This study of the use of foreign precedents concerns a sample of 18 supreme and constitutional courts across four continents and belonging to the two main legal traditions. The choice of countries was beyond our control but the sample is representative nonetheless (despite the absence of Africa\(^1\)).

The practice of explicitly applying foreign precedents appears to be limited from both a quantitative and a qualitative point of view\(^2\). Nevertheless, the findings vary between the group that cites a great deal\(^3\) and that which cites very little\(^4\); they therefore merit closer examination in order to show what separates the two groups fundamentally.

**The scope of the study on the use of foreign precedents by constitutional courts**

Why apply foreign precedents when there are already various sources of domestic and international law available to the court in interpreting the constitution? Foreign precedents pose theoretical problems relative to constitutional interpretation, which problems must be put into context.

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\(^1\) It is worth noting that Africa is often left out of international comparative studies, with the exception of South Africa, which is essential to any such research.

\(^2\) This has already been demonstrated: T. Groppi, M.-C. Ponthoreau, (eds.) *The Use of Foreign Precedents by Constitutional Judges*, Oxford, Hart, 2013. Compared with the sample of sixteen courts proposed for that particular publication, the present report is based on new case studies: Argentina, Belgium, Brazil, Croatia, France, Greece, Italy, Latvia, the Netherlands, New Zealand, Portugal, Singapore and Venezuela.

\(^3\) This group is made up of the High Court of Australia; the Supreme Courts of Canada, New Zealand and Argentina; and the Constitutional Court of Portugal.

\(^4\) This group is made up of the Constitutional Courts of Austria, Croatia, France, Germany, Latvia and Taiwan; and the Supreme Courts of Brazil, the United States, Japan, the Netherlands, Greece, Singapore and Venezuela.
All the reports emphasised a double relationship: one with the national constitution, the other with legal tradition. The purpose of foreign precedents is always one of persuasion: no court – even in a common-law system – would consider itself bound by a foreign precedent (with the exception of the Supreme Court of Argentina in its initial stages).

The introduction of the comparison of precedents amongst the methods employed in interpreting a constitution may itself rest on a number of constitutional provisions. Article 39 (1) of the 1996 South African Constitution is now the most renowned constitutional provision empowering judges to interpret the Bill of Rights in the light of international law and, potentially, foreign domestic law. A number of European constitutions – themselves expressions of the transition to democracy – have included directives on interpretation favouring constitutional interpretation based on international human rights legislation and, in particular, the Universal Declaration of Human Rights. This includes Article of the 1978 Spanish Constitution and above all Article 16.2 of the 1976 Portuguese Constitution. The reports from Croatia and Latvia emphasise the role played by the case law emanating from European Court of Human Rights and, more generally, Europe’s constitutional heritage. It is indisputably in the field of rights and freedoms that case law has circulated the most. Such openness to foreign domestic law and international law constitutes, according to the Portuguese reporter, an important element – though not a determining one – in explaining the frequency with which foreign precedents are cited. The Croatian reporter even considers that this can in no way prevent unforeseeable practices.

Nonetheless, membership of "the open society of interpreters of fundamental rights", to paraphrase Peter Häberle, is a determining factor in the "ideology of interpretation" reproduced in legal doctrine and case law. Both can pursue the implementation of the values of positive law or, conversely, seek to withdraw from them. In putting forward a particular interpretation of a legal rule, the author thereof expresses an ideology that aims to implement those values or, more exactly, favour some values over others. Those basic values conveyed by positive law are its evolving nature (in other words, its ability to adapt to social change) and its foreseeable nature (i.e. legal certainty). J. Wroblewski matches these extreme values with dynamic and static ideologies that are the subject of practical compromises in judicial reality. However, these demand interpretative activity in their objectives and, therefore, in selecting directives for such interpretation.

The static ideology is well illustrated by the position adopted by Justice Antonin Scalia of the United States Supreme Court, for whom borrowings may only apply in drafting a constitution, in its interpretation. He is part of an interpretative trend that is far from favourable towards contributions from outside the jurisdiction, particularly in the interpretation of the Constitution of 1787 in terms of social developments: “originalism” (or the original intent of the Founding Fathers) advocates an interpretation that is as close as

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5 Report presented by Sanja Baric.
6 Report presented by Janis Pleps.
7 Report presented by Rui Manuel Moura Ramos.
possible to the original text\textsuperscript{10}. Conversely, the use of foreign law in interpreting the constitution is an expression of the open and dynamic ideology. This method ranks amongst those that allow a constitution to adapt more readily to social and political developments. In Canadian legal doctrine, the constitution is often compared to a tree: “The tree is rooted in past and present institutions, but must be capable of growth to meet the future”. The Justices of the Supreme Court of Canada are of the view that this doctrine “mandates that narrow technical approaches are to be eschewed”\textsuperscript{11}.

The use of foreign precedents is related in part to the notion that a judge has of his role in passing judgement and, therefore, of the national constitution. The Portuguese and American cases\textsuperscript{12} are interesting precisely because they deviate from the usual analyses, which consist in supporting the view that courts in common law jurisdictions frequently cite foreign precedents, unlike courts in civil law systems. In the case of common law jurisdictions, these tend to view the law as the statement of a kind of "transnational" unity: inspiration has been drawn everywhere from the English technique, and particularly the doctrine of precedent under which the judge follows a preceding decision, unless he is distinguishing the case, whereby he rules that the ratio of the precedent does not apply to materially different facts. Furthermore, a number of countries have coexisted with the United Kingdom within the same political whole. Given that the common law tradition is the subject of an attachment to an entity more vast than the State, it follows that it will be more favourable towards the citation of foreign precedents as a result. This factor doubtless plays a determining role for the Australian\textsuperscript{13} and New Zealand\textsuperscript{14} reporters. As recalled by the latter, for a long time the Judicial Committee of the Privy Council acted as a court of appeal and its precedents were restrictive. The Supreme Court of New Zealand took on that same role in 2003. The decisions handed down by English courts continue to be cited even though, in constitutional matters, the English experience is less salient nowadays than in the past owing to developments connected to the form of government and European integration.

