The Italian Constitutional Court

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1 Introduction

To understand the role of foreign law, foreign decisions and of legal comparison in the decisions of the Italian Constitutional Court, it is necessary to provide a very brief outline of its history, its functions and its activity.1

The Constitutional Court (Corte Costituzionale) was introduced for the first time in the Italian legal system with the 1948 Constitution (articles from 134 to 137). Owing to strong resistance by conservative political circles it started operating only in 1966.

It is composed of 15 members who form a sole chamber (i.e. there are no sections of the Court). Five of the members are elected by the three highest judicial courts: three by the Court of Cassation (Corte di Cassazione) which is the expression of ordinary (civil and criminal) jurisdiction; one by the Consiglio di Stato, the highest administrative jurisdiction; one by the Corte dei Conti, the highest public accountability court.

Other five are elected by Parliament (both members of the Senate and of the Chamber of Deputies) with a very high a majority (not less than 3/5 of all its members).

The last five are designated by the President of the Republic. The members of the Constitutional Court remain in office for nine years and may not be re-elected or re-appointed.

While the five members elected by three judiciary bodies are, invariably, high ranking judges who are still in office, the other ten members vary in their background. Most of them are law professors, often of great repute, but some may be politicians with a legal background. The constitutional requirement is that the judges must be or members of the judiciary, law professors or practicing lawyers.

The main competences of the Constitutional Court are three:

(a) Constitutionality of laws, both national and regional
(b) Conflicts of apportionment between the powers of the State (typically Parliament and the judiciary) and between the State and regions, or between Regions
(c) The impeachment of the president of the Republic.

1 For a detailed presentation of the Italian Constitutional Court one can now refer to the excellent volume by Vittoria Barsotti, Paolo G. Carozza, Marta Carbajal, and Andrea Simoncini, Italian Constitutional Justice in Global Context, OUP, 2015.
In these last sixty years there has been a significant shift in the kind of cases brought in front of the Court. Initially they concerned mostly the constitutionality of laws (especially those dating back to the Fascist period). After the 2001 Constitutional reform, with the devolution of numerous powers to the Regions, conflicts in this area have increased considerably and represent nowadays more than 40% of the cases.

In the case of conflicts of apportionment the case is brought directly to the Court by the institution which deems its prerogatives have been invaded.

The question of constitutionality of a law is, instead, raised incidentally in a pending case, when the judge is of the opinion that the law he or she should apply is contrary to Constitution, and therefore asks for a decision on this point by the Court. The Italian system does not foresee direct access to the Constitutional Court by individuals (as in the “recurso de amparo”) or by members of Parliament (as in the French model).

In these 60 years the Court has rendered over 20,000 decisions.

In the cases concerning the constitutionality of law the most recent statistics show, quite expectedly, a great majority of cases in which the unconstitutionality has been denied, and a more limited number of cases in which it has been declared. This data, however, may be misleading because in many cases of denial there are many decisions of so-called “interpretative rejection”: the law is not unconstitutional provided it is interpreted in the way dictated by the Court; or of “manipulation” of the norm to which some element is added to render it constitutional.

All the decisions are taken by the full Court and signed by President of the Court and by the reporting judge. There are no dissenting opinions.

2 Empirical Results and Some Cases

In the two main empirical researches on the role of foreign law, foreign case-law and comparative law in the decisions of the Constitutional Court the first (from 1970 to 2004) has shown a very limited impact. The second (from 2006 to 2016) has produced more significant results, as compared to the past, but still very small in relation to the overall number of decisions.

4 Lucio Pegoraro, “La Corte costituzionale e il diritto comparato nelle sentenze degli anni ‘90”, in Quaderni costituzionali 1997, p. 60. This research has been significantly widened by the same Author with a comparison with other constitutional courts in La Corte costituzionale italiana e il diritto comparato, Dottorati comparativi, CLUEB, Bologna, 2005.


6 Edouardo Veltre, son of the famed mathematician Vito Veltre, was professor of Roman law in the universities of Bologna (where he was also rector) and Rome, and was expelled from university following the 1968 racial laws. He actively participated in the Resistance movement and was decorated for his valor. He always nurtured comparative interests. Among his works is a commentary on what is generally considered the first comparative law text, the “Collatio legum mosaicarum et romanarum” dating back to the early fifth century A.D.

