CONSTITUTIONAL LAW AND PRECEDENT

INTERNATIONAL PERSPECTIVES ON CASE-BASED REASONING

Edited by
Monika Florczak-Wątor

Constitutional Law and Precedent

This collection examines case-based reasoning in constitutional adjudication; that is, how courts decide on constitutional cases by referring to their own prior case law and the case law of other national, foreign, and international courts. Argumentation based on judicial authority is now fundamental to the resolution of constitutional disputes. At the same time, it is the most common form of reasoning used by courts. This volume shows not only the strengths and weaknesses of such argumentation, but also its serious methodological shortcomings. The book is comparative in nature, with individual chapters examining similar problems that different courts have resolved in different ways. The research covers three types of courts; namely the civil law constitutional courts of Germany, Italy, Poland, Lithuania, and Hungary; the common law supreme courts of the United States, Canada, and Australia; and the European international courts represented by the European Court of Human Rights and the Court of Justice of the European Union. The authors are distinguished scholars from various countries who specialise in constitutional justice issues. This book will be of interest to legal theorists and practitioners, and will also be especially insightful for constitutional court judges.

Monika Florczak-Wątor is a full professor at the Department of Constitutional Law of the Jagiellonian University in Krakow, a director of the Center for Interdisciplinary Constitutional Studies of the Jagiellonian University, and director of the Interdisciplinary Program 'Society of the Future' at the Doctoral School in the Social Sciences of the Jagiellonian University, Poland.


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Edited by Monika Florczak-Wątor

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6 Precedents and case-based reasoning in the adjudications of the Italian Constitutional Court

Giovanni Cavaggion

1. The position of the *Corte Costituzionale* in the Italian legal system

In the Italian legal system, the establishment of the Constitutional Court was one of the most prominent changes brought about by the transition from the Fascist regime to the current republican democratic Constitution of 1948. The *Corte Costituzionale* is a specialised and centralised Court vested with the power of constitutional review of legislation in relation to its compatibility with both the fundamental constitutional principles and rights (enshrined in Part I of the Constitution) and the rules that guarantee the balance of power among the different constitutional bodies and their functioning (enshrined in Part II).

The Constitutional Court is regulated by Articles 134–137 of the Italian Constitution, by Constitutional Laws Nos 1/1948 and 1/1953, and by Statutory Law No 87/1953. According to Article 135 of the Constitution, the Court is composed of fifteen judges (each with a term of office of nine years)[1], selected from among the most senior legal practitioners in the country.

The Italian Constitution designs the Constitutional Court as a 'pure' guarantee body. This means that the Court is not part of any of the three traditional 'powers' of the European legal tradition (legislative, executive, judiciary), but rather it is a new and independent 'power', vested with the task of enforcing the Constitution as the fundamental law of the Republic. More precisely, Article 134 of the Constitution states the following:

> The Constitutional Court shall pass judgement on:—controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;—conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;—charges brought against the President of the Republic, according to the provisions of the Constitution.

1 Five constitutional judges are elected by the parliament in joint session, five are appointed by the President of the Republic and five are elected by the judiciary.

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1.1. The interactions between the Constitutional Court and the judiciary

Naturally, despite being part of a separate and independent power, due to its specific functions, the Constitutional Court is strictly connected to the judiciary and consistently interacts with the other courts and tribunals of the Italian legal system.

Firstly, a connection between the Constitutional Court and the judiciary can be found in the constitutional provision that regulates the composition of the Court and the election of its members (Article 135 of the Constitution).[2] As already mentioned, five out of the fifteen constitutional judges are elected by the judiciary and, more precisely, by the Supreme Courts of the Italian jurisdiction, which are the Court of Cassation (civil and criminal jurisdictions, three constitutional judges), the Council of State (administrative jurisdiction, one constitutional judge) and the Court of Auditors (accounting jurisdiction, one constitutional judge). In addition to *electing* five constitutional judges, the members of the judiciary can also *become* constitutional judges in their own right: Article 135 of the Constitution states that constitutional judges can be chosen (also) from among ordinary or administrative judges of the higher courts.[3]

Secondly, in its day-to-day activities, the Constitutional Court closely interacts with the judiciary in the framework of the so-called incidental constitutional review process. According to Article 134 of the Constitution, the Constitutional Court (and only the Constitutional Court) has the power to adjudicate cases 'regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and the Regions'[4] and, consequently, to strike down (annul) those laws that are incompatible with the Constitution.[5] In the incidental constitutional review process, the connection between the Constitutional Court and the judiciary lies in the fact that the *Corte Costituzionale* cannot freely decide on which questions to examine: a law must be brought before the Court by a judge who is presiding over a specific pending case. This means that each of the hundreds of tribunals and courts that compose the Italian judiciary, while presiding over a case, can (and must) refer a 'question of constitutionality' to the Constitutional Court, if said tribunal or court (the so-called *a quo* judge) suspects that the law that should be applied to the case might be unconstitutional. From

2 See Federico G. Pizzetti, 'La Corte costituzionale' in Paola Bilancia and Eugenio De Marco (eds.), *L'ordinamento della Repubblica. Le istituzioni e la società* (CEDAM 2018) s 2.

3 According to Art 135 Cost., constitutional judges must be selected from among judges (or retired judges) of the Supreme Courts of the Italian jurisdiction, full professors of law and lawyers with at least twenty years of practice.

4 This formula includes statutory laws, governmental law decrees and delegated legislative decrees, as well as regional and provincial laws.

5 Within the constitutional review process, the Constitutional Court can assess both the formal constitutionality (whether the act has come into existence in accordance with the procedures outlined by the Constitution) and substantive constitutionality (whether the contents of the act are compatible with the Constitution) of a law (or an act having the force of law).

this perspective, Italian judges have been described as the 'gatekeepers' of the Constitution[6], because, in order to reach the Constitutional Court, the constitutional review process must usually pass their preliminary scrutiny.

Thirdly, Article 134 of the Constitution states that the Constitutional Court is also vested with the power to decide 'on conflicts regarding the allocation of power among the branches of the State'. Through this function, the Court enforces the separation of powers as outlined by the Constitution in cases in which a constitutional body denounces that another body of the state has infringed on its constitutional prerogatives. The matter can very well involve the judiciary, since the judiciary itself is a constitutional power and therefore it can become a party in the 'conflict of powers'.[7]

1.2. The vertical binding effects of the Constitutional Court's decisions

The Constitutional Court also interacts with the judiciary at the end of the constitutional review process through its adjudications.

