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Open data of judicial decision in comparative perspective: towards a reshaping of source theory?[*]

Adottando una prospettiva comparata, l'autrice esplora le ricadute *teoriche*, in punto di teoria delle fonti del diritto, di un fenomeno eminentemente *pratico*, ovvero la messa a disposizione online gratuita delle decisioni di merito.

Adopting a comparative perspective, the author explores the *theoretical* repercussions, in terms of the theory of the sources of law, of an eminently *practical* phenomenon, namely the free online availability of trial Courts' decisions.

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1. Introduction

The convergence of civil and common law models is a classic theme of comparative law, so that it seems difficult to imagine anything to add to the extensive literature on the subject. What is changing today, however, is the perspective from which the same phenomenon can be viewed, thanks to the advent and development of artificial intelligence. This is the link connecting three very different systems such as the Chinese, French and Italian ones, which, at different times, have experienced an innovation that promises to change – and is already changing – the theory of the sources of law: the open data of judicial decisions. Such an initiative, firstly adopted in China, without too much resonance in Europe, has soon been replicated in France – whose legislative events, also in terms of certain debatable choices, have already been much discussed – and, finally, in Italy, where, since 14 December 2023, all the decisions rendered by the trial courts since 2016 are freely accessible by the public.
Now, the availability of such a vast amount of material poses several challenges and promises multiple developments, with certainly different meanings and implications, also due to the constitutional and legal structure of each Country. However, what the three experiences have in common is – on the one hand – the historic (formal) rejection of the theory of binding precedent, which now contrasts with the sudden visibility of lower Courts jurisprudence that has so far remained hidden, and – on the other hand, and consequently – the need to redefine the relationships among such massive jurisprudence with the decisions of the Supreme Courts.

[*] The text replicates, with the addition of essential bibliographical references, the lecture given at the Joint AIDC/DPCE Young Scholars Conference "*Itineraries of Legal Comparison. New Issues and New Perspectives*", Link Campus University, Rome, May 16-17, 2024.

2. Supreme courts' common tendency to extend their powers

The Chinese legal system, on the one hand, and the Italian and French ones, on the other, could not appear more different, and in many respects they do are, starting with their respective constitutional foundations: the separation of powers, currently enshrined by most European Constitutions, is not provided for in the Chinese one. There, by contrast, all powers are concentrated in the National People's Congress (NPC), and the only possible distinction is that between functions, each of which, in principle, is exclusively attributed to a different organ, but still under the control of the NPC (and, ultimately, of the Communist Party). The judiciary is not understood as separate and independent order or power, as it is in Italy and in France, but as an administrative articulation, rigidly hierarchised and globally accountable to the NPC: moreover, the Basic Law does not even contemplate a specific term for 'the Judiciary', but merely regulates 'the Courts'; and, although Art. 126 Const. states that each of them «exercise[s] judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual»[1], the subsequent provisions place each level of jurisdiction under the «supervision» of the higher ones, and even the Supreme People's Court (SPC) – albeit defined by Art. 127, para. 1, Const, as «the highest judicial organ» of the State – is accountable to Congress and its Standing Committee (Art. 128 Const.).

Against this background, the SPC has over time slowly attempted to increase its powers, at least in the area of interpretation, but the formal rule remains that of the subordination of the judge to the law: not only as a corollary of the authoritarian state, but also (and, perhaps, even before that) as it corresponds to the centuries-old Chinese tradition, in which the doctrine of stare decisis has never had any citizenship[2].

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[1] On the notion and historical developments of judicial independence in China, see, among others, R. PEERENBOOM, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in ID. (ed.), *Judicial Independence in China. Lessons for Global Rule of Law Promotion*, Cambridge, 2010, p. 69 ff.; C. MUGELLI, *Judicial Independence in China: A Comparative Perspective*, in *Acta Juridica Hungarica*, 2013, p. 40 ff.; L. FENG, *The Future of Judicial Independence in China*, in H. P. LEE - M. PITTARD (eds.), *Asia-Pacific Judiciaries. Independence, Impartiality and Integrity*, Cambridge, 2017, p. 81 ff.; Z. YANRONG, *The Way to Understand the Nature and Extent of Judicial Independence in China*, in *Asian Journal of Law and Society*, 2019, p. 131 ff.

