



UNIVERSITY OF TRENTO
Department of Legal Sciences
Faculty of Law

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Comparing Constitutional Adjudication

**A Summer School on Comparative Interpretation of European
Constitutional Jurisprudence**

4th Edition - 2009

The "dialogue of judges" and the mutual influence of constitutional concepts in Europe : How the interpretation of national fundamental rights is influenced by the fundamental rights of the ECHR and the EC general principles as well as by a horizontal exchange of ideas of national constitutional courts.

Italy

**The “Dialogue of Judges” and the Mutual Influence of Constitutional
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1. The Dialogue of Judges in Italy: Introduction

Art. 23 of Law n. 87/1953 states that, in assessing the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions, the Constitutional Court shall use «the norms of the Constitution or of the constitutional laws». Therefore, the Italian legislative framework on judicial review of legislation does not explicitly provide for the possibility to refer to foreign or international sources of law. In fact, the only articles referring to the relation between Italian and international law are art. 10, art. 11 and art. 117 c. 1 of the Constitution.

Art. 10 Const. states that Italy conforms to general recognized norms of international law: on the basis of this provision, through the adoption of a domestic law, international covenants, treaties, etc. become binding; according to art. 11 Const., Italy agrees, on conditions of equality with other States, to the limitation of sovereignty necessary to create an order that ensures peace and justice among nations: on this basis, the Constitutional Court introduced the principle of primacy of EU law on domestic law; finally, art. 117 cl. 1 of the Constitution provides that «legislative power shall be vested in the State and Regions in compliance with EU law and international obligations»: on the basis of this provision, the Constitutional Court declared that the international treaties¹ and European law² are *norme interposte* and shall be considered as parameters in assessing the constitutionality of national laws.

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¹ Cases 348-349/2007.

Consistently with this legislative and constitutional framework, the Italian Constitutional Court case-law is rarely influenced by the law or the legal argumentation of other countries (horizontal influences), but it is strongly influenced by the European Convention of Human Rights and its interpretation, provided by the Court of Strasbourg (vertical influences).

2. Horizontal Influences

Among the few cases where the Constitutional court refers to foreign constitutional argumentation, it usually quotes the French Constitutional Council case-law. Nevertheless the cases are all related with Private Law issues and not with the protection of fundamental rights. This choice can easily be explained considering that the Italian Civil Code was adopted in 1942, taking as a model the French *Code Civil*.

On the contrary, decision n. 161/1985 is one of the few cases concerning the protection of fundamental rights quoting a decision issued by a foreign Constitutional Court. In this case, the Court, assessing the constitutionality of art. 1 and 5 of law n. 164/1982, concerning transsexual's right to gender transition, quotes the decision issued by the *Bundesverfassungsgericht* on April 11, 1978. The case arose from the question of constitutionality of law n. 164/1982, filed before the Constitutional Court by the Court of Cassation. On the opinion of the Court submitting the question, the law was unconstitutional because it permitted to change gender status taking into account even psychological and not exclusively physical considerations. In order to decide, the Constitutional Court provides a definition of the term "transsexualism", first of all with reference to medical science. Moreover, it refers to the definition provided by the German Constitutional Tribunal, stating that «the aim that has to be satisfied in a transsexual person is that the physical and the psychological sexual orientation overlap». On the opinion of the Constitutional Court, the Italian legislation is in

² Case 103/2008.

compliance with the definition provided by the German Constitutional Tribunal, introducing a new concept of sexual identity based both on physical and psychological elements. In order to support its decision, the Court refers also to the decision of the European Commission of Human Rights, issued on May 5, 1978 (case Daniel Oosten Wijck vs. Belgian Government), considering that this decision is the expression of a general trend in the legislation and the case-law of the other States. On the basis of this reasoning, the Court declares that the challenged law is not unconstitutional.

In decision n. 117/1979, the Court generically refers to «comparative law»: the Constitutional Court declares the oath formula which used to be declared by the witnesses in criminal proceedings, referring to the religious relevance of the oath, partially unconstitutional.

Finally, there is a reference to international law and comparative case-law in **decision n. 49/2003**, on the question of constitutionality of the act amending regional law n. 3/1993 of region Val D'Aosta, introducing positive actions in order to support women representation in regional political bodies. Nevertheless, the quotation is not provided in the motivation of the Court, but in the appeal. In fact, in the case at issue, the Government challenged the act, considering that it was adopted exceeding the legislative competences granted by the Constitution to regions: region Val D'Aosta, in its defence, referred to the case-law of the French Constitutional Council as well as to the UN Convention on the Elimination of all Forms of Discrimination against Women and art. 23-2 of the Charter of Fundamental Rights of the European Union.