With regard to the vertical binding effects of the Court's decisions, it is important to keep in mind that, according to Article 136 of the Constitution, 'When the Court declares the constitutional illegitimacy of a law or of an act having force of law, the law ceases to have effect the day following the publication of the decision'. This means that only the decisions that declare the unconstitutionality of a law (*sentenze di accoglimento*) have a general (*erga omnes*) binding effect in the legal system and therefore are binding for each and every Italian tribunal or court (for the judiciary as a whole). Put differently, when the Court declares the unconstitutionality of a law (or provision), that law loses its effectiveness the day after the Court's decision is published, and from that moment onwards it can no longer be applied by the judiciary. As a matter of fact, the binding force of these kinds of decisions is so strong that the unconstitutional law loses its effectiveness *retroactively* (*ex tunc*), which means that it can no longer be applied not only in future cases (in which future events will be adjudicated), but also in pending cases (in which past events are currently being adjudicated).[8]

6 See Piero Calamandrei, *La illegittimità costituzionale delle leggi nel processo civile* (CEDAM 1950) XII.

7 This could be the case, just to give a few examples, of a conflict between a tribunal/court and one of the Houses of Parliament regarding the immunity guaranteed to MPs by the Constitution, or of a conflict between the Parliament and a court regarding cases of judicial law-making.

8 The only exception is decisions on past cases that became *res judicata* or past events that are no longer disputable in court. The exception to these exceptions is represented, in turn, by criminal convictions that have become *res judicata*: if the law that established a criminal offence is struck down by the Constitutional Court, all convictions based on said law immediately lose their effectiveness.

It must be noted, however, that these decisions do not qualify as 'precedents' (strictly speaking)[9] from the vertical perspective; on the one hand, this is because they do not obtain their binding force from a *stare decisis* doctrine, but rather directly from the Constitution (Article 136 of the Constitution), and on the other hand, because the *Corte Costituzionale* and the judiciary are two separate powers, and consequently the object of the constitutional review performed by the Constitutional Court and the object of the adjudications of 'regular' courts and tribunals are fundamentally different in nature.

Conversely, the decisions that reject a question of constitutionality and declare it unfounded (*sentenze di rigetto*) do not have general vertical binding effects, since with these decisions the Constitutional Court only rejects the specific question of constitutionality *as it was raised by the* a quo *judge in the case at hand*. This does not mean, however, that the law on which the question of constitutionality was raised should automatically be regarded as constitutional. In fact, the same judge (or another judge) could very well raise a new question of constitutionality on the same law, for example, by using a different line of legal reasoning or a new argument.[10]

In light of the foregoing, it can be safely stated that, even though the Constitutional Court is not part of the judiciary *strictu sensu*, the connection between the *Corte Costituzionale* and the other tribunals and courts of the legal system is strong, to the point that scholars often describe it as a 'permanent dialogue' that involves the Court, on the one hand, and the 'thousands of judges' that compose the judiciary, on the other hand.[11] As I will argue in the following sections, precedents and case-based reasoning play a pivotal role in this dialogue.

2. The role of the *Corte Costituzionale*'s references to national judicial decisions

In order to understand the role of references to national judicial decisions (which include self-references and references to the decisions of other national courts and tribunals) in the Italian Constitutional Court's adjudications, it is necessary to move forward based on the premise that Italy, as with many other continental European legal systems, is a civil law system. This means that in the Italian legal system, judicial precedents are not a source of the law and that the judiciary is

9 On this issue, see Adele Anzon, *Il valore del precedente nel giudizio sulle leggi* (Giuffrè 1995) 137 ff.

10 As a matter of fact, it could be argued that rejection decisions do have a vertical binding effect, which is limited to the prohibition, for the *a quo* judge, to raise a question of constitutionality that is entirely identical to the one that the Court has already rejected. See Giuseppino Treves, 'Il valore del precedente nella giustizia costituzionale italiana' in Giuseppino Treves (ed.), *La dottrina del precedente nella giurisprudenza della Corte costituzionale* (UTET 1971) 6.

11 See Segreteria generale della Corte costituzionale, *Che cos'è la Corte costituzionale?* (Corte Costituzionale 2020) 41 ff.

not bound by an obligation of *stare decisis*. Consequently, precedents are, theoretically, deprived of any *legal* binding force both in the horizontal and vertical dimensions. This is also true for the Constitutional Court, which is an independent constitutional body that does not belong to the judiciary (see section 1) but, nevertheless, uses a method of adjudication that is fundamentally jurisprudential in nature.

Actually, it could be argued that it is precisely because its method of adjudication is a jurisprudential one that the Constitutional Court is inevitably drawn towards incorporating references in its decisions.[12] As a matter of fact, precedents are heavily featured in the jurisprudence of the courts and tribunals of civil law systems, in which the *jurisprudence constante* (a series of concordant decisions on the same matter), despite lacking binding legal value, is still regarded as extremely persuasive for subsequent judges (see section 2.1).

Moreover, due to its connection and interaction with the judiciary (see section 1), the Constitutional Court, while interpreting a law in order to assess its (potential) unconstitutionality (especially in the incidental constitutional review process), must often refer, at least to some extent, to the *jurisprudence constante* of other national courts or tribunals (see section 2.2).

2.1. The role of self-references

The role and relevance of self-references in the Italian Constitutional Court's decisions has been the object of ample academic debate in the last decades. Historically, scholars developed two different theories on the matter.

The first theory argues that, because precedents have no legal value in the Italian legal system (and since this also applies to the *Corte Costituzionale*[13]), the Constitutional Court can freely choose whether or not to refer to its own previous decisions in its adjudications. However, the Court is by no means (legally) bound to stick by said choice and, consequently, by its own precedents.[14] Differently put, according to this theory, even if an obligation for the Court to justify its choice when disregarding one of its precedent decisions existed, said obligation would not have a legal basis, but rather a 'factual', 'moral', 'rational' or 'cultural' one.[15]

12 Because constitutions are legal texts in their own regard, Constitutional Courts are naturally drawn towards the instruments, criteria, means and techniques of legal and judicial interpretation. See Anzon (n 9) 9.

