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The Italian Constitutional Court and the Use of Comparative Law: An Empirical Analysis

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Abstract

The paper analyzes the use of comparative and foreign law by the Italian Constitutional Court. The author carries out an empirical study mainly with two purposes: measuring the impact of comparative law on the activity of the Court and classifying the functions of comparative law in the Court's decision-making process.
It is impossible to identify all the cases where the Court considers comparative law. Nevertheless, references to comparative or foreign law in rulings can be regarded as significant hints. The Court's case-law between 2000 and 2021 is examined, and 74 rulings with comparative references are identified. This data is the starting point of the analysis, which shows the increasing use of comparative law by the Constitutional Court. Moreover, the classification of these references shows the growing importance that comparative law has in the Court's legal reasoning.

Keywords

Italian Constitutional Court – comparative law – foreign law – rulings – legal reasoning

1 Introduction

The use of comparative law by the Italian Constitutional Court has been a well debated issue among scholars, starting from the first studies carried out in the 1980s.[1] Since then, waves of interest for the subject emerged, especially during

1 In this respect, it is worth to mention the seminal works by PEGORARO, "La Corte costituzionale e il diritto comparato nelle sentenze degli anni '80", Quaderni costituzionali,

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the first decade of the 21st century.[2] In the aftermath, research on the use of comparative law by the Constitutional Court was partially set aside, or, at least, the subject was less debated among Italian scholars.[3] That occurred not because of a real lack of interest, but rather because of a different approach that was adopted to analyze the subject, a much wider approach, aiming at verifying how often and when top courts use comparative law. In other words, the Constitutional Court was not the main focus of the research anymore: a "comparison on the use of comparative law" was chosen to be able to understand how foreign solutions circulate, assuming that systems allow them to circulate, of course.[4]

1987, p. 601 ff., and PEGORARO and DAMIANI, "Il diritto comparato nella giurisprudenza di alcune Corti costituzionali", Diritto pubblico comparato ed europeo, 1999, p. 411 ff., as well as SOMMA, *L'uso giurisprudenziale della comparazione nel diritto interno e comunitario*, Milano, 2001, who analyzes a broader subject, not limited to constitutional case-law.

2 With regard to Italian scholars, see PEGORARO, "L'argomento comparatistico nella giurisprudenza della Corte costituzionale italiana", in FERRARI and GAMBARO (eds.), *Corti nazionali e comparazione giuridica*, Napoli, 2006, p. 477 ff.; PEGORARO, *La Corte costituzionale italiana e il diritto comparato. Un'analisi comparatistica*, Bologna, 2006; RIDOLA, "La giurisprudenza costituzionale e la comparazione", in ALPA (ed.), *Il giudice e l'uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica*, Milano, 2006, p. 15 ff.; SPERTI, "Il dialogo tra le Corti costituzionali ed il ricorso alla comparazione giuridica nella esperienza più recente", Rivista di diritto costituzionale, 2006, p. 125 ff.; ZENO-ZENCOVICH, "La giurisprudenza della Corte costituzionale e il diritto comparato della responsabilità civile", in BUSSANI (ed.), *La responsabilità civile nella giurisprudenza costituzionale*, Napoli, 2006, p. 273 ff. See also the debate between Vincenzo Zeno-Zencovich and Antonio Baldassarre: ZENO-ZENCOVICH, "Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?", Diritto pubblico comparato ed europeo, 2005, p. 1993 ff.; BALDASSARRE, "La Corte costituzionale italiana e il metodo comparativo", Diritto pubblico comparato ed europeo, 2006, p. 983 ff.; ZENO-ZENCOVICH, "Una postilla ad Antonio Baldassarre", Diritto pubblico comparato ed europeo, 2006, p. 992 ff. Among international studies, see CANIVET, ANDENAS and FAIRGRIEVE (eds.), *Comparative Law Before the Courts*, London, 2005; PONTHOREAU, "Le droit comparé en question(s). Entre pragmatisme et outil épistémologique", Revue internationale de droit comparé, 2005, p. 7 ff.; MARKESINIS and FEDTKE, *Judicial Recourse to Foreign Law: A New Source of Inspiration?*, Oxford- Manchester, 2006; MARKESINIS, *Juges et universitaires face au droit comparé. Histoire des trente-cinq dernières années*, Paris, 2006.

3 See, however, DE LUNGO, "Comparazione e legittimazione. Considerazioni sull'uso dell'argomento comparatistico nella giurisprudenza costituzionale recente, a partire dal caso Cappato", Federalismi.it, 17/2019, as well as PASSAGLIA, "Corte costituzionale e comparazione giuridica: una analisi (molto) sineddotica, una conclusione (quasi) sinestesica", in GIOVA and PERLINGIERI (eds.), *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006–2016*, Napoli, 2018, p. 63 ff.

4 See LE QUINIO, *Recherche sur la circulation des solutions juridiques. Le recours au droit comparé par les juridictions constitutionnelles*, Clermont-Ferrand, 2011; PIN, "Perché le Corti comparano?", Diritto pubblico comparato ed europeo, 2012, p. 1429 ff.; GROPPI and

This paper is not supposed to contribute to this kind of research. Its purpose is to renew the studies concerning only the Italian Constitutional Court, so as to verify whether over time the use of comparative law has undergone changes. Building upon the studies that were carried out at the beginning of the century, the research will be limited to the case-law of this century, thus starting from January 2000 to December 2021.

2 Some Explanatory Notes Concerning Methodology

Apart from the delimitation related to the period taken into consideration, further explanations are required concerning methodological choices that can have an impact on the outcome of the research.

It is not surprising that the use of comparative law by the courts is one of the most frequent issues addressed in debates among comparative scholars. In many cases (i.e., for many courts), the theoretical approach can be integrated with an empirical one, so as to put theoretical assumptions under review: when courts make explicit references to foreign or comparative law the impact of comparative or foreign law can be quite precisely determined. In fact, it can be established using evidence.

The Italian Constitutional Court is not part of this category of courts. There are references in the Italian constitutional case-law, nevertheless, the Court tends to refrain from quoting foreign or comparative law. As a result, the researcher needs to see beyond the text of the judgments and try to grasp some evidence from the "silence".

To put it more explicitly, having regard to experiences in which the courts, as the Italian Constitutional Court, appear "reticent", it is clear that the study on quotations of comparative law can be only indicative, and not fully descriptive: after having detected all the references to foreign or comparative law, even the most irrelevant ones, it is not possible to establish, on the bases of these

PONTHOREAU (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013; DI MANNO (ed.), *Le recours au droit comparé par le juge*, Bruxelles, 2014; ALÁEZ CORRAL et al., "Encuesta: el método comparado en derecho constitucional", Teoría y Realidad Constitucional, 2018, p. 15 ff.; HIRSCHL, "Judicial Review and the Politics of Comparative Citations: Theory, Evidence and Methodological Challenges," in DELANEY and DIXON (eds.), *Comparative Judicial Review*, Northampton (MA), 2018, p. 403 ff.; FERRARI (ed.), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, Leiden-Boston, 2019; BIAGI, "Foreign Law in Constitutional Interpretation", in Max Planck Encyclopedia of Comparative Constitutional Law.

pieces of evidence, "how much comparative law" is actually used. Basically, any analysis on the use of comparison that is carried out with reference to the explicit references to the *lex alii loci* needs to be coupled with a different kind of analysis, a less empirical and more speculative one, to guess at least the most important cases in which comparative law was used but the argument was not expressed in the text of the judgment. Of course, the more "reticent" a court is, the more difficult this task becomes. And, in general, the more "reticent" a court is, the less the explicit references that are detected can orient the research in looking for implicit references and, in general, in assessing the real importance that comparative law has.

