eighties a particular trend in legal scholarship and a certain judicial attitude were inclined to propose this right as a perfect subjective right [...] suggesting the French and German approach as a model".

[7] Decision n. 206/74: the judge refers to a particular subject: "obligatory insurance against accidents while working and against work-related diseases" in the German law system. Specifically, the Court suggests that a legislative solution should come from the Government and the Parliament (considering that this kind of solution "has been proposed in a recommendation from the European Economic Community and carried out by the German Federal Republic"). Decision n. 61/06: the subject is the right to have the double surname. In this decision, Community law is used through the medium of several Recommendations of the European Council. In this case, there is full achievement of the principle of equality between father and mother for deciding the children's surname. See recommendations n. 1271/1995, n. 1362/1998 …and several decisions of the European Court of Human Rights against forms of discrimination based on sex in choosing the surname (affaire Unal Teseli c. Turquie, affaire Stjerna c. Finlande, affaire Burghartz c. Suisse). Decision n. 393/06: In this decision the judge underlines the common principles of the European countries. He says, "we cannot refuse to take into account that the principle of the retroactivity of the lex mitior (subject of the current decision) has been established both on the international and on the community's level; this circumstance influences the review that this Court has to produce...". The judge's reference was to the International Covenant on Civil and Political Rights; the Treaty on the European Union; the Court of Justice of the European Community, and the Fundamental Rights of European Citizens...

> *bisogni diversi dai nostri, varrà a richiamare i nostri studiosi all'osservazione della vita paesana e ad indirizzarli sopra una via nella quale il connubio fra la pratica e la scienza sarà più facile, con quanto maggior profitto del progresso dei nostri studi, ognun vede.*

In 1916, curiosity about new approaches to law marked the words of Gianfranco Pacchioni, who stressed that it was important for the national development of the juridical system to go beyond national borders through an improvement of the comparative method in his book *Elementi di diritto civile*:

> *Due sono, a nostro avviso, i rimedi che possono scongiurare i pericoli inerenti a questo stato di cose, e cioè: da una parte il rinnovato studio del diritto romano dal punto di vista pratico, e dall'altra l'intensificazione delle ricerche di legislazione e di diritto comparato. Occorre illuminare e vivificare lo studio del codice civile patrio collo studio parallelo dei codici degli altri paesi, e più specialmente di quei codici che più si diversificano dal nostro.*

Afterwards, various Italian scholars paid attention to several foreign legal systems (to compare sensitive questions) or to foreign laws. Examples of this are English law on the accountability of trade unions, American company law, French law on share companies and German law regarding the civil code. But there is a certain hesitation in the courts to make decisions based on extra-state parameters because of a kind of horror of "alieni juris"; it is a generally accepted view among Italian lawyers and judges about what happens abroad that argumentations based on foreign models are not as strong as those based on the Italian one". Consequently, even if comparative law has a crucial importance as an element which helps in decision making, it remains in the shadows.

Zeno Zencovich takes into account a large number of constitutional decisions published in the law review *Il Foro Italiano* from 1970 to 2004 (Zeno-Zencovich, 2005) and Lucio Pegoraro handles the same subject covering three different periods of judicial activity of the Italian Constitutional Court: the 1980s, part of the 1990s, and five years of the 21st century, from 2000 to 2005 (Pegoraro, 1987, 2006). Notwithstanding, this is still not enough, but all data is useful to understand the Italian comparative method of the Constitutional Court in its interpretation of the Constitution. Such data can grant us the opportunity to know part of Italian constitutional history even if we are denied the possibility of analyzing a more complex panorama of dialogue between the Italian constitutional judges and transnational judges.

An empirical research of recent years

The Italian Constitutional Court referred to foreign cases very few times. Just to have an idea, the constitutional decisions during the 1980s (1980-1989) are 4,462 but only 5 times (nn. 123/1980, 300/1984, 161/1985, 71/1987, 1085/1988) they referred to foreign cases.

During the 1990s, the Constitutional Court issued 4,996 decisions but just 3 times (nn. 329/1992, 286/1995, 72/1996) it referred to foreign precedents.

From 2000 to 2009 the constitutional judge decided 4,612 cases and 4 times (531/2000, 448/2002, 49/2003, 199/2005) the Court referred to foreign precedent. Finally, the Court of Cassation referred to several foreign precedents in the decision n. 21748/2007.