[2] B. AHL, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, in *The China Quarterly*, 2014, p. 122.

It is true that official compilations of «cases of general legal effect» have been found since imperial times (cfr. C. XINGLIANG, *China's Guiding Case System. A Study on the Mechanisms of Rule Formation*, in *Peking University Law Journal*, 2014, p. 238 ss.; THE HARVARD LAW REVIEW ASSOCIATION, *Chinese Common Law? Guiding Cases and Judicial Reform*, in *Harvard Law Review*, 2016, p. 2215 s.); but the phenomenon is easily explained by the concentration of all powers in the head of the Emperor (J. DENG, *The Guiding Case System in China's Mainland,* in *Frontiers of Law in China*, 2015, p. 452), whose will – regardless of the form in which it was expressed – always had identical efficacy: thus, once it was manifested as a decision in an individual case

From this angle, similarities begin to emerge, in at least two respects: firstly, the idea of jurisprudence as a source of law has long been denied in both Italy and France too, also by virtue of the normative datum. Indeed, not only both systems do not formally contemplate jurisprudence as a source of law, but article 5 of the French Civil Code expressly prohibits the so-called *arrêts de règlement,* that is, a decision of general application; and such a prohibition is also easily derived from article 101, para. 2, of the Italian Constitution, which has already been recalled to argue that giving a single judgement a normative role would end up eliminating any difference between judge and law[3].
However – and we come to the second similarity –, the existence of these limitations did not prevent French and Italian Supreme Courts to take on, more and more explicitly, a normative role. There are many indications of this trend, but it will suffice here to recall, on the one hand, the doctrine of living law, which originated in Italy but was subsequently adopted by the French *Conseil Constitutionnel*[4], which implies the recognition that the law in force is not the *law tout court*, but the *law as interpreted*; on the other hand, the phenomenon of the temporal modulation of judgements' effects, which reveals the appropriation by the Supreme Courts of a function traditionally entrusted to the legislature, namely that of determining the *dies a quo* of application of a law[5].
If these few remarks seem to be enough to show the commonality of the trend, it is common ground that the progressive use of artificial intelligence in the judicial sector constitutes a global phenomenon too; hence, the opportunity – if not the necessity – to assess how the use of AI tools has impacted, or may impact, the evolution of source theory, although – as stressed – already underway.

(*li*) and included in a compilation, «the case that was the basis of this *li* was gradually forgotten. In this sense, ancient Chinese case law was actually [...] a system for the extinction of precedent» (C. Xingliang, *China's Guiding Case System*, *supra*, p. 244).

[3] G. Verde, *Mutamento di giurisprudenza e affidamento incolpevole (considerazioni sul difficile rapporto fra giudice e legge),* in *Riv. dir. proc.,* 2012, p. 18.

[4] It is not by chance that French Constitutional Court statement following which «any litigant has the right to challenge the constitutionality of the effective meaning that a consistent interpretation of case law confers to a legal provision» (Conseil constitutionnel, 6 octobre 2010, n° 2010-39 QPC and 14 octobre 2010, n° 2010-52 QPC) appeared shortly after the publication of the article by G. Zagrebelsky, *La doctrine du droit vivant et la question de constitutionnalité*, in *Constitutions,* 2010, p. 9 ff. On Conseil Constitutionnel's reception of the Italian doctrine of living law see N. Maziau, *Brefs commentaires sur la doctrine du droit vivant dans le cadre du contrôle incident de constitutionnalité*, in *Rec. Dalloz,* 2011, p. 529 ss.

[5] I have dealt with the subject extensively in V. Capasso, *Giudici consequenzialisti. La modulazione temporale degli effetti delle pronunce tra efficacia* ultra partes *ed effettività della tutela*, Napoli, 2020.