It is a matter of approximation. An approximation that, in the case of the Italian Constitutional Court, still appears tolerable, because the number of cases is high enough to indicate at least some trends. And to a certain extent, approximation also means objectivity, which derives from the choice to consider (only) what is written, a sort of documentary evidence: although in many cases comparative law plays a role that is not explicitly recognized by a reference, and those cases are necessarily neglected, the fact of founding research on empirical evidence is the only way to achieve an outcome in which the scientific method is applied. Thus, it is possible to clearly distinguish what comes from empirical analysis, what is an objective deduction and what is a personal intuition.

3 The Outcome of Data Analysis: a Trend Towards Enhancement of Comparative Law

The analysis of 22 years of constitutional case-law shows that references to foreign or comparative law can be detected in 74 rulings, either judgments or orders: the judgments have a longer and more analytical legal reasoning. Therefore, it is no coincidence if the vast majority of references can be found in 68 judgments, whereas orders contribute with only six rulings.[5]

5 The following is the list of rulings where references to foreign or comparative law were identified: *Corte costituzionale*, 24 April 2002, No. 135; 7 May 2002, No. 155; 28 November 2002, No. 494; 20 December 2002, No. 536; 13 February 2003, No. 49; 1 October 2003, No. 303; 1 June 2004, No. 161; 26 May 2005, No. 199; 20 January 2006, No. 16 (Order); 17 March 2006, No. 116; 23 November 2006, No. 393; 23 November 2006, No. 394; 12 October 2007, No. 341; 15 April 2008, No. 102; 30 April 2009, No. 125; 26 November 2009, No. 311; 15 April 2010, No. 138; 8 July 2010, No. 250; 22 July 2010, No. 270; 8 October 2010, No. 293; 24 November 2010, No. 334; 5 January 2011, No. 1; 27 January 2011, No. 32 (Order); 8 June 2011, No. 180 (Order); 25 July 2011, No. 245; 24 January 2012, No. 13; 7 June 2012, No. 150 (Order); 13 November 2013, No. 267;

74 rulings in twenty-two years mean that the average number per year is 3.36 rulings. If compared with the average number of rulings delivered by the Constitutional Court (372 per year), it is clear that the number of references to foreign or comparative law is very low, maybe even too low to allow any analysis that could aspire to have scientific soundness.

Notwithstanding these reservations, if one adopts a dynamic approach, some interesting indications seem to emerge.

The following table shows, year by year, the number of rulings in which comparative law references were identified, the overall number of rulings, and the ratio of the two former data expressed in percentage.

Year	A – Rulings with references to foreign / comparative law	B – Total rulings	C – Impact of rulings with refences (A/B %)
2000	0	592	0
2001	0	447	0
2002	4	536	0.75
2003	2	382	0.52
2004	1	446	0.22
2005	1	482	0.21
2006	4	463	0.86
2007	1	464	0.22
2008	1	449	0.22
2009	2	342	0.58
2010	5	376	1.32
2011	4	342	1.17

22 November 2013, No. 278; 22 November 2013, No. 279; 13 January 2014, No. 1; 9 May 2014, No. 120; 10 June 2014, No. 162; 11 June 2014, No. 170; 11 June 2014, No. 172; 26 September 2014, No. 227; 22 October 2014, No. 238; 11 February 2015, No. 10; 5 June 2015, No. 96; 15 July 2015, No. 157; 23 July 2015, No. 178; 13 April 2016, No. 84; 14 July 2016, No. 174; 15 December 2016, No. 265; 26 January 2017, No. 24 (Order); 9 February 2017, No. 35; 24 February 2017, No. 43; 26 May 2017, No. 123; 13 July 2017, No. 179; 18 January 2018, No. 5; 21 February 2018, No. 33; 7 June 2018, No. 120; 26 June 2018, No. 133; 16 November 2018, No. 207 (Order); 21 December 2018, No. 239; 21 February 2019, No. 20; 4 March 2019, No. 33; 29 March 2019, No. 68; 9 April 2019, No. 78; 9 April 2019, No. 79; 7 June 2019, No. 141; 25 September 2019, No. 214; 3 October 2019, No. 219; 20 December 2019, No. 279; 11 February 2020, No. 15; 26 February 2020, No. 32; 23 June 2020, No. 120; 17 September 2020, No. 201; 4 December 2020, No. 262; 9 March 2021, No. 32; 9 March 2021, No. 33; 30 April 2021, No. 82; 14 May 2021, No. 98; 21 October 2021, No. 197.

Year	A – Rulings with references to foreign / comparative law	B – Total rulings	C – Impact of rulings with refences (A/B %)
2012	2	316	0.63
2013	3	328	0.91
2014	7	286	2.45
2015	4	276	1.45
2016	3	292	1.03
2017	5	281	1.78
2018	6	250	2.4
2019	9	291	3.10
2020	5	281	1.78
2021	5	263	1.90
TOTAL	74	8185	—
AVERAGE	3.36	372.05	0.90

Indeed, the table shows data that seem to be quite significant, from many points of view. First, they confirm the limited number of references identified in the constitutional case-law. However, the table also indicates the growth of references, despite the corresponding reduction of the overall number of rulings delivered by the Court every year. The turning point can be identified in the year 2010. In the decade that precedes it, the record highs are those of 2002 and 2006, with 4 rulings. 2006 is also the year in which the impact of rulings with reference was the highest if compared with the overall number of rulings; in any case, this record high does not reach the threshold of 1% (0.86).

This threshold is exceeded in 2010 (1.32%), and in the following years the general rule is that references to foreign or comparative law can be detected in more than 1% of rulings; the only exceptions are 2012 (0.63%) and 2013 (0.91%). These are the years in which even the absolute value is lower: the 2 rulings of 2012 and the 3 of 2013, the latter replicated in 2016, are the only data below the maximum recorded in the first decade of the century. In 2011 and in 2015, the 4-ruling record of the period 2000–2009 is matched. These are the recent years that displayed the worst results for comparative law. For the rest, the data always reach at least 5 rulings (in 2010, 2017, 2020, and 2021), with the peaks of 2014 (7) and – above all – of 2019 (9). The percentage data exceeds 3% in one case (3.10 in 2019) and in two others 2% (2.45 in 2014 and 2.40 in 2018).

If data are aggregated over several years, a comparison can be drafted between the first decade and the last five years of the period under examination: in this way, data become rather significant.

In the years 2000–2009, out of the total 4,603 decisions, those bearing foreign or comparative law references are 16 (1.6 per year), with an overall impact of 0.35%, well below half the overall impact of the entire period taken into consideration (0.90%).

In the years 2017–2021, on the contrary, out of the total 1,366 decisions, 30 (6 per year) bear foreign or comparative law references, with an overall impact of 2.20%, more than six times the percentage of the first decade of the century.

Of course, with such limited numbers, it is perhaps a bit risky to express any conclusion designed to describe a general outcome of the analysis. Nevertheless, the rather huge evolution that results from the comparison between 2000–2009 and 2017–2021 seems to be too huge to be simple randomness. Actually, it is more likely the symptom of a trend towards enhancement of comparative law in constitutional case-law. A trend that needs, of course, to be checked in the near future, to find confirmation or contradiction.

4 The Functions of Comparative Law References

The comparative law references that are included in the rulings of the Court do not always have the same value. It could not be otherwise. The functions they perform are, indeed, rather diverse, to the point that probably the main purpose of this paper can be identified in sketching a classification of the different references to foreign and comparative law that can be detected in the Italian constitutional case-law.

4.1 *The "Neutral" References to Comparative Law*

A significant number of references to foreign or comparative law are characterized by having a very modest impact on the Court's legal reasoning so that they could not be considered as a part of it. Despite their secondary role, it is nevertheless important that comparative law makes its appearance in the ruling: this is because the appearance itself is an indication of the attention that is paid to comparison by the constitutional judges.