In terms of percentage this means a relationship of 0,11% (during the 1980s), of 0,06% (during the 1990s), and of 0,08% (in the last decade).

During the 1980s, the 5 mentioned decisions can be divided in the following way:

- 2 refer to German cases: *161/1985* (*Bundesverfassungsgericht*, April 11th, 1978) and *71/1987* (the reference is to the decisions of May 4th, 1971, February 22nd, 1983 and January 8th, 1985).
- 2 to US cases: *123/1980* (Missouri v. Holland) and *1085/1988* (proposes a general reference to "some judicial cases").
- 1 to a French case: *300/1984* (decision n. 76 - 71 DC, December 30th, 1976 of the French Conseil constitutionnel).

During the 1990s, the 3 mentioned decisions can be divided in the following way:

- 1 *(329/1992)* refers to various countries but to specific foreign precedents: it refers to the French Cour de Cassation (see arrets Englander of February 11th, 1969 and Clerget of November 2nd, 1971), the Federal Constitutional Court of Germany (decisions of December 13rd, 1977, versus the Republic of Philippines and April 12th, 1983, versus the National Iranian Oil Company), the Swiss Federal Court with several cases (e.g. decision of January 19th, 1987 versus the Socialist Republic of Romania) and the Appellate Court of The Hague (decision of November 28th, 1968, N.K Cabolent c. National Iranian Oil Company).
- 1 (*286/1995*) refers to a German decision (July 24th, 1968) but it is a mere reference proposed by the judge a quo. The Constitutional Court focuses on the Italian legislation to take its decision.
- 1 (*72/1996*) refers to some general French judicial cases.

Finally, the constitutional decisions of the last decade (until 2007) can be divided in the following way:

- 1 (*531/2000*) proposes a general and brief reference to foreign precedents of other countries.
- 1 (*448/2002*) refers to general German and US cases. The reference is proposed by the judge a quo but the Constitutional Court decides considering the national dimension.
- 1 (*49/2003*) refers to the French Conseil constitutionnel even if the Constitutional Court does not take into account any foreign case.
- 1 (*199/2005*) proposes a brief and general reference to North-American cases.
- 1 (*Court of Cassation, 21748/2007*) proposes several references to foreign precedents (to North-American, English, German cases).

The Italian Constitutional Court uses very few times *foreign judicial decisions* and, when it happens, the main goal of the judge is to find in the foreign case a valid support for his own point of view.

The first decision of this kind is probably the *n. [probably n.] 123/1980*, issued by the Constitutional Court to solve a conflict of competencies between the State and the Region of Sardinia arising from resolution n. 0211 of July 29th, 1975 (by the Ministero dell'agricoltura e delle foreste), which had as its subject the Convenzione di Ramsar-Saline di Macchiareddu e Stagno di Santa Gilla (Cagliari). The Italian Constitutional Court resolved the case deciding in favour of the State and referring to the American Supreme Court case *Missouri v. Holland*, because of its similarity to the Italian one. To be precise, the citation was within the text of the decision, at point n. 4 of the so-called "considerato in diritto"[8], where the Constitutional Court merely made a reference to the foreign case, considering it to be similar to the Italian one. What is more, it also referred to a couple of concepts used in the American decision in order to underline that, in accordance with the US Constitution ("States may not exercise certain powers reserved for the federal government: they may not enter into treaties…", art. I, sect. X), the Supreme Court used the legal reasoning which "even" the Italian Court used to specify the relationship between the Regions and the State ("Diversamente, si dovrebbe ritenere che l'ambito costituzionalmente riservato all'autonomia regionale resti, per definizione, escluso dalla sfera, nella quale si svolgono le relazioni esterne dello Stato: con l'insostenibile conseguenza come dice la Corte Suprema degli Stati Uniti, significativamente in un caso per più versi analogo al nostro (Missouri versus Holland, U.S. Supreme Court 1920, 252 U.S. 416) di creare un vuoto, dove, invece, deve risiedere un 'potere della massima importanza' quello, appunto, di stipulare i trattati che 'appartiene a qualsiasi governo civile'").