7 Decision 27.6.1973, n. 91.

the case of re-marriage the second spouse could not receive through the will of the deceased spouse more than what the law granted to the sons of the first marriage. Here again the decision illustrates the long history of the rule which from Roman times reaches till the French Code Civil (from which it is replicated in Italy). However the decision points out that it was rejected in Austria, Germany and Switzerland and on such basis points out that the provision was clearly aimed at discriminating against the second spouse (generally a woman) in contrast with the principle of equality among spouses and among citizens.

The third case9 concerns a provision of the Italian Penal Code which punished very seriously the crime of psychologically subjugating an individual putting that person under one own will.

The crime was considered akin to slavery and placed among the provisions against slavery.

Again the decision deeply analyses the historical origins of the provision; on how it was introduced especially to combat forms of entrapment of minors; on the differences between the provision of the Italian Penal Code of 1889 and that of 1930; on analogous provision in other criminal codes. Remarkably – at least in the tradition of the Constitutional Court – there is a lengthy analysis of the notion of "psychical deprivation" in medical science.

The conclusion is that the norm is vague and undetermined and therefore contrary to the constitutional provision on the certainty of every penal norm.

3 The More Recent Developments

In the second period the decisions are more numerous (and we shall try further on to explain why). In the first place one finds decisions in which comparative law is used in support of the constitutionality of the challenged provision.

In the case10 concerning the legislation on illegal immigration the decision points out that in several other European countries (France, Germany, UK) illegal immigration is a crime, often punished much more severely in Italy.

Again11 French, German and British legislation is used to support the decision of Italian law in the case of liquidation procedures of enterprises operating in the field of services of general interest. In a further decision12 in which the contested provision was the anti-stalking legislation the Court rejected the claim that the norms did not specify with sufficient precision the crime through an analysis of the similar provision in German law (there is a very long tradition of strong doctrinal convergence between Italian and German criminal law scholars) which punishes any conduct which can assimilated to that precisely set out in the norms.

In several other decisions the analysis of foreign law is used to counter arguments on a supposed eccentricity of the impugned Italian legislation.

The most noticeable example in which this method was followed is the decision13 which rejected the claim that the civil code provisions allowing marriage only between persons of different sexes was unconstitutional. The Court pointed out that the solutions to the issue were the most diverse, varying from jurisdiction to jurisdiction, and therefore it was up to Parliament, and not to the Court, to decide which to adopt.

Finally, in a few – very few – cases reference has been made not to foreign laws, but to decisions of other constitutional courts.

In a delicate decision14 concerning the (un)constitutionality of an electoral law, the Court supported its decision making reference to the arguments used, in similar cases by the German Bundesverfassungsgericht.

4 Unexpressed Use of Foreign and Comparative Law

The number of decisions by the Italian Constitutional Court in which there is an explicit reference to foreign law, foreign case-law and comparative law is extremely limited, even considering only 21st century jurisprudence. Before trying to set out some explanations and conclusions there are many caveats.

(a) In the first place most cases brought in front of the Court do not justify a comparative approach. Practically all the cases of apportionment,15 but also in those cases in which the contested law is of an exclusively internal nature and it would be futile, if not ostentatious, to look at foreign examples, especially if, at the end of the day, the question of unconstitutionality is declared inadmissible or not founded.16

(b) In the second place the Court has, since the end of the 1980s, a very active and well-staffed office for foreign and comparative law research which,
on request by the President or by the reporting judge, prepares a rich file of legislation, case-law and legal doctrine which is circulated among all the judges; who therefore should be able to consider to what extent such materials are useful in the decision-making process. If and when these researches find their way in the written decisions is left to the style of the reporting judge. This generally happens only in very generic way through a reference to "foreign laws" or to "other jurisdictions". But this does not mean that the Court has ignored what happens outside the boundaries of Italian jurisdiction.

(c) One must also consider that ideas, solutions, rules foreign to the Italian legal tradition are constantly imported through the legislation of the European Union, through the decisions of its courts (mainly the CJEU), and through the case law of the European Court of Human Rights. The references to these elements – which are present in a very high number of cases concerning the constitutionality of national or regional laws – have not been analyzed here because they are considered as being part of the Italian legal system.