4.1.1 The "Borrowed" References

The first category of rulings includes those in which the comparative law reference, *strictly speaking*, cannot even be assigned to the Constitutional Court. The case occurs, first of all, when the reference appears in the *Conclusions on*

points of law of the ruling,[6] but it is more precisely located in the first paragraph of it, which summarizes the issue at stake as the claimant or the referring court expressed it. Two rulings can be mentioned in this regard: the one concerning the conversion of a driving license issued by a non-EU State into an Italian license (Order No. 180 of 2011) and the one dealing with prison overcrowding (Judgment No. 279 of 2013). The reference to criteria for identifying false accounting in the U.S. law can certainly be assimilated to the two just mentioned, even though it is not included in the first paragraph of the *Conclusions on points of law* of Judgment No. 161 of 2004: as a matter of fact, the reference appears in a passage in which the Constitutional Court recaps the arguments of the referring court.

Another kind of borrowed references can be identified in judgments where reference to the foreign legal system, and perhaps also to some of its basic characteristics, is made mainly because it was the subject of one or more judgments or decisions rendered by the Court of Justice of the European Union, the European Commission or the European Court of Human Rights: Judgment No. 536 of 2002 is a clear example, since the regulation of hunting in Corsica is evoked in relation to a ruling by the Court of Justice; in Judgment No. 116 of 2006, the regulation of G.M.O.s. is considered in the light of a decision of the European Commission against the law of an Austrian *Land*; similarly, in Judgment No. 125 of 2009, concerning State aid, the reference to foreign law is made by the Constitutional Court quoting a judgment by the Court of Justice concerning the German legal system; in Judgment No. 245 of 2011, on the right to marry irregular foreigners, the Constitutional Court argues the violation of Article 117(1) of the Constitution by the legislation that prevented the exercise of the said right by referring to a judgment of the European Court of Strasbourg pertaining to the United Kingdom legislation on the matrimonial capacity of foreigners; the Order No. 150 of 2012, concerning heterologous fertilization, relies on a decision of the *Grande Chambre* of the Court of Strasbourg concerning the Austrian system; in Judgment No. 278 of 2013, the excessive rigidity of the legislation that protected the anonymity of the mother while giving birth is analyzed also having regard to the position of the European Court concerning the French legislation; in judgment No. 178 of 2015, the need for a balance between general interests and protection of individual rights is evoked, and to this end the European Court of Human Rights is mentioned

6 The *Conclusions on points of law* is the part of the ruling that hosts the legal reasoning. The previous part, *Considerations on facts*, is mainly the overview of arguments expressed by the parties: the 74 references that are taken into account in this paper are all included in the *Conclusions on points of law*.

for its position concerning the reductions in pension treatments implemented by the Portuguese legislator; with Judgment No. 43 of 2017, the scope of some judgments of the Strasbourg Court in the matter of administrative sanctions that can be qualified, under the European Convention on Human Rights, as "criminal" is reduced with reference to the practice in the German Democratic Republic that the said judgments examined; Judgments Nos. 32 and 33 of 2021, in the matter of formal recognition of the relationship between parents and children, both refer to the French legal system, in particular in connection with the request for an advisory opinion that the French Court of Cassation submitted to the Court of Strasbourg, in the application of Protocol No. 16 to the European Convention on Human Rights; lastly, Judgment No. 197 of 2021 refers to the "security custody" existing in the German legal system as an object on which the European Court developed its case-law.

Two other judgments must be included in this category. The reference made to the "main European countries" that can be found in Judgment No. 262 of 2020 is nothing more than the consequence of a textual quotation from the document "Hypothesis of revision of the levy on real estate", drawn up by the Finance Department of the Ministry of Economy and Finance in August 2013. Even more peculiar is, however, the case of Judgment No. 68 of 2019, in which the generic reference to "other legal systems" is part of a passage taken from a previous decision of the same Constitutional Court (Judgment No. 343 of 1987): in this case, the reference is not borrowed from the parties or other subjects, still the reference is borrowed, because the use of comparative law was actually made by the judgment that is textually quoted.

4.1.2 The Descriptive or Explanatory References

The second category of rulings includes those in which references to foreign or comparative law are made to describe or to explain some aspects of the issue that the Constitutional Court is dealing with.

The oldest ruling of this type is Judgment No. 494 of 2002, concerning the recognition of the filiation for incestuous children: the Court makes a historical reference to the *Code Napoléon* as a source of inspiration for "the original tradition of exclusion concerning the moral rights of children born out of wedlock". In Judgment No. 199 of 2005, adequate information on the unfair terms of the contract pursuant to Article 1469-*quater* of the Civil Code is explained thanks to a comparison with "the *fair opportunity* that North American case-law uses as a prerequisite for the effectiveness of the limits established by the law". The same purpose of explaining characterizes the reference made in Judgment No. 157 of 2015 to the origin of the penalty payments for delay provided by Article 114 (4)(e) of the legislative decree No. 104 of 2 July 2010, an

origin that the Council of State found in the French model of the "*astreintes*". Similarly, in Judgment No. 214 of 2019, the reference to the "US experience of the so-called *gerrymandering*" is made to evoke possible manipulative techniques of the constituencies.

Although their function is just slightly more intense, a greater importance must probably be recognized to those references made to a specific situation that arose in a foreign legal system to define a legal concept in concrete terms: in this regard, it is noteworthy that, in Judgment No. 311 of 2009 and in Judgment No. 1 of 2011 (as well as in Judgment No. 227 of 2014, which contains the textual quotation of the Judgment of 2011), starting from a judgment rendered by the European Court of Strasbourg, reference is made to the situation that arose following German reunification to specify the meaning of the "compelling reasons of general interest" which justify regulation with retroactive effects affecting the right to a fair trial; in the same vein, Judgment No. 219 of 2019, after having highlighted that "the rules that prevent the use of some pieces of evidence rest essentially on the need to introduce measures aimed also at discouraging possible 'abuses'", states that "it is known, in this regard, that in common law the prevailing purpose of exclusionary rules is precisely that of deterrence".

Among the descriptive references, there are also those in which the foreign experiences are mentioned to add complementary information, which is not necessary, but they can help a better understanding of the legal reasoning. Therefore, they are not required, but they are neither useless. This is the case of Judgment No. 334 of 2010, in which the Court recognizes that the law which extended compulsory education was inspired by "the experience of other European countries". It is likewise the case of Judgment No. 238 of 2014, that while describing the historical evolution of the immunity of States under international law, focuses on the progressive establishment of the limit to the application of the immunity rule, making an explicit reference to the so-called Italian-Belgian thesis and to judgments delivered by Italian and Belgian courts in the first decades of the 20th century. In Judgment No. 133 of 2018, the issue concerned the immunity that protects members of Parliament for the opinions they express: the Court emphasizes a peculiarity of the system that emerges in comparison with those systems, such as the German and the American, which expressly limit immunity "to acts performed within the Chamber". Lastly, in Judgment No. 279 of 2019, followed by Judgment No. 15 of 2020, the reasons that prevent full development of the potential of financial penalties are considered and the Court admits that, unlike what happens in other systems, these obstacles affect the possibility for these penalties to be a real alternative to deprivation of personal liberty.

Among the descriptive or explanatory references can be included also those judgments in which comparative law reference is related to the recognition of the existence of a transnational rule: in Judgments No. 135 of 2002, nos. 393 and 394 of 2006, concerning, respectively, recordings as means of obtaining evidence in criminal cases, the change of the limitation periods for certain crimes and some electoral crimes, the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, is mentioned, "although lacking legal effect", for the fact that it expresses "principles common to European legal systems". Similarly, in Judgment No. 179 of 2017, reference is made to "the principle of proportionality of the penalty, known in many European legal systems, and also codified in art. 49(3) of the Charter of Fundamental Rights of the European Union".