The weight of tradition is deeply felt with the differences in methods and reasoning: the common law tradition gives precedence to the pragmatic approach and the importance of the facts on the one hand, and to inductive reasoning on the other. Analogical reasoning is frequently encountered. Consequently, the use of foreign precedents does not seem “foreign” or strange but rather is part of the judicial landscape. However, the Supreme Court of the United States remains one of the few common law courts in the world to make only exceptional reference to foreign precedents. This reluctance lies in the significant methodological quarrel between judges wishing to stick to a “conservative” reading of the constitution and those supporting a “liberal” interpretation of the same. This controversy is rooted in a constitutional revision procedure that is particularly difficult to implement. The exchanges between Justices Scalia and Breyer have no equal outside the United States and


\textsuperscript{11} Collection of decisions relative to the Canadian Charter of Rights and Freedoms, General Principles of Interpretation, available on the Canadian Institute of Legal Information website: http://www.canlii.org/ca/doc/chart/app-a.html.

\textsuperscript{12} Report presented by Alain Levasseur.

\textsuperscript{13} Elisa Arcioni and Andrew McLeod.

\textsuperscript{14} W. John Hopkins.
confirm the significance of the issue of interpretation there. A number of reports (including those from Austria, Greece, the Netherlands and Venezuela) even stress the fact that the issue is not discussed in their respective countries.

Following the example of the US Supreme Court, the Supreme Court of Singapore is also habitually presented as a common law court that rarely cites foreign precedents. While this analysis is confirmed by the report on the Singaporean Supreme Court, it must however be qualified as the Court has increasingly made reference to foreign case law since 2007. The reporter stresses that the increase in the number of citations is a corollary to the increase in the number of constitutional cases on which the Court has ruled: few such cases are heard (153 between 1963 and 2013, an average of 3.06 cases per year), which explains why the citation of foreign precedents remains the exception despite it being on the rise.

Conversely, reasoning by means of abstract categories – deductive reasoning, therefore - is the dominant trend in Romano-Germanic legal systems. This leaves only marginal room for analogical reasoning and, therefore, the citation of foreign precedents. The doctrine of precedents is largely unknown in the civil law tradition. Nevertheless, foreign precedents are frequently cited in a number of countries in South America though these belong to that same civil law tradition. Constitutional law in those countries has indeed been heavily influenced by US constitutional law (federal State, presidential government and, above all, establishment of a supreme court modelled on the US Supreme Court). The Argentine report even describes the relationship between the American Constitution and the Argentina’s 1853 Constitution as a "genetic" one. The current Constitution, which was revised in 1994, is presented as having rid itself of the US “footprint”, notably with Article 75 (22) which grants constitutional status to several international treaties including, in particular, the American Declaration of Rights and Duties of Man and the Universal Declaration of Human Rights.

In spite of the fact that the Argentine legal system is a Romano-Germanic one, its Supreme Court frequently cites foreign precedents and, more specifically, American case law. While Brazil and Venezuela share the same characteristics as their neighbour, in recent years (2000 – 2013), the Supreme Tribunal of Justice has cited very few foreign precedents and the same applies to the Supreme Court of Brazil for the years 2006 – 2012 (which nonetheless represents the period during which the Court has seen the number of such citations increase slightly). These two courts are faced with massive litigation (for the periods considered, both handed down more than 34,000 decisions), which explains the low number of foreign precedents cited. The Japanese Constitution of 1946, drafted by the American armed forces, was also heavily Americanized, though without this being translated nowadays into a regular practice of citing American precedents (even if American case law is without doubt the most significant source of inspiration).

15 Two other common law jurisdictions are just as ill at ease with this practice: Singapore and Malaysia. See C. Saunders, ‘Judicial engagement with comparative law’ in T Ginsburg, R Dixon (eds), Comparative Constitutional Law, Northampton, E Elgar, 2011, p. 574.


17 Report presented by Julio César Rivera Jr.

18 With the entry into force of the new constitution at the end of 1999 and the creation of a socialist State, the old practice of citing foreign precedents has dried up: report by Claudia Nikken.

19 Report presented by Ana Lucia de Lyra Tavares and Adriana Vidal de Oliveira.

20 Report presented by H. Yamamoto.
Legal traditions do not explain everything, but they do constitute more or less fertile ground for transplantations. This leads to an examination of the institutional context as well as the weight carried by those interpreters; there is, in fact, a range of factors that explain the greater or lesser use of foreign precedents.