Four years later the Constitutional Court again used a foreign case in *Decision n. 300/1984* on the question of the constitutional legitimacy of both ordinary law n. 437, May 3rd, 1966 and articles 1 and 2 of law n. 150, April 6th, 1977[9].

In this case the Constitutional Court is called upon to make a judgement on the abovementioned law (which extends constitutional guarantees to European parliamentarians ex art. 68 Const.) in order to check whether it is inconsistent with art. 11 of the Constitution. The judge "a quo" refers to a decision (n. 76-71 DC, December 30th, 1976) of the French *Conseil constitutionnel* as a parameter of comparison. According to this decision, any international commitment which clashes with the Constitution cannot be ratified without a prior revision of the Constitution. In this way, the judge a quo offers the Court a good opportunity to analyze in depth the French decision through which it can assert that there is no conflict with the choice of the French legal system. In fact, the Constitutional Court uses the reference to the foreign decision proposed by the judge a quo to underline the difference between the Italian and the French system of judicial review. This comparison is made at the end of its decision.

Decision n. 161/1985: the Court of Cassation (first civil section) raises the problem of the constitutional legitimacy of articles 1 and 5 of ordinary law n. 164, April 14th, 1982 (on questions of rectification of sexual ascription), underlining their inconsistency with articles 2, 3, 29, 30 and 32 of the Italian Const. To clarify in depth the psychical and physical identity of a transsexual subject and then to indirectly support its adjudication, the Italian Constitutional Court quotes a judicial decision of the *Bundesverfassungsgericht* (April 11th, 1978) at the beginning of its argumentation *secundum* law ("considerato in diritto"). A few sentences later it specifies that the Italian legislator was faithful to the legislative, administrative and judicial trends of various other States. Afterwards, the Court does not mention

[8] In this part of the decision, the judge explains the reasons of his decision from a legal point of view. Another part of the decision is "ritenuto in fatto" where the judge retraces the events of the case at hand.

[9] Trattato che istituisce un Consiglio unico ed una Commissione unica delle Comunità europee e del Protocollo sui privilegi e le immunità, con Atto finale e Decisione dei rappresentanti dei Governi, firmati a Bruxelles l'8 aprile 1965.

any other foreign case, except the Daniel Oosten Wijck case (issued by the European Court of Human Rights) in order to underline that the Italian legislation was placed within a juridical civilization that is always in transition. In fact, it is possible to say that the present decision is on a human rights question, that of the transsexual identity of an individual, together with the protection of "minorities and anomalous situations", covered by values of the freedom and dignity of the human being.

Decision N. 71/1987: This decision concerns the application of art. 18 containing the collision regulation capable of identifying the rule concerning divorce between a foreign and an Italian citizen. With this decision the Italian Constitutional Court declares the constitutional illegitimacy of art. 18 preliminary rules (*Disposizioni preliminari*) to the Italian civil code regarding the part in which it considers the application of the husband's law in the absence of a national law equally applicable to both consorts. At the end of its legal reasoning, the Court searches for support in the judicial comparative framework and finds it in three decisions of the Constitutional Court of the German Federal Republic. The reference to the decisions of May 4, 1971; February 22nd, 1983 and January 8th, 1985 is justified by principles included in each of them which are useful to support the Italian viewpoint. In fact, the first case established the constitutional review of collision regulations, while the second and the third declared the illegitimacy of those rules which require the application of the husband's law.

Decision N. 1085/88: This decision declares the constitutional illegitimacy of art. 626, co. 1, the criminal code's provision regarding theft. The Constitutional Court refers to German rules (Criminal code, art. 248) and scholarship, to the English Theft Act (of 1968) and, finally, to the United States, where "some judicial cases" similar to the Italian case at hand had taken place. The Constitutional Court proposed an absolutely generic reference without any judicial citation, which helped, however, to confirm its own point of view.