13 The exception is represented by the Constitutional Court's decisions that declare the unconstitutionality of a law (*sentenze di accoglimento*) ex art 136 Cost. (see section 1.2). However, these decisions are binding for the Constitutional Court from a horizontal perspective and for the adjudication of identical (not just similar) cases, not as 'precedents' *strictu sensu*, but rather because they expunge (annul) the relevant law or provision from the legal system, thus creating a *res judicata* that prevents that same law or provision from becoming the object of future constitutional reviews. On this issue see Anzon (n 9) 144.

14 See Norberto Bobbio, *Studi per una teoria generale del diritto* (Giappichelli 1970) 41 ff.

15 See, *ex multis*, Anzon (n 9) 166.

A second theory argues that the Constitutional Court's precedents (and precedents in general) are provided with (at least) a 'mild' legal value, which finds its basis in the particularly strong 'persuasive effectiveness' of the Court's previous decisions (given its pivotal role as the main safeguard of the Constitution in the legal system) and in the general principles of equality, reasonableness (*ragionevolezza*) and the rule of law that require a minimum level of predictability regarding judicial decisions. According to this theory, these principles compel the Court to maintain a certain degree of stability in its jurisprudence, since it would be illogical (unreasonable), from both a substantial and legal perspective, to differently assess identical or even similar cases without a convincing explanation.[16]

In practice, regardless of which theory is correct, it can be safely stated that the Constitutional Court, since the beginning of its jurisprudential activity in 1956, has, *de facto*, recognised a certain degree of horizontal binding force to its own previous decisions when adjudicating similar cases. It must also be stressed that the stability, in a horizontal dimension, of the Court's jurisprudence is enhanced by the role of the *Corte Costituzionale* as the only body vested with the power of constitutional review in the Italian legal system (see section 1), as well as by the fact that the Court functions as a single panel that does not allow dissenting opinions and that is composed of judges with a fairly long term of office.[17] Therefore, there is basically no risk of diverging decisions on the same matter over reasonably short timeframes. Moreover, the Constitutional Court usually issues a low number of decisions every year (around 300 on average); this indirectly reinforces the stability of its jurisprudence, because a low number of decisions also means minimal variance between them.[18]

Due to the combination of these 'stabilising factors', scholars argue that the horizontal binding force of the Court's precedents is actually quite strong, even though it is not regarded (save for a few exceptions) as legal in nature. Put differently, the fact that the Constitutional Court's previous decisions do not have, in theory, any *legally* binding force in a horizontal dimension for the adjudication of similar cases does not necessarily mean that they do not have, in practice, some level of *substantially* binding (persuasive) force on the Court.[19]

16 See, *ex multis*, Alessandro Pizzorusso, 'La motivazione delle decisioni della Corte costituzionale comandi o consigli?' (1963) 2 Rivista trimestrale di diritto pubblico 345. On the possibility of recognising some form of legal value to precedents in general in the Italian legal system see, *ex multis*, Gino Gorla, 'Precedente giudiziale' in *Enciclopedia giuridica* (Istituto della Enciclopedia italiana 1990).

17 See Alessandro Pizzorusso, 'Stare decisis e Corte costituzionale' in Giuseppino Treves (ed.), *La dottrina del precedente nella giurisprudenza della Corte costituzionale*, cit., 55 ff.

18 See Enrico Albanesi, 'The Role of Precedent in the Italian Legal System (with Specific Attention to Its Use Made by the Italian Corte Costituzionale)' (2018) 19 REDP 242.

19 The relevance of the Court's own precedents for constitutional judges is confirmed by the fact that a section of the 'dossiers' that the Court's offices and the judges' assistants prepare for each case is always devoted to the review of the Court's previous decisions on the same (or on a similar) matter. See Giacomo Canale, 'L'uso "tendenziale" del precedente nella giurisprudenza costituzionale e i suoi possibili sviluppi futuri' (2020) Consulta online 5.

Within this framework, the Constitutional Court regularly refers to its own precedent decisions mainly in order to: (i) found and strengthen its legal reasoning (*ratio decidendi*) when declaring the unconstitutionality of a provision; (ii) argue that a question of constitutionality is unfounded or inadmissible; (iii) rule out that its precedent jurisprudence is applicable to a given case ('distinguishing'); (iv) confirm the *ratio decidendi* of its precedent decision(s), while slightly modifying it and clarifying it, in order to change its scope ('loosening'); and (v) explain the reasons why it chooses not to follow its previous jurisprudence on a given matter ('overruling').[20]

In cases (i) and (ii), the Court uses self-references to reinforce its reasoning and adjudications on a given matter by supporting them through synthetic references to its legal arguments in similar or comparable cases[21], thus leveraging the 'persuasive force' of its previous decisions. These references usually take the form of a quotation or paraphrase of the part of the previous decision that contains the *ratio decidendi* that the Court laid down in a similar case (which is used to summarise the Court's legal reasoning) and that it wishes to sustain (or apply) in the case at hand.[22] The reference is accompanied by the relevant decision's number and year (for example, 'Decision No 1/1956'), which allows the reader to verify it. Moreover, it is not uncommon for the Court to refer not only to a single precedent, but to a whole line of concurring jurisprudence (*jurisprudence constante*), and therefore to quote a single *ratio decidendi*, accompanied by a list of precedent decisions in which the same *ratio decidendi* was consistently applied (for example, 'Decision Nos 1/1956, 2/1957, 3/1958'). Obviously, the higher the number of concurring previous decisions, the higher the level of persuasiveness is for the *ratio decidendi*.

These kinds of references allow the Court to strengthen the foundation of its legal motivation while avoiding unnecessary repetitions, as would happen if it had to reproduce the same line of reasoning in its entirety every time that it wished to apply a given *ratio decidendi*. At the same time, these references allow the Court to present its legal reasoning as the natural consequence of a harmonious chain of concurring adjudications.[23]

In cases (iii), (iv) and (v), the Constitutional Court refers to its previous decisions in order to rethink its stance on a given matter by either distinguishing between cases, loosening the scope of a previous *ratio decidendi* or, sometimes, by overruling its own previous jurisprudence. The Court is free to do so precisely

20 See Maurizio Pedrazza Gorlero, 'Introduzione ad una ricerca sul precedente nella giurisprudenza della Corte costituzionale' in Maurizio Pedrazza Gorlero (ed.), *Il precedente nella giurisprudenza della Corte costituzionale* (CEDAM 2008) 25 ff.