**The institutional context and the weight carried by interpreters**

Other elements linked to constitutional courts do indeed have an important part to play. A discursive, narrative and analytical judicial style, supported by the practice of judges delivering individual opinions, is thus much more propitious for the use of foreign law to interpret the constitution, as it reveals the interpretative and decisional process as an exchange of arguments leading to a judicial decision. The practice of judges delivering separate opinions, each arguing a different possible interpretation of constitutional provisions facilitates the emergence of an evolving case law and the adaptation of the constitution. On the basis of their mission (i.e. ensuring the observance of the constitution), myriad constitutional courts operating within Romano-Germanic legal systems have freed themselves to a great extent from the tradition under codified law that confers a passive role to judges. Amongst the various cases studied, it can therefore be seen that for those courts in which separate opinions are permitted, there is much more frequent use of foreign precedents, though this is by no means systematic. This is what emerges from the reports on the German and Croatian Constitutional Courts. Conversely, as is highlighted in the Italian report, where separate judicial opinions are not permitted, the practice of citing foreign precedents can only be limited. The editorial style (short decisions based on the judges’ unanimity) goes hand in hand with a method of reasoning in which the doctrine of precedent is unknown. These aspects are put forward in the French report to explain the lack of explicit reference to foreign precedents on the part of the Constitutional Council which is, moreover, confined by very narrow time constraints in delivering judgements.

This does not prevent a number of judges from developing a particular interest in the movement of case law or from displaying their interest in that practice in their articles and presentations: e.g. Guy Canivet in France or Sabino Cassese in Italy. This is all the more obvious for those working in courts that allow separate judicial opinions: e.g. Michael Kirby in Australia; Claire L’Heureux-Dubé and Frank Iacobucci in Canada; Lord Cooke in New Zealand; Stephen Breyer in the United States.

Generally speaking, a judge who has spent time abroad, learned in foreign law and working in a context that is open to outside contributions will more readily examine foreign solutions and include such an argument in his or her reasoning. It is now a regular occurrence for judges from the various constitutional courts in Europe to meet and discuss shared legal problems. For lawyers from common law jurisdictions, going abroad to receive training is a frequent occurrence and, consequently, they do not hesitate in seeking arguments from outside their own legal system. Foreign precedents are therefore frequently put forward by judges in their decisions.

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21 Report presented by Sebastian Graf von Kielmansegg.
22 Report presented by Maurizia De Bellis.
23 Report presented by Alexis Le Quinio.
24 One may also cite examples beyond the scope of the cases studied for the Congress of Vienna: Arthur Chaskalson in South Africa; Aharon Barak in Israel; John Murray in Ireland; Genaro Gongora in Mexico, etc.
parties to an action as part of their submissions. This is inconceivable, for instance, for an Austrian lawyer imbued with a formal legal approach. Nevertheless, parties in a constitutional case are now increasingly raising similar arguments. This is highlighted by both the Austrian and the Italian reports, even though their courts are unaware of the argument in practice. Foreign precedents may also be put forward by an amicus curiae, as mentioned in the Argentine and Brazilian reports. There again, the practice is not admitted by all courts. Contributions from amici curiae, often defended by NGOs, frequently rely on comparative studies. They have sometimes prompted some courts, reticent with regard to the citation of foreign law (such as the US Supreme Court), to cast off their usual reserve and openly draw inspiration from international law and foreign law where the case in question lends itself to it. Finally, most courts are now part of a network of courts, such as the Association des Cours Constitutionnelles ayant en Partage l’Usage du Français (Association of Constitutional Courts Working in French) or even the World Conference on Constitutional Justice organised by the Venice Commission. It is, however, difficult to assess the effects of such contact on in expanding the horizon of constitutional case law. As can be understood from the Belgian report, it can only be maintained that such networks, and the informal contact that they encourage, wield an implicit influence.

The results of the study on the use of foreign precedents by constitutional courts

Since this area of research became central to comparative constitutional studies, it must be admitted that a certain amount of confusion reigned as to the subject(s) discussed by judges. This is because judges often do not explicitly cite foreign material (constitutions, legislation, doctrine, etc.), or else do so in an incomplete way or make even more vague reference thereto without necessarily identifying those materials with any degree of precision. There are certainly clues that allow us to gauge the implicit influence of foreign precedents. Nonetheless, a number of practices can be easily identified and confirm the results of past research.

Explicit use is limited from a quantitative point of view

Explicit use of foreign precedents proves to be limited from a quantitative point of view. This first observation concerns above all those constitutional courts working in a civil law framework. In the common law system, judges are more willing to cite foreign case law. Unquestionably, the case of the Supreme Court of New Zealand alone indicates that this practice is a habit: the court cited foreign precedents in 33 out of 34 constitutional cases between 2003 and 2013, almost 100%. For more established courts as well as those where it was not possible to conduct quantitative research for the entire period of activity, the results are just as remarkable in their uniformity. The Argentine report thus identifies three stages in the use of foreign precedents by the Supreme Court of Argentina: between 1863 and 1903, the

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25 Report presented by Anna Gamper.


28 T. Groppi, M.-C. Ponthoreau (eds.) op. cit.
Court made extensive use of American precedents, which had binding force; between 1903 and 1994, American precedents were only of persuasive value but continued to be used extensively; from 1994 to date, the use of foreign (and particularly American) precedents has been in decline, with an increase in the use of international human rights treaties to which the Constitution conferred constitutional weight when it was revised in 1994. In the Australian report, the emphasis is rather on the increase in citations in constitutional cases coming before the High Court: for the 2005-2008 period, there were 154 citations in 37 constitutional decisions using foreign precedents while, for the 2009-2013 period, there were 263 citations in 37 decisions.\(^{29}\)