Decision N. 329/1992: On this occasion the Constitutional Court was called upon to express its own opinion about a question of constitutional legitimacy – raised by the Administrative Court (*TAR*), Region of Lazio – regarding the royal law decree (*r.d.l.*, August 30th, 1945, n. 1621, which became Law, July 16th, 1926[10]). Since its first legal considerations, the Constitutional Court makes reference to the decision of December 2nd, 1975 issued by the Court of Frankfurt and to the British Act of State Immunity of July 20th, 1978. Continuing with this comparative perspective, the Constitutional Court finds support for its legal reasoning both in foreign legislation and judicial cases. In fact, it refers to the French Cour de Cassation (see, arrets Englander of February 11th, 1969 and Clerget of November 2nd, 1971), the Federal Constitutional Court of Germany (decisions of December 13th, 1977, versus the Republic of Philippines and April 12th, 1983, versus the National Iranian Oil Company), the Swiss Federal Court with several cases (e.g. decision of January 19th, 1987 versus the Socialist Republic of Romania) and the Appellate Court of The Hague (decision of November 28th, 1968, N.K Cabolent c. National Iranian Oil Company). The Constitutional Court does not quote the legal reasoning supported by the aforementioned foreign decisions, but reference is made in order to specify that Italian cases were followed – since the decision n. 729 of March 13th, 1926, issued by the Court of Cassation – by other States. Furthermore, in terms of implicit influences, the Constitutional judge supports his conclusions mentioning a brief but significant historical premise which primarily includes "Countries with European culture".

Decision N. 286/1995: In this case the Constitutional Court gives its opinion on a question of constitutional legitimacy raised by the Court of Cassation, first civil section, about art. 70 r.d. of March 16th, 1942, n. 267[11] in comparison with art. 3, 29, and 31 Constitution. The specificity of this decision is given by the fact that the reference to foreign judicial cases comes from the Court of Cassation, which supports its decision by referring to that of the German Constitutional Court of July 24th, 1968. In the final legal reasoning, the Italian Constitutional Court does not confirm the position of the Court of Cassation, so that the foreign decision *represents a weak support for its conclusion*. In fact, it endorses its own point of view focused on the Italian regulation and perspective (in fact the Court is firmly hoping the legislator will intervene for a rational readjustment of the matter), "taking into account other European legal orders" but substantially "apart from tendencies of regulation followed by other European States"[12].

[10] The Law required the authorization of the Minister of Justice for execution acts on goods belonging to a foreign State and which were different from those that are not subject to coercive measures, in accordance with rules of international law.

[11] It regards cases of bankruptcy, arrangement with creditors, receivership and compulsory winding up of a company.

[12] "Indipendentemente dai citati precedenti e dagli orientamenti della disciplina di altri Stati europei […] Ciò rende auspicabile l'intervento legislativo, finalizzato ad un razionale riordino della materia, inteso ad armonizzare questo delicato aspetto della legge fallimentare ai principi ispiratori della riforma del 1975, eliminando gli inconvenienti lamentati, tenendo presenti gli altri ordinamenti europei e considerando in ogni caso i principi costituzionali sulla libertà dei coniugi e sulle esigenze di quel nucleo familiare che la Costituzione ha voluto chiaramente privilegiare".

Decision N. 72/1996: the Constitutional Court declares the illegitimacy (because of inconsistency with art. 3 of the Italian Constitution) of art. 369, code of navigation. In this case the legal reasoning of the Court is supported by historical motivations to justify the existence of a rule dating from the early forties. Furthermore, the Court specifies that the rule, even if it is not contained in the Napoleonic code, was, however, supported by "French judicial cases". The reference to the foreign decisions is absolutely general, as was a confirmation of the relationship "species" (foreign decisions) to "genus", the historical argumentations, in whose framework the reference has to be placed.

Decision N. 531/2000: On this occasion, the Italian Constitutional Court is called on to give its own opinion on the Constitutional consistency (art. 3) of the military penal code, art. 83 with regard to a term of imprisonment of between 3 and 7 years for the offence of scorn of the national flag or other state symbols. The Court specifies in its legal considerations that this crime raises the "problem of boundaries for the freedom of speech, as argued by constitutional cases in other countries". But the reference to foreign judicial cases is limited to a general and brief reference, in fact, straight afterwards the Court quotes Italian decisions to specify and circumscribe the range of the article examined.