21 See Gustavo Zagrebelsky, 'Caso, regola di diritto, massima' in Giovanna Visintini (ed.), *La giurisprudenza per massime e il valore del precedente* (CEDAM 1988) 96 ff.

22 It must be stressed that, in some cases, the Court might choose to quote a segment of a previous decision that, while not being technically part of its *ratio decidendi*, still contains an important general statement on a constitutional law matter. See Pizzorusso (n 17) 61.

23 See Pedrazza Gorlero (n 20) 2.

because its precedents, while persuasive, lack a legally binding horizontal force. However, it must be stressed that the *Corte Costituzionale* is the constitutional body vested with the power of striking down (annulling) laws made by parliament, which is, in turn, the only constitutional body directly elected by the people. This means that a shift in the Court's jurisprudence, if it leads to the annulment of laws that are critical for the political programme of the parliamentary majority, risks being perceived as a politically motivated move by the public. Consequently, in light of its complex role in the constitutional system, when the Court considers the possibility of diverging from its previous decisions (through the distinguishing, loosening or overruling techniques), it must be particularly careful, and if it chooses to do so, it must thoroughly explain its legal reasoning.[24]

This is true especially with regard to overruling, because overruling is the jurisprudential technique that creates the highest degree of unpredictability in the Court's adjudications. However, overruling still can (and, in some cases, must) happen, in particular over longer timeframes, when there is a noticeable shift in the *idem sentire* in Italian society on a given matter. A famous example of this is the case of Article 559 of the Italian Criminal Code, under which adultery was punished as a criminal offence only when it was committed by a wife (but not by a husband). The Constitutional Court initially found, with its Decision No 64/1961, that Article 559 was not unconstitutional; the Court argued that a wife's infidelity was perceived, by the legislator and by Italian society, as a more serious offence than that of a husband. However, seven years later, the Court re-examined the matter and overruled its own precedent with Decision No 126/1968, finding that (in an Italian society that was rapidly evolving) Article 559 could no longer be regarded as compatible with the fundamental constitutional principle of moral and legal equality between spouses established by Articles 3 and 29 of the Constitution.

At any rate, it must be stressed that, despite the frequent use of self-references on the Constitutional Court's behalf, there are still many cases in which the Court does not use existing precedents and does not refer to its previous decisions in similar cases. For example, in some cases, the Court might choose to overrule its previous jurisprudence on a given matter without mentioning the precedent adjudications that it is going to disregard.[25] In other cases, the Court might choose to present the *ratio decidendi* of a decision without referring to its existing precedents that leveraged the same line of legal reasoning in similar cases. This can happen precisely because *stare decisis* is not a principle in the Italian civil law system and, ultimately, the Court is free to decide which level of binding force it wishes to recognise regarding its own precedent decisions.

24 See, *ex multis*: Pizzorusso (n 17) 56; Anzon (n 9) 166. In general, on the issues connected with judicial law-making in constitutional courts in Europe, see Monika Florczak-Wątor (ed.), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020).

25 See Canale (n 19) 8.

2.2. The role of references to national courts/tribunals' decisions

The Italian Constitutional Court also refers, in some cases, to the jurisprudence of other national courts or tribunals. After all, if the thousands of judges that compose the judiciary are the 'gatekeepers' of the Constitution (see section 1.1), it is only natural for the Constitutional Court to take their jurisprudence into account when assessing a case.

Preliminarily, it must be stressed that, obviously, in the incidental constitutional review process, the Constitutional Court must refer to the ordinance of the *a quo* judge, since it is with that ordinance that the question of constitutionality was referred to the Court and the constitutional review process was activated. The ordinance that raises a question of constitutionality, however, is not an actual 'precedent' nor a previous adjudication, because it is not a final decision in a previous similar case, but rather is a temporary processual act from which the incidental constitutional review process originated in the case at hand.

Therefore, when it comes to case-based adjudication, the analysis must focus on the Constitutional Court's references to final decisions of the judiciary in previous cases. This kind of reference is particularly frequent, especially when the Constitutional Court has to determine the correct *interpretation* of the law that has become the object of its scrutiny.

As a matter of fact, all forms of legal reasoning (including constitutional review) must always distinguish between the *text* of the law and the *rule* that can be inferred from said text through its interpretation.[26] A single text can be interpreted in many different ways, and hence it can serve as the legal basis for multiple different rules. This distinction generates a number of possible interactions between the Constitutional Court and the judiciary, as in order to exercise their respective powers, both the Constitutional Court and the other Italian courts and tribunals have to first interpret the text of the applicable law in order to infer a workable rule from it.[27] But what if the Constitutional Court's interpretation and the judiciary's interpretation of the same law diverge?

Normally, the Italian Constitutional Court is not bound to the literal interpretation of the law nor to the interpretation of the law embraced by the judiciary (or by the majority of the tribunals and courts that compose the judiciary). It is precisely due to this perspective that, historically, the *Corte Costituzionale* has claimed the power to declare the incompatibility with the Constitution of a law *as it is interpreted by the judiciary* or, conversely, to declare that a law is not incompatible with the Constitution because *it can be interpreted in other (non-unconstitutional) ways that the judiciary did not consider*.

26 On this matter see Andrea Proto Pisani, 'Three Notes About "Precedent" in the Evolution of the Jurisprudence of the Constitutional Court, in the Jurisprudence of a Necessarily Restored Court of Cassation and in the Interpretation of Processual Rules' (2018) 4 RDRST 188.

27 See Pizzorusso (n 17) 49 ff.

The Italian framework, however, is noticeably complicated due to the existence of the Court of Cassation (*Corte di Cassazione*), which is the highest national court on civil and criminal matters. The Court of Cassation (which is organised in multiple civil and criminal sections) is usually the third-instance court (the court of 'last resort') and, under Article 111 of the Constitution, it assesses only whether the first- and second-instance decisions correctly identified, interpreted and applied the existing laws in the case at hand. Consequently, the Court of Cassation cannot assess the merits of the case. Moreover, one of the functions of the Court of Cassation is to ensure the 'uniform interpretation of the law in the legal system' (*nomofilachia*).