To conclude the analysis of this second category of judgments, descriptive or explanatory references can be detected also in these cases in which they are aimed at underlining certain features of foreign systems that make them suitable to be configured as patterns for the Italian legal order. In this regard, three judgments can be mentioned.

First, the possible definition of foreign legal systems as a pattern is suggested in Judgment No. 49 of 2003, where the Court states that in a previous ruling (Judgment No. 422 of 1995), it expressed a "positive assessment" with regard to practices "freely adopted" by political parties tending to strengthen the presence of women in representative offices, also with specific provisions in the parties' statutes, following "the model of initiatives widespread in other European countries".

The two other cases both concern the field of medically assisted procreation. Judgment No. 162 of 2014 declares the unconstitutionality of the prohibition to use medically assisted heterologous procreation techniques if a pathology that was the cause of absolute and irreversible sterility or infertility had been diagnosed. When addressing the specific issue of the number of donations, the Court suggests updating the Guidelines issued by the Minister of Health, "containing the indication of the procedures and techniques of medically assisted procreation", "possibly also in the light of the regulations established in other European countries (such as, for example, France and the United Kingdom)". Judgment No. 96 of 2015 declared the unconstitutionality of the prohibition to use medically assisted procreation techniques, with preimplantation diagnosis, for fertile couples carrying certain transmissible genetic diseases: in urging the legislator to provide for forms of authorization and control of structures authorized to carry out these medical practices, the Court mentions the possibility of enhancing, if necessary, "the provisions already specifically identified

by the majority of European legal systems in which this kind of medical practices is admitted".

4.2 *The Use of the Comparative Law Argument by the Court*

The 36 rulings mentioned so far represent something less than half of the total number of rulings recorded in the time period that this paper takes into consideration. In none of these rulings, for one reason or another, it can be said that comparative law is really a part of the legal reasoning that is the base of the final decision adopted by the Court. As a result, only in the other 38 rulings that were identified for the period 2000–2021 a real use of the comparative law argument can be assessed. In these rulings, indeed, references to foreign or comparative law contribute to the elaboration of the legal reasoning (and generally also to the *ratio decidendi*), so that comparative law truly becomes an instrument in the hands of the Constitutional Court.

The limited number of rulings that remain confirms and enhances the conclusion that the comparative law plays a marginal role in the constitutional case-law: it is used too randomly to be considered a significant feature of the Court's argumentative techniques. However, also in this regard, a dynamic approach can help recognize a significant trend towards the growth of the importance of comparative law, a trend that seems to strengthen as time passes. The following table is similar to the one that was previously proposed, except for replacing the total comparative references with those in which comparative law is to be fully considered as an argument used by the Constitutional Court.

Year	A – Decisions with arguments containing foreign / comparative law	B – Total decisions	C – Impact of decisions with citations (A/B %)
2000	0	592	0
2001	0	447	0
2002	1	536	0.19
2003	1	382	0.26
2004	0	446	0
2005	0	482	0
2006	1	463	0.22
2007	1	464	0.22
2008	1	449	0.22

Year	A – Decisions with arguments containing foreign / comparative law	B – Total decisions	C – Impact of decisions with citations (A/B %)
2009	0	342	0
2010	4	376	1.06
2011	1	342	0.29
2012	1	316	0.32
2013	1	328	0.30
2014	4	286	1.40
2015	1	276	0.36
2016	3	292	1.03
2017	3	281	1.07
2018	5	250	2
2019	5	291	1.72
2020	3	281	1.07
2021	2	263	0.76
TOTAL	38	8185	—
AVERAGE	1.72	372.05	0.46

Compared to the statistics concerning all the references, this table, focusing on references that can be defined as "qualified", shows a slightly different trend in growth: the year 2010 does not mark a turning point, but rather an exception, which is repeated in 2014. In fact, these are the only years, until 2015, in which the impact of decisions with respect to the total exceeds the 1% threshold. Starting from 2016, however, the upward trend seems to stabilize, since the only year in which it falls below 1% is 2021, while in 2018 the threshold of 2% is also reached.

On the basis of these findings, the comparison that was previously made between the first decade of the century and the last five years can be reconsidered, with even more evident results. The 6 rulings (0.6 per year) of the 2000–2009 period represent 0.11% of the total number of rulings delivered by the Court; on the other hand, the 18 rulings (3.6 per year) of the 2017–2021 period, reach 1.32% of the total ruling delivered, with an impact that is almost twelve times greater than for the first decade of the century.

Despite this rather evident rate of growth, it is clear that dealing with an extremely reduced number of pronunciations, any possible deduction must be

"handled with care". Notwithstanding, even a reduced number can offer some hints of reflection, especially when it comes to proposing a classification of the kind of uses that the Constitutional Court does of comparative law.

4.2.1 Comparative Law as a Means to Strengthen an Obiter Dictum

In a theoretical ranking of the impact of comparative law references on the Court's argument, the lowest position would be occupied by Judgment No. 265 of 2016, which declares the unconstitutionality of a regional legislation that limited the possibility of carrying out an on-call passenger transport service to taxi or chauffeur-driven operators only.

The reason that founds the unconstitutionality of the challenged provision is the violation of the exclusive State competence in the matter of "protection of market competition", however, the Court expresses the wish that the "empowered legislator promptly takes charge of [...] the new demands for regulation", so as to answer to growing questions which "are currently under discussion also within the European Union, in many of the Member States, as well as in numerous other jurisdictions throughout the world".

This last reference, although not strictly related to the *ratio decidendi*, cannot be defined as merely descriptive, insofar as the Court, while expressing the wish for legislative action, offers a hint concerning what could be the outcome of a possible new judgment on the issue in the event of persistent inaction of the legislator: it is fair to state that the Court, considering other Member States, would warn the legislator to adopt a regulation and eventually would impose it to do so declaring the unconstitutionality of the existent regulation, insofar as inadequate to answer to the new demands for regulation.

4.2.2 Comparative Law as a Means to Interpret Constitutional and Legislative Standards of Review

The Constitutional Court can use comparative law to clarify the contents of constitutional or legislative provisions which act as standards for the constitutional review at stake. In these cases, comparative law can help define the real issues to be decided.

The most iconic example of this type of use of comparative law can be found in Judgment No. 303 of 2003, in which one of the most analytical references can be found among those detected in the rulings of the period taken into consideration. In order to argue the constitutional need not to limit "the unifying activity of the State only to matters expressly attributed to it in exclusive power or to the determination of the principles in matters of shared competence", the Court emphasizes the importance of means aimed at enhancing unity: indeed, under certain conditions, unitary needs justify "also in constitutional systems

strongly pervaded by institutional pluralism", an exception to the ordinary distribution of powers. In this regard, the Court refers to "the concurrent legislation of the German constitutional system (*konkurrierende Gesetzgebung*)" and "the *Supremacy Clause* in the US federal system", to conclude that also in the Italian constitutional system there must be means aimed at making the distribution of powers between the State and the regions more flexible, through provisions that find their main support "in the proclamation of unity and indivisibility of the Republic".

The use of comparative law as an aid to interpreting standards of constitutional review is also recorded in Judgment No. 82 of 2021. The subject of this ruling was a regional legislation that had introduced environmental taxes. The starting point of the Courts' review is, on one hand, the recognition that, from a constitutional point of view, the protection of the environment as a common good has resulted, among other things, in the establishment by the State of environmental taxes and, on the other, the recognition of the possibility for the regions to establish their own autonomous taxes which, "as is now proper to other European regional systems", may also include those aimed at protecting the environment. These considerations justify the exercise of the regional tax authority, which is however criticized in the case at issue because the challenged provisions could not pass the proportionality test.