Decision N. 448/2002: the Constitutional Court issued its decision to regulate a conflict of competencies between State powers (the Court identified "who" had to make a decision about the application of art. 68, co. 1, Const.). The Tribunal of Caltanissetta raised the question and underlined that the range of application of art. 68[13] by the Parliament is much wider in Italy than in other countries, as proved by American and German judicial cases on the matter of the lack of accountability of parliamentarians when expressing opinions. Notwithstanding, the Constitutional Court in its conclusion does not refer to the foreign judicial cases and bases its decision on an "internal", on a national perspective.

Decision N. 49/2003: In this case the Constitutional Court expresses its own opinion on the constitutional legitimacy of articles 2, co. 1 and 7, co. 1 of the regional law of Valle d'Aosta (November 13th, 2002, n. 21, "Modificazioni alla legge regionale 12 gennaio 1993, n. 3 [Norme per l'elezione del Consiglio regionale della Valle d'Aosta]"), already modified by the regional laws of March 11th, 1993, n. 13 and September 1st, 1997, n. 31, and by the regional law of August 19th, 1998, n. 47 ("Salvaguardia delle caratteristiche e tradizioni linguistiche e culturali delle popolazioni walser della valle del Lys") with regards to artt. 3, co. 1 and 51, co. 1 Const.

Also in this case it can be seen that a reference is made to foreign cases by the Region Valle d'Aosta, which refers to the French Conseil constitutionnel to show how it changed its position before and after the new article 3 of the French Constitution regarding the constitutional principle "*La loi favorise l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives*". But this reference proposed by the Region was not taken into account by the Constitutional Court, which developed its legal reasoning without looking at the foreign judicial cases.

Decision n. 199/2005: In this case the Constitutional Court declares the constitutional inconsistency of art. 423, co. 1, code of shipping (royal decree March 30th, 1942, n. 327). The reference to the foreign decision is general and brief and it is made by the Court in its conclusion in order to support its legal reasoning: it refers to the "fair opportunity" used in the North-American cases as legal assumption of effectiveness.

Decision n. 21748/2007 (Court of Cassation): in this case the Italian Court of Cassation decided on a hard case concerning the "right to live or to die"[14]. The Court chose between two different approaches: on the one hand, it could refer to the best interest of the patient leaving aside his/her will to put his/her life in an irreversible vegetative state, subject to the other's will (in the case at hand, to the father's will); on the other hand, the choice can regard the will of the patient and his/her right to ask – through the guardian – for the interruption of the forced feeding. The Court decided to follow this second way and, in order to authorize the guardian of a person in an irreversible vegetative state to stop the medical treatment which artificially keeps him/her alive, had to check two strict parameters. First of all it must evaluate the guardian's will, if he is acting considering the exclusive interest of the patient; looking for latter's best interest, he must

[13] Art. 68, Members of Parliament cannot be held accountable for the opinions expressed or votes cast in the performance of their function. In default of the authorization of his House, no Member of Parliament may be submitted to personal or home search, nor may he be arrested or otherwise deprived of his personal freedom, nor held in detention, except when a final court sentence is enforced, or when the Member is apprehended in the act of committing an offence for which arrest *flagrante delicto* is mandatory. Such an authorization shall also be required in order to monitor a Member of Parliament's conversations or communications, or to seize such member's mail.

[14] In November Italy's highest court of appeals, the Court of Cassation in Rome, upheld the ruling of a Milan lower court allowing the petition supported by the patient's father to have his daughter's food and hydration removed so that she could "be allowed to die", since she had been a vegetative state after a car accident in 1992.

decide not "on behalf of" the patient, nor "for" the patient, but "with" the patient". The Court decided after trying to reconstruct the will of the unconscious patient and taking into account his/her desires before becoming unconscious or after inferring his/her will from his/her personality, lifestyle, wishes, values, ethical, religious, cultural and philosophical convictions[15].

This particular attention to the detailed circumstances of the case at hand and to the convictions expressed by the patient during his/her life, when he/she was able to decide for him/herself, has been followed in other legal orders by the Courts[16]. In fact, the Italian judge refers to the leading case Quinlan, where the Supreme Court of New Jersey, with the decision of March 31st, 1976, complied with the doctrine of the substituted judgment test; the same happened within the same Court in the decision of June 24th, 1987, Nancy Ellen Jobes. According to this doctrine, as specified by the Court of Cassation, the choice is made trying to be as faithful as possible to the will of the patient.