3. Open data as a vehicle of legal transplaint

Firstly, the use of artificial intelligence can speed up change. This seems to have been the case in China: here, if the legal and political background explains the extreme caution over time adopted by SPC while promoting precedent's valorisation, things changed with the beginning of the new millennium, when the Court embarked on a real policy of endorsing case law, as part of a broader reform promoted by the Court itself through a series of Five-Year Plans. To that purpose, an initial step was the selection of the so-called guiding cases[6], i.e. judgments (from any Court) deciding matters of special importance, which are outlined, summarised and then published, with an obligation for subsequent judges (not to follow, but) to quote them[7]. This already constitutes a first expansion of the Court's control, which, as a Court of appeal, is instead able to review only a very small part of the litigation. In fact, although Chinese judicial system is articulated on four levels of Courts[8], parties are normally only allowed one appeal[9]. Consequently, «a large amount of cases stop in the Intermediate People's Court»[10], effectively preventing the SPC from exercising effective supervision over the jurisprudential development[11]. By selecting guiding cases, therefore, the SPC ends up exercising its review even in matters in which it could not ordinarily intervene.

But, as noted, «[w]hile the guiding-cases mechanism has brought certain case-law elements into the Chinese legal system, more significant changes in that direction have been effectuated by the prevalent use of algorithms in courts»[12]. Indeed, the scope of the Five Years

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[6] As J. Deng, *Should the Common Law System Be Intelligentized?: A Case Study of China's Same Type Case Reference System*, in *Geo. L. Tech. Rev.,* 2019, p. 223 ff., reminds, «[i]n 1985, China's highest court, the Supreme People's Court of China (SPCC) began to publish "typical cases" […] in its official publication, the Gazette of SPCC.1 Since then, there have been debates about whether or not to adopt "precedent" into China's legal system. Against some resistance, SPCC has made consistent efforts to increase the role of prior cases in China's legal system, leading to the establishment of the guiding case system in 2010».

[7] When detecting an analogy between their case and a guiding case, subsequent judges must refer (*canzhao*) to the latter (Art. 9 Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance",2015) and mention it in their reasoning, but cannot use it as the basis for adjudication (Art. 10 Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance", 2015).

[8] Starting with the lowest grade, the Basic People's Courts, the Intermediate People's Courts, the High People's Courts and, at the highest degree, the Supreme People's Court.

[9] M. Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China, in Washington International Law Journal,* 2017*,* p. 295.

[10] J. Deng, *The Guiding Case System*, *supra* note 2, p. 461.

[11] The phenomenon is not limited to China. For UK, see, e.g., UK, G. Drewry- L. Blom-Cooper- C. Blake, *The Court of Appeal*, Oxford, 2007, noting (in the back cover) that «the Court of Appeal [...] occup[ies] its crucial position as, to all intents and purposes, the court of last resort — indeed, a supreme court — for most civil appellants».

[12] G.G. Zheng, *China's Grand Design of People's Smart Courts,* in *Asian Journal of Law and Society*, 2020, p. 570.

plans has always been larger than the just mentioned one[13]: in particular, among the reforms aimed at digitising the judicial system, the establishment of a national database of published judicial opinions, together with the implementation of software programs that make it possible to interconnect all Courts and to search and compare precedents, made it possible the establishment of the so-called Like-Cases Recommendation System (LCRS) or Same Type Case Reference system (STCR). Based on machine learning, the system is «composed of a series of systems that work together to ensure judges adhere to prior decisions made by their own courts (or superior courts) on cases that are similar to the case before them»[14]. Such a system has already been read «as a system of horizontal precedent». And, even if «this is not to say that China is adopting stare decisis», since «LCRS is enhanced by statistic algorithms to find regularities in cases, rather than a mechanism to follow the ratio decidendi of preciously decided cases»[15], a strong pressure towards case-law conformity is exerted by the overall system of judge accountability. Suffice here to mention that the Supreme People's Court Opinion on Implementing Judicial Accountability, issued in August 2017, provides that «judges deciding a case should conduct comprehensive search on all similar and related cases decided or deciding by the same court and generate a review report with the assistance from case handling platform, case files system, China Judicial Judgments Online, Faxin (Trust in Law), and Zhishen (intelligent trial)». And it seems fair to say that the use of such platforms to search for and mention precedent cases – as said, by now a duty for the judge – «is the stronger force moving Chinese courts towards a case-law system»[16].