4.2.3 Comparative Law as an Argument to Support the Challenged Legislation

Comparative law references can be used – and they are actually used several times – in constitutional review with the purpose to support the challenged legislation. These references, indeed, are able to strengthen the grounds on which the Constitutional Court declares unfounded the questions of constitutionality.

An example is the reference in Judgment No. 155 of 2002. The Court addresses the issue of pluralism in private broadcasting and to reply to the alleged failure to recognize broad freedom for broadcasters to propose their own "orientation" it underlines how the legislation concerning political communication in the main European countries, "despite the inevitable diversity of inspiring criteria", follows patterns of regulation of radio and television air times that are generally characterized by the rule of equal chances".

Another ruling in which the comparative argument is aimed at strengthening the challenged provisions is Judgment No. 341 of 2007, on banking compound interest. The Judgment includes a rather analytical explanation of the state of the law in France, Germany, Spain, and the United Kingdom (with a reference to Austria and Belgium), to highlight how the clear distinction that

they all trace between banking regulations and general contract law creates the conditions to assess the peculiarity of the Italian regulation of compound interests. Reviewing the contested provisions, the Court admits that the Italian legislator, in adapting the national system to the law of the European Union, has proceeded to strengthen the special characteristics of banking compound interest. As a result, the new provisions pursue the aim of homogenizing the Italian law to that of other European countries.

In Judgment No. 250 of 2010, concerning the crime of illegal immigration, comparative law analysis shows that criminal provisions of similar inspiration, "sometimes accompanied by the imposition of penalties even significantly more severe" than that provided for by the Italian regulation, can be detected "in the legislation of several countries of the European Union: and this both in the context of the countries closest to ours for legal traditions (such as France and Germany), and among those of different traditions (such as the United Kingdom)". In the same Judgment, the Court also considers "not superfluous" to add that also "punishing irregular immigration with financial penalties is anything but unknown" in other legal systems, and specifies that "financial penalties, alternative or joint to the prison sentence, are provided for by the laws of Germany, France and the United Kingdom, for instance; while the Spanish law, for the irregular stay, provides for the only financial administrative sanction". In Order No. 32 of 2011, the latter argument is taken up with almost the same wording.

In Judgment No. 270 of 2010, the specific references made to the French, German and British legal systems help confirm what emerges from the national regulatory framework, namely the relevance, in order to carry out an evaluation of the various interests involved" in concentrations of companies operating in the sector of essential public services that are subject to extraordinary administration. These various interests appear adequately protected in Italy, and the reference to other legal orders supports this conclusion because the legal solutions are similar. This statement represents one of the grounds of the legal reasoning that leads to declaring the question of constitutionality unfounded.

In the same vein, although in a much more concise form, the reference in Judgment No. 267 of 2013 is aimed at corroborating the logical and legal sustainability of the choice to open the Fire Brigade to volunteers: in this regard, the Court notes that "other legal systems – such as the German one – have assigned voluntary and non-professional personnel a large part of civil protection activities".

A more significant reference, again to the German legal system, is the one included in Judgment No. 172 of 2014. In order to decide on the constitutionality

of the criminal provision on stalking, that was challenged for its indeterminacy, the "concise statement" for which the Italian legislator has opted (like "in most countries where [a specific] legislation has been adopted" on stalking) is certainly strengthened, in terms of compatibility with constitutional principles, by the following remark: "even in a legal system like the German one, in which it was chosen to enumerate the cases of persecution [...], the list is not exhaustive, but provides for a closing clause [for analogous cases], which attracts in the scope of criminal relevance, in addition to the punctually typified conducts, also any 'other similar behavior'".

In Judgment No. 5 of 2018, the question of constitutionality concerning mandatory vaccinations is declared unfounded. The legal reasoning includes a rather analytical account of the plurality of approaches that can be found thanks to comparative law research. From this plurality of approaches emerges, however, "a general legal preference for policies that spread vaccine use". The forms of this preference vary considerably: "[a]t one extreme are measures which, even recently, attach criminal sanctions to mandatory vaccine laws (France); at the opposite end of the spectrum are vaccine promotion programs that leave maximum room for individual autonomy (like in the United Kingdom)"; falling between the two are "a variety of choices calibrated in different ways, which include examples in which vaccination is mandatory to enter the school system (like in the United States, certain autonomous communities of Spain, and France to this day) and others that require parents (or guardians exercising parental responsibility) to consult a doctor prior to making a choice themselves, under penalty of fines (Germany)". Moreover, the Court highlights that "[i]n many countries [...] there is an ongoing debate on vaccination policies, aimed at finding the most effective legal tools in view of the shared objective of protecting health against infectious diseases and those that can cause serious complications, which can be contained through preventive vaccination".

Judgment No. 33 of 2018 does not declare unconstitutional the extended seizure that the legislation on criminal organizations provides for, and in order to do so the Court emphasizes that the challenged seizure is a patrimonial measure "which is part of the 'modern' forms of seizures to which, for some time, several European States have resorted to overcoming the limits of the effectiveness of the 'classic' criminal seizure".

With reference to Judgment No. 239 of 2018, concerning questions of constitutionality on the electoral law for the European Parliament, the comparative law reference is used to justify the provision that imposes a 4 percent qualifying threshold: the choice made is "not unreasonable", among other reasons, "if it is considered that a similar choice has already been made by other Member

States of the Union, numbering specifically 14, which also include larger countries such as France and Poland".

Similarly, in Judgment No. 78 of 2019, the failure to provide – among the conditions that prevent participation in the procedures for recruitment of university professors – the condition of the marriage relationship with a professor belonging to the department or structure recruiting, or with the president of the university, the general manager, or a member of the university's executive board, is not considered by the Court inconsistent with the Constitution. To this effect, it is defined as "significant" that, on the one hand, "in other legal systems close to ours, academic solutions are promoted who favor family unity", and on the other hand, "the need to preserve access to an academic career from possible conditioning is satisfied through mechanisms other than the drastic provision of the prohibition to even apply".

In Judgment No. 79 of 2019, the questions of constitutionality concerning the reform of the organization of the Italian Red Cross are declared unfounded, also taking into account that the new organizational scheme has aligned "our system with other experiences, in particular (but not only) European": the Court expressly mentions the United Kingdom ("the British Red Cross, which received royal recognition in 1908, is a voluntary aid society, auxiliary to public authorities"), as well as continental legal systems (the French *Croix-Rouge*, "a non-profit association recognized as being of public utility", the German *Bundesverband des Roten Kreuzes*, a "registered association pursuant to Article 21 and following of the German Civil Code", the Spanish *Cruz Roja*, "a civil association of public relevance composed only of civil volunteers").

With regard to the failure to provide tax relief in favor of the spouse in the event of company transfers, Judgment No. 120 of 2020 underlines that this type of concession is aimed at limiting financial difficulties at the time of succession. Notwithstanding, the absence of relief does not lead to a declaration of unconstitutionality: among other reasons, the Court underlines that in other jurisdictions there is rarely a total exemption and, in any case, the reliefs "are linked [...] to much heavier tax burdens on inheritances"; in particular, a Judgment delivered in 2014 by the Federal Constitutional Court is expressly mentioned which declared incompatible with the principle of equality a fiscal concession "provided by the German system with regard to taxes on inheritance and gifts in the event of a transfer of corporate assets by succession" analogous to the one at issue before the Italian Court, "but less broad and more rigorous in its reference to the preservation of jobs, and, above all, appearing in a context in which the tax is markedly higher".

Lastly, with Judgment No. 201 of 2020, the question concerning the imputation of some kind of companies in proportion to the share of the profits,

regardless of the actual perception by the shareholder, is declared unfounded. In the legal reasoning, the Court, among other arguments, exposes the one according to which "this method of income imputation 'for transparency' [...] is not peculiar to our tax system, since it is a pattern also known, to some extent, in the legal systems of other countries".