A few sentences later there is a reference to the decision of June 25th, 1990, when the Supreme Court of the United States established that the US Constitution does not forbid to the State of Missouri to fix "a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent".

Again, in the German case of March 17th, 2003 the Bundesgerichtshof determined that, in order to comply with the will of the patient, if it cannot be clearly deduced, it may be identified step by step also considering his/her values, wishes, convictions and so on.

Then there is a reference to the case of February 4th, 1993 of the House of Lords, according to which, if it is not possible to clarify the patient's will, it is contrary to the best interest of the patient keeping on artificially feeding and hydrating, which are considered to be unjustified invasive treatments of the bodily sphere.

The references proposed by the Italian judge are not mere or brief quotation of the foreign precedents; in fact the judge specifies which part of the foreign case is interesting in his perspective. But the reference is just "ad adiuvandum" the decision of the Court of Cassation, which was felt as controversial in the Italian context, subject to many comments and reviews.

Final considerations

The reference to foreign judicial decisions is meant primarily to prove that "even there", in different contexts, a particular solution has been suggested that the Court wants to use "even here", in the national context. The "other" is sometimes a particular context (decision n. 123/80) and sometimes a group of democratic countries (decision n. 286/95). This kind of reference offers paradigms for judicial reasoning, provides useful examples of similar cases decided in other jurisdictions and can illustrate the range of possibilities or possible consequences of a particular argumentation or of a specific choice.

From the survey it can be seen that the Constitutional Court refers above all to foreign cases in terms of communitarian cases; it is inclined to leave aside comparative references, as can be inferred both from the small number of decisions referring to a foreign case law and from the lack of historical reconstruction of the quoted institutions and their development (Zencovich) that should put the decision itself in a diachronic perspective of comparison.

Analyzing the implicit influences which led a judge to issue a specific decision, with a specific legal reasoning, is not a simple matter; in fact, it is not easy to investigate the hidden reasons of a *ratio decidendi*, that is to say those unwritten explanations which induced the Court to quote or to omit certain foreign precedents within the path of its legal reasoning. Notwithstanding, this topic cannot be ignored or neglected if a more complete survey is to be pursued. It is necessary to underline, however, that, considering the small number of decisions which refer to foreign cases and the little emphasis put by the Court on them, even implicit influences confirm the tendency of Italian judges to open their own points of view to "others".

In this regard, decision n. 71/1987 is interesting because when the Court says that "É tuttavia un dato comparatistico di qualche rilevanza che in alcuni Paesi

[15] The Italian government intervened with a "decree law" entitled "Urgent Provisions on Nutrition and Hydration". It established, "Pending the approval of a complete and comprehensive legislative framework in the field of end-of-life, nutrition and hydration, as forms of life support physiologically designed to alleviate suffering, cannot under any circumstances be rejected by the person concerned or suspended by caregivers of persons unable to provide for themselves". Under Italian law, a decree law can be put into place in urgent circumstances, for a period of 60 days, while Parliament considers it for permanent approval.

[16] The need to refer to foreign precedents can be justified also because there is no legislation regarding living wills or any consistent body of law regarding informed consent in Italy. For this reason Italian courts and scholars rely on general principles drawn from various legal sources to assess whether artificial nutrition and hydration can be allowed. Furthermore, if an incompetent adult can be appointed a guardian, there are some "strictly personal acts" that can only be carried out by the individual concerned, and before the Englaro case it was not clear whether the refusal of treatment belonged to this particular category. What is more, it was not clear whether the suspension of life would be at odds with the constitutionally protected, "inalienable" and "inviolable" right to life and to health (art. 32 Italian Const).

europei sensibili a entrambi si preferì ricorrere a criteri diversi […] mentre, in altri Paesi, all'introduzione, peraltro più recente, del principio costituzionale della eguaglianza morale e giuridica fra i coniugi", it does not mention which Countries are the object of reference; a few lines later two decisions of the German Constitutional Court are mentioned. In this case, as in most of those analyzed, it seems to me that the implicit influences coincide with the will of the Court which uses the foreign decisions as a parameter both for reinforcing its final choice and, sometimes, for clarifying the preservation of some constitutional values. Decision n. 71/87 can offer this kind of example because the declaration of unconstitutionality of art. 18 seems to derive from its inconsistency with principles contained in the Constitution (as is the case in most foreign constitutional systems) such as the prohibition of any form of discrimination between the sexes and the moral and juridical equality between consorts ("contrarietà ai principi, accolti nella nostra Costituzione [così come nella maggior parte degli ordinamenti costituzionali stranieri] del divieto di ogni discriminazione fra i sessi e dell'eguaglianza morale e giuridica fra i coniugi, dei quali il secondo é specificazione del primo").