4. Trial courts' jurisprudence vs. Supreme Court jurisprudence

Whether or not one considers that the Chinese system may already be defined as a system of stare decisis, it has already been noted that it is based on horizontal precedent. This undoubtedly constitutes a distinguishing feature from the situation in continental Europe, where the relevant precedent (be it binding or persuasive) tends to be that of the Supreme Courts alone. The use of artificial intelligence, however, can also change the existing

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[13] For an overall description, see C.X. Zou, *Achievements and Prospects of Artificial Intelligence Judicature in China*, in *Chinese Studies*, 2022, 11, p. 197 ff.

[14] J. Deng, *Should the Common Law System Be Intelligentized?: A Case Study of China's Same Type Case Reference System*, in *Geo. L. Tech. Rev.,* 2019, p. 224.

[15] G.G. Zheng, *China's Grand Design*, *supra* note 12, p. 570. For a slightly different view, see J. Deng, *Should the Common Law System Be Intelligentized?: A Case Study of China's Same Type Case Reference System*, in *Geo. L. Tech. Rev.,* 2019, p. 224-225. In the Author's opinion, «[u]nlike guiding cases, STCR aims to make prior cases binding, rather than quasi-binding, and thus, is a further step towards creating a type of common law in China».

[16] G.G. Zheng, *China's Grand Design*, *supra* note 12, p. 570.

framework: this is what is believed will happen in France and Italy, following the forthcoming full and free availability of inferior Courts case law.
Reflection on the subject has already started in France, where open data of judicial decisions was announced in 2016, although the liberalisation of first instance judgments is not yet complete[17]; here, in speculating on the consequences of algorithmic exploitation of this mass of data, a «hierarchical inversion» between trial Courts' jurisprudence and higher Courts' one has already been hypothesised, as a result of the «factual equalisation of court decisions processed by the machine»[18]. And, although French scholars have always understood, by the term «jurisprudence», exclusively that of the *Cour de cassation*, the most recent considerations about the impact of open data on source theory have led to the hypothesis of a broad notion of the term, including the decisions of the lower Courts[19].
Similar considerations appear to be also applicable to the Italian landscape, where the introduction of the public database of trial Courts' judgments is recent[20]. In both systems, in fact, it seems fair to acknowledge that the current, absolute pre-eminence of Supreme Courts jurisprudence derives only in part from legal reasons.
Of course, it is true that the Italian Constitutional Court is constant in ruling out the possibility that trial courts jurisprudence may be read as living law[21], especially when conflicting opinions exist and/or in the absence of a ruling by the Court of Cassation[22]; equally true is that the nomofilactic function is expressly assigned to the Court of Cassation by article 65 ord. giud. Moreover, it is very difficult to find Supreme Courts' rulings quoting decisions of the lower Courts.
However, in more than one case the Italian Constitutional Court emphasised trial Courts' jurisprudence[23]; after all, the concept underlying the doctrine of living law is that the law is

[17] For an up-to-date review of the successive steps of the reform, see P. DEUMIER, *L'effet de l'open data sur la jurisprudence des juges du fond*, in this *Review*, 2023, p. 684 ff.
[18] A. LOUVARIS, *Présentation générale. La justice prédictive entre être et devoir être*, in ORDRE DES AVOCATS AU CONSEIL D'ETAT ET A LA COUR DE CASSATION (dir.), *La justice prédictive. Actes du colloque du 12 Février 2018, organisé par l'Ordre des avocats au Conseil d'État et à la Cour de cassation à l'occasion de son bicentenaire en partenariat avec l'Université Paris-Dauphine PSL,* Paris, 2018, p. 33 (free translation).
[19] L. RICHIER, *Jurisprudence et intelligence artificielle : un compromis entre lutte et complémentarité*, in this *Review*, 2023, p. 675.
[20] Problems and perspectives of the new database are investigated by E. D'ALESSANDRO, *Ricerca, informazione e dissemination in diritto processuale civile: la Banca Dati di Merito Pubblica (Obiettivo PNRR M1-C1 Riforma 1.8),* in this *Review*, 2024, p. 333 ff.
[21] Italian Constitutional Court, January 30th 2002, n. 1; April 5th 2012, n. 78.
[22] Italian Constitutional Court, June 17th 2010, n. 217; March 12nd 2010, n. 98.
[23] Reference is made to the pronouncements mentioned in SALVATO (ed.), *Profili del «diritto vivente» nella giurisprudenza costituzionale,* in www.cortecostituzionale.it, February 2015, p. 8-9, note 20-24, also containing the citation of the relevant excerpts.