The Court of Cassation's decisions, as with the decisions of every other court in the Italian legal system, are not legally binding precedents, although they are 'final' in the sense that they cannot be further appealed. However, due to the Court of Cassation's position as the highest judge in the legal system and due to its task of ensuring that the law is interpreted consistently over time, its decisions are provided with a high degree of 'persuasiveness' in their own regard. This is especially true when the Court of Cassation adjudicates a case in its 'joint sections' (*sezioni unite*) composition.

In light of this, it comes as no surprise that the powers of the Court of Cassation and those of the Constitutional Court can, in certain cases, interfere with each other. While the Court of Cassation is vested with the power of clarifying (with highly persuasive decisions) the correct interpretation of existing laws, the Constitutional Court is vested with the power to assess the compatibility of existing laws with the Constitution. As already mentioned, in order to perform this task, the Constitutional Court must (obviously) first interpret the law at hand in order to determine its actual meaning. Consequently, the question that the Italian legal system had to answer was whether or not the Court of Cassation's previous decisions that clarified the correct interpretation of a given law were relevant (and, if they were, to what extent) for the Constitutional Court when assessing the same law's constitutionality.

In a first phase, the two courts struggled to define their respective roles and powers and sometimes clashed with each other. In a number of decisions following its inauguration in 1956, the Constitutional Court consistently stated that, when interpreting a law in order to answer a question of constitutionality, it did not consider itself bound by the Court of Cassation's previous decisions that clarified the correct interpretation of the same law. Put differently, the Constitutional Court argued that the fact that a given law was consistently interpreted in a certain way by the judiciary was irrelevant in the constitutional review process: if the Constitutional Court were to find that said law should have been interpreted in a different way, it would have stated so, regardless of how the law actually 'lived' in the judiciary's decisions.[28]

28 See, for example, Decision Nos 8/1956 and 11/1965.

This means that the Court could reject questions of constitutionality that were based on the judiciary's consistent interpretation of a law by simply pointing out that another possible (constitutional) interpretation existed, thus claiming the power to 'reveal' (to the judiciary) the correct interpretation of the law. However, because decisions of *rigetto* are not provided with a general vertical binding force (see section 1.2), the judiciary often ended up insisting on the interpretation that was ruled out by the Constitutional Court, and consequently the Constitutional Court was forced to issue a second decision (this time a legally binding decision of *accoglimento*) on the same matter in order to declare the unconstitutionality of the relevant law *as interpreted by the judiciary*.[29]

In a second phase, the Constitutional Court (starting with its Decision No 276/1974) developed the doctrine of *diritto vivente* ('living law'). According to this theory, *diritto vivente* is created when a specific interpretation of a law (or of a provision) by the judiciary is consolidated and consistent over time, and therefore when all (or most) of the judges in the legal system interpret a given law (or provision) in the same way over a considerable time span. In this case (and in this case only), the Constitutional Court accepted that the relevant law (or provision) must be examined (in the constitutional review) *as it is interpreted by the judiciary* (as it *lives* in the judiciary's interpretation). The Constitutional Court further clarified that in order for an interpretation to be regarded as 'consolidated' (and thus become *diritto vivente*), the interpretation must come from the Court of Cassation, and not from any national court or tribunal.[30] Furthermore, the interpretation must come from the 'joint sections' of the Court of Cassation[31] or, if that is not the case, it must, at least, not be disputed within its sections.[32]

Within this framework, the Court of Cassation's previous decisions gain some level of binding force in the constitutional review process, since they limit the Constitutional Court's margin of discretion in determining the meaning of the laws that it scrutinises.

In a third phase, the doctrine of *diritto vivente* established itself and the two courts overcame their past conflicts (notwithstanding a few exceptions). In the current state of the art, the Court of Cassation is vested with the power of clarifying the correct interpretation of a given law or provision, while the Constitutional Court is vested with the power of declaring that such an interpretation is unconstitutional.[33] Starting with Decision No 276/1974, the Constitutional Court has applied this doctrine in hundreds of cases[34], in which the Court has assessed both

29 See, for example, Decision Nos 26/1961 and 52/1965.

30 See, *ex multis*, Decision Nos 171/1982, 257/1984, 326/1994 and 41/2006.

31 See, for example, Decision No 260/1992.

32 See, for example, Decision Nos 40/1984 and 32/2007.

33 The Court of Cassation is the primary recipient of the power to interpret the law and the Constitutional Court is the primary recipient of the power to interpret the Constitution. See Antonino Spadaro, *Limiti del giudizio costituzionale in via incidentale e ruolo dei giudici* (ESI 1990) 19 ff.

34 Just to give some examples, see Decision Nos 266/2006, 64/2008, 197/2010, 338/2011, 208/2014 and 1/2015.

the existence of *diritto vivente* and its constitutionality.[35] This, in turn, means that in these decisions, the Constitutional Court refers to the relevant jurisprudence of the Court of Cassation and analyses it in order to determine whether it reaches the level of stability required to be regarded as *diritto vivente*. If that threshold is met, the Constitutional Court considers itself bound by the judiciary's interpretation of the law and cannot suggest other possible (constitutional) interpretations of the same law in order to reject the question of constitutionality. In some cases (which are, currently, not very common), the Constitutional Court has even recognised the existence of *diritto vivente* without mentioning the individual, specific decisions of the Court of Cassation from which said recognition originated: when doing so, the Constitutional Court usually refers, in general, to the 'consolidated jurisprudence of the Court of Cassation' or to the establishment of *diritto vivente* on the matter.[36]

Lastly, it must be noted that in some (quite rare) cases, the Constitutional Court might also choose to refer to the previous decisions of first- or second-instance tribunals and courts. References to these kinds of decisions, however, are far less frequent than those to the Court of Cassation's decisions, because precedents of first- and second-instance judges are not provided a high degree of 'persuasiveness' in the legal system. This means that the Constitutional Court enjoys a wide margin of freedom in interpreting the relevant law, since it is not bound by any kind of *diritto vivente*. From this perspective, the decisions of first- and second-instance judges are usually mentioned by the Constitutional Court merely *ad adiuvandum* to reinforce its legal reasoning on a given issue.[37]