As for those courts that cite few foreign precedents, the results are just as striking. The French Constitutional Council has never expressly cited a foreign precedent. Equally, Belgium’s Constitutional Court has cited no foreign precedents to date. Reference to a few foreign decisions can be found in the part of the Court’s decisions that summarises the arguments put by the parties and is therefore in no way part of the Court’s reasoning. The case of Japan is worthy of mention here: only one decision handed down by the Supreme Court makes express reference to a foreign precedent out of 234 constitutional cases\(^{30}\) between 1947 and 2013. Between 1948 and November 2013, the judges at the Constitutional Court of Taiwan made reference to foreign precedents in 133 decisions out of a total of 714 (being 12.32%), but only on four occasions in the majority opinions (being 0.56%)\(^{31}\). Based on a very broad conception of references to foreign sources (given that these include all references to foreign materials such as case law, legislation, doctrine or even generic references, e.g. “the experience of other countries” or "some countries in the European Union"), the Italian reporter picked up only 46 decisions out of 17,174 between 1970 and 2012. The citation of foreign precedents is in effect even more limited as only 10 explicit references were found amongst the 46 decisions that cited foreign sources. Incidentally, it would appear that the Constitutional Court prefers expressly to cite foreign law (32 cases) rather than foreign case law (10 cases). Between 1951 and 2012, the German Constitutional Court handed down 175,545 decisions; indeed, it has witnessed massive litigation, but the report only takes into account those published in the official law reports, these being the most significant decisions (3,176)\(^{32}\). Amongst the latter, 60 cite foreign precedents (i.e. 1.89% of the decisions published, but this percentage would be even lower were all decisions taken into account). Over a shorter period of time (1980-2010) but with a higher number of decisions, the Austrian

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\(^{29}\) The study conducted by E. Arcioni and A. McLeod completes that of C. Saunders, A. Stone, “Reference to Foreign Precedents by the Australian High Court: A Matter of Method” in T. Groppi, M.-C. Ponthoreau (eds.), *op. cit.*, p.13-38.

\(^{30}\) The report prepared by H. Yamamoto confirms the study conducted previously: A. Ejima, “A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents” in T. Groppi, M.-C. Ponthoreau (eds.), *op. cit.*, p.273-300.

\(^{31}\) These figures presented by In-Chin Chen complete the study conducted previously: W.C. Chang, J.R. Yeh, “Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan” in T. Groppi, M.-C. Ponthoreau (eds.), *op. cit.*, p.373-392.

Constitutional Court also cites very few foreign precedents: 60 decisions out of 13251 (i.e. 0.45%) and a further 18 decisions for the period ending August 2013.33

By contrast, Latvia’s Constitutional Court without doubt cites foreign precedents more advantageously as between June 1996 (the date it was established) and September 2013, it handed down 231 decisions, of which 56 make explicit reference to foreign precedents (i.e. 24%). The Latvian reporter states that the 56 decisions that explicitly cite foreign case law contain 126 references thereto. Nevertheless, this practice has been on the decline since 2007: now that it has developed its own case law, it seems that the Court looks less to foreign case law for that which it lacked. Generally speaking, newer constitutional courts seek to bolster their legitimacy by relying on the case law emanating from more established courts belonging to stable democracies (in the case of Latvia, case law from the German Constitutional Court). In this way, they indicate that they belong to the same community. References to foreign law may serve as a means of compensating for a lack of case law for those courts acting in young democracies. The practice in Latvia does, however, invalidate the findings of our previous collective research. We had observed that, in the long term, the explicit use of foreign precedents remained almost unchanged. A slight decrease in the number of citations was noted in 2010 in the decisions handed down by the Constitutional Court of South Africa. This decrease was apparently linked to the recent appointment of judges who were less open to comparisons with foreign law.34 The part played by individual judges is a determining factor here. For instance, all the citations in German case law were mainly attributable to one judge (Justice Ackerman); once he retired from the bench of the Constitutional Court, such citations mostly disappeared.35 In the case of Latvia, reference to (foreign) precedents has waned over time: on the one hand, the Constitutional Court has established its own case law, and particularly in cases concerning the limitations to fundamental rights; and, on the other, the national legal system is understood by a good number of lawyers (and, therefore, judges) as an essential component of national (constitutional) identity (and where reference to foreign case law was once seen as a necessity at the Court’s inception, now there is no further need for it). This is where we find the demarcation between those courts belonging to the common law sphere, where citing foreign precedents is a standard method, and those courts acting within Romano-Germanic legal systems, where the same method is quite out of the ordinary.

This is why, for those courts that make only infrequent reference to foreign case law, the passage of time changes nothing or next to nothing. There is no notable change as the obstacles are epistemological: they are fundamentally linked to the way in which law is conceived and made. Thus the Austrian report stresses the fact that the closed-mindedness of the Austrian Constitutional Court is explained by the resonance of positivist methodology. A recent opening relates to the rules and principles of European law and particularly the European Convention on Human Rights, which has constitutional status under Austrian law. However, citing decisions from the European Court of Justice in Luxembourg and those of the

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European Court of Human Rights in Strasbourg has no impact on other references made to foreign case law, which are still rare. The Croatian report also notes a phenomenon of rejection which is of interest: the few citations of foreign case law are always a fact of the Court’s opinion, and the dissenting judges refuse to cite foreign precedents themselves in their own dissention. Beyond the judicial sphere, it is therefore a strong sense of nationalism that may explain the rejection of that practice as national constitutional identity is in question. As regards courts in Central and Eastern European states, it is doubtless the combination of two factors – belonging to the civil law tradition on the one hand, and a deep attachment to sovereignty on the other – that ultimately leads to a very measured practice in terms of references to foreign case law.