As to the EU, especially after the 2007 Lisbon Treaties, its highly complex legislation is part and parcel of the Italian legal system and directly applicable not only by all judges but also by all public authorities. As to the ECHR the Italian Constitution (article 11) follows the monistic approach, and therefore ratification of International Conventions makes them enforceable within the national jurisdiction.

This wealth of "external" legal materials makes it less impellent or even necessary, to look for solutions from other jurisdictions, but rather, more practically, to examine how the same issue has been implemented in other important and comparable countries.

It does not, therefore, appear appropriate to apply some kind of "impact factor" in order to establish if the Italian Constitutional Court (or, as a matter of fact, any other Court) is, or is not, open to foreign or comparative laws, cases, ideas.

5 A Critical Appraisal

If quantitative evaluations are in this field, as in many others, fallacious, this does imply that one cannot – and should not – express a series of critical remarks.

A research on the presence or absence of foreign and comparative law in the case-law of the Italian Constitutional Court suggests some possible explanations of the prudency that has been detected.

(a) In the first place, although comparative law is a widespread legal discipline and, since the last 20 years, a compulsory subject in law degree curricula, the judges in the Court have only rarely been engaged in comparative law research and teaching. And the noticeable exceptions are not – or have not – been sufficient to steer a general tendency towards domestic legal self-sufficiency.

Comparative law is an attitude one acquires at an early stage of one’s legal formation and it is difficult to pick it up later on (the same can be said of the law & economics approach as of sociological jurisprudence).

To this one must add that not only five of the judges come from the highest jurisdictions – which generally are devoid of any interest towards foreign experiences – but most of the judges’ assistants (clerks in the US, référendaires in the CJEU) are ordinary judges who do not partake in comparative dialogues.

(b) Secondly one should consider language barriers. A part from noticeable – very noticeable – exceptions few judges of the past had linguistic abilities, were invited abroad, made conferences in a language different from Italian. Clearly this does help create a “comparative mentality”. The best example of this general attitude is that only in 2016 (twenty years after the introduction of the Internet) the Italian Constitutional Court has activated a more accessible and complete English version of its web site. The materials are, however, still scarce and the translation of the headnotes, and of some of the decisions, is still far from the standards one would – and could – expect from such an important institution. And while the Court devotes significant effort to collect decisions from other constitutional courts, much less effort is made to be known abroad.

\footnote{The Constitutional court, following other analogous European courts (see Paolo Passaglia, "Corti costituzionali e rinvio pregiudiziale alla Corte di giustizia", at http://www.corteconstituzionale.it/documenti/convegni_seminari/CC_SS_Corti_costituzionali_rinvio_pregiudiziale_200805.pdf [accessed 12.0.2007]), has started, with order 16.7.2003, n. 207, to ask the CJEU for preliminary rulings in areas of the latter’s competence.}

\footnote{With two decisions of 31.10.2007, n. 348 and 349 the Constitutional court has stated that the Strasbourg jurisprudence is directly relevant in the Italian legal order, although the ECHR does not have the strength of a constitutional norm.}

\footnote{See the web-page http://www.corteconstituzionale.it/jsp/consulta/documentazione/segnalazioni.do.}
Finally one should observe that the *en banc* model of decision, with no dissenting opinions, tends to marginalize the use of foreign and comparative law. The judges concur not only in the outcome, but also in the opinion behind it, and therefore the tendency is that of avoiding arguments that might be seen as an intellectual flourish.

Much better, and safer, an *aurea mediocritas*. To this one must add that comparative law arguments are among the most used in dissenting opinions, but if they are not allowed there is no way to introduce them in the debate.

There are however more relevant lessons that can be drawn from the results of the research, which tell us a lot not so much about comparative law, but about the mentality of the Italian Constitutional Court.