3. The role of the Constitutional Court's references to foreign, international and European judicial decisions

In the last couple of decades, the Italian Constitutional Court has shown an increasing willingness to open itself up to a dialogue with the two European supranational courts (the European Court of Justice [ECJ] and the European Court of Human Rights [ECtHR]), on the one hand (see section 3.2), and to a comparative approach towards the jurisprudence of other European (or even Western) national legal systems, on the other hand (see section 3.1).[38]

Consequently, it is not unusual to find, in the Constitutional Court's more recent decisions, references to the precedents of European or foreign courts. These references can be found both in the Court's factual premise (in which the Court reports the arguments of the *a quo* judge and of the parties) and in its legal reasoning (in which the Court actually performs the constitutional review). Moreover, it is possible to further divide this second kind of referencing into two

35 See, *ex multis*, Decision Nos 361/2001 and 20/2009.

36 See, for example, Decisions Nos 32/1995, 25/1999, 264/1999, 117/2000 and 329/2000.

37 A recent example can be found in Decision No 242/2019.

38 See Paola Bilancia, *The Dynamics of the EU Integration and the Impact on the National Constitutional Law* (Giuffrè 2012) 160 ff.

groups: those that are ultimately generic in nature (the foreign and European decisions are referred to as an example of the *id quod plerumque accidit*) and those that effectively serve an independent and noticeable purpose in determining the Court's adjudication.[39]

The following sections will only consider the latter references, since they are the only ones that can be directly attributed to the Constitutional Court and that carry a significant weight in the Court's final decisions.

3.1. The role of the Constitutional Court's references to the judicial decisions of courts in other countries

Historically, the Italian Constitutional Court has rarely (if ever) referred to the jurisprudence of foreign national courts and was described by scholars as mainly being uninterested in the comparative perspective.[40] This restrictive approach towards the decisions of foreign courts started to change, as already mentioned, in the last few decades, to the point that there are now a few cases in which the *Corte Costituzionale* has referred to the jurisprudence of foreign legal systems in a way that seems to have actually influenced the Court's final adjudication.

However, it must be stressed that, since the Constitutional Court is the only recipient of the power of constitutional review in the Italian constitutional system, it can (obviously) refer to foreign decisions exclusively from an *ad adiuvandum* perspective in order to reinforce and support its argument by pointing out that other courts in Europe (or in the 'Western world') follow (or have followed) its same line of reasoning. This means, of course, that foreign decisions are deprived of any kind of legal binding force.

A noticeable example of the Italian Constitutional Court's use of foreign precedents from an *ad adiuvandum* perspective is Decision No 1/2014, in which the Court had to examine the constitutionality of the election law in force at that time, which, despite adopting a proportional mechanism, granted a considerable majority bonus to the most-voted-for coalition. The Court found that the majority bonus was unconstitutional, because Articles 3, 48 and 67 of the Constitution demand that if the legislator chooses an electoral system based on proportional representation, the said system cannot be excessively distorted after the votes have been cast (as happens with an unreasonably high majority bonus). To support its reasoning, the Court referred to three similar decisions of the German Constitutional Court[41], arguing that, on electoral matters, the German constitutional system is comparable to the Italian one.

39 See Paolo Passaglia, 'Il diritto comparato nella giurisprudenza della Corte costituzionale: un'indagine relativa al periodo gennaio 2005 –giugno 2015' (2015) Consulta online 592 ff.

40 On the matter, see Vincenzo Zeno-Zencovich, 'Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?' (2005) Diritto pubblico comparato ed europeo 1993 ff.

41 Decisions BVerfGE, 2 BvF 3/11 25 July 2012, BVerfGE, 2 BvR 197/79 22 May 1979 and BVerfGE, 2 BvH 1/52 5 April 1952.

In a similar vein, the Constitutional Court used *ad adiuvandum* references to the jurisprudence of foreign courts in its Decision No 170/2014, while declaring the unconstitutionality of the national provision (enshrined in Law No 164/1982), which prescribed that, when an individual completed a gender reassignment process, if they were married, the marriage would automatically lose its effectiveness (having effectively transformed into a same-sex marriage).[42]

Moreover, in its recent Decision No 207/2018, the Constitutional Court referred to previous decisions of the Canadian and English Supreme Courts[43] in order to support its argument that, on the matter of the unconstitutionality of provisions criminalising assisted suicide *per se* (without granting some kind of exception in specific cases), it was necessary to suspend the constitutional review process (for one year) in order to give parliament a chance to amend the existing legislation in a manner compatible with the Constitution.

In other cases, the Constitutional Court chose not to refer to a specific foreign decision, but rather to an entire line of jurisprudence developed by the judiciary of a foreign legal system.

For example, in Decision No 238/2014, while examining the compatibility with the Constitution of the customary international law principle that exempts foreign sovereign states from the Italian civil jurisdiction, the Constitutional Court highlighted how the scope of said principle was gradually narrowed down by the judiciary both in Italy and in Belgium.[44]

Similarly, in its Decision No 10/2015, the Constitutional Court referred to the consolidated jurisprudence of several foreign constitutional courts. The Court did so while explaining its decision to limit (for the first time in its history) the retroactive effects of the annulment of an unconstitutional provision, and argued that, in similar cases, many other European constitutional courts have the power to limit the retroactive effects of their decisions, mentioning the jurisprudence of the Austrian, German, Spanish and Portuguese Constitutional Courts on the matter as an example.

3.2. The role of the Constitutional Court's references to judicial decisions of international and supranational (European) courts

Historically, the practice of referring to judicial decisions of international (or supranational) courts has not been very common in Italy. However, the European integration process was successful in changing (at least in part) this tendency in recent years. On the one hand, the European Union's (EU's) uniqueness from a

42 The Court referred to the similar conclusions of the German Constitutional Court in Decision BVerfG, 1 BvL 10/05 27 May 2008.

43 Cases *Carter v Canada* [2015] CSC 5 and *Nicklinson et al.* [2014] UKSC 38.

44 The same argument was made by the Court with Decision No 329/1992, and it was similarly supported through references to previous decisions of the constitutional and ordinary courts of several foreign legal systems.

constitutional law perspective led the Italian Constitutional Court to recognise the primacy of European law as a principle of the national legal system as early as 1984 (with Decision No 170/1984). This means that, for those matters in which Italy transferred a part of its sovereignty to the EU's institutions, the Constitutional Court started to look to (and refer to) the jurisprudence of the ECJ as a parameter provided with some level of binding force. On the other hand, the constitutional reform of Article 117 of the Constitution in 2001[45] allowed the Constitutional Court to affirm the primacy of the European Convention on Human Rights (ECHR) over national statutory law (Decision Nos 348/2007 and 349/2007[46]), which inaugurated a new era of references to the ECtHR's decisions.

a) ECtHR. With regard to the ECtHR's precedent decisions, the Constitutional Court's references still prevalently fall in the category of *ad adiuvandum* references, and therefore, in most cases, the Court refers to the ECtHR's adjudications in order to strengthen its own arguments on matters that involve the protection of those fundamental rights that belong to the European common constitutional tradition.