Only three reports highlight a slight increase in the number of citations although such references remain infrequent. For the Italian Constitutional Court, the most notable change since 2000 relates rather to a more rigorous practice: instead of generally citing foreign sources, the Court’s decisions refer to a number of cases that do not necessarily belong to the same legal "family"; further, the Court does not simply cite such sources but also examines them closely. For the Supreme Court of Singapore, the increase relates to a greater number of constitutional cases (individuals increasingly defending their own rights before judges) and, as a corollary to this, there is increased reference to foreign precedents. Finally, for the German Constitutional Court, the slight increase over the course of the last decade is perhaps linked to a greater integration of European legislation into German law; ultimately, however, the reporter notes that nothing fundamental has changed in the Court’s attitude towards the use of foreign precedents.

The case of Taiwan also presents an interesting particularity to be brought to light: while majority opinions rarely cite foreign precedents, dissenting judges are increasingly making reference to foreign precedents. Professors Chang and Yeh had hypothesised that, in the long run, a regular practice of referring to foreign precedents in separate opinions could influence the majority opinion. This is not confirmed by the Taiwanese report: over the course of the 2010-2013 period, 49 dissenting opinions cited foreign cases, as opposed to 32 for 2008-2010, 23 for 2003-2008 and 17 for 1994-2003. The regular increase in citations made by dissenting judges has caused no shift in the number of majority opinions citing foreign precedents (4). This confirms that dissenting judges engage in this practice more readily as they feel freer to do so than majority judges, the latter having to account for the decision and protect the authority thereof. There are therefore quite a number of epistemological obstacles which, in the final analysis, explain the reluctance in citing foreign precedents explicitly and the resulting preference for a “hidden” or general use of foreign materials.

The implicit influence of foreign precedents is difficult to detect

Constitutional judges quite often do not cite foreign sources of inspiration in their decisions, settling instead for a covert use of foreign precedents. It may be argued that this is to avoid any implication that they may breach the terms of their nation’s constitution and, consequently, may not be accused of doing so. Furthermore, while judges who support the use of foreign court decisions do not claim that such decisions are binding but simply useful in better understanding their own constitution, those judges who are against it are no less lively in defending their constitutional law as a whole.

It is appropriate first of all to acknowledge that such implicit influence is difficult to detect as it is not necessarily conscious but, at the same time, it is highly likely. Indeed, judges act in a globalised context that they cannot ignore. They often belong to networks that bring

36 On this notion, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, Paris, Economica, 2010.
together members from the same geographical and/or legal area. The difficulty lies in proving the existence of such indirect influence. One of the most reliable solutions consists in collecting judicial "secrets", but judges are generally reluctant to reveal the ways in which they reach their decisions as they have to observe their duty of circumspection. Very few researchers have pursued this avenue (even though some are either retired or sitting judges).

There are three ways of identifying covert foreign references. Firstly, there are the submissions made by parties seeking additional arguments in foreign case law. The Italian report thus shows that parties to litigation are increasingly making reference to foreign law even though the Constitutional Court ignores these references in the majority of cases. A number of documents may now be accessed on the website for the French Constitutional Council (press release, complete materials on the National Assembly and the Senate, letter of referral), and the documentary record is likely to contain references to foreign materials. A collective work on the Council’s deliberations over the course of its first thirty years (1958-1983) reveals a number of references, and particularly to foreign legislation for the period from 1980 to 1983. Secondly, the university and professional trajectory of judges, which may have led to them studying overseas, is a clue highlighted by quite a number of reports. Finally, there is the role of judicial assistants who, owing to their own legal education, may be particularly open-minded as regards comparative law. The Japanese report underlines the fact that any decision handed down by the Supreme Court was preceded by full comparative research carried out by a judicial assistant. On the contrary, this is not current practice at the Constitutional Council: members of the Council do not have personal assistants, on the one hand and, on the other, the head of the Council’s research department (Mr. Lionel Brau) acknowledges that the department does not specialise in comparative law and also that a study of foreign and/or comparative law may only be envisaged where required by a given decision (recently for Decision no 2013-669 DC of 17 May 2013 concerning same-sex marriage, the Council’s departments compiled a documentary record containing comparative aspects, i.e. the decisions handed down by the Belgian Constitutional Court (1 March 2012), the Spanish Constitutional Tribunal (6 November 2012) and the Portuguese Constitutional Tribunal (9 April 2010). Generally speaking, it is appropriate to highlight the fact that not all courts have a research department specialising in foreign and comparative law. The existence of such a department producing comparative studies at the request of the reporting judges is a determining factor. More specifically, the Italian report reveals that the number of requests for comparative studies has increased over the last decade (30 out of a total of 40 since 1989) and has established a link between the requests made by judges to the comparative law department and the references identified in the Court’s decisions: 8 cases since 2002. This low incidence is due to the absence of dissenting opinions: divisions within the Court are hidden, so references to foreign precedents are anything but consensual. In the case of Japan, the reporter notes that, since the mid-2000s, there has been a tendency on the part of the Supreme Court to be more attentive to foreign sources, but it does not refer explicitly to foreign precedents and those references that are made remain quite general (e.g. “foreign countries”) or refer to foreign legislation. One final observation concerns the particular case of the Netherlands where there is no review of the constitutionality of laws, only lesser regulations. This review is undertaken by the supreme courts (for court and administrative orders). The submissions of the advocates general before the Court of Cassation occasionally contain a discussion of foreign case law.