4.2.4 Comparative Law as an Argument to Criticize the Challenged Legislation

Another kind of reference to foreign or comparative law can be identified in those cases in which the reference is aimed at highlighting, or rather it contributes to highlighting, the inadequacies of Italian law, and in particular the challenged provisions.

In this regard, one of the most exemplary cases is in Judgment No. 293 of 2010, which declares unconstitutional the provisions regulating the use without an empowering title of an asset for purposes of public interest: the Court clearly states that "[t]he legislator could have regulated [...] the subject-matter in different ways, and could also have radically excluded the possibility of acquiring the asset on the simple basis of having occupied it, thus guaranteeing the return of the property to the private individual, *in analogy with other European systems*".[7]

A similar use of comparative law is in Judgment No. 10 of 2015, where the Court, for the declaration of unconstitutionality of the challenged provisions, makes clear that "leaving aside its designation as a 'surcharge'", the so-called 'Robin Hood tax' (actually, a "surcharge" of 5.5 percent on the income tax of the companies on undertakings operating in specific sectors, including the sale of gasoline, petroleum, gas, and lubricant oils) "amounts to an 'increased rate' of corporate income tax, which is applicable under the same terms and to the same income as the latter, and does not operate as a tax on profitability, as has occurred in other legal systems".

Judgment No. 174 of 2016 bears a comparative reference aimed at strengthening the reasons for the declaration of unconstitutionality that affected the regulation of the survivor's pension and in particular the unreasonable reduction introduced. In analyzing the legal framework in which the challenged provisions are placed, the Court also underlines that the reduction in the amount of the survivor's pension could be regulated taking into account several criteria; among them "the age of the beneficiary spouse, as considered in other legal systems".

7 Emphasis added.

A relevant impact must be recognized to the reference, made in Judgment No. 35 of 2017, to the difference between the run-off that opposes lists and the run-off that opposes individual candidates. The declaration of unconstitutionality that strikes down the provision for a run-off between lists in the election of the Chamber of Deputies is supported by many arguments, among which the aforementioned difference: the run-off between candidates that is used, in other legal systems, in majoritarian electoral systems, is a means to ensure the elected candidate broad representativeness in a single-member constituency, while for the run-off between lists the leading idea is to ensure – through the assignment of a bonus in terms of seats – a governing political majority.

An even stronger use of the comparative law reference is made in Judgment No. 120 of 2018, which declares the unconstitutionality of the legislation prohibiting the establishment of trade unions by members of the armed forces. The Constitutional Court takes into account the approach that emerges from the case-law of the European Court of Human Rights, which is open to the recognition of this right, and underlines that the French legislator, with the law No. 2015–917 of 28 July 2015, intervened precisely to overcome the incompatibility of the previous national legislation with the European Convention, "by recognizing the right of professional association in accordance with the provisions laid down in dedicated legislation".

The provision of a transparency law that imposed a duty to publish fiscal data concerning income, assets, and involvement and shares in companies concerning all managers working for the public administrations, irrespective of their position, and extending to their spouses and relatives up to the second degree, is declared unconstitutional by Judgment No. 20 of 2019. In the legal reasoning, the Court notes that, to achieve the purpose of the legislation, "there are certainly alternative solutions", and indeed some of these solutions "are favored […] in other European systems".

In Judgment No. 33 of 2019, after having found the unconstitutionality of a provision concerning the obligation of associated management by certain municipalities of fundamental functions, the Court points out that successful interventions in response to the problem of the pulverization of municipalities have been implemented in other systems, often carrying out the principle of differentiation not only with regard to the organization but also with regard to functions; a concise list of European experiences is also drafted.

In order to declare the unconstitutionality of the effects of the living law on the basis of which the rules governing the execution of the sentence did not fall into the scope of the prohibition of retroactive application deriving from the principle of legality of the penalty, Judgment No. 32 of 2020 takes into account "multiple and convergent reasons". Among the latter, are included

also the case-law of the Court of Strasbourg and the confirmations that it finds "in the case-law of other courts and in the legislation of other countries": an express reference is made to some rulings of the Supreme Court of the United States and to the provisions of the French Criminal Code.

To conclude, Order No. 16 of 2006 must be mentioned, although it does not bear, of course, a declaration of unconstitutionality, but a declaration of manifest inadmissibility, based on the impossibility for the Constitutional Court to act in the way the referring court asked without overlapping the discretionary choices of the legislator. Despite these difficulties that prevent a judgment on the merits, comparative law is used to suggest the inadequacy of the contested legislation. The challenged provisions regulate the exercise of the right of revocation of the defender and of the right to renounce the defensive mandate in the criminal proceedings, and in the order the need for legislative intervention that could stem the "pathological abuse" of the possibilities offered by law in force is highlighted: the abuses the Court is dealing with are prevented and repressed in other legal systems thanks to "specific institutes, ideally aimed at ensuring that the defensive guarantees live and develop fully within the trial, but to the extent that they do not degrade to mere instruments of paralysis or delay" so that they can be a means to ensure "defense in the trial and not a defense from the trial".

4.2.5 Comparative Law as an Argument in Support of the Solution Adopted by the Court

Another category of references that can be detected is that in which foreign or comparative law is used to support the choices made by the Constitutional Court. The support can take various forms, as well as different degrees of strength.

i. In three cases, the analysis carried out by the Court results in the demonstration of the absence of shared solutions among national legal orders, hence the impossibility of deducing conclusive arguments from the observation of foreign systems. It is what the Court states in Judgment No. 138 of 2010, concerning the recognition of same-sex marriages: two references can be identified in this regard. The first occurs where the Court declares inadmissible the question of constitutionality based on the alleged violation of Article 2 of the Constitution. Despite the definition of homosexual unions as social groups (which therefore deserve protection under the Constitution), the Court recognizes the broad discretion of the Parliament in this matter. And to support this conclusion a simple "overview of the laws of the countries that have recognized [homosexual] unions so far, even if not exhaustive" can easily "ascertain the diversity of the choices made". The second reference is very similar to the

first, but for its structure and for its effects; it occurs where the Court declares the question of constitutionality based on Article 117(1) of the Constitution inadmissible, citing, as "further confirmation", what emerges "from the overview of the choices and solutions adopted by numerous countries which have introduced in some cases a genuine extension to homosexual unions of the legislation in place for civil marriages or, more frequently, highly different forms of protection ranging from the general equivalence between such unions and marriage, through a clear distinction from marriage in terms of their effects".

This argumentative scheme can be found also in Judgment No. 84 of 2016, concerning the absolute prohibition of clinical or experimental research on embryos. In the legal reasoning, the Court makes extensive references to the *Parrillo v. Italy* Judgment of 27 August 2015, also in the part in which the *Grande Chambre* of the European Court of Human Rights analyzes the solutions adopted by the different legal systems of the Member States of the Council of Europe. The outcome of the comparison is that "there is no broad European consensus on the subject", given that "whilst seventeen out of the forty Member States in relation to which the Court has information have adopted a non-prohibitive approach in this area […], other countries have enacted laws that expressly prohibit any research into embryonic cells, whereas others permit the research in question under strict conditions". These multiple approaches lead the Constitutional Court to highlight the need to defer to the discretion of the legislator, which, "acting as the interpreter of the general will, is required to strike a balance through legislation between the fundamental values that are in conflict, taking account of the views and calls for action that it considers being most deeply rooted at any given moment in time within the social conscience". The inadmissibility of the question of constitutionality is the obvious result of these remarks.