This has been the case, for example, for the right of adopted children to know the identity of their biological mother in cases in which she wishes to renounce her anonymity (Decision No 278/2013). The Constitutional Court referred to the ECtHR's decisions in the cases *Godelli v Italy*[47] and *Odièvre v France*[48] in order to reinforce its argument that the Italian provisions on the matter at hand were too strict, because they basically did not allow the biological mother to 'change her mind' under any circumstances (while, on the contrary, the French provisions would allow her to do so), thus infringing on the right to respect for private and family life.

Similarly, the jurisprudence of the ECtHR has been prominently featured in the recent Decision Nos 207/2018 and 242/2019 of the Constitutional Court on the matter of assisted suicide. The Court had to assess the constitutionality of the Italian Criminal Code provision that incriminates whoever helps someone end his or her own life. In this case, the Court referred to the jurisprudence of the ECtHR (in the cases *Pretty v The United Kingdom*[49], *Koch v Germany*[50] and *Haas v Switzerland*[51]) to argue that the Italian constitutional system as well as the ECHR do not recognise the right to end one's own life.[52]

45 The new para 1 of art 117 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'.

46 On these decisions see, *ex multis*: Barbara Randazzo, *Giustizia costituzionale sovranazionale. La Corte europea dei diritti dell'uomo* (Giuffrè 2012).

47 Application No 33783/09, 25 September 2012.

48 Application No 42326/98, [GC], 13 February 2003.

49 Application No 2346/02, 29 April 2002.

50 Application No 497/09, 19 July 2012.

51 Application No 31322/07, 20 January 2011.

52 However, the Court ultimately found that the criminalisation of assisted suicide *per se* was unconstitutional (see section 3.1).

After the aforementioned reform of Article 117 of the Constitution in 2001, the Constitutional Court also started to refer (in some cases) to the decisions of the ECtHR as an independent parameter of the constitutional review. More precisely, in order to verify whether a national law is compatible with Article 117 of the Constitution, the Court can now assess its compatibility with the ECHR *as interpreted by the ECtHR*.[53] This means that the *Corte Costituzionale* can refer to the ECtHR's precedents to clarify the meaning of an ECHR provision.

An example of this new kind of reference to the ECtHR's jurisprudence can be found in the Constitutional Court's Decision No 311/2009. The Court had to assess the compatibility with Article 6 of the ECHR (and therefore with Article 117 of the Constitution) of national laws that offer a retroactive interpretation of a previous law, thus conferring on it a specific meaning among the many that would be possible. The Constitutional Court found that Article 6 of the ECHR, as interpreted by the jurisprudence of the ECtHR[54], does not prohibit 'authentic interpretations' by the legislator, as long as they serve 'overriding reasons relating to the public interest'.[55]

In its Decision No 245/2011, the Constitutional Court struck down the prohibition to marry for foreign citizens illegally residing in the Italian territory (enshrined in Article 116 of the Italian Civil Code), which violated Articles 2 and 29 of the Constitution. The Court found that the prohibition also violated Article 12 of the ECHR, as interpreted by the ECtHR in the case of *O'Donoghue and Others v The United Kingdom*[56], in which the Court of Strasbourg stated that the margin of appreciation that the Convention grants to member states cannot expand to the point of justifying the implementation of a general prohibition that completely negates the right to marry and start a family, as recognised by Article 12 of the ECHR.

b) ECJ. With regard to the jurisprudence of the ECJ, it is important to distinguish between cases in which the Constitutional Court refers to an ECJ decision on a preliminary ruling that the Constitutional Court itself requested, and cases in which the Constitutional Court refers to the ECJ's precedent decisions *strictu sensu*. Cases of the first kind fall within the scope of Article 267 of the Treaty on the Functioning of the European Union, which regulates the request of an ECJ preliminary ruling by a 'Court or Tribunal of a Member State'. In these cases, the

53 On the matter see Vittorio Angiolini, 'L'interpretazione conforme nel giudizio sulle leggi' in Marilisa D'Amico and Barbara Randazzo (eds.), *Interpretazione conforme e tecniche argomentative* (Giappichelli 2009).

54 The Constitutional Court refers to the EctHR's decisions in the cases *Forrer-Niedenthal v Germany* (Application No 47316/99, 20 February 2003), *Ogis-institut Stanislas, Ogec St. Pie X et Blanche De Castille et al. v France* (Application Nos 42219/98 and 54563/00, 27 May 2004), and *National & Provincial Building Society et al. v United Kingdom* (Application Nos 21319/93, 21449/93 and 21675/93, 23 October 1997).

55 This line of reasoning was sustained by the Constitutional Court with its subsequent Decision Nos 1/2011, 257/2011, 15/2012 and 227/2014.

56 Application No 34848/07, 14 December 2010.

decisions of the ECJ cannot be regarded as actual precedents, since they are just a provisional segment of the constitutional review process.

With regard to references to precedents *strictu sensu*, the Constitutional Court often refers to specific decisions of the ECJ in the so-called *principaliter* constitutional review process, in which the state directly challenges a regional law (or, vice versa, in which the region challenges a national law) before the Court. In fact, in this kind of process, the Constitutional Court can directly strike down regional provisions that are incompatible with European law by leveraging the violation of Articles 11 and 117 (see section 3) of the Constitution.[57] From this perspective, the Court has referred to the jurisprudence of the ECJ in order to assess the compatibility with European law (as interpreted by the Court of Luxembourg), for example, of regional laws that limited the circulation of genetically modified organisms (Decision No 23/2021[58]), that interfered with the criteria for competitive procedures (Decision Nos 160/2009, 184/2011 and 39/2020[59]) and that implemented exceptions to the European regulation on hunting (Decision No 266/2010[60]), on environmental standards of protection (Decision Nos 62/2008 and 67/2010[61]) and on competition (Decision Nos 368/2008[62] and 439/2008[63]).