3. Vertical Influences

As already stated in the introduction, the Italian Constitutional Court often refers to supranational sources of law and case-law. In particular, the European Convention on Human Rights (ECHR) and the decisions of the European Court of Human Rights are highly relevant. Sometimes the Constitutional Court quotes also the International Covenant on Civil and Political Rights and rarely it considers the Universal Declaration

on Human Rights. In these cases, the Constitutional Court recognises the international dimension of human rights and considers them in this broad meaning or refers to International and European standards on human rights as means to support the interpretation of national constitutional norms and values. In particular, a special role is given to the European Convention on Human Rights and the European Court of Human Rights' case-law.

Decision n. 188/1980 is particularly relevant because for the first time the Constitutional Court, in its motivation, refers to a supranational jurisdictional body: the European Commission for Human Rights. The Court, in fact, states that the right of defence, protected by art. 24 of the Italian Constitution, includes also the right to a fair trial, as stated by art. 6 of the European Convention on Human Rights and decisions n. 722/60 and 727/60 of the European Commission of Human Rights and affirms that the interpretation of the right to a fair trial, as provided in the quoted decisions, is coherent with the principle laid down in art. 24 Const.

Decision n. 404/1988 deals with the right to housing: the Court affirms, confirming its previous cases, that this right is one of the fundamental features of the democratic State and must not be denied; the Court underlines that this right, even if declared by art. 47 of the Constitution, has nevertheless a broader international dimension: in fact, a fundamental right to habitation is protected by art. 25 of the Universal Declaration of Human Rights as well as by art. 11 of the International Covenant on Economic, Social and Cultural Rights.

In decision n. 125/1992, the Constitutional Court, assessing the constitutionality of the law on the penal system and jail penalty, affirms that this sanction can be given to minors only with the aim of facilitating their re-education and reintroduction in civil society: therefore, the penal legal system concerning minors should be different from the one concerning adults. According to the Court, this is established not only by art. 27, cl. 3, 30 and 31 Cost., but also by art. 14, par. 4, of the International Covenant on Civil and Political Rights.

In decision n. 494/2002, the Court refers to the right to be recognised as a legitimate child, as declared by art. 7 and 8 of the Convention on the Rights of the Child as well as by art. 2 of the Italian Constitution.

In decision n. 120/2004, the Court interprets art. 68 of the Constitution, granting a special immunity to the members of Parliament with reference to the opinions or the votes expressed in the performance of their function. In defining the content of the privilege, the Court refers to the European Court of Human Rights' case-law (decisions 30 January 2003, applications n. 40877/98, *Cordova v. Italy I* and n. 45649/98, *Cordova v. Italy II*), stating that the immunity cannot in principle be regarded as imposing a disproportionate restriction on the individuals' right of access to a court.

Decision n. 154/2004 originates from a conflict of competences between the President of the Republic and The Supreme Court, concerning the interpretation of art. 90 of the Italian Constitution, granting to the President a special immunity for the acts adopted during the performance of his function. In this case, the Constitutional Court, in recognising to the parties of the process before the Supreme Court the right to participate in the judgment on the conflict of powers as well, explains that this choice is justified on the basis of the right to stand before a judge, which is established by art. 24 and 111 of the Italian Constitution as well as by art. 6 ECHR, as interpreted by the Court of Strasbourg (decisions 30 January 2003, applications n. 40877/98, *Cordova v. Italy I* and n. 45649/98, *Cordova v. Italy II*).

In the interpretation of fundamental rights, the Court refers to the European standards (even though not to the European case-law), in decisions n. 505/1995 and 376/2000. In the first one, the Court affirms that, on the basis of art. 6 ECHR, art. 2 and 3 of the European regulation n. 99/63, 25 July 1963, and the Italian legislation on Public Administration and civil servants, it is possible to affirm the existence of a citizens' right to have access to the administrative acts, to participate to their adoption and to challenge them. In the second, the Court declares that, from art. 29 and 30 of the Constitution, as well as art. 8 and 12 ECHR, art. 10 of the International Covenant on Economic, Social and Cultural Rights and art. 23 of the International Covenant on Civil

and Political Rights, it is possible to derive the principle according to which the family deserves special forms of care and protection.