38 Report presented by par Elaine Mak.
The spheres of influence are generally those that one would imagine *a priori*. It is hardly surprising that the Europeanisation of law should be presented by the Austrian reporter as one of the vectors for such implicit influence. The Japanese report reveals the contribution made by the Supreme Court of the United States: the author highlights the strong influence of American case law whilst underlining the lack of reciprocity. Reference to foreign academic works on the part of Greek, Brazilian and Venezuelan judges appears to be a means for them to draw inspiration from foreign cases without expressly acknowledging it. This circuitous method clearly shows how difficult it is to find traces of foreign case law in decisions and how carefully the data – which is not infallible and is therefore questionable - has to be handled. Finally, a number of courts that do explicitly cite foreign precedents also refer to other materials, sometimes going beyond foreign legal academic works and legislative or government reports: the Supreme Court of Canada cites sociological studies and even literary works.

**Analysis of the use of foreign precedents**

*The practice is limited from a qualitative point of view*

Judges appear to be aware that citing foreign precedents is a risky practice and must, therefore, be measured. This is the thrust in particular of the dissenting opinion of some judges who call for caution. Although they remain few, a number of courts consequently try to contextualise foreign precedents by distinguishing the constitutional systems and discussing the different cases. Only the Constitutional Court of South Africa and the Supreme Court of Canada are part of and characterised by this “virtuous” practice. With a more restricted selection of precedents (essentially from common law jurisdictions), the Australian High Court adopts the usual common-law line of reasoning with regard to foreign precedents and, therefore distinguishing. Other courts opt for a less costly approach in terms of time, research and competence: reference to foreign precedents does not aim to import a foreign solution but rather provide assistance in interpreting a domestic legal issue. As a result, the practice most frequently encountered consists in finding a foreign precedent that backs up the chosen solution without mentioning any precedents to the contrary. In other

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39 The Canadian report presented by Karen Eltis and Jean-François Gaudreault-DesBiens does not follow the proposed questionnaire and provides in in-depth study of the foreign materials other than precedents cited by the Supreme Court of Canada.

40 The opinion of Justice Breyer of the US Supreme Court is well known: *Printz v United States*, 521 U.S. 898, 976. See in particular, the opinion of Justice Kristine Kruma of Latvia’s Supreme Court, case No 2008-03-03, parag.6; that of Justice Wilson of the Canadian Supreme Court, in *R. v. Turpin* [1989] 1 SCR 1296 or in *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211; the opinion of Justice Ackermann of South Africa’s Constitutional Court, *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SA 6 (CC) 48 or that of Justice O’Regan of the same Court, which stresses the dangers of “shallow comparativism”, *Fose v Minister of Safety and Security* [1997] 3 SA 786 (CC) 35; see also the opinion of Justice Macken of the Irish Supreme Court, *Pól O Murchú v An Taoiseach* (2010) IEHC 26.


words, judges often make pragmatic use of foreign cases without concerning themselves with justifying their selection and seeking above all to bolster the desired solution. The British and Americans call this practice "cherry-picking".

Can judges really be expected to behave like informed comparatists, aware of the limitations of comparison? Given that they are limited by the issues brought before them in such cases, can courts really provide a theoretical framework for interpreting the constitution? There is no doubt that we should not ask too much of judges who must, above all, rule on conflicts of interpretation. Since they refer to foreign cases that relate to one same issue, they are more like handymen than theoreticians. Admittedly, even lawyers under common law systems work in a formal, rational world. Common law does not develop according to an abstract rationality but rather a discursive one which gives a prominent place to analogical reasoning and consequentialist argument. Although the majority of constitutional or supreme courts now have a department responsible for comparative studies, it does however seem impossible to ask these to provide full and systematic studies of foreign precedents on all of the issues considered. This explains in part why constitutional courts do not cite their foreign sources of inspiration in their decisions and instead settle for a covert use of foreign law. The most fundamental reason lies, however, in a concern for the acceptance of decisions. Here lies the epistemological fissure between the two traditions. The judges and members of the civil tradition belong to the same legal community and are subject, at least in part, to the same constraints as, in each case, "the interpretation that stands the best chance of being retained is that which reinforces the representation of a transparent legal system that is neither incomplete nor redundant, that is coherent in its aims and in adapting its means to those aims." This approach can only give a subsidiary, even hidden, place within the civil tradition to the comparison of laws in legal reasoning generally and in judicial reasoning in particular. The fact that a court takes its actual audience into account therefore bolsters a conformist, conservative conception of legal rationality. This is why the implicit influence of foreign precedents is most diffuse in courts under Romano-Germanic legal systems.

The purposes of using foreign precedents

Three distinct purposes emerge from an examination of the relevant case law. Firstly, foreign precedents are use as reference points. In other words, it is a matter of providing a framework by listing foreign decisions that have already been handed down on the same issue, such as same-sex marriage. This purpose is seen most frequently in common law jurisdictions. It allows the decision to be handed down to be part of a wider context, by examining what has been done elsewhere without having necessarily to emulate what has already been done — and, therefore, without discussing those precedents. They are instead presented as sources of inspiration with a view to interpreting the national constitution. The objective pursued here is to make it known that the Court is aware that it is not alone in having to rule on the issue which has been brought before it. Several reports reveal that judges make use of foreign precedents when they are faced with a difficult and/or new case concerning the protection of rights and freedoms (with the exception, however, of Italy). The court’s history partly determines the frequency with which it pursues this purpose.