According to scholars, in these cases, the ECJ's decisions are (at least to some degree) binding for the Constitutional Court, because the ECJ is the only court vested with the power of issuing a final and clarifying interpretation of European law, and therefore its jurisprudence becomes fundamental in determining whether European law has been violated by regional provisions. As a matter of fact, it could be argued that the binding force of the ECJ's precedents is actually higher than that of the Court of Cassation's precedents (see section 2.2), because while the Constitutional Court can interpret national laws (and its interpretations coexist with those of the Court of Cassation), it cannot (conclusively) interpret European law (and so it must inevitably refer to the ECJ's interpretation on the matter).

Moreover, it must be noted that it is not unusual for the Italian Constitutional Court to also refer to the jurisprudence of the ECJ from an *ad adiuvandum* perspective (including references to preliminary rulings requested not by the Court itself, but by other Italian courts or tribunals, or references to decisions regarding

57 See, *ex multis*, Decision No 102/2008. For a comprehensive analysis of the Constitutional Court's decisions that applied this doctrine, see Davide Paris, *Il parametro negletto: Diritto dell'Unione europea e giudizio in via principale* (Giappichelli 2018).

58 The Court referred to the ECJ's precedents in cases C-192/01 and C-165/08.

59 The Court referred to the ECJ's decisions in cases C-147/06 and C-148/06.

60 The Court referred to the ECJ's decisions in case C-118/94.

61 The Court referred to the ECJ's decisions in case C-215/06.

62 The Court referred to the ECJ's decisions on competition in the wine sector in cases C-388/95 and C-347/05.

63 The Court referred to the ECJ's decisions in cases C-107/98, C-26/03, C-458/03 and C-340/04.

other European legal systems). This happened, for example, in decisions on the matters of the recovery of state aids (Decision No 125/2009[64]), the rights of the defendant in criminal trials when the charges are modified by the prosecution (Decision No 192/2020[65]), grave professional misconduct and contract breaches by an economic operator (Decision No 168/2020[66]), *ne bis in idem* in criminal law (Decision No 145/2020[67]), public contracts and competition (Decision Nos 131/2020[68] and 100/2020[69]).

In these cases, the jurisprudence of the ECJ is used by the Constitutional Court to reinforce and support its legal arguments (by showing that they are shared by the Court of Luxembourg), rather than as a means to verify if national law violates European law.

4. Conclusions

In light of all the foregoing, it can be safely stated that case-based reasoning and references to previous judicial decisions (by the Court itself or by other national and supranational tribunals and courts) play a significant role in the Italian Constitutional Court's adjudications. The *Corte Costituzionale* was able to strike a precarious (but reasonable) balance between the fundamental principles of the Italian civil law system (which does not recognise any legally binding force to precedents) and the need to ensure a minimum level of predictability and stability of judicial decisions, on the one hand, and to open itself up to dialogue with other (national and supranational) judicial bodies, on the other hand.

From this perspective, self-references have become (as soon as the Court started functioning) an indispensable part of the *Corte Costituzionale*'s adjudications, and they still represent, as of today, the most heavily featured example of case-based legal reasoning in the Court's adjudications.[70] At the same time, the *diritto vivente* doctrine seems to have been effective in regulating the interaction between the Constitutional Court and the national judiciary by recognising some binding effects to the *jurisprudence constante* of the Court of Cassation, while preserving the Constitutional Court's fundamental role as the only body vested with the powers of constitutional review and interpretation of the Constitution.[71] The European integration process (both within the EU and within the Council of Europe) facilitated the inauguration of a new era in the jurisprudence

64 The Court referred to the ECJ's decisions in cases C-142/87, C-390/98, C-368/04 and C-408/04.
65 The Court referred to the ECJ's preliminary ruling in case C-646/17.
66 The Court referred to the ECJ's decisions in cases C-41/18 and C-267/18.
67 The Court referred to the ECJ's decisions in cases C-524/15, C-537/16, C-596/16 and C-597/16.
68 The Court referred to the ECJ's decisions in cases C-113/13 and C-50/14.
69 The Court referred to the ECJ's decisions in cases C-285/18, C-89/19 and C-91/19.
70 See Canale (n 19).
71 See Proto Pisani (n 26).

of the *Corte Costituzionale*, in which references to supranational decisions are no longer limited to strengthening the Court's arguments, but can become an actual parameter of the constitutional review.[72]

From a methodological perspective, much is yet to be studied, since the *Corte Costituzionale* does not yet seem to have developed an entirely consistent method when it comes to references and case-based adjudication.[73] As argued in the previous sections, within a somewhat well-defined framework, the Court's use of references still presents a certain degree of variability and unpredictability, because the Court enjoys a high degree of freedom precisely because the Italian legal system is a civil law system, and due to the Court's peculiar role and powers.[74] Examples of this variability and unpredictability can be found in cases in which the Court decided to overrule its previous jurisprudence but did not explain why it chose to do so and did not mention the previous decisions that it was going to disregard[75] (see section 2.1); in cases in which the Court recognised (or did not recognise) the existence of *diritto vivente* without referring to the specific decisions of the Court of Cassation that supported its conclusion (see section 2.2); in cases in which the Court leveraged the jurisprudence of foreign constitutional courts to implement new processual instruments for the first time in its history (see section 3.1); or in cases in which it is not entirely clear whether the Court referred to the jurisprudence of the two European courts (the ECtHR and ECJ) from an *ad adiuvandum* perspective or as an independent parameter of the constitutional review (see section 3.2).

Consequently, it remains to be seen whether the slow (but steady) increase in the day-to-day use of references to previous decisions by the Constitutional Court will lead to the stabilisation of its approach to case-based reasoning or to an increase in the unpredictability of its use of judicial precedents.

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72 On the matter see Giuliano Amato and Benedetta Barbisan, *Corte costituzionale e Corti europee: fra diversità nazionali e visione comune* (il Mulino 2015).

73 This is confirmed by the lack, in the last decade, of comprehensive and organic studies on the use of precedents by the Constitutional Court. See Anzon (n 9); Pedrazza Gorlero (n 20).

74 See Canale (n 19) 7 ff.

75 *Ivi*, 8.

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