A general reference to the Strasbourg case-law is provided by decisions n. 299/2005, 105/2005 and 205/2005.

Finally, decisions n. 348 and 349/2007 are extremely relevant with reference to the use of foreign law and legal argumentation by the Constitutional Court. The decisions originate from the question of constitutionality of the Italian legislation concerning the dispossession of private property made by Public Authority for reasons of public good. Both the cases are particularly relevant because, on one side, they clarify the position of the European Convention on Human Rights – together with the Strasbourg case-law – in the Italian system of the sources of law and, on the other, they define their role in the interpretation and the implementation of the individual fundamental rights. With reference to the first issue, both the decisions state that, on the basis of art. 117 cl. 1 of the Constitution, as amended by constitutional law n. 3/2001³, the European Convention on Human Rights is an “intermediate law” (*norma interposta*), which, having an intermediate status between the Statute and the Constitution, can be considered by the Constitutional Court as a parameter in its decisions. Furthermore, the Court explains that, considering that the interpretation of the European Convention is reserved to the European Court of Human Rights, the Italian judges and legislator have the obligation to respect both the disposition of the Convention and the decisions of the Court of Strasbourg. Considering the second issue, the Court, on the basis of its previous case-law, affirms that the European Convention on Human Rights has a peculiar interpretative value with reference to Italian legislation: in particular, the Court considers that the European Convention and the Italian Constitution are in a relation of «coincidence and integration», in order to foster the

³ Art. 117 cl. 1 states: «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations».

protection of individual fundamental rights. With the aim to provide a «uniform system of protection of human rights», it is essential the role of the European Court of Human Rights, as well as the Italian Constitutional Court: the former, in fact, has the power to give the final interpretation of the European Convention, while the latter has the competence to assess the compatibility of the supranational dispositions with the Italian Constitution. Therefore, the Court of Strasbourg and the Constitutional Court have different roles, but they share the single aim to protect fundamental rights at the highest possible level (in particular, on this point, see decision n. 349/2007, par. 6.1.1 – 6.1.2). On these theoretical basis, the Court considers art. 1 of the First Additional Protocol to the European Convention on Human Rights as a parameter in order to review the constitutionality of art. 5-bis of the law-decree n. 333/1992. This article is found unconstitutional, because, in case of dispossession of private property by the State, for reasons of public goods, it is not granted a fair indemnity to the former owner.

4. Concluding remarks

In conclusion, in the Italian Constitutional court case-law, vertical influences are quite relevant, but horizontal influences are unusual. This is due not only to normative reasons (an explicit “dialogue clause” is lacking in the Italian constitutional and legal framework on judicial review of legislation), but also to some contextual issues. With reference to the latter, for example, the Italian Constitutional Court usually does not participate to the International Conferences (for example, it did not participate at the World Conference on Constitutional Justice held in Cape Town, South Africa, on 22-24 January) and the cooperation with the Venice Commission is very limited. On the Venice Commission website, only one report, concerning media freedom, concerns Italy. It is worth mentioning, anyway, that former Constitutional Judge Guido Neppi Modona is currently deputy member of the Venice Commission. Moreover, in the judges curricula, at present, foreign languages and comparative law knowledge are not very relevant. In fact, for a long time, foreign language education has been excluded

from the Italian schools of law and only a few judges, due to their personal education and experience, are fluent in English or other foreign languages (see e.g. judges Cassese or Tesaurò). Nevertheless, in the last years, the role of foreign language education and exchange programmes (in particular Erasmus, Socrates, etc., as well as exchanges in doctoral studies) is progressively increasing. In particular, a few years ago English classes have been introduced into Law curricula, even though the quality and the level of the programmes is very much differentiated among universities. It is possible that, in the future, due to these improvements, the knowledge of foreign languages and the exchange programmes will strongly affect judges' attitude. With reference to comparative law, this method is quite well established in the Italian legal doctrine. Nevertheless it has been introduced as compulsory subject in the Italian schools of law only a few years ago (previously, it was included only in the curricula of political sciences faculties) and it is not included in the programmes of the post-graduate schools for legal professions. Finally, in the Constitutional Court there is a special comparative law department, with the task of providing comparative law studies: nevertheless, the judges do not usually reserve high consideration to them.