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The value of judicial precedent in the Italian legal system*

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Introductory Remarks

When one talks about judicial precedent, one is usually referring to the guideline value of a judicial decision with respect to a pending case, regarding the same or a similar issue as the one previously handled¹.

In the Italian legal system the role and effectiveness of judicial precedent has been at the centre of an academic debate for some time. Legal scholarship explores the issue in a much broader scope than legal positivism, which, by basically reducing the legislative phenomenon to the position of laws, denies the implementation any legal value.

It is an established opinion that case law is not a source of law in Italy. This is a *more or less* acceptable view: there are two decisive constitutional provisions which, respectively, subject judges only to the law (Article 101, paragraph 2 Constitution) and legitimise the distinction between courts only on the basis of the functions that they exercise, without any hierarchical link being established between them (Article 107, paragraph 3 Constitution). A confirmation of the fact that case law does not play the formal role of source of law can be found in Article 1 of the Preliminary provisions to the civil code, which, when listing the sources of law, does not mention courts’ decisions.

* This essay is the outcome of shared insights from three authors. At the same time, the Introductory Remarks and the Part I can be specifically attributed to Laura Baccaglioni, the Part II to Gabriella Di Paolo, and the Part III to Fulvio Cortese.

¹ MARINELLI, under *Precedente giudiziario*, in *Enciclopedia del diritto. Aggiornamento, VI*, Milan, 2002, 891.



Also, it would be inappropriate to glean from the abovementioned laws the notion that court rulings assume a *de facto* authority or, as it were, a merely persuasive effectiveness – to use an expression borrowed from common law – just because in the Italian system they do not have a *strictly speaking* binding effect with regard to future rulings². This would be both an imprecise and incomplete conclusion.

Certainly, talking of sources of law, the idea of the increasing role of case law and the effectiveness of precedent in court rulings is nowadays broadly accepted³. Nobody can deny the very creative role of case law, or the legal theory of so called “living law”, which is a result of the consolidated case-law interpretation of the legislation⁴.

On the other hand, merely stating that in Italy judicial precedent has no binding force for the other judges does not fully clarify the effect that a decision might have on other judges. A judicial precedent may in fact have varying degrees of effectiveness: the fact that in a legal system decisions do not bind subsequent judges to rule in the same way on similar or identical cases does not necessarily mean that there is a general expectation that the precedent will be followed. Indeed some systems, which deny the existence of an obligation on the part of the judge to follow the precedent, refer to a so called ‘weak’ binding force of the ruling, i.e. they recognise judges’ power to deviate from prior decisions if there are serious and well-founded reasons for ruling otherwise. As we shall see, the position of the Italian legal system wavers unclearly between those who believe that precedent can have a weak binding force and those who see a mere persuasive effect.

Finally, an examination of the role of judicial precedent in a specific legal order cannot be limited to analysing the effectiveness of the precedent, but must necessarily also take other aspects into account, such as the objective scope of the precedent (i.e. what, in a ruling, might be binding); the institutional scope (from which legal body the precedent comes from); the

² See for all MATTEI, under *Precedente giudiziario e stare decisis*, in *Digesto (discipline private) sezione civile*, XIV, Turin, 1996, 148 ff.

³ VARANO, *Civil law e common law: tentativi di riflessione su comparazione e cultura giuridica*, in *Rivista trimestrale di diritto e procedura civile*, 2009, 49.

⁴ PIZZORUSSO, *Delle fonti del diritto*, in Scialoja Branca (ed.), *Commentario del Codice civile*, Bologna- Rome, 1977, 280.



directional scope (the relationship between the legal body that created the precedent and the subsequent case judge)⁵.

With reference to the last aspect, in common-law legal systems, it is normal to distinguish between vertical and horizontal effectiveness of precedent to indicate those cases in which a judge is bound, respectively, to the decision of another judge of equal level or rulings by a lower-level judge. In this regard, it is important to note straight away that the debate on precedent in Italy is mainly about the value of decisions of the upper bodies of the different legal sectors (i.e. decisions by the *Corte di Cassazione* for civil and criminal cases, and by the Council of State for administrative law) compared to lower-level judges. One wonders to what extent the judgments of the Supreme Courts might influence judges who are at a lower level in the judicial structure, given that there is no hierarchical obligation in the strict sense. Furthermore, recent legislative amendments have revived the debate on the role of horizontal precedent, at least insofar as it concerns rulings by the High Courts, whereas it is worth mentioning that as far as decisions of trial judges are concerned, horizontal effectiveness of precedent does not come into play: there is nothing preventing a judge from invoking a judgment of another judge; however it will only serve as an example, and not as a precedent in the strict sense⁶.

Before examining in detail the role of judicial precedent in the various branches of the Italian legal system, it is worthwhile mentioning a number of scenarios in which precedent has binding force for all other judges. This is the case of judgments with which the Constitutional Court takes on an issue of the constitutional illegitimacy of a regulation and rulings by the Court of Justice on the incompatibility of a State regulation with EU Treaties. In both cases, the decisions made by the two legal bodies mentioned obligate the judges to adhere to the decision rendered, with the consequence that, if they do not adhere, then the subsequent decision must be considered invalid. Nevertheless, in these cases it would be incorrect to talk of

⁵ The distinctive categories of judicial precedent used here are from TARUFFO, *Dimensioni del precedente giudiziario*, in *Scintillae Juris. Studi in memoria di Gorla*, Milan, 1994, 388 ff. See also TARUFFO, *Precedente e giurisprudenza*, in *Rivista trimestrale di diritto e procedura civile*, 2007, 709 ff.

⁶ TARUFFO, *Precedente ed esempio nella decisione giudiziaria*, in *Rivista trimestrale di diritto e procedura civile*, 1984, 31.



an obligation to the precedent in a strict sense. The reasons for this are to be found in the very specific roles of the Constitutional Court and Court of Justice. Neither of them are involved in resolving disputes, but they do examine the validity of legislation with regard to the Constitution or Treaties, when the issue is raised during a dispute that is pending before another judge.

Also, as far as the judgments of the *Corte di Cassazione* are concerned, it is important to note that only those that accept the claim on unconstitutionality are effective. Only they have the same abrogative force that is attributed to a law that can replace a previous one⁷. On the other hand, judgments that reject the exception of unconstitutionality have no binding effect on judges of the legal system and can be overwritten by a decision by the same legal body.

As far as Court of Justice decisions are concerned, on the one hand they handle the interpretation of supra-national laws and on the other hand, they are delivered by a judicial body that is not part of the Italian legal system.

The value of judicial precedent in civil matters

1. The effectiveness of precedent in civil procedural law: the Corte di Cassazione, its creation and its role in upholding and protecting the law

Civil law is perhaps the area where the subject of the effectiveness of judicial precedent has been recently reconsidered. The reforms brought about by Legislative Decree 2 February 2006, no. 40 and Law 18 June 2009, no. 69 – which have affected the regulation of *Corte di Cassazione* trials – have given increasing weight to the effectiveness of precedent, when it has been delivered from the highest court of the judicial system (which is precisely the *Corte di Cassazione* for civil justice).

⁷ PIZZORUSSO, *Stare decisis e Corte costituzionale*, in Treves (ed.), *La dottrina del precedente nella giurisprudenza della Corte costituzionale*, Turin, 1971.



As far as civil litigation is concerned, there are normally two instances of jurisdiction on the merit, which are decided by courts of first and second instance, which can vary depending on the kind of dispute and its subject matter⁸. There can then be a third instance, carried out before the *Corte di Cassazione*, which is called upon to decide on challenges to every decision that affects subjective rights (Article 111, paragraph 7 Constitution). Anyway, judgments before the *Corte di Cassazione* can be challenged exclusively for issues of law, never of fact: pursuant to Article 360 of the Italian Code of Civil Procedure (henceforth, CCP) the grounds of motion before the Supreme Court shall regard only breach or misapplication of regulations of substantive and procedural law (so called *errores in iudicando* and *in procedendo*)⁹. Moreover, if the appeal is upheld, the *Corte di Cassazione* normally does not decide the case directly, but merely voids the judgment and states the so called principle of law, deferring to another trial judge, who is called upon to settle the dispute in light of the Supreme Court ruling. However, the constraint on the referral judge of the principle of law from the Supreme Court does not pertain to the issue of the value of judicial precedent, because the former represents a phenomenon of progressive *res judicata*, since the referral trial is a particular phase of the same trial¹⁰.

⁸ For the sake of completeness, it is worth noting that while the two instances of jurisdiction are the norm, there are also exceptions, such as cases in which the judgments, by law, can only be appealed in the *Corte di Cassazione* (see also, e.g., Article 618, CCP).

⁹ As provided by Article 360, paragraph 1, CCP, according to which “The judgments issued in the appeal proceeding or in the one-instance proceeding may be challenged by motion before the *Corte di Cassazione* for the following reasons: 1) for reasons concerning jurisdiction; 2) for breach of the applicable law provisions on venue where the motion for the assessment of venue is not provided by the applicable law provisions; 3) for breach or false application of law provisions and of the collective labour agreements; 4) for lack of, or insufficient or contradictory reasoning on, an issue of fact, which is disputed and decisive for the proceeding”. For the sake of completeness, it is important to point out that the last reason of appeal, which has undergone recent changes, stands out from the rest, since it is aimed at asserting an inadequate statement of reasons, in particular an omission in the reasoning of the appealed decision, without seeking from the Supreme Court a legitimate re-examination of the facts of the dispute and, consequently, a third-instance trial. The change, most recently in Law 7 August 2012 no. 134, has even further limited the power of the *Corte di Cassazione* to question the reasoning behind the challenge to the judgment, which today is only permitted in the case of lack of reasons, not of insufficient or contradictory reasons. On these aspects, see CONSOLO, *Nuovi ed indesiderabili esercizi normativi sul processo civile: le impugnazioni civili a rischio di “svaporamento”*, in *Corriere giuridico*, 2012, 1133.

¹⁰ CHIARLONI, *Prime riflessioni su recenti proposte di riforma del giudizio di cassazione*, in *Giurisprudenza italiana*, 2003, 818.



The analysis of the significance to attribute to the role of *Corte di Cassazione* precedents in the Italian legal system must start from the acknowledgement that this legal body does not function only as an appeals court. Article 65 of Royal Decree 30 January 1941, no. 142 (known as the Law on the Organisation of the Courts, currently in force), assigns the Supreme Court the task of enforcing “the correct observance and uniform interpretation of the law, as well as the unity of national objective rights”¹¹. This function (known as “nomophylactic”) belongs to the *Corte di Cassazione* as an upper body of the legal system¹². From this perspective, it is no coincidence that the rule, rather than being part of the CCP or CcRP (Code of Criminal Procedure), appears in legal system regulations.

To understand why the Supreme Court has been assigned this role, it is worth looking at the inception of this legal body. The Italian *Corte di Cassazione* was established in the pre-unification era and was based on the original French court that was set up in the early 18th Century. In France, the *Tribunal de Cassation* initially had the function of receiving appeals from losing parties or the General Public Prosecutor of the Republic reporting a breach or misapplication of laws by courts of last resort. In its original set up, the *Tribunal de Cassation*, appointed directly by the King, was not a judicial body: it was charged with supervising final judgments, if, according to the Public Prosecutor of the King, the rules applied to the specific case had been misinterpreted, although the answer from the *Tribunal de Cassation* had no direct effect on the dispute¹³.