not given by the written text alone, but by the opinion developed by case law and doctrine as to the legal meaning to be attributed to a given legal provision. And, if one considers that the Supreme Courts only analyse a small percentage of the overall domestic litigation, it is evident that in the vast majority of cases it is the opinion of the lower Courts that will count in the end. In addition, it is possible to assume that, even before the open data, the Supreme Courts already were aware of trial Courts' case law: not only because it is often mentioned by the parties (or, if appropriate, by Attorneys General), but also because a part (however small) of such jurisprudence has already been made available for a few years now by private case law databases, and therefore already forms part of the results returned by the searches that it is reasonable to assume each judge performs in order to reach a solution to the case[24].

If one agrees with the remarks just made, it seems possible to consider that what has hitherto stood in the way of the valorisation of lower Courts' case law is not the legal inconceivability of its use for this purpose, but a mere matter of fact, that is the inadequacy of the available databases, as they are incomplete and chargeable. Consequently, it cannot be excluded that the future availability of such jurisprudence, thanks to the open data of judicial decisions, may end up enhancing lower Courts' role in the theory of the sources of law, if not actually showing a living law other than the one hitherto believed to be so.

As US studies show, in fact, private databases of trial Courts decisions often suffer from selection bias, which distorts the results of searches, leading the researcher – thus, also the Supreme Court judge – to erroneous conclusions about the state of lower Courts case law[25]. But if this is true, and if it is true that living law is made by the majority practice of the Courts,

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[24] The abovementioned assumption is confirmed by the few empirical works conducted so far: among them, it is worth mentioning the research on legal reasoning conducted by French scholars at the Université Lumière Lyon 3: see P. Deumier (dir.), *Le raisonnement juridique*, Paris 2013. The study analysed the conclusions of the *avocats généraux* and the reports of the *conseillers rapporteurs* for the Court of Cassation, and the reports of the *rapporteurs publics* and *commissaires du gouvernement* for the Council of State, for 2009 (364 documents) and, for some indicators, also for 2008 (894 total documents), most of which unpublished: see P. Deumier, *Présentation*, in P. Deumier (dir.), *supra*, 3). In fact, while the Court of Cassation had already begun to publish them some years ago, in the guise of "external motivations" of its *arrêts* (F. Descorps Declère, *Les motivations exogènes des décisions de la Cour de cassation,* in *Rec. Dalloz,* 2007, 2822 ff.), Council of State's *travaux préparatoires* remain internal working documents, not circulated to the public

[25] See, among others, A.A. Reinert, *Measuring selection bias in publicly available judicial opinions*, in *Rev. Litig.,* 2018, p. 255 ff.; K. Carlson - M.A. Livermore - D.N. Rockmore, *The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions*, in *Journal of Empirical Legal Studies*, 2020, p. 224 ff.

I was not able to find similar studies conducted in the Countries under comparison. However, it seems worth mentioning the conference report delivered by S. Huber, *Le style et la motivation des décisions ainsi que les rapports entre la Cour fédérale de justice allemande et la doctrine* during the conference *Cassation et révision : Quel avenir pour les juridictions supremes ?,* Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Luxembourg, April 4th 2019, making reference to an empirical study (of which I have not heard any more) trying to correlate the precedents quoted by the German Supreme Court and the databases used by judges.

one may wonder whether the advent of open data of trial Courts decisions will really constitute a disruptive phenomenon, capable of *changing the law*, or rather… the way to show what *the law already is*, even if we are not aware of it.

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