With Judgment No. 123 of 2017, the Court declares unfounded the question of constitutionality concerning the lack of any provision allowing for the cancellation of a final judgment in administrative matters following a ruling against the Italian State by the European Court of Human Rights. In the legal reasoning, it is underlined that the Strasbourg Court prompts an adaptation of national legal systems to the protection requirements connected with compliance with its judgments. Nevertheless, in areas other than the criminal law, it is not at present apparent from Convention case-law that there is any general obligation to adopt the restorative measure of reopening the trial and that the decision to provide for this is left to the States Parties, which are moreover encouraged to make provision to this effect, albeit with due consideration to the various countervailing interests in play". The national answers to this encouragement produce a plurality of solutions: in light of this, the progressive

introduction of instruments allowing for the reopening of trials that has been registered in various legal systems (the Court focuses on Germany, Spain, and France) is considered suitable to indicate a trend, that Italy hopefully will follow, taking into account, however, the need to recognize the power of the legislator to a balance among the interests at stake.

ii. Comparative law is sometimes used to corroborate the solution that the Constitutional Court adopts regarding the interpretation of the law in force, a solution that, apparently, has not unanimous support. Several rulings deserve to be mentioned in this regard.

In Judgment No. 102 of 2008, the analysis of other European systems is a means to exclude the existence of constraints deriving from the European Union law: as a result, the alleged conflict between national and supranational sources is declared unfounded. In particular, in the matter of tourist taxes, the Court observes that there is no specific European Union legislation, so that the question of constitutionality concerning the tax provided for in the Sardinian regional legislation clashes, on this point, with the circumstance that such taxes are or were provided for under the national law of various Member States of the European Union": "for example", "the German *Kurtaxe*; the French *taxe de séjour*; the *impuesto sobre las estancias en empresas turìsticas de alojamiento* formerly in force in the Autonomous Community of the Balearic Islands; the *impôt sur les chambres d'hôtels et de pensions* in Brussels".

In Judgment No. 13 of 2012, concerning the admissibility of the *referendum* for the partial repealing of the electoral law for the Chambers, a comparative law reference is used for what pertains to the alleged revival (in case of repeal of the repealing provision) of the previous legislation. In order to exclude this revival, one of the arguments of the Court is that "also in other legal systems (such as the United Kingdom, France, Spain, the USA, and Germany), legislation may not, as a rule, be restored through the repeal of other legislations, unless express provision to this effect is made: this is because repeal is not limited to the suspension of the effects of a law but expunges it *sine die*".

Judgment No. 10 of 2015 is a very interesting case of reference to comparative law. One of the two references to mention[8] deals with the power of Constitutional Courts to limit the retroactivity of a declaration of unconstitutionality. To strengthen the conclusion according to which the Court is endowed with the power to calibrate effects in time, it is highlighted that "a comparison with other European constitutions – such as for example the Austrian, German, Spanish and Portuguese constitutions – shows that it is commonplace to constrain the retroactive effects of decisions that legislation

8 The other was mentioned in Section 4.2.4.

is unconstitutional, including in interlocutory proceedings, irrespective of whether the constitution or the legislator explicitly vested the constitutional court concerned with such powers".

Lastly, in Judgment No. 98 of 2021, the inadmissibility of the question of constitutionality is declared because the referring court failed to duly take into account the prohibition of analogy in criminal law to the detriment of the offender: this failure results in an incomplete exposition on the relevance of the question. To underline the importance of the prohibition of analogy *in malam partem* in criminal law, the Court refers to "other systems", focusing on the case-law of the German Constitutional Court, "according to which in criminal matters 'the possible literal meaning of the law sets the extreme limit of its legitimate interpretation by the judge' (BverfGE 73, 206 (235); more recently, in the same sense, BverfGE 130, I (43); 126, 170 (197); 105, 135 (157); 92, I (12))".

iii. A deep impact of comparative law characterizes a couple of rulings in which the Constitutional Court uses the comparative law argument as a contribution to the definition of the subject matter, so that its function with respect to the legal reasoning is not simply supportive and explicative, since it contributes to set up the way in which the Court addresses the issue.

This is the case of Order No. 24 of 2017, in which the questions of interpretation relating to the application of the statute of limitations in criminal matters are submitted by the Constitutional Court to the Court of Justice for a preliminary ruling. To strengthen the need for clarification by the Court of Luxembourg, the Court of Rome refers to the comparative law argument in two respects. On the one hand, it points out, although the Grand Chamber, in the *Taricco* Judgment of 8 September 2015 (case C-105/14) adopted a procedural conception of limitation, in several legal systems across Europe, like what happens in Italy, a substantive conception is accepted: for this purpose, express reference is made to the Spanish law, and in particular to a Judgment delivered by the Constitutional Court (STC, Judgment of 14 March 2005, No. 63). On the other hand, the existence of the principle according to which "the activity of the courts […] must be governed by legal provisions that are sufficiently precise" is considered as "a defining feature of the constitutional systems of the Member States of civil law tradition"; such a founding principle would be considerably weakened if courts could decide not to apply the law, even they were requested to do so (as in the aforementioned Judgment of the Court of Luxembourg) because courts cannot be entitled to exercise "the power to create new criminal law in place of that established by legislation approved by Parliament".

Talking about the use of comparative law by the Constitutional Court, Judgment No. 141 of 2019 is certainly outstanding, since it gives comparative

law a very significant place, using it to explain the general framework of the legislation concerning prostitution as well as a key argument for the adoption of several choices in the legal reasoning. The Judgment declares unfounded the questions of constitutionality concerning provisions making recruitment, aiding and abetting of prostitution criminal offenses in circumstances where prostitution itself is not generally criminalized.

In order to decide, the Court associates a historical and a comparative law analysis regarding the normative patterns within which prostitution is regulated: against this backdrop, the opposition is resumed between the classic regulationism model (adopted in Italy before the law No. 75 of 1958, based on the French example) and the abolitionist model, originally set up in Great Britain and lately adopted also in Italy. The Court then takes into account the emergence, in Europe, of further models of prostitution law: the so-called "neo-regulationism" and the "neo-prohibitionist" models, the latter, in the most radical version (the so-called "Nordic model"), punishing the sex worker's client, regardless of the voluntary or forced nature of prostitution. Faced with such a plurality of models, the Court finds that "both the legislative solutions inspired by the abolitionist model and those inspired by the neo-prohibitionist model in the most radical version – which, through the punishment of the client, further expands the 'scorched earth' boundaries around prostitution – have been considered compatible with the Constitution by the constitutional courts of other European countries as regards challenges that largely overlap with the issues submitted for the examination of [the Italian] Court". In particular, the rulings of the Portuguese Constitutional Court (with reference to the abolitionist model) and of the French Constitutional Council (for the neo-abolitionist model) are cited.

On the basis of this conceptual framework, the Court develops its own legal reasoning, and it expressly refers, again, to the ruling of the Constitutional Court of Portugal, which stressed that "there is no irreconcilable contradiction in the distinction drawn between the judgment on the basic conduct of the prostitute and that on the conduct of the third party that facilitates – or exploits or induces – the activity". This reference is a further, indisputable demonstration of the importance of the comparative law argument in the constitutional review of the challenged provisions.

4.2.6 The Use of Foreign Constitutional Case-Law as a Precedent

Quite recently, constitutional case-law has revealed a peculiar use of comparative law: it occurs that the Constitutional Court makes detailed references to rulings of other courts, almost as if to evoke them in the manner of horizontal

precedents, thus having, of course, purely persuasive effects. Three rulings can be mentioned in this respect.

The first, and very representative case is that of Judgment No. 1 of 2014. When declaring the unconstitutionality of some provisions of the electoral law for the Parliament, the Court expressly relies on foreign case-law to define the impact of the principle of equality in voting: "within constitutional systems similar to the Italian one in which that principle is also incorporated, whilst the specific form of electoral system is not afforded constitutional status, the constitutional courts have for some time expressly acknowledged that, if the legislator adopts a proportional system, even only partially, it will create a legitimate expectation on the part of the electorate that there will not be any imbalance in the effects of each vote, that is differing assessments of the 'weight' of each vote 'on the outcome' when allocating seats, except insofar as necessary to avoid impairing the proper operation of the parliamentary body (see German Federal Constitutional Court, Judgment 3/11 of 25 July 2012; however, see previously Judgment No. 197 of 22 May 1979 and Judgment No. 1 of 5 April 1952)".