Only with the French Revolution, in a full and unwavering adherence to the principle of separation of powers, was the experience of the *Tribunal de Cassation* revived: with a special law in 1790 a real judicial body was established, and charged with deciding on appeals

¹¹ As provided in Article 65 of the Law on the Organisation of the Courts: “*Attributions of the Supreme Corte di Cassazione – The Supreme Corte di Cassazione*, as the supreme court of the judicial system, ensures the correct application of the law and its uniform interpretation, the unity of law throughout the country, and observance of the limits between the jurisdictions of the different courts; it regulates conflicts of venue and attribution, and performs other tasks assigned to it by law. The supreme *Corte di Cassazione* is located in Rome and has jurisdiction over the entire Italian State and over any other territory subject to its sovereignty”.

¹² GORLA, *Postilla su “l’uniforme interpretazione della legge e i tribunali supremi”*, in *Foro italiano*, 1976, V, 127 ff. and TARUFFO, *La Corte di Cassazione e la legge*, in *Il vertice ambiguo. Saggi sulla Cassazione civile*, 1991, 64.

¹³ For an overview of the genesis of the *Corte di Cassazione*, see CONSOLO, *Spiegazioni di diritto processuale civile*, II, Turin, 2014, 533 ff., as well as SATTA, under *Corte di cassazione*, in *Enciclopedia del diritto*, X, Milan, 1962, 797 ff.



presented by losing parties or the General Public Prosecutor against decisions by courts of last resort, in the event of potential breach or misapplication of legal provisions. In France, during the evolution of the *Tribunal de Cassation* (in the meantime renamed as *Cour de Cassation*), it was allowed to invoke the so called principle of law, which the referral judge was required to follow: the appeal against the judgment entailed the obligation for the trial judge to define the dispute based on the Court of Cassation ruling.

In the Italian system, too, the *Corte di Cassazione* was created with the task of coordinating judicial power with legislative and administrative ones, “with the aim of keeping it [judicial power] within the limits assigned to it”¹⁴. At the time of the unification of Italy, the Supreme Court was not a single legal body: there were regional Courts of Cassation in Turin, Florence, Naples, Palermo and Rome. The capital was also home to the Joint Chambers, which in some areas behaved as a higher body than other Courts. As for the civil sector, Law 24 March 1923, no. 601 repealed the regional courts and provided the body in one location: a single *Corte di Cassazione* was established in Rome¹⁵.

Calamandrei, who redesigned the role of this body in the Italian legal system, observed how the existence of a series of decisions issued in identical cases – although not rising to the level of source of objective rights as in other legal orders – meant that judges tended to adhere to the existing precedent¹⁶. Nevertheless, the very same plurality of judges that is typical of the organisation of the courts could (and still can) determine the forming of multiple jurisprudential interpretations of the same regulatory text: thus, on the one hand, there is a risk of a current damage to the principle of equality among citizens, protected today by Article 3 Constitution; on the other hand, there could be a potential damage to the unity of the objective national legal principle¹⁷.

¹⁴ CARNELUTTI, *Lezioni di diritto processuale civile*, IV, Padua, 1933, 251 ff.

¹⁵ CALAMANDREI, *La Cassazione civile*, I, *Storia e legislazioni*, Turin, 1920, 635 ff. and also SATTA, under *Corte di Cassazione*, *supra* note 13, 798 ff.

¹⁶ IANNIRUBERTO, *Le attribuzioni delle Sezioni Unite civili e l'efficacia del principio di diritto*, in *Corriere giuridico*, 2008, 722 ff.

¹⁷ CALAMANDREI, *La Cassazione civile. Disegno sistematico dell'istituto*, II, *supra* note 15, 67 made clear reference to Article 24 of the Albertine Statute (on this aspect see also MORTARA, *Commentario del Codice e delle leggi di*



Hence came the idea of creating a single supreme body, modelled on the French one, with the task of ensuring the correct observance of the law as well as a uniform interpretation of the case law: the *Corte di Cassazione* was conceived in these terms with the aim of enacting the so called *jus litigatoris* (i.e. deciding on appellate remedies to judgments only on the grounds of legitimacy), on the one hand, and the so called *jus constitutionis*, on the other hand: in other words, by controlling the decision, the *Corte di Cassazione* should provide the exact interpretation of the law to enact in the specific case, so as to direct the judges of subsequent trials, in the interpretation of those regulations.

Article 65 of the Law on the Organisation of the Courts was conceived in these terms. In truth, the reference to the “uniform interpretation” in the law was new: the Statutory laws of the pre-unification Italian States, which had been inspired by the French model in creating a supreme legal body, focused on the *Corte di Cassazione*’s function of voiding decisions for breach of law¹⁸. Article 122 of the Law on the Organisation of the Courts (Royal Decree 6 December 1865, no. 2626), which came into effect with the unification of Italy, defined the function of the *Corte di Cassazione* only by referring to its maintaining “precise observance of the law”¹⁹. The same can be said of Article 61 of Royal Decree 30 December 1923, no. 2786 on the judiciary system, which replaced Royal Decree 2626/1865. Only Article 65 of the current Law on the Organisation of the Courts granted the Supreme Court the task of protecting the uniform interpretation of case law. This innovation was intended by Calamandrei to ensure within the Italian legal system – where case-law precedent is not strictly speaking binding – an interpretation of the law that could guarantee equality among citizens. The function of judicial precedent in the Italian Supreme Court can be read in these terms, at least in an abstract way:

procedura civile, I, Milan, 1908, 80); in truth, these observations are still current, on the basis of Article 3 Constitution (see among others PRESTIPINO, *Il nuovo ruolo delle Sezioni Unite*, in Ianniruberto – Morcavallo (ed.), *Il nuovo giudizio in Cassazione*, Turin, 1st edition, 2007, 42 text and note 8). See also MONTESANO, *Su alcune funzioni della Cassazione civile secondo la Costituzione della Repubblica Italiana*, in *Scintillae iuris. supra* note 5, 293.

¹⁸ As mentioned by TARUFFO, *La Corte di Cassazione e la legge*, *supra* note 12, 62 only the Neapolitan Laws on the Organisation of the Courts of 1808 and 1817 referred directly to the *Corte di Cassazione*’s task of “maintaining the exact observance of the law”, whereas there was no mention of the need to ensure the uniform interpretation of the case law, which is the result of Article 65 of the Law on the Organisation of the Courts.

¹⁹ TARUFFO, *La Corte di Cassazione e la legge*, *supra* note 12, 61.



precedent is not in opposition to the law, but rather contributes to the enactment of the principle of legality and safeguards the principle of equality (Article 3 Constitution).

Also for these reasons, Article 67 of the Law on the Organisation of the Courts creates a special agency sitting in the *Corte di Cassazione* (Ufficio del Massimario) with the task of extrapolating the so called “*massima*” from the judgments issued by the Supreme Court. The principle of law identified by the Court can be considered the *regula juris* to be applied in the specific case, a sort of individualised precept, albeit not connected to the facts at hand or the resolved dispute²⁰.

2. Gino Gorla’s thesis and the idea of the existence of an institutional duty to abide by the precedents of the Corte di Cassazione

As we shall see, in the Italian system the principle of law should inform the trial judges charged with ruling on identical or similar cases to the ones decided by the *Corte di Cassazione*. There is currently a debate on how binding the principle of law issued by the Supreme Court is. It is a matter of understanding whether the decisions of the Court have only a merely “factual” authority (i.e. they have persuasive force over the judges who are subsequently called upon to decide on similar or identical cases) or if there is a real institutional duty for the subsequent judges to abide by that precedent, with the power to deviate from it if there are serious and well-founded reasons.

We have already excluded that the position of judges with regard to judicial precedent, even when issued by the Supreme Court, can be described in terms of an obligation to enact it,

²⁰ This task is assigned to the referral court, which has to decide on the dispute based on the principle of law, to which it is bound. As previously mentioned, this has nothing to do with the binding or persuasive scope of judicial precedent, since the referral trial is a continuation of the trial in a new instance. Rather it is important to assess the scope of the stated principle of law with regard to different judgments. In this regard, it is interesting to note that Article 393 CCP established that the principle of law stated by the *Corte di Cassazione* does not lose effect after completion of the referral trial. So if the trial is not reinstated or, even if it is, it subsequently expires, the principle of law will preserve its binding force even in the new trial that will be set up with the resubmission of the appeal.



sanctioned by the invalidity of the judgment delivered. This outcome is brought about by the explicit ban on distinguishing judges based on a hierarchical order, as well as by their subjection only to the law, as mentioned in the Constitution. The judge can feel free to form his own opinion, with the sole limitation being the reason for the judgment.

However, if the Supreme Court's duty to safeguard the uniform interpretation of the law does not translate – for the judges subsequently charged with deciding on similar or identical cases – into an obligation at the time of trial that affects the legitimacy of the ruling, it would not seem appropriate to describe the effectiveness of the *Corte di Cassazione* precedent merely in terms of persuasiveness. In this regard, some scholars have framed the function of the *Corte di Cassazione* of ensuring the uniform interpretation of the law in terms of an institutional duty; in other words, the Supreme Court also orders to not deviate from precedent unless there are serious and well-founded reasons, which must be stated in the reasoning of the judgment. A similar description has been given to the obligation for trial judges to abide by the precedent issued by the Supreme Court²¹.

This interpretation of the *Corte di Cassazione*'s function of upholding and protecting the law – on which not all scholars are in agreement – certainly respects the constitutional facts, ensuring the independence of the court from other bodies by guaranteeing the reasoning of the judgment; at the same time, this interpretation gives meaning to the “nomophylactic” function described in Article 65.

There are many examples that give evidence to the central role of the Supreme Court.

Some of these come from legal practice: first of all, it is worth remembering that the Constitutional Court, when it is called upon to decide on the constitutionality of a provision, clearly shows a preference for, among all possible interpretations, that of the *Corte di Cassazione*²².

²¹ GORLA, *Postilla*, supra note 12, 127 ff.; BONSIGNORI, *Il precedente giudiziario in materia processuale*, in *Contratto e impresa*, 1987, 405 ff.; BIN, *Funzione uniformatrice della Cassazione e valore del precedente giudiziario*, 1998, 550.

²² GALGANO, *L'efficacia vincolante del precedente di Cassazione*, in *Contratto e impresa*, 1999, 893.



Often, it is the statute law that binds itself to the Supreme Court precedents: sometimes Parliament, while delegating the drafting of a legislative decree to the government, compels it to adhere to the principles laid down in the case law in a certain field²³.

Furthermore, with specific reference to the “bond” of the judge on the merit to the precedent issued by the Supreme Court, it is worth mentioning Article 64, paragraph 7, Law 30 March 2001 no.165. This rule provides that when the *Corte di Cassazione* issues a decision on the interpretation of a collective bargaining agreement, the ensuing judgment takes on a particular value: to be precise, if the trial judge, charged with deciding on another dispute regarding the same issue, wants to deviate from the statement of the Supreme Court, he must issue a judgment interpreting the collective agreement under discussion, which can then be directly appealed to the *Corte di Cassazione*²⁴. When the Supreme Court reaffirms its own precedent, the contested decision will be voided, and the trial will be required to adhere to the *dictum* issued. The provision in question certainly protects the judge’s freedom of interpretation, since it introduces a merely procedural constraint²⁵. At the same time, however, that regulation guarantees a uniform interpretation, assigning to the Supreme Court the task of assessing, in the case of an immediate challenge to the judgment, the exactness of the interpretation provided by the trial judge²⁶.