(a) The first, and most surprising, finding is that in practically all the decisions what is lacking is a judicial history not only with reference to the millenary experience of Roman law (which admittedly makes sense only in a limited number of cases), but with the *travaux préparatoires* of the Italian Constitution which are hardly ever mentioned, and even more rarely cited are the great jurists which were the framers of the fundamental text. The decisions lack completely in historical depth. There is no interest in trying to understand how and why a norm was written in a certain way, and other versions were discarded. And obviously as "comparison involves history", if there is no history there cannot be comparison. This ahistorical attitude of the Italian Constitutional Court allows (or forces?) it not to be bound by firm traditional bearings and to adapt its decisions to the specific moment. This clearly renders the Court entirely self-referential and unpredictable.

(b) The second point that must be made is that the model of the decisions of the Italian Constitutional Court is structured in such a way that there appears to be no dialogue with the parties in the case, generally the private parties in the case in which the question of constitutionality has been raised, and the Avvocatura dello Stato (the institution which by law represents the interests of the State in front of the Constitutional court, as in front of most other courts). In the absolute majority of cases the Court limits itself to explaining why it does not agree with the judge who has raised the question, and that is it. If one considers that most often counsel for the private parties are the most reputable lawyers and law professors of the country it is easy to understand that the court is not very open to any sort of dialogue. Not having to rebut the arguments of the parties, but simply to agree or, more often, disagree, with the judge *a quo* reduces significantly the length and depth of arguments used, which can easily be summed up in a peremptory *hoc volo, sic iubeo*.

6 Final Remarks

Comparative legal research is intellectually fascinating and extremely rewarding for an academic scholar. One should however be cautious in transposing such an approach to constitutional adjudication. The risk that has been clearly set out with his usual pugnacious style by Justice Scalia in his dissent in *Roper v. Simmons* "is to look over the heads of the crowd and pick out its friends*.

This mistrust towards a comparative approach cannot be attributed exclusively to Antonin Scalia’s strong ideological conservative stance. Similar views were expressed in the same case by Justice O’Connor in her dissent, which moves from very different political positions.

One could venture to say that the use of comparative arguments in judicial decisions is only one of the many rhetorical styles used to enhance persuasiveness. The latter is an essential element of Justice, as socially perceived, but has little to do with the correctness of the decision. When it comes to constitutional adjudication what is of foremost importance is the consistency of the decision with constitutional values and traditions; its direct and indirect effects, included those which were unforeseen and unintended; the strengthening of legal certainty. Sound legal reasoning is not guaranteed only if it has passed a comparative law exam.

There is a further caveat. As has been aptly pointed out by the dean of Italian comparative constitutional law scholars, Giuseppe de Vergottini, the much

20 Thousands of pages of scholarly work, dozens of seminars and conferences have been devoted to the issue without succeeding in breaking the tradition of the Court. For an exhaustive bibliography on the topic see Giuseppe Bergonzoni, *Corte costituzionale, autorità, azione, etica nella giurisprudenza: oltre l’unanimità e la legittimità*, in Mauro Bertolissi (ed.), *Riforme. Opinioni a confronto. Giornate di studi in ricordo di Livio Paladini*, Jovene, Naples 2001, p. 155.

21 I have tried to set out these conclusions more detail in *Le sentenze della Corte costituzionale (come sono e come si vorrebbe che fossero)*, in *Rivista trimestrale di diritto pubblico* 2005, p. 89.

22 And, following a tradition which is at least three centuries old, the Court does not quote (if not elliptically) writings of legal scholars; see Paolo Fassaglia (ed.), *I rapporti tra la giurisprudenza costituzionale e la dottrina*, Editore Scientifica, Naples 2005.

23 543 U.S. 59, at 62 (2006), adding: "To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."
publicized "dialogue among courts" (especially among constitutional courts) is an extremely ambiguous and even deceptive term.\textsuperscript{24} First of all, a dialogue requires at least two speakers who interact reciprocally. There is no "dialogue" if simply one court refers to foreign legislation or jurisprudence, without being looked back at. This one-way approach is simply one aspect of an ancient process, that of the circulation of legal models, in which some countries are only "exporters" and other countries only "importers". Citing foreign law may be the first step towards a comparative analysis, but still is very far away from an appropriate use of comparative methodology, which implies a multiplicity of variables, which may be quite inappropriate in constitutional adjudication.

One might conclude that it is the task of legal doctrine to compare constitutional jurisprudence, pointing out convergences, differences, strong and weak points, with the optimistic view that their writings will be taken into account and will contribute to a better judicial process.

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