Secondly, foreign precedents serve to reinforce the solution handed down, and this is doubtless the most common purpose as much for those courts that cite a large number of precedents as for those that cite very few. Judges take a two-pronged approach. In an extension of the purpose described above, foreign case law may only be described without being discussed with a view to supporting the decision. Precedents are generally presented in summary form, and even with no specific reference cited. However, unlike the purpose above, they are included in the final reasoning which leads the court to reach its own decision. The court may also take a more in-depth approach: the foreign precedent (as this no longer concerns a range of foreign decisions but rather a limited number of precedents) is discussed as much in the majority decision as in the dissenting judgement(s). This is the approach taken by the Latvian Constitutional Court when it refers to German constitutional precedents. The inclusion of a foreign case in the court’s reasoning then leads to it being considered in its original case-law context and compared with domestic precedents. The Australian reporters note that the constitutional nature of a given case may constitute an obstacle to the importation of a foreign solution by the High Court, which then highlights domestic specificities. The Canadian report stresses that the number of citations is linked to the extent of any disagreement on a given issue. In order to strengthen the acceptance of their decision, judges will cite more precedents, and particularly so when the court opposes the stance adopted by federal government.

Finally – and more infrequently – courts cite foreign precedents *a contrario sensu*. The *a contrario* argument is used in such instances to demonstrate the specific nature of domestic law. The Latvian report thus highlights that the reference made to an American precedent by a party (to litigation) was rejected by the Constitutional Court as “unjustified” as it was deemed too far removed from Latvian case law. Similarly, American precedents relating to the First Amendment were rejected in a case concerning religious freedom by the Supreme Court of Singapore (*Chan Hiang Leng Colin v Public Prosecutor*, 1994). In that decision, and over the period from 1990 to 2006, Chief Justice Yong Pung How developed the ‘four walls’ doctrine, which underscores the inapplicability of American precedents and the specificity of the national constitution. The Canadian report highlights the fact that American precedents on the interpretation of the Bill of Rights are not followed in the majority of cases by the Supreme Court of Canada, which often uses the case law of the US Supreme Court in interpreting the Canadian Charter of Rights and Freedoms; however, it does so in order to distance itself from US case law and identify those traits specific to Canadian society.

*The most influential courts*

The reports confirm that the most influential courts are the Supreme Court of the United States, the Supreme Court of Canada, the Constitutional Court of South Africa and the Constitutional Court of Germany. The circulation of precedents being most widespread amongst common law jurisdictions, British courts are the most cited in Australia, New Zealand and, to a lesser extent, Canada. However, beyond the sphere of influence that is the Commonwealth countries, it is no surprise that the US Supreme Court should be the most cited, even though the decline of the latter’s influence has been highlighted. It benefits both

45 We have already observed the same in our collective research: T. Groppi, M.-C. Ponthoreau, “Conclusion: The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future”, *op.cit.*, p.411-431.

from its seniority and the dissemination of the 1787 Constitution throughout the world. The messianic vocation in which Americans have never ceased to believe amplifies the movement and the worldwide influence of American academia attracts a great many future lawyers. Legal training in a number of countries, such as Israel, is an exact copy of America’s law schools. This Americanisation of law has significant consequences for legal reasoning and on their reference system.

Moreover, this success is part of an international context in which States rally around the liberal model that refers back to the “human rights – pluralist democracy – rule of law” triptych\(^{47}\). This trio opens the door to membership of a large number of international organisations such as the Council of Europe, accession to the European Union or even to benefitting from financial assistance from the World Bank. Nevertheless, the Canadian\(^{48}\) and German models are do compete with the US model, which is often perceived and rejected as the “anti-model”\(^{49}\). In order to compensate for the US model’s loss of influence, the citation of foreign decisions by the Justices of the US Supreme Court in their opinions may be analysed in terms of jurisprudential expansion. Oscillating between pragmatism and universalism, some constitutional courts, in wishing to see the dissemination of their case law, thus seek to “return the favour”\(^{50}\). This is a response to the desire to assert the international influence of a given model; this has already been clearly established for the Supreme Court of Canada\(^{51}\).

The influence exerted by a constitutional court is often more intricate, linked to geographical location and/or similarities between constitutional texts and/or a shared language. The Venezuelan report emphasises above all the influence of the Spanish Constitutional Tribunal, together with that of the Colombian Constitutional Court, on the Supreme Tribunal. The Supreme Court of Singapore refers above all to precedents from the courts in Malaysia and India, as the Bill of Rights under the Singaporean Constitution is a legacy of the Malaysian Constitution, which itself was inspired by the Indian Constitution.

The language factor is worthy of particular scrutiny. The influence wielded by German constitutional case law is now losing momentum owing to a lack of translated decisions, except in Central and Eastern European countries and, to a lesser extent, in Latin America (especially Brazil). In particular, the Latvia report highlights the fact that citations of precedents from the German Constitutional Court represent 39% of all references to foreign

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\(^{50}\) This position was defended by the American judge S. Breyer during a debate organised by Norman Dorsen: “The relevance of foreign legal materials in US constitutional cases: A conservation between Justice Antonin Scalia and Justice Stephen Breyer” 3, I-CON, 2005, pp. 519.

case law. The Latvian Court also refers to commentaries from the German Basic Law and, more generally, to German legal doctrine. For the Croatian Constitutional Court, German case law is also the principal source of inspiration. The German Constitutional Court’s prestige still applies in a favourable regional context. In the case of Latvia, the other Court that is often cited is the Constitutional Court of Lithuania (17%) and, with the Austrian Constitutional Court being cited in Croatia. The close ties between the German and Austrian Constitutional Courts are revealed by the Austrian report, which also highlights the influence of German case law owing to the relationships between the national constitutions and respective constitutional courts. It is, incidentally, almost always German constitutional case law that serves as a source of inspiration for Austrian judges, who cite foreign precedents only rarely and are bound by European case law. Reciprocity on the part of the German Constitutional Court is not as obvious: references to Austrian case law only comes fourth after American, Swiss and French precedents.