²³ As mentioned by GALGANO, *L’efficacia vincolante*, *supra* note 22, 893.

²⁴ This rule, introduced with reference to the working relationship with the Public Administration, was extended to all private working relationships with Article 420-bis CCP, modelled in the same terms.

²⁵ IANNIRUBERTO, *Le attribuzioni delle Sezioni Unite*, *supra* note 16, 725; AULETTA, *Profili nuovi del principio di diritto (il “vincolo delle sezioni semplici al precedente delle sezioni unite”)*, in Fazzalari (ed.), *Diritto processuale civile e Corte Costituzionale*, Naples, 2006, 18.

²⁶ AULETTA, *Profili nuovi*, *supra* note 25, 19; CONSOLO, *Spiegazioni di diritto processuale civile*, II, *supra* note 13, 554.



3. *The Supreme Court's role in upholding and protecting the law in CCP regulations: the strengthening of this role in the recent reforms and the reasons for this increasing demand*

The central role, as described above, of the *Corte di Cassazione's* function of upholding and protecting the law is confirmed by several CCP rules about Supreme Court trials. This role has also been greatly strengthened by reforms on that matter in recent years. To be honest, the amendments are not due to a conscious desire to bring the Italian legal system closer to those in which, traditionally, the judicial precedent of upper courts has always had binding force. The strengthening of the Supreme Court's "nomophylactic" function was brought about as a remedy against the exponential increase of the number of appeals to that Court, with the intention of limiting the motions²⁷. We do not intend to assess whether and to what extent this goal has actually been pursued; rather, we need to verify whether and in what way the "nomophylactic" role of the *Corte di Cassazione* has been accentuated and in what terms the judgment that it delivers becomes binding for the judges subsequently charged with deciding upon identical or similar cases.

The first provision that stands out is Article 384 CCP, which deals with the statement of the principle of law by the Supreme Court. As mentioned above, the exercise of the *Corte di Cassazione's* "nomophylactic" function is not expressed by means of the whole decision. Nor does the Italian law give weight to the distinction between *ratio decidendi* and *obiter dictum* of the judgment, as is the case in common-law systems. Rather, the Supreme Court's function of protecting the law is expressed through the principle of law (*regula juris*) that the *Corte di Cassazione* states after delivering its decision.

Today, due to Legislative Decree no. 40/2006, which amended Article 384 CCP, this principle must be expressed by the *Corte di Cassazione* every time the grounds of the motion concern the breach or misapplication of legal provisions or when the Supreme Court resolves

²⁷ On these aspects, see VERDE, *Il difficile rapporto tra giudice e legge*, Naples, 21 ff.; in general, on the causes of the strengthening of the Supreme Court's role, see CARBONE, *Le Corti Supreme. Prolusione al convegno di Perugia 5-6 maggio 2000*, Milan, 2001, 11.



an issue of law which is particularly important, regardless of the result of the appeal. In such cases, the *Corte di Cassazione*, in giving reasons for its decision, must explain how to interpret the principle of law to be applied in the current case. Principle of law is no longer a *lex specialis* for a single case in a protracted decisional process (the so called ‘act of *nomopoiesis*’) to be issued by a referral judge. Rather, the *regula iuris* of the decision is instrumental in the *Corte di Cassazione*’s function of upholding and protecting the law. This is even truer when one considers that the principle of law maintains its own effectiveness, even if the subsequent referral trial is never set or if for some reason it expires (Article 393 CCP).

Some legal scholars have considered the amendment of Article 384 CCP the establishment of the value of case-law precedent in Italy. This position needs to be treated with caution. First of all, it is worth noting that a Supreme Court’s judgment might contain multiple rules of law, as many as the issues of exact interpretation of the law handled in the judgment, and regardless of their weight in the decision²⁸. Secondly, the way in which this intent is pursued is different from common-law systems (where *stare decisis* operates) since the principle of law is completely separate from the context of the reasoning of the judgment and, because of this, it might appear false²⁹. It is not by chance that in common-law systems the publication of reasons helps determine the *ratio decidendi*, but it is entirely entrusted to the free research of the interpreter, far from being bound by precise formulations of the principle of law,³⁰.

²⁸ TARUFFO, *Precedente e giurisprudenza*, supra note 5, 723 observes how typically the reasoning of a judgment contains maxims, regardless of whether they are *rationes decidendi* or *obiter dicta*. This would explain why the Italian legal system has a lot of repetitive and tralatitious rulings and why many *obiter dicta* of a decision might end up becoming a precedent only because they contain maxims.

²⁹ CONSOLO, *Le impugnazioni delle sentenze e dei lodi*, Padua, 2012, 366-368; TOMMASEO, *La riforma del ricorso per cassazione: quali i costi della nuova nomofilachia?*, in *Giurisprudenza italiana*, 2003, 827; TEDOLDI, *La delega sul procedimento di cassazione*, in *Rivista di diritto processuale*, 2005, 934; TARUFFO, *Precedente e giurisprudenza*, supra note 5, 724; DE CRISTOFARO, Sub Art. 384, in Consolo (ed.), *Codice di procedura civile commentato*, II, Milan, 2013, 1133, who warned of the risk of the institutional function of the Ufficio del Massimario becoming superfluous and dangerous, on the other hand, because the principle of law had already been drafted by the Supreme Court, and on the other hand, because if the maxim was inconsistent with the one issued by the Office of the Maxims, this would be the cause of serious uncertainty.

³⁰ TOMMASEO, *La riforma*, supra note 29, 827.



The *Corte di Cassazione's* function of upholding and protecting the law is also embodied in another institution: the motion in the interest of the law, provided by Article 363 CCP, as amended by Legislative Decree 40/2006; the scope of the rule's application has been broadened, with the very aim of increasing the *Corte di Cassazione's* "nomophylactic" role³¹. The same title "Appeal in the interest of the law" is a reflection of the objective of this institution: the interest in re-examining the judgment does not come from a concrete (and admissible) challenge from a party, nor is it functional in bringing about a change that might affect the interests of the parties³². On the contrary, the motion in the interest of the law – whose roots are to be found in French law – aims to remove from the legal world an erroneous decision, so as to avoid it conditioning, as an erroneous precedent, the convictions of other judges.

Per Article 363 CCP, the Supreme Court, sometimes *ex officio*, other times based on an appeal presented by the General Public Prosecutor, can establish a principle of law in relation to a judgment that the parties have not challenged, or no longer wish to challenge, or with regard to a decision that would not be otherwise appealable³³. The motion in the interest of the law has neither the characteristics nor the effects of a challenge: it comes out from the fact that the principle of law stated in this case has no effects on the parties to the decisions (either

³¹ CONSOLO, *Spiegazioni*, II, *supra* note 13, 302 ff.

³² As a scholar noted, the same expression "Motion in the interest of the law" instead of the "Voidance in the interest of the law" is symptomatic: the old legal text, which displayed a merely destructive nature (voidance in the interest of the law) is replaced today by a positive statement. FORNACIARI, *L'enunciazione del principio di diritto nell'interesse della legge*, in *Rivista di diritto processuale*, 2013, 35.

³³ To be precise, compared to prior legislation, the current Article 363 CCP has strengthened the power to appeal to the Supreme Court of the General Public Prosecutor, who may now request a ruling from the Supreme Court when the parties have not requested an appeal within the terms of the law, or no longer wish to appeal, or when the decision is not appealable at the *Corte di Cassazione*. This rule has also provided that the principle of law can be stated *ex officio* by the Supreme Court even if the appeal has been declared inadmissible if the issue at stake is of particular significance; in any case the decision of the Supreme Court does not have any effect on the parties (IMPAGNATIELLO, *Principio di diritto nell'interesse della legge e funzione nomofilattica della Cassazione*, in *Giurisprudenza italiana*, 2009, 932). It has been pointed out that the first novelty of this legislation is substantively unsuitable to relaunching the institution of appeal in the interest of the law, given that cases of intervention by the Public Prosecutor are really rare (CONSOLO, *Spiegazioni di diritto processuale civile*, II, *supra* note 13, 542-543; MONTELEONE, *Il nuovo volto della Cassazione civile*, in *Rivista di diritto processuale*, 2006, 951). It has also been noted that the *ex officio* initiative of the Supreme Court - in stating the principle of law in the interest of the law – marks the strong operational potential of the institution, from the perspective of the reinforcement of its "nomophylactic" function (BRIGUGLIO, *Pluralità di riti e variazioni del rito innanzi alla Corte di Cassazione*, in *Il Giusto processo civile*, 2008, 517; IMPAGNATIELLO, *Principio di diritto*, 933).



because the decision was not challenged or not challengeable, or because the challenge was dropped). The appeal in the interest of the law shows how the intent of the legislation is that the exercise of the function of upholding and protecting the law not be dependent on the exercise of a purely jurisdictional function³⁴.

Article 366-bis CCP, introduced by Legislative Decree 40/2006 and then repealed by Law 69/2009, can be interpreted similarly. The rule burdened the appellant with the task of presenting their own appeal to the *Corte di Cassazione*, identifying for every reason specific legal questions to address to the Supreme Court³⁵. The intent of that provision was clearly to simplify the Supreme Court's function of stating the principle of law.

The innovation, however, had a short life: the new regulation, introduced with the intent of avoiding litigation, in practice turned out to be a true failure because of the excessive formalism and rigid approach followed by the *Corte di Cassazione* in its usage³⁶. The burden of stating specific legal questions was repealed by Law 69/2009, which added a new reason for inadmissibility of the appeal to the *Corte di Cassazione*. Today Article 360-bis CCP specifies that the appeal to the *Corte di Cassazione* can be rejected on procedural grounds if the contested decision has indicated the points of law in accordance with the constant interpretation of the Supreme Court, and as long as the assessment of the reasons for appeal does not offer elements for confirming or changing its interpretation. The appellant is then required to specify in their challenge the interpretation of the consolidated case law on the question they raised, on why the judgment on the merits of the case that they are challenging diverges from the case law or what are the reasons for reconsidering that interpretation, to which even the appealed judgment has been adapted. Article 67-bis of the Law on the Organisation of the Courts

³⁴ FAZZALARI, under *Ricorso per cassazione nel diritto processuale civile*, in *Digesto (discipline penali) sezione civile*, XVII, Turin, 1998, 602; CONSOLO, *Spiegazioni di diritto processuale civile*, II, *supra* note 13, 542; SASSANI, *Tra "consapevolezza culturale" e "buona volontà organizzativa": considerazioni sparse sulla deprecata funzione nomofilattica della Corte di Cassazione*, in Cipriani (ed.), *Stato di diritto e garanzie processuali*, Naples, 2008, 277 ff.