A similar approach can be found in Judgment No. 170 of 2014, which declares the unconstitutionality of the provision of the automatic divorce following the gender reassignment of one of the spouses. According to the Court the issue "involves, on the one hand, the state's interest in not altering the heterosexual nature of marriage (and thus in not permitting its continuation once the essential prerequisite that the married couple is of the opposite sex no longer obtains) and on the other hand the interest of the couple, one of whom has changed sex, in ensuring that the exercise by one spouse, with the consent of the other, of the freedom to choose in relation to such a significant aspect of his or her personal identity is not excessively penalized by the complete sacrifice of the legal dimension provided for the previous relationship, which the couple would on the contrary wish to maintain". This second position, which is the one the Court adopts, "has been adopted in the judgments of the Austrian Constitutional Court – see VerfG, Judgment No. 17849 of 8 June 2006 – and the German Constitutional Court – see BVerfG, 1st Senate, order of 27 May 2008, BvL 10/05".

The third occasion arose with Order No. 207 of 2018, on the criminalization of medically assisted suicide. In postponing the discussion of the case for a year, so as to give the legislator time to provide for a new regulation, the Court underlines that this solution "definitively shoulders concerns similar to the ones that inspired the Canadian Supreme Court in 2015, when it struck down a criminal provision similar to the one currently under review as unconstitutional", but "decided to suspend its ruling for twelve months, to give the

Parliament the chance to draft comprehensive legislation in the area, avoiding the gap in legislation that would have otherwise been caused by the Judgment (Supreme Court of Canada, Judgment of 6 February 2015, *Carter v. Canada*, 2015 SCC 5)". Moreover, the "spirit" of the Constitutional Court's order matches "that of the recent Judgment handed down by the Supreme Court of the United Kingdom on assisted suicide, in which the majority of judges deemed that 'it would be institutionally inappropriate at this juncture for a court to declare that [the provision under review] is incompatible with article 8 [ECHR]' without giving Parliament the opportunity to consider the issue (Supreme Court of the United Kingdom, Judgment of 25 June 2014, *Nicklinson and another*, [2014] UKSC 38)". These references to foreign rulings prove that they inspired the Constitutional Court to consider the need, especially in matters delicate as the one at stake, to favor the development of a "collaboration" and a "dialogue" between the Court and Parliament.

4.2.7 Comparative Law as a (Possible) Part of the Ratio Decidendi (of a Future Decision)

Among all the rulings delivered in the time period considered in this paper, Judgment No. 120 of 2014 is probably the one in which comparative law assumes the greatest importance in the legal reasoning. Referring to a case-law dating back to the Eighties (Judgment No.154 of 1985), the Court confirms the impossibility to submit the rules of Parliament to the constitutional review and thus declares inadmissible the question of constitutionality raised against the provisions that exclude the jurisdiction of the courts over employment matters concerning the Chambers.

The Judgment stands out for a significant change in interpretation, since it opens towards a possible review of the rules of Parliament (not in the constitutional review, but) in proceedings introduced by a conflict between State powers, to the point that the Judgment could be read as a very peculiar suggestion to the referring court to consider the opportunity to initiate such a conflict.[9] Comparative law plays a major role in this regard: the Constitutional Court emphasizes that "within systems of constitutional law similar to our own, such as France, Germany, the United Kingdom, and Spain, provision is no longer made for exclusive internal jurisdiction over employment relations with employees and relations with third parties".

9 I suggested this interpretation of the legal reasoning in PASSAGLIA, "Autodichia ed insindacabilità dei regolamenti parlamentari: *stare decisis* e nuovi orizzonti", Giurisprudenza costituzionale, 2014, p. 2110 ff.

The importance of this reference cannot be underestimated, even though it has no binding effects in a future judgment, of course. What is particularly significant is that the Court seems to suggest the outcome of a possible future conflict between State powers. Far from being what generally comparative law is for the Court, i.e., a mere *argumentum ad abundantiam* in legal reasoning that could neglect the comparative law argument without major consequences, in this case, the place of the reference, which immediately follows the evocation of the foundations of the rule of law, could almost suggest that the argument taken from foreign systems express the implementation of this "great rule", that Italy still has to achieve. In other words, the evolution of the rule of law seems to inevitably lead to the cancellation of exclusive internal jurisdiction of the Chambers: if this occurred in the other European democracies, it shall occur in Italy too.

The impact of the comparative law argument in Judgment No. 120 of 2014 is certainly significant. Unfortunately, subsequent Judgment No. 262 of 2017 decides the conflict between State powers on a completely different basis, contradicting the precedent of 2014 and neglecting any reference to comparative law.

5 Final Remarks

The outcome of the research carried out can hardly offer undisputable hints for some conclusions. Among the few remarks that can be suggested, it must be confirmed that, despite the limited number of empirical evidence, comparative law seems to have undergone, in recent years, a strengthening of its weight in the constitutional case-law, at least in quantitative terms.[10] However, as it has been pointed out, numbers are not the only criterion to weigh the influence of comparative law in the activity of the Constitutional Court.

In this regard, it is appropriate to focus on the real use that the Court has made of the comparative argument. It must be admitted that comparative law is never the *founding argument* of a solution: maybe with the only exception of what has been found in relation to Judgment No. 120 of 2014 (and despite subsequent Judgment No. 262 of 2017),[11] for the rest, the foreign or comparative reference has a merely integrative function or, at most, it strengthens the choice made for a solution that could have been adopted even regardless of any comparison, albeit, perhaps, with a less solid argumentative basis.

10 See Section 3.

11 On this Judgment, see Section 4.2.7.

Making reference to foreign precedents is one of the most significant ways to use comparative law, still, the latter acquire nothing more than persuasive effects.[12] Of course, it is not irrelevant – "not superfluous", to take up the terms used in Judgment No. 250 of 2010 – that a legislative provision can find similarities with provisions in force abroad;[13] neither is irrelevant that the provision appears strongly "original" in comparison with foreign provisions.[14] In any case, the analysis of the constitutional case-law suggests that considerations based on comparative law are mainly *a fortiori* arguments: they are "further evidence", according to the expression used in Judgment No. 138 of 2010, with respect to a solution that is already adopted when the Court decides to include (or not to include) the comparative law reference in the legal reasoning. The same applies to the cases in which the plurality of legislative solutions that can be envisaged in the light of a comparative analysis conveys the recognition of a legislative discretion: looking at the considerations expressed by the Court, it is clear that the same conclusion could have been adopted also with the only support of the "national" arguments.[15]

Therefore, comparative law is an argument that stands on the side and that it is never a founding argument: this is the role that is assigned to comparative law, but this is also the only role that can be assigned to it, at least in a context, such as that of the Italian constitutional case-law, characterized by the existence of a strong tradition and by peculiarities that need to be maintained and protected.[16]

12 See the rulings taken into account Section 4.2.6.

13 For the analysis of these cases, see Section 4.2.3.

14 See the cases reported above, Section 4.2.4.

15 Examples of this use are given in Section 4.2.5.

16 In this regard, the aforementioned *Corte costituzionale*, 26 January 2017, No. 24 (Order) (analyzed *supra*, para. 5.2.(e)), in which, while referring a question for a preliminary ruling to the Court of Justice, the Constitutional Court strongly reaffirmed its duty to prevent any "incorporation into the legal order of a rule at odds with the principle of legality in criminal matters" (*Conclusions on points of law*, para. 2.) and pointed out on several occasions the need for the European Union to respect the constitutional identities of the Member States.