English is indisputably a not inconsiderable factor in explaining the extent of the use of foreign precedents. It is appropriate, in this respect, to note that for those countries not bound by the European Convention on Human Rights, the case law emanating from Strasbourg is cited by the Supreme Court of New Zealand, the Supreme Court of Canada and the High Court of Australia. Access to that case law in English doubtless explains the frequency of the citations, whereas the influence of French is only noticeable in Canada and, to a lesser extent, in Central and Eastern European countries (Belgian constitutional case law is also used in particular by the Latvian Constitutional Court) and in South American countries. There are certainly cultural reasons (not least bilingualism in Canada) together with the exportation of the *Code civil* and the *Code du droit administratif* which explain these reference to French case law.

The report from Japan shows that the Supreme Court has only recently begun to translate its decisions (available on the Court’s website) into English. This is in effect an essential criterion for ensuring that case law gets circulated. In the Japanese case, its influence remains limited and is only really observed at the Constitutional Court of Taiwan as many judges there (originally law professors) were trained most notably in Japan (and in Germany or the United States). With its CODICES website: http://www.codices.coe.int.

Objections to the hypothesis on judicial dialogue

The gap between the two groups is not only quantitative but also lies in the differences between the ways in which foreign case law is cited and employed. What is most striking, however, is that common law jurisdictions keep to themselves, rarely venturing outside their own cultural sphere; only the Supreme Court of Canada demonstrates an interest in offering a broad range of citations (it will be noted that it shares this trait with the Constitutional Court of South Africa and that both courts deal with mixed laws). The hypothesis on communication between courts or even on judicial dialogue, so often supported following the initial research

52 See the CODICES website: http://www.codices.coe.int.
conducted by Anne-Marie Slaughter\textsuperscript{53} in the Anglo-American world, rests in fact on a group of courts belonging to the same family, but the “family meetings” are closed to those who do not share the same cultural aspects, and in particular the language. The study conducted by the Canadian reporters on foreign materials other than those precedents cited by the Supreme Court confirms the latter analysis as the Court refers primarily to materials in English from common law countries. This therefore contextualises the Court’s openness and its "virtuous practice" seen in the citation of foreign precedents. The reporters thus argue that the Supreme Court of Canada is firmly anchored in a dynamic of “limited universalism”.

Despite the development of comparative constitutional law in the Anglo-American world,\textsuperscript{54} there is nothing to suggest greater openness to courts other than those that are English-speaking. Nonetheless, translations are multiplying and there are now many courts that have a website where case law is available in English. The case law of the European Court of Human Rights, which can be accessed in English, is increasingly cited by common law courts as well as South American courts. Some courts in Europe can also be seen to be turning more readily to that case law in order to avoid discussions on the legitimacy of using foreign sources. This is what emerges from the Greek report\textsuperscript{55}.

Those courts that cite very little are not unaware of foreign precedents for all that, as is shown by the implicit influence at play; the courts simply prefer not to cite them. When they do refer to such precedents, it is in the same vein as those courts that cite a great deal: to bolster the decision handed down, mostly in the field of the protection of rights and freedoms. Institutional issues lend themselves less well to the citation of foreign precedents, as they are often expressions of traits specific to institutional systems. It is no doubt unrealistic to think that judges will abandon such pragmatic use of foreign precedents. A more explicit use would, however, suppose more substantial reasoning with greater attention paid to the selection of precedents. Even assuming that courts are engaged in a more virtuous practice, the fact remains that the main objective pursued by the use of foreign precedents is not communication between courts, but above all to strengthen the decisions handed down\textsuperscript{56}. It is therefore inappropriate to talk in terms of “dialogue” from both an empirical and a conceptual point of view\textsuperscript{57}.

Why does doctrine feel the need to speak of a “thing” that does not really exist? There is no doubt “something” that it is right to name. A representation of this “thing” does not exhaust the reality of it. It takes part in its own construction. Indeed, legal doctrine plays a part in creating the image itself through its imagination and conceptualisation of the image. Citations of foreign precedents reveal "something" that has doubtless been incorrectly named. Nonetheless, it is right not to underestimate the power of suggestion that this misnomer holds: it is part of the transformation of our collective approach to the normative significance of new


\textsuperscript{54} M. Rosenfeld, A. Sajo (eds), The Oxford Handbook of Comparative Constitutional Law, Oxford, OUP, 2012.

\textsuperscript{55} Report presented by Paraskevi Mouzouraki.

\textsuperscript{56} This is clearly shown by the empirical research conducted previously with Tania Groppi and is, to my mind, confirmed by the reports presented in Vienna.

\textsuperscript{57} In this sense, see also the conclusions of the study conducted on the basis of a reduced range (Supreme Court of the United States and the Constitutional Court of Taiwan) D. Law, W.-C. Chang, “The Limits of Global Judicial Dialogue” (2011) 86 Wash. Law Review, pp. 523
legal objects. While the theories may not be true, they may however contribute (with the help given by a comparison of different laws\textsuperscript{58}) to an understanding of the truths that reality itself cannot teach us. The work is far from complete; indeed, there remains the task of inventing transnational constitutional law\textsuperscript{59}.

\textsuperscript{58} On the relationship between legal theory and comparative law to better understand the diversity in legal reality, see M.-C. Ponthoreau, Droit(s) constitutionnel(s) comparé(s), cit.