³⁵ When a motion to the *Corte di Cassazione* is proposed against an inadequate statement of reasons in the judgment (Article 360 no. 5) the illustration of the ground concerns only the ascertainment and evaluation of significant facts for the settlement of the dispute. On this point, see CAPONI, *Il nuovo giudizio di cassazione civile: quesito di diritto, principio di diritto, massima giurisprudenziale*, in *Foro italiano*, 2007, I, 1387.

³⁶ CONSOLO, *Spiegazioni*, II, *supra* note 13, 564.



provides for the establishment of a special chamber of the *Corte di Cassazione* (the so called “filtering” chamber, composed of magistrates applied to other chambers) with the task of assessing motions and carrying out a preliminary trial on the proposed challenges, in accordance with Article 360-bis CCP.

There is no doubt that the intent of the Law in introducing Article 360-bis CCP was to enact constitutional law: the uniform interpretation of the law is guaranteed by the rejection of the challenge in first instance, when it is raised against judgments that have ruled in accordance with the case law of the *Corte di Cassazione*, if there are no grounds of fact or law to change the precedent.

Most appropriately, some Scholars have remarked on how Article 360-bis CCP gives semi-binding value to *Corte di Cassazione* precedents to the extent to which the regulation burdens the appellant with providing adequate reasons for arguing for the case-law interpretation followed in the appealed judgment to be modified³⁷.

In order to verify the compliance with Article 360-bis CCP, one wonders when, on a certain question, Supreme Court case law can be said to have formed. In particular – and it will be up to the *Corte di Cassazione* to respond – it becomes decisive to understand whether there is a quantitative limit, in other words if even a few isolated judgments can be considered a legal approach against which appellants should be measured³⁸.

³⁷ CONSOLO, *Dal filtro in Cassazione ad un temperato “stare decisis”: la prima ordinanza sull’art. 360-bis*, in *Corriere giuridico*, 2010, 1406.

³⁸ In this regard, the scholarship has observed that the solution cannot always be one-way. Specifically, only a few judgments might suffice (even not very recent ones) if they deal with areas of civil law that are not very inclined to change. On the contrary, multiple analogous decisions will be needed on the same issue, or just one intervention by the Joint Chambers of the *Corte di Cassazione* (see DE CRISTOFARO, *Sub art. 360-bis*, in Consolo (ed.), *Codice di procedura civile commentato*, II, *supra* note 29, 877); on this point, cf. also CARRATTA, *Il “filtro” al ricorso in cassazione fra dubbi di costituzionalità e salvaguardia del controllo di legittimità*, in *Giurisprudenza italiana*, 2009, 1565. As for the period of time, the Joint Chambers have specified that what matters for the assessment with regard to the enduring semi-binding force of precedents is the state of case law at the time of the decision of the appeal, not at the time of the issue of the appealed judgment or of the drafting of the appeal (see Joint Chambers 6.09.2010 no. 19051, commented by CONSOLO, *Dal filtro in Cassazione*, *supra* note 37, 1405 ff.). This can make the assessment at the time of the issue of the appeal seem arbitrary, given the possibility of a change in the case law in the meantime.



The same aim of strengthening the ‘nomophylactic’ function is the context of the reform, brought about by Law 69/2009: Article 118, as amended, expressly allows judges to present their legal reasons even by resorting to compliant precedents (but they are prohibited from referring to legal theory)³⁹. There is no doubt that Article 360-*bis* CCP has an indirect effect on the Courts, which are prompted to invoke precedents, so as to show the parties that they follow a motivational process that has already been shared by other judges. An explicit legislative reference to compliant precedents is made in Article 348-*ter* CCP: introduced with Law 7 August 2012, no. 134, the rule provides that the Court of Appeals, when it considers *prima facie* that the appeal does not have reasonable probability of being upheld, can decide with a succinctly reasoned order even through “reference to compliant precedents”.

4 (continued). The new Article 374, paragraph 3, CCP and the meaning of deferral to the Joint Chambers

This particular focus on precedent and its vertical scope, so to speak, is coupled with an accentuation of the role ascribed to decisions of the Supreme Court, which is exercised even in a horizontal direction to the precedent.

We are referring to the modification introduced also in Legislative Decree 40/2006, paragraph 3 of Article 374, entitled “Ruling of the Joint Chambers”. This innovation has been described as the statutory acknowledgement of a *certain* value of judicial precedent in the Italian civil law system⁴⁰.

³⁹ It is no coincidence that there has been talk of the value of the “existence of precedent as a formal instrument of stability and rationalisation” and of an accentuation of the *Corte di Cassazione’s* role in providing a rule of adjudication as a criterion for clarifying and directing decisions in similar cases (see MORCAVALLO, *Sistema di principi e tutela dei diritti*, in Ianniruberto-Morcavallo (ed.), *Il nuovo giudizio in Cassazione*, II ed., Turin, 2010, in particular 7-8-13) even though the reference to precedents mentioned in Article 118 of the provisions implementing the CCRP should be understood as referring also to decisions issued by the courts with jurisdiction over the matter.

⁴⁰ RICCIO, *La rivitalizzazione legislativa della funzione nomofilattica della Cassazione*, in *Contratto e impresa*, 2006, 827.



As an appropriate premise, it is worth recalling that the Supreme Court, in civil matters, operates through five distinct chambers (the so called individual chambers), to which appeals are assigned *ratione materiae* by the First President of the *Corte di Cassazione*. For reasons that we will now examine, he can decide to entrust the decision of the appeal to the Joint Chambers: the composition of the Supreme Court is different in that case because it is made up of nine members. The possibility that the *Corte di Cassazione* might rule in Joint Chambers is by no means new: it was even contemplated in CCP 1865, albeit for different reasons than the current ones. At the time only in this case did the principle of law constrain the referral judge. Specifically, the repealed Article 547 CCP established that if the referral judge, charged with deciding on the matter after an initial judgment from the *Corte di Cassazione*, diverged from the principle of law delivered by it, the *Corte di Cassazione* – newly charged with the appeal of the judgment – had to rule in Joint Chambers. If the judgment was voided for the same reasons, the referral judge was required to observe the decision issued⁴¹.

The set up changed radically with the passing of CCP in 1942: on the one hand, on the basis of Article 393 CCP, the referral judge is still bound to the principle of law, regardless of whether it was pronounced by an individual Chamber or Joint Chambers; on the other hand, per Article 374 CCP, the Joint Chambers have been assigned new roles. In particular, they decide controversial cases with regard to the division of jurisdiction (proof of the higher role of the Supreme Court, even beyond the civil and criminal sectors), as well as cases in which the appeal to the *Corte di Cassazione* raises points of law decided differently than the individual chambers, i.e. matters of particular significance. These examples show *par excellence* the “nomophylactic” role that the Law on the Organisation of the Courts assigns to the Supreme Court.

Legislative Decree 40/2006 added another scenario: today Article 374 CCP states that “if the individual chamber does not agree with the principle of law pronounced by the Joint Chambers, it can defer to the Joint Chambers, by way of a reasoned order, the decision on the appeal”. Yet again, the innovation, which certainly aims to strengthen the “nomophylactic”

⁴¹ GORLA, *Postilla*, *supra* note 12, 127 ff.



function of the Supreme Court, was designed not only to impose a limit on the variations in the case law, but also to contain the excess of appeals to the *Corte di Cassazione*.

In all truthfulness, the draft law proposed a real bond of the Individual Chambers to the Joint Chambers, as in it required the former to defer the appeal to the latter, should they not intend to adhere to the principle of law previously announced⁴². The introduction of this provision seems to have implemented the legal theory, which was mentioned earlier, according to which trial judges and the *Corte di Cassazione* have the functional duty to adhere to the Supreme Court precedent and not diverge from it unless for serious and well founded reasons⁴³. It is true, however, that the introduction of Article 374, paragraph 3, as formulated in the draft law, had been strongly opposed by many: on the one hand, it raised questions of compatibility with the constitutional norm of the judge's subjection to only the law, because it seemed to prevent the individual chamber from emitting a ruling⁴⁴. On the other hand, it raised the issue of compatibility with the criminal trial process, in which a similar provision was lacking⁴⁵; again, since Article 374 CCP is silent on the point, one wonders what would have been the outcome of the judgment issued by the individual Chambers if it had diverged from the precedent of Joint Chambers, without deferring to the Joint Chambers⁴⁶.

According to the text of the law that later entered into force, the reference to a "bond" is missing. The literal change to the regulation seems to allow the individual chamber the

⁴² On the subject, it is also worth noting that the regulation does not mention the word "precedent", which is replaced by "principle of the law", which has taken on a central role in *Corte di Cassazione* trial reform.

⁴³ Retro § 2.

⁴⁴ AULETTA, *Profili nuovi del principio di diritto*, supra note 25, 9 denounces the difference between the bond that the draft law was intended to establish and the one introduced by Article 64 of Law 165/2001 (see § 3). As for the former, the establishment of a constraint on the judge on the merit over the case only occurs on a procedural level, as it allows the judge to issue a judgment that diverges from the *Corte di Cassazione's* precedent (and in any case partially saves the immediate challenge to that decision). On the contrary, in the text of Article 374 CCP, which appeared in the draft law, it seemed that the individual chamber was not able to decide any differently from the Joint Chambers, but could only defer the matter to them (in other words, *ne...alter in idem*). Auletta pointed out how such a conclusion was somewhat paradoxical, because it ended up giving a horizontal constraint to precedent, in the absence of a vertical constraint. Along the same lines see IANNIRUBERTO, *Le attribuzioni delle Sezioni Unite*, supra note 16, 725.

⁴⁵ CARRATTA, *Il "filtro" al ricorso in cassazione*, supra note 38, 1597. On this point, cf. DI PAOLO, § 5.

⁴⁶ RORDORF, *Stare decisis: osservazioni sul valore del precedente giudiziario nell'ordinamento italiano*, in *Foro italiano*, 2006, V, 284 remarks on the imperfect character of this provision: because its breach has no sanction since the judgment issued by the individual chamber can become a *res judicata*.



freedom to defer the matter to the Joint Chambers. In doing that, the Law shows that any violation of the norm on the part of the individual chamber – that does not defer to the Joint Chambers and decides otherwise – does not invalidate the judgment. The precept contained in Article 374, paragraph 3, CCP can be appreciated in terms of a regulatory bond for the individual chambers, without the risk of a violation of the norm affecting in any way the validity of the judgment⁴⁷. However, the current provision has a strong value in principle in that it introduces in the Italian legal system an (albeit circumscribed) value of precedent, even vertically speaking: there is an indirect acknowledgement of the institutional duty of trial judges to take into account the principles pronounced by the Corte di Cassazione and the option to diverge from them, albeit with good reason⁴⁸.

According to the statutory law's amendments that we have outlined, one wonders whether the Italian system has come any closer to legal systems founded on case-law precedents. Certainly, one cannot deny the growing focus on precedent, especially when pronounced by the Supreme Court, and the highly creative role of case law. Anyway, this phenomenon makes it difficult, even today, to speak of the Italian Civil *Corte di Cassazione* as a court of precedent. This is not due only to the constitutional constraint on the judge to the law only. What can constrain a judge, albeit only at a functional level, is not the decision of the *Corte di Cassazione* itself, but rather, as emerges from the regulations that we have examined, the principle of law that it pronounces. In this perspective, as we have seen, it is difficult to think that the principle of law, which has been formulated in abstract terms without any reference to the facts, can guarantee uniform case-law and legislative interpretation, which are

⁴⁷ CONSOLO, *Spiegazioni*, II, *supra* note 13, 586, to which add IANNIRUBERTO, *Le attribuzioni delle Sezioni Unite*, *supra* note 16, 727.