Another interesting decision seems to be n. 286/95 because the declaration of inadmissibility of the question of constitutional legitimacy is the consequence of the Court's taking of a position first "independently from the judicial tendencies of other European States" and then "taking into account other European legal orders" (thus making explicit mention of the influence of foreign judicial positions).

What undoubtedly emerges is a functional use of foreign decisions by the Constitutional Court: they can be useful to underline the unreasonableness of the contested rules, to put constitutional principles in a persuasive perspective, to reinforce the argument. But it is a kind of comparative silence, at least at a judicial level: the comparative analysis is actually (almost) absent from the style of the motivation of the Italian Constitutional Court's decisions.

At this point, it is necessary to specify another aspect of Italian constitutional justice: even if it seems clear that foreign decisions do not represent a constant parameter for the constitutional judge, it should be noted that references to foreign cases are present both in the yearly reports of the Constitutional Court's President and in the judges' speeches. On this point, the speech of Prof. Gustavo Zagrebelsky, President of the Constitutional Court in 2004, is emblematic. As can be understood from the national report of Prof. Zagrebelsky, the constitutional judges are perfectly aware of foreign precedents on specific matters but they are usually a subject of study and legal scholarship (see, monographs, note to decisions, articles, essays,...) rather than a point of reference for them.

It is interesting to note that the dossiers prepared by the judge's assistants to assist him in reaching his final decision often contain references on comparative law. In 1987 a specific research department was set up at the Constitutional Court with the main task of preparing a detailed dossier with comparative legislation for each case. This office was initially headed by Prof. Aldo Sandulli and was staffed by American, English, German, French, Spanish and Austrian trainees. The office constantly works on constitutional decisions in order to clarify how similar cases were adjudicated in other legal orders.

With regard to the implicit influences, the shrewd jurist maybe able to trace the foreign models used by the Court in its decision and this is possible because he knows the deliberative path of the decision before its drawing up, or because he is an expert on the matter in hand, or because he knows the foreign judicial point of view.

Again, in order to clarify the point about implicit influences, decision n. 170/1984 (concerning the relationship between national communitarian legal orders) refers to a formula used in American case law to define federal relationships, which is "separate but coordinate orders": this can be seen as an implicit but clear quotation of the American theory about federalism. Furthermore, the viewpoint of the Court concerning all fundamental rights is to put them at the top of the hierarchy of constitutional values, to consider them in a position higher than any other principle, not subjected to the constitutional review of its substantive content. This concept has been embraced by the Italian Constitutional Court, taking into account the American doctrine of preferred freedoms and the German one of *Wesensgehalt*. Finally, another example is provided by all the constitutional decisions regarding the right to privacy: in each of them, as specified by Prof. Baldassarre, it is possible to find implicit influences from decisions in other countries, especially where the analyzed right is the subject of debate (e.g., United States). Comparative law has the basic role of enhancing the understanding of national law and for this reason it is an integral part of it (Baldassarre, 2006, p. 983).

Therefore, using foreign case law can be seen as an inappropriate and erroneous tool because the "principle of the state" allows the correct constitutional in-

terpretation – that is to say, a constitutional interpretation should be based on national/state law. This means that referring to foreign decisions can undermine the reliability of a legal reasoning because it includes foreign factors, external elements which can weaken the logical reasoning of the Court.

Together with the scarcity of foreign judicial references in the motivation of the Italian Courts, scholarship underlines how the Constitutional Court avoids being a "vehicle for the circulation of a juridical model", considering that the structure of the final motivation has always been an instrument for the development of common law systems. Opening itself to a comparison could lead the Court to a transnational dialogue and confrontation even if the infrequent reference to the foreign point of view is used by the judge just to reinforce the national decision (as it happens most of the time) and for this reason, this kind of practice can make the process of globalization less forced.

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