⁴⁸ RORDORF, *Stare decisis*, *supra* note 46, 284; LUISO, *Diritto processuale civile*, II, Turin, 2013, 467-468. According to these scholars, even before the 2006 Reform, the individual chamber had the onus of deferring the matter to the Joint Chambers, if it wanted to diverge from the precedent pronounced by them (see also PROTO PISANI, *Su alcuni problemi organizzativi della Corte di Cassazione: contrasti di giurisprudenza e tecniche di redazione della motivazione*, in *Foro italiano*, 1988, V, 28-29). In particular, Luiso asks the provocative question of the meaning of Article 374, paragraph 2, CCP (on the basis of which the Joint Chambers intervene in the event of a divergence from the case law) if after the Joint Chamber's decision the individual chamber can diverge from the precedent.



objectives that the Supreme Court is called upon to pursue, even when the law itself considers it binding⁴⁹.

The value of judicial precedent in criminal matters

1. Semantic clarifications

In Italian criminal law terminology, the word “judicial precedent” does not have a single meaning. In a first meaning, and from the point of view of the legal sources, this expression is used as a synonym for a previous case-law decision, which has guideline value with respect to judges called on to decide on an identical or similar matter to the one previously dealt with. In this view – which is the one chosen for the present analysis – the issue of the value of precedent requires an assessment of the true role of judge-made law in the life and development of law, and to what extent binding authority can be ascribed to judicial decisions.

A second meaning of judicial precedent emerges from Article 133 of the Italian Criminal Code (henceforth: CrC): this provision states that the judge, when applying the sentence, must also take into account the offender’s tendency towards crime, which can be inferred, among other things, “from the *criminal and judicial precedents* and in general from the behaviour and life of the offender prior to the crime”. In this context, the term “judicial precedent” is juxtaposed to “criminal precedent” to specify that a criminal proceeding is still pending against a subject, before a final conviction has been issued; otherwise, one should use the word “criminal precedent”. From this point of view, when talking of the value of precedent in criminal matters one normally refers to the several substantive and procedural effects that a criminal conviction (or even just the criminal prosecution) might have within criminal proceedings subsequently established. Just to list a few examples, think of the weight that a prior criminal conviction can have for triggering a charge of recidivism, and in determining the

⁴⁹ TARUFFO, *Precedente e giurisprudenza*, supra note 5, 723-724.



sentence as well as the concession (or revocation) of benefits such as a suspended sentence. From a strictly procedural point of view, think of the effects that a final conviction might produce in the precautionary proceedings (for the purposes of assessing the existence of the conditions of applicability of personal precautionary measures, and notably the precautionary needs set forth in Article 274 of the Italian Code of Criminal Procedure, hereinafter CCrP), or with regard to the evidence (Article 238-bis CCrP)⁵⁰, as well as the preclusive effects that are connected to the conviction (Article 649 CCrP) pursuant to the *ne bis in idem* principle⁵¹. These are very distinct topics, which cannot be addressed here.

2. Specificity of criminal law and sui generis precedents

While the issue of the value of judicial precedents affects all areas of law, it undoubtedly takes on a particular significance and complexity in criminal law⁵². Behind the question of the acknowledgement of a general rule of *stare decisis* is the topic of the possible equalisation of judge-made law and statutory law: a real taboo for civil-law systems⁵³, in which criminal matters are governed, as we shall see, by the principle of legality (“*nullum crimen, nulla poena sine praevia lege poenali*”).

On the other hand, it is also true that in criminal law the needs underlying the theory of *stare decisis* – and notably the need for legal certainty – are particularly important: because criminal law (substantive and procedural law) affects fundamental rights, and especially personal freedom, the certainty and predictability of the legal consequences of individuals’

⁵⁰ Article 238-bis CCrP: “Without prejudice to Article 236, final judgments may be gathered as evidence of the facts therein ascertained and shall be evaluated in compliance with Articles 187 and 192, paragraph 3” (English translation from GIALUZ - LUPARIA – SCARPA, *The Italian code of criminal procedure. Critical essays and English translation*, Padua, 2014).

⁵¹ DI PAOLO, *The exchange of information extracted from the criminal record: the heterogeneity of the national legal systems and problems of language*, in *Criminal Proceedings, Languages and the European Union. Linguistic and Legal Issues*, F. RUGGIERI (ed.), Berlin Heidelberg, 2013/2014, 161-180.

⁵² On the subject see, above all, CADOPPI, *Il valore del precedente nel diritto penale*, Turin, 2nd edition, 2014, *passim*.

⁵³ MANES, *Prometeo alla Consulta: una lettura dei limiti costituzionali all’equiparazione tra “diritto giurisprudenziale” e “legge”*, in *Giurisprudenza costituzionale*, 2012, 3474.



actions take on a very special role. Consistency in the interpretation of the law is of fundamental importance in criminal matters. As we shall see, this explains why criminal procedural law provides various mechanisms for preventing and solving conflicts of interpretation in jurisprudence, especially within the *Corte di Cassazione*.

This having been said, in criminal law more or less the same applies as what was described for the other branches of law. Since the Italian legal system remains a civil-law system, according to the current legislation judicial precedent cannot play the central role it occupies in common-law systems: there is no legal obligation for Italian criminal courts to conform to the principle of law (*regula juris*) set forth, regarding identical or similar cases, in decisions previously issued by judges of the same level. Basically, there is no horizontal bond with precedents. And this also applies to the specific case of so called “auto precedent”⁵⁴, which concerns precedents issued by the same court that decides on the following case.

There is also no vertical obligation to conform to precedents, i.e. with regard to decisions issued by higher-level courts, and notably with respect to decisions delivered by the *Corte di Cassazione*, the upper body of the legal system. After all, the provisions that establish the obligation of respecting the principle of law issued by the *Corte di Cassazione* (Article 627, paragraph 3, CCrP; Article 173 of the Provisions Implementing the CCrP, hereinafter IPCCrP)⁵⁵ are explicitly aimed only at the so called “referral judge”, i.e. the trial judge to whom the Supreme Court sends the case for a new trial in the event of annulment with referral. The constraint under discussion is therefore valid only within the same criminal proceedings in which the Supreme Court has been called on to give a ruling. But naturally this kind of situation goes beyond the issue of judicial precedent: since the new trial before the referral judge is only a different phase of the same trial, it must be framed within the different phenomenon of the progressive formation of *res iudicata*⁵⁶.

⁵⁴ The terminology used here is borrowed from TARUFFO, *Precedente e giurisprudenza*, *supra* note 5, 18-19. For the difference between horizontal and vertical scope of precedent, see MATTEI, under *Precedente giudiziario e stare decisis*, *supra* note 2, 149; *Id.*, *Common law. Il diritto anglo-americano*, in *Trattato di diritto comparato*, edited by Sacco, Turin, 1992 (reprinted in 1996), 215.

⁵⁵ See *infra*, §. 5.

⁵⁶ For similar considerations on civil trials, see above, THE VALUE OF JUDICIAL PRECEDENT IN CIVIL MATTERS, §. 1.



It is also worth noting that while there is no duty – either for *Corte di Cassazione* judges or for trial judges – to observe judicial precedents, the same is not true with regard to judgments issued by the Constitutional Court, when the constitutional illegitimacy of a provision is declared, or even with regard to judgments issued by the Court of Justice of the European Union, when a national provision is declared incompatible with the EU law having direct effects on the legal orders of Member States. In both cases the decisions issued by the Courts are binding in the subsequent criminal trials because they directly affect the existence and applicability of the provision subject to the review of compatibility: the declaration of constitutional illegitimacy has the effect of removing the contested provision from the legal system, similarly to what happens after a legislative repeal; the Court of Justice’s ruling that states the incompatibility of the national provision with the directly applicable EU law has the effect of preventing the national judges from applying the provision under consideration, and brings about a situation similar to the one following a legislative repeal⁵⁷. For these reasons, it is common opinion that in both scenarios it is incorrect to speak of “precedent” in a strict sense. Furthermore, because these phenomena are basically comparable to the repeal of a law through a legislative intervention, in criminal law it is expressly established that the judgments of the Constitutional Court should have effect even in trials already closed with a final conviction: when the object of the abovementioned assessment of unconstitutionality is not any piece of legislation, but specifically a criminal rule defining a conduct as an offence, the enforcement judge must revoke the final judgment of conviction, to avoid enforcement of the sentence and all subsequent penal effects (Article 2 CrC; Article 30 Law 11.3.11.953 no. 87; Article 673 CCrP)⁵⁸.

⁵⁷ For these considerations, see Constitutional Court judgment no. 230 of 2012, §.5, at <http://www.cortecostituzionale.it/>.

⁵⁸ Article 673 CCrP explicitly provides for the revocation of the judgment of conviction in the event of repeal and declaration of constitutional illegitimacy of a provision defining a conduct an offence, but is silent on the case of a judgment of the Court of Justice of the European Union that declares such national legislation incompatible with the EU law directly applicable in the legal systems of the Member States. The practice of revocation has been extended to this particular scenario by the case law. See *Corte di Cassazione*, Section I, 20.01.2011, no. 16521, Titas Luca, unpublished, according to which a judgment of the Court of Justice that assesses the EU incompatibility of a provision defining a conduct an offence “**embeds itself in the provision and integrates its precept with immediate effect (...) thereby producing “a sort of abolitio criminis” that demands that, as a result of a**



A separate matter are the judgments issued by the European Court of Human Rights, headquartered in Strasbourg. This is a jurisdictional body that does not belong to the Italian judicial system and that handles “all matters concerning the interpretation and application of the Convention and the Protocols” (Article 32 ECHR). In theory, that should be enough to prevent the obligations on the Contracting States (and their respective judicial authorities) to abide by the Court’s judgment from being included in the category of “binding precedent” in a strict sense. However, no doubt these judgments are particularly effective in the Italian legal system, since the Italian courts are expected to interpret the national law (substantive or procedural criminal law) in the light of the principles enshrined by the European Convention of Human Rights, as interpreted by the jurisprudence of the Strasbourg Court. This particular guideline value with respect to judges called upon to decide on identical or similar cases is usually explained by stating the existence, for the Italian courts, of a duty of “conventionally consistent interpretation”. This obligation is derived directly from Article 117 Constitution, which demands that legislative power be exercised “*in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*”⁵⁹.

On a different level, a conviction by the European Court of Human Rights against a Contracting State imposes a legal obligation for that State to put an end to the violation found by the Court within its domestic legal order (Article 46 ECHR). The Italian legal system, in order

constitutionally-oriented interpretation, the provision of Article 673 of the CCrP be extended to such cases of inapplicability of the national provision defining a conduct an offence”. It is worth noting that according to the case law of the Joint Chambers of the Corte di Cassazione the res iudicata should be allowed to be modified in favour of the convicted person even when the declaration of unconstitutionality regards a criminal provision not containing the definition of the offence, but that could mitigate the relevant punishment, at least in those cases in which an illegitimate penalty is still being enforced (see Joint Chambers 24 October 2013, no. 18821, Ercolano, Cassazione Penale, 2015, 28 and Joint Chambers 29 May 2014, no. 42858, Gatto, in Cassazione Penale, 2015, 41, both annotated by GAMBARDELLA, Norme incostituzionali e giudicato penale: quando la bilancia pende tutta da una parte, 65).

⁵⁹ Constitutional Court, judgments nos. 348 and 349 of 2007, at <http://www.cortecostituzionale.it/>. The concept was reiterated in Constitutional Court, judgment no. 311 of 2009, which states: “A contrast between a national provision and a provision of the Convention, in particular of the ECHR, is a violation of Article 117, first paragraph, Constitution. The national court has the task of applying ECHR provisions, in the interpretation offered by the Court of Strasbourg, and when it determines a contrast between a national provision and the Convention, it must proceed to an interpretation of the former that is consistent with the latter. When the court is not able to apply the ECHR provision instead of the national one, and cannot apply the national provision that it deems inconsistent with the Convention provision (and, therefore, with the Constitution), it must raise the issue of unconstitutionality in accordance with Article 117, first paragraph, Constitution”.



to abide by the final judgments of the European Court of Human Rights – and in particular those finding a violation of the right to a fair trial stated in Article 6 ECHR – grants the opportunity of reopening the criminal trial vitiated by unfairness, even if it has already concluded with a final conviction. Indeed, to ensure the full protection of the convicted person who presents an appeal in Strasbourg – which is then upheld – a new case of revision of the criminal judgment of conviction has been introduced, the so called “European revision” (Article 630 CCrP)⁶⁰. In a different way, when the person convicted in a criminal trial applies to the Strasbourg Court for violation of Article 7 ECHR – and a breach of the Convention is found – the remedy should not be found in the just mentioned “European revision”, but rather in the enforcement procedure⁶¹. This type of procedure allows the competent court to alter the *res iudicata*, replacing or redetermining the sentence originally applied, or revoking the judgment of conviction, depending on the violation discovered.

3. Value of precedent and criminal law

We now need to examine the specifics of precedent in criminal cases to assess whether or not there are further particular reasons hindering the application of *stare decisis*, as well as the equalisation of judge-made law with statutory law. We will then need to identify what effects judicial precedent has in the criminal procedural system. Denying the binding authority of case law judgments is not enough to clarify the value that a previous decision can have in the

⁶⁰ This new case of revision was not introduced with a legislative reform, but by means of a ruling by the Constitutional Court (judgment no. 113 del 2011, at <http://www.cortecostituzionale.it/>), which declared the unconstitutionality of Article 630 CCrP “in the part in which it does not envisage a different case of revision of the judgment or of the criminal decree of conviction with the aim of reopening the trial, when it is necessary, in accordance with Article 46, paragraph 1 of the ECHR, to be consistent with a final judgment of the European Court of Human Rights”.

⁶¹ For this interpretation, see Constitutional Court judgment no. 210 of 2013, at <http://www.cortecostituzionale.it/>



subsequent judgments, since precedent, on an abstract level, can have different degrees of effectiveness⁶².

Our inquiry needs to examine what makes the Italian criminal law system different from other branches of the law: the principle of legality (Article 25 Const.; Article 2 CrC); the Code of Criminal Procedure provisions that emphasise the *Corte di Cassazione's* function of ensuring the exact observance and uniform interpretation of the law (Article 65 of Royal Decree 30 January 1941, no. 12, so called Law on the Organisation of the Courts; Articles 610, paragraph 2, and 618 CCrP; Articles 172 and 173 IPCCrP).

In order to understand the role of the principle of legality in relation to the issue of the precedent's value it is important to remember that case law is not a source of law in Italy. In support of this conclusion, it has been previously noted that two Constitutional provisions appear to be decisive (notably Article 101, paragraph 2 Const., which subjects the judges only to the law, and Article 107, paragraph 3 Const., which legitimises distinctions between magistrates only on the basis of their functions, excluding any kind of hierarchical relationship between them) as does Article 1 of the Preliminary Provisions to Civil Code (henceforth PPCC), which does not mention court decisions among the list of sources of law⁶³. These are generally acceptable positions, but might not paint a complete picture with regard to criminal law. The main argument used in this field to preclude judges from playing a formal role in the creation of law leverages Article 25, paragraph 2 Constitution – “*No one may be punished except on the basis of a law already in force before the offence was committed*” – which grants constitutional relevance to the principle of legality (*nullum crimen, nulla poena sine lege*).

This analysis cannot go into the details of the basis and scope of this principle, which is the canon informing modern criminal law. This is proven by the fact that it has been accepted, albeit with substantial variations, in common-law countries, and the European Court of Human

⁶² As already noted (see above, *Introductory Remarks*) according to a hypothetical ideal scale based on the principle of graduation, precedent can have merely persuasive force, relatively binding force (so called “weak” binding force), or binding effect (so called “strong” binding efficacy).

⁶³ Cf. above, *Introductory Remarks*.



Rights has provided an international concept of it, confirmed by Article 7 of the ECHR⁶⁴. It is useful to note, however, that the rationale behind this principle, as well as its implicit corollaries (principle of specificity⁶⁵; principle of non-retroactivity of the criminal law⁶⁶; principle of culpability⁶⁷; statutory reserve⁶⁸)⁶⁹, is a need for guarantee: since criminal law deals with the most serious and socially unacceptable unlawful acts, and provides the harshest sanctions within the legal system, the principle of legality is aimed at raising awareness among individuals of what conducts are to be considered as an offence, a, and of what sanctions they can expect. Only in this way can citizens enjoy the freedom of self-determination and consciously choose their behaviours, while taking on the relative responsibility⁷⁰.

There is no doubt that the principle of legality upheld in Italian constitutional law includes the notion of “absolute statutory reserve”. This sub-principle implies that the task of legislating on criminal matters – i.e. the power to decide what actions constitute an offence and what penalty these actions deserve – is deferred exclusively to Parliament, as an institution that embodies the highest expression of democratic representation⁷¹. In this perspective, it does not seem to be in compliance with the Constitution that criminal law is set down by the executive power, through sources that are subject to the “law” in a formal sense. Similarly, it does not make sense to say that it is the court, with its decisions, that makes criminal laws. A judicial decision – even when it deals with and resolves legal issues – should have effects only on the

⁶⁴ For an in-depth analysis, see CADOPPI, *Il valore del precedente*, *supra* note 52, 196 ff.

⁶⁵ The definition of both the offence and the penalty must be sufficiently clear for individuals to conduct themselves in accordance with its commands.

⁶⁶ This principle prohibits the enactment of retrospective criminal laws (i.e. *ex post facto* laws).

⁶⁷ Under this notion, the basis for the imposition of individual criminal liability is a certain degree of “blameworthiness” in the commission of a crime or offence.

⁶⁸ It means that criminal offences and penalties must be prescribed by law that is promulgated by the legislature.

⁶⁹ On the subject see, among many, FIANDACA-MUSCO, *Diritto penale. Parte generale*, Bologna, 2009, 50 ff.

⁷⁰ CADOPPI, *Il valore del precedente*, *supra* note 52, 42.

⁷¹ MARINUCCI-DOLCINI, *Manuale di diritto penale. Parte generale*, Milan, 2012, 37. This argument was vigorously reaffirmed recently by the Italian Constitutional Court. See Constitutional Court, judgment no. 230 of 2012, *supra* note 57, at §. 7: “in the interpretation given by the Court of Strasbourg, the conventional principle of legality in criminal matters seems to be less inclusive than the one upheld by the Italian Constitution (and, in general, in continental legal systems). It does not contain the principle [...] of statutory reserve, as defined in Article 25, second paragraph, Constitution; a principle that [...] defers the power of legislating in criminal matters – since it affects the fundamental rights of the individual, and notably personal freedom – to the institution that is the highest expression of political representation: that is, the Parliament, elected by universal suffrage by the entire country”.



case in question (*uti singuli*), but not on future cases. It would not contribute to the “creation” of criminal law, but just to its application to an individual case⁷².

Naturally this view suggests the idea of a clear and comprehensive law to be automatically applied by the judge, who is considered a mere “mouthpiece of the law”. This is a flawed notion based on equally flawed legal positivist dogma of the completeness, unity and consistency of the legal system. Experience shows that the law is not “self-sufficient”: a legal text cannot contain the solution to every issue and cannot be absolutely precise, because, due to its general nature, it needs to follow more or less vague formulae. Consequently, the judge has to complete the law through interpretation, which inevitably entails a more or less broad margin of creativity: after the judge’s interpretation, the rule becomes more detailed and specific than how it had been written and becomes almost a “new rule”⁷³.

In light of these considerations, the prevailing idea in Italian legal science (except in the criminal sphere) is that the process by which the law is made (i.e. the “legal process”) does not finish with the setting down of written laws, but is a much more complex phenomenon, which also includes the implementation of laws and their practical application⁷⁴. This different view has contributed to give increasing weight to case law and the question of precedent, as demonstrated by numerous legal studies and recent legislative reforms in civil law⁷⁵. Notable signs of this new interest for the “law in action” can also be found in the field of criminal law⁷⁶, traditionally tied to a formal conception of the “law” and therefore unlikely to be influenced by the legal theory on precedent. Indeed, the new general conception of the law, together with the impetus provided by the decisions of the European Court of Human Rights, have brought into the limelight the question of the value of precedent, in particular when the Joint Chambers of the *Corte di Cassazione* decide to depart from previous case law, as this *revirement* produces a partial case-law-based *abolitio criminis*.

⁷² CADOPPI, *Il valore del precedente*, *supra* note 52, 46.

⁷³ CADOPPI, *Il valore del precedente*, *supra* note 52, 117.

⁷⁴ MARINELLI, under *Precedente giudiziario*, *supra* note 1, 875; TARUFFO, *Precedente e giurisprudenza*, *supra* note 5, 709 ff.

⁷⁵ See above, THE VALUE OF JUDICIAL PRECEDENT IN CIVIL MATTERS, § 1 ff.

⁷⁶ CADOPPI, *Il valore del precedente nel diritto penale*, Torino, 1999; AA.VV., *Interpretazione e precedente giudiziale in diritto penale*, COCCO (ed.), Padua, 2005.



4. *Effectiveness of precedent and the role of the Criminal Corte di Cassazione in upholding and protecting the law: historical overview*

Before examining in more detail the terms of the current debate in Italy over the effectiveness of the Joint Chambers' judgments that overrule previous decisions in favour of the convicted person, it would behove us to analyse the question of the value of precedent from the perspective of criminal procedural law. In this regard, since we have already excluded that there is a horizontal *stare decisis* among decisions of trial judges, we now need to understand the scope of the binding nature of the decision issued by the highest court of the legal system (which is the *Corte di Cassazione* for criminal justice).

In order to understand this aspect it is important to note that the Italian judicial system ensures two instances of jurisdiction on the merits, and a third instance (for issue of law only) before the *Corte di Cassazione*. Judgments delivered by first-instance judges (Tribunal, Court of Assizes and Justice of the Peace) can be challenged both by the prosecutor and the accused or convicted person. The appeal is available against acquittal or conviction, and can be made either on factual or on purely legal grounds. The judgments of the second-instance courts (Court of Appeals or Appellate Court of Assizes⁷⁷), and also those of the first-instance judges that the law declares to be unappealable⁷⁸, can be challenged before the *Corte di Cassazione*. This appellate remedy – which the Constitution grants against “*all judgments and decisions on personal freedom, issued by ordinary or special jurisdictional bodies, [...] for violation of the law*” – is available exclusively for specific reasons: pursuant to Article 606 CCrP the grounds of motion before the Supreme Court shall regard only breach or misapplication of regulations of substantive and procedural law (so called *errores in iudicando* and *in procedendo*)⁷⁹. If the

⁷⁷ When the appeal is against the judgment delivered by the Justice of the Peace, the competent trial court is the Tribunal (Article 39 Legislative Decree 28 August 2000, no. 274), which in this case acts as the appellate judge.

⁷⁸ According to Article 593, paragraph 2 CCrP, judgments of conviction applying only fines are not appealable.

⁷⁹ See Article 606 CCrP, which reads: “1. The appeal to the Supreme Court will contain maxims may be lodged if it is based on the following arguments: a) the judge exercises a power that is granted by law to legislative or



appeal is upheld, the *Corte di Cassazione* voids the judgment, and decides itself the case or shall order that the trial be referred to another judge of a lower level, depending on the type of violation found: in all cases in which further fact-finding is not required (for example, if the criminal act is not deemed an offence by law, or the offence has been extinguished, or prosecution should not have been started or continued, or the crime does not fall under the jurisdiction of the ordinary judge)⁸⁰ the *Corte di Cassazione* will void without referral, and so decide itself on the case; in all the other scenarios, the Supreme Court declares the annulment of the judgment, specifically stating the principle of law which the trial judge must follow (Article 173, paragraph 2 of IPCCrP; Article 627, paragraph 3 CCrP).

This legal framework allows us to reiterate, for criminal trials, what has previously been said about civil trials⁸¹: when the *Corte di Cassazione* carries out its function of review of legality, to ensure better justice in individual cases (the so called *jus litigatoris*), the referral judge is directly subject to the Supreme Court decision, since he must “conform to the judgment of the *Corte di Cassazione* as regards any issue of law it has decided upon” (Article 627, paragraph 3 CCrP)⁸². As previously noted, this aspect does not pertain to the value

administrative bodies or not allowed to public authorities; b) failure to comply with or misapplication of criminal law or other legal rules which must be considered in the application of criminal law; c) failure to comply with the procedural rules established under penalty of nullity, exclusion of evidence, inadmissibility or expiry; d) decisive evidence is not gathered, when a party has requested its gathering also during the trial evidentiary hearing, exclusively in the cases provided for in Article 495, paragraph 2; e) the grounds of the judgment are lacking, contradictory or manifestly illogical, when the defect results from the text of the appealed decision or from other documents of the proceedings specified in the arguments for the appeal to the *Corte di Cassazione*. 2. In addition to cases and effects established in specific provisions, the appeal to the *Corte di Cassazione* may be lodged against judgments which are delivered at the appeal stage or are not appealable. 3. The appeal to the *Corte di Cassazione* is inadmissible if it based on arguments other than those allowed by law or which are manifestly groundless or on breaches of law that are not raised in the arguments of the appeal, with the exception of the cases provided for in Articles 569 and 609 paragraph 2”. On the subject of appeals to the *Corte di Cassazione*, see BARGIS, *Impugnazioni*, in CONSO-GREVI-ILLUMINATI (ed.), *Compendio di procedura penale*, Padua, 2014, 1022 ff.; SIRACUSANO D.-SIRACUSANO F., under *Cassazione*. I) *Diritto Processuale Penale*, in *Enciclopedia Giuridica Treccani*, IX, updated, Rome, 2000; SPANGHER, under *Suprema Corte di cassazione (ricorso per)*, in *Digesto di Disciplina Penale*, XIV, Turin, 1999, 123.

⁸⁰ For a complete overview of hypotheses of annulment without referral, see Article 620 CCrP.

⁸¹ See above, THE VALUE OF JUDICIAL PRECEDENT IN CIVIL MATTERS, §§ 1 and 3.

⁸² Unless there are doubts about the constitutionality of the principle of law: in this event, the referral judge cannot observe the principle of law issued by the Court, but must refer to the Constitutional Court judge, to criticise the law as interpreted by the *Corte di Cassazione*. See Constitutional Court, judgment no. 305 of 2008, at <http://www.cortecostituzionale.it/>



(persuasive or binding) of judicial precedent, because the referral trial is a distinct phase of the same trial.

In order to assess the binding nature of the precedent of the *Corte di Cassazione* in future trials before lower courts or the Court itself, we should address the other fundamental role traditionally assigned to the Supreme Court by the so called “nomophylactic” function, which consists in ensuring consistency in the case-law interpretation of the law, as well as the unity of national law.⁸³

The history of the Criminal *Corte di Cassazione* – in many respects similar to the genesis of the Civil *Corte di Cassazione* – can help us understand the reasons for this function, as well as how it is performed. As mentioned, this body is a descendant of the French *Tribunal de Cassation* which was established after the French Revolution. Initially the *Tribunal* played an essentially repressive role, since it had been conceived – alongside the prohibition of *arrêt de règlement* and the mechanism of *référé législatif* – to abolish the freedom of interpretation of the judges, who were reduced to a mere “mouthpiece of the law”. In this perspective, the *Tribunal* was invested with the power to invalidate judgments contrary to the law or based on arbitrary interpretations of the law, since they were contrary to the principle of separation of powers⁸⁴.

The failure of the revolutionary attempts to annul or reduce the judicial power promoted a more realistic view of the interpretative activity. In France the distinction soon returned between “authentic interpretation” and “case-law interpretation”, and so the right to interpret the law for individual cases was restored to the judiciary. Above all, it was recognised that in both criminal and civil matters there could be contrasting interpretations of the law. On the basis of these new concepts the *Tribunal de Cassation* (in the meantime renamed *Cour de Cassation*) took on a more modern appearance: from “driving belt of authentic interpretation,

⁸³ As explained by TARUFFO, *Una riforma della Cassazione civile?*, in *Rivista trimestrale di diritto e procedura civile*, 2006, 760 ff., “assessing legitimacy and ensuring the uniformity of case law [are not] different and separate functions”, but rather “two sides of the same coin, two aspects of the same basic function that is assigned to the Corte di Cassazione” as the upper body of the legal system.

⁸⁴ CALAMANDREI, *La Cassazione civile*, vol. I, 1920, republished in Naples, 1976, 407-408.



performed by the legislators themselves”,⁸⁵ it became the body of the judiciary charged with ensuring the correct and uniform interpretation of the law (*jus constitutionis*).

In the wake of the French experience, also in the pre-unification Italian States the idea of establishing a Supreme Court to ensure a uniform interpretation of criminal law took root. One of the first States to establish this judicial body was the Kingdom of Naples, which in 1817 created a “Supreme Court of Justice”. As explained in the letter of presentation to the King, the Supreme Court was the highest of all the legal bodies and its role was “not to deal with the interests of the parties, but to oversee the judges and to remind them constantly of the uniformity and observance of the laws”⁸⁶. The decisions of the Court had to be published in the same form as the official collection of statute laws, so as to act as much as possible as guidelines for the judges and, presumably, for the citizens⁸⁷.

Other States followed the example of Naples. After the unification of Italy there were five Criminal Courts of Cassation in the country (in Turin, Florence, Naples, Palermo and Rome). Naturally the presence of multiple Courts of Cassation fuelled conflicts in case law, since in the meantime (and until 1890, when the first unified criminal code, the so called *codice Zanardelli* of 1889, came into force) more than one criminal code had been in force⁸⁸. But with the adoption of a unified criminal code, the existence of different contrasting interpretations of the same (and by now only) legal text became intolerable: a high degree of inconsistency in the criminal case law seemed even more unacceptable than in civil law, because, as the Minister Zanardelli said, the inequality of citizens before the law is much more serious and absurd in relation to the concept of crime, the public interest and social order, than it is in civil law, which

⁸⁵ The expression is from MARINELLI, under *Precedente giudiziario*, *supra* note 1, 875.

⁸⁶ Letter dated 9 September 1817, signed by NICOLINI-PARILLI-ENGLER, reproduced in CADOPPI, *Il valore del precedente*, *supra* note 52, 229.

⁸⁷ CADOPPI, *Il valore del precedente*, *supra* note 52, 229.

⁸⁸ We are referring to the so called Sardinian-Italian code, the code of the Kingdom of Sardinia of 1859, subsequently extended (with a few changes) to the entire territory of the Kingdom of Italy, except for Tuscany; and to the Tuscan Criminal Code of 1853, which remained in force in the area of the former Grand Duchy of Tuscany. See CADOPPI, *Il valore del precedente*, *supra* note 52, 69.



is concerned with private matters⁸⁹. In 1889 (30 years before the unification of the Civil Court of Cassation), the Criminal Court of Cassation was unified⁹⁰. After the regional courts were abolished, their respective functions were concentrated in the *Cassazione Penale Unica*, headquartered in Rome; the “Joint Chambers” of the Court were charged with settling conflicts in jurisprudence. In the opinion of the Minister Zanardelli, in this special composition the Supreme Court would have a “quasi-legislative” role: “of giving *mandatory standards* to new judges on the merit”⁹¹. The idea was a *Cassazione Penale Unica* with a strong function of upholding and protecting the law and that could dictate interpretations that were binding for everyone.

In reality, despite the good intentions of the creators of the *Cassazione Penale Unica*, and their great faith in the body’s ability to put an end to all conflicts in jurisprudence, the disagreements in interpretation went on, so at the end of the 19th Century there was still a situation of jurisprudential chaos⁹². A high number of case-law disputes was also occurring in the 20th Century, after the introduction of the criminal code of 1930 and the code of criminal procedure from the same year (the so called *Codice Rocco*), and continues today, despite the adoption in 1988 of a new code of criminal procedure (the so called *Codice Vassalli*). Therefore, also in the criminal field there is an ongoing debate on the “crisis” of the *Corte di Cassazione*

⁸⁹ This is a paraphrase of the words of the Minister of Justice Zanardelli, *Senato del Regno, Discorsi pronunciati dal Ministro Guardasigilli G. Zanardelli nelle tornate del 13 e 16 marzo 1888*, Rome, 1888, 5, quoted by CADOPPI, *Il valore del precedente*, *supra* note 52, 232.

⁹⁰ The history of the Criminal Court of Cassation diverges from that of the Civil Court of Cassation not only around the unification, but also in another important aspect. We are referring to the remedy of the motion to the Corte di Cassazione in the interest of the law, a mechanism that was originally designed for both civil and criminal law, but which later disappeared in criminal law. After being accepted into the codes of criminal procedure of 1865 and 1913, this type of appeal was not adopted by the code of criminal procedure of 1930, perhaps due to the very limited practical application until then. After that, the institution was never again introduced into the Italian criminal justice system.

⁹¹ Again in the words of Zanardelli, *Senato del Regno*, 26, quoted by CADOPPI, *Il valore del precedente*, *supra* note 52, 231.

⁹² Cf. ESCOBEDO, *La Corte di Cassazione penale nel suo odierno funzionamento e nelle progettate riforme*, in *Giustizia penale*, 1901, VII, p. 577, according to which conflicts in case law, far from decreasing, actually became more frequent; what made things worse was the fact that the conflicts took place no longer among multiple Courts of Cassation, but within the unified Court (*Cassazione Penale Unica*), often in the same chamber.



and its function of upholding and protecting the law, and on the reforms needed to restore and strengthen it⁹³.

5. The Supreme Court's function of upholding and protecting the law in the current code of criminal procedure

This brief historical digression shows that since its inception the *Corte di Cassazione Penale* was conceived as a body with the task, on the one hand, of guaranteeing the implementation of the law in specific cases (the so called *jus litigatoris*) and, on the other, of providing the exact interpretation of the applicable law (the so called *jus constitutionis*), so as to help uniformity in case law and unity of the legal order. This was the logic behind Article 65 of Royal Decree 30 January 1941, no. 142 (known as the Law on the Organisation of the Courts), a general law that entrusts the Supreme Court with the task of “ensuring the correct observance and uniform interpretation of the law” and “the unity of the national objective law”⁹⁴.

The importance of the *Corte di Cassazione's* role in upholding and protecting the law is also reflected in several provisions of the current code of criminal procedure about the Supreme Court trials.

Significant among these is Article 173 IPCCrP, concerning the reasons of the judgment and the statement of the principle of law, which is the *regola juris* that the Court must declare with its decision, and through which it defines an interpretative approach that aspires to

⁹³ Cf. AA.VV., *La Corte assediata. Per una ragionevole deflazione dei giudizi penali di legittimità*, Atti del Convegno dell'Associazione tra gli studiosi del processo penale, Rome, 27-29 September 2012, Milan, 2014. See also, among others, BARGIS-BELLUTA, *Rimedi per i “mali” della Corte di Cassazione: ovvero “Carta di Napoli” e dintorni*, in BARGIS-BELLUTA, *Impugnazioni penali. Assestamenti del sistema e prospettive di riforma*, Turin, 2013, 303; AA.VV., *Le impugnazioni penali nel prisma del giusto processo, Progetto di ricerca di Rilevanza Nazionale (PRIN 2007) (2008-2010)*, at http://www.unibo.it/NR/rdonlyres/C36BC3A7-7D6C-4C94-85DF-C0BF0E7385AA/211620/Leimpugnazionipenali_BOLOGNA_maggio2011.pdf.

⁹⁴ See above, THE VALUE OF JUDICIAL PRECEDENT IN CIVIL MATTERS, § 1.



acquire stability and general compliance. So it is the principle of law, not the entire ruling that acquires, within the limits outlined below, guiding effectiveness.

Article 173 IPCCrP establishes that the *Corte di Cassazione*, in whatever arrangement it is judging⁹⁵ (i.e. Joint Chambers or Individual Chamber) is required to state the principle of law on which the decision is based⁹⁶. However, in the first case, this obligation always applies, whatever decision the Court adopts; in the second case, it only applies if the judgment is annulled with referral. The different positioning of the rule under examination is related to the different type of acknowledged effectiveness of the precedent. When the Court decides as an individual chamber, its judgment is binding for the referral judge (Article 627, paragraph 3) with regard to any legal matter ruled upon. In this perspective, the obligation to state the principle of law responds to the need to avoid difficulties in identifying the *regola juris* to be followed⁹⁷, since failure to observe it might be a ground for a subsequent appeal to the *Corte di Cassazione* (Article 628, paragraph 2 CCrP). Conversely, when the Joint Chambers are deciding, the identification of the principle of law is considered essential because the statement in question has not only an “internal effect” on the individual proceeding (producing the decisional bond for the referral judge), but also outside it, because of the Supreme Court’s function of upholding and protecting the law⁹⁸. This function ensures that the subsequent case law *generally* conforms to the decisions of the Joint Chambers. We said “generally” because the decision of the Joint Chambers, while it cannot in any way be considered binding *erga omnes*⁹⁹,

⁹⁵ It is worth remembering that, as far as criminal matters are concerned, the Corte di Cassazione operates through eight different Chambers, which also include the “Summer Chamber” and the so called “Filtering Chamber (the seventh Chamber, established in 2001, composed of magistrates who also sit in other Chambers), which performs a preliminary assessment of the admissibility of the appeal, based on Article 610, paragraph 1 CCrP. It is the President who assigns the appeals to the various chambers, according to the criteria established by the legal system. The President and the individual chambers can decide to defer the appeal to the Joint Chambers. In this case, the presiding court will be composed of a greater number of magistrates than those in the individual chamber (nine members instead of five).

⁹⁶ Article 173 IPCCrP reads: “1. In the judgment of the Corte di Cassazione the reasons of the appeal are stated in the limits strictly necessary for the decision. 2. In the case of annulment with referral, the judgment specifically states the principle of law to which the referral judge must conform. 3. When the appeal is deferred to the Joint Chambers, the judgment always states the principle of law on which the decision is based”.

⁹⁷ CANZIO, *Il ricorso per cassazione*, in CHIAVARIO-MARZADURI (ed.), *Le impugnazioni*, Turin, 2005, 520.

⁹⁸ LUDOVICI, *sub art. 173 IPCCrP*, in *Codice di procedura commentato*, ed. by GIARDA-SPANGHER, Vol. III, Milan, 2010, 8736.

⁹⁹ CORDERO, *Procedura penale*, Milan, 2012, 9th edition, 1157.



is an “influential precedent”, in that it has a “persuasive” effect that makes it suited to guide the judges in future trials, helping to stabilise subsequent case law.

The Court’s function of upholding and protecting the law is also reflected in the provisions that regulate the assignment or deferral of appeals to the Joint Chambers. Article 610, paragraph 2 CCrP attributes the power of assignment of appeals to the Joint Chambers first of all to the First President of the Court “when the issues raised are particularly relevant or when conflicts among the decisions of individual chambers need to be resolved”. But this is not the only way of deferring to the Supreme Assembly: Article 618, paragraph 2, confers similar power also to the individual chamber, when it discovers that “the question of law under its examination has caused or may cause judicial conflict”¹⁰⁰. Evidently, the two scenarios have very different conditions. On the one hand, the individual chambers cannot exercise their faculty when the questions are of particular importance. On the other hand, they can defer the appeal to the Joint Chambers not only when a case-law conflict has arisen that the First President has not yet decided to defer to the Joint Chambers, but also when the legal question brought to their attention might give rise to a dispute that does not exist yet at that time. The latter scenario happens, for example, when the chamber intends to adopt a decision that departs from the case law of the Court (or at least from the dominant interpretative approach) and also when the Joint Chambers have already attempted to settle a pre-existing dispute with a statement with which the individual chamber claims that it cannot agree¹⁰¹.

The regulations on the issue suggest that the legislator, when drafting the provisions under Articles 610 and 618 CCrP, did not only attribute to the Joint Chambers a role (of “settling judicial conflicts”) that is the central part of the function of ensuring the exact observance and uniform interpretation of the law, but also thought of prevention. Mechanisms were put in place to prevent disputes continuing after the Joint Chambers have ruled. All this with the

¹⁰⁰ If the individual chambers intend to exercise the faculty of deferring the appeal to the Joint Chambers, they must do so with an order, i.e. a decision which, with an obligation to state the reasons (Article 125, paragraph 3, CCrP), must indicate the terms of the existing case-law conflict or state the reasons why the question might give rise to a conflict or disagreement with regard to a previous decision by the Joint Chambers.

¹⁰¹ BERTONI, *sub Article 618 CCrP*, in *Commento al nuovo codice di procedura penale*, edited by CHIAVARIO, VI, Turin, 1991, 278.



purpose of stabilising and standardising the case law also underlying the legal theory of *stare decisis*.

Some Scholars have raised some doubts on the real “stabilising” effectiveness of the abovementioned system, since the founders gave the individual chambers the mere faculty, not the obligation, to defer to the Joint Chambers. This is particularly significant if one considers that the definitive draft of the 1988 CCrP included a provision (Article 610-bis CCrP) that established that “the individual chambers conform their decisions to the principle of law stated by the Joint Chambers to resolve the dispute; otherwise they must submit an appeal to the Joint Chambers detailing the reasons for the disagreement”¹⁰². The Parliamentary Commission, in its definitive opinion, raised serious doubts about this solution, claiming that it would “impose, for the first time in our trial system, a bond, albeit general and correct, to precedent”¹⁰³. By contrast, it has been noted that “this was not the introduction, even in a very limited area, of *stare decisis*, but of a negative obligation, the prohibition on issuing sentences that conflicted with the principles issued by the Joint Chambers, through a criticism based on [...] their precedent”¹⁰⁴. Nevertheless, due to the abovementioned fears, the original text was replaced with the current one: the “bond” disappeared, as did the obligation to defer the matter to the Joint Chambers.

Another provision emphasising the Supreme Court’s function of upholding and protecting the law is Article 172, paragraph 2, IPCCrP, which regulates the return of the appeals previously deferred to the Joint Chambers. According to this provision “under no circumstances can a motion be returned which, after a decision by the Joint Chambers, was deferred by a chamber of the *Corte di Cassazione* with a statement of the reasons that can cause a new conflict of jurisprudence”. It is clear that the legislator explicitly envisaged the possibility of a disagreement among the individual chambers, which was already implicitly acknowledged by

¹⁰² See CONSO-GREVI- NEPPI MODONA (ed.), *Il nuovo codice di procedura penale. Dalle leggi delega ai decreti delegati*, V, *Il progetto definitivo e il testo definitivo del codice*, Padua, 1990, 1355.

¹⁰³ Literally the Parliamentary Commission’s second opinion, 33, quoted in CONSO-GREVI- NEPPI MODONA (ed.), *Il nuovo codice di procedura penale. Dalle leggi delega ai decreti delegati*, supra note 102, 1355.

¹⁰⁴ ZUCCONI-GALLI-FONSECA, *Le nuove norme sul giudizio penale di cassazione e la crisi della Suprema Corte*, in *Cassazione penale*, 1990, 527.



Article 618, paragraph 2 CCrP. This confirms, if it were still necessary, the non-existence of a legal obligation to conform to the precedents of Joint Chambers, both for *Corte di Cassazione* and trial judges. This also seems to confirm the intent underlying Article 618, paragraph 2 CCrP, to assign to the Supreme Assembly a sort of “preferential jurisdiction in the formation and evolution of consolidated case law”¹⁰⁵: the dialectic within the Corte di Cassazione is guaranteed, but it will be up to the Joint Chambers to decide whether to make changes based on the case law.

In light of the legal framework described above, we can conclude that the current procedural rules have certainly helped strengthen the Criminal Court of Cassation’s function of ensuring the exact observance and uniform interpretation of the law compared to the past¹⁰⁶. However, it seems difficult to assign to the precedents of the Joint Chambers and, moreover, to the judgments of the individual chambers, a binding effect in the strict sense outside the single proceedings in which they were stated. Certainly, the decisions of the Joint Chambers are authoritative and influential precedents, and a certain credit must be given, although to a lesser extent, to the statements of the individual chambers, since the mechanism for deferring to the enlarged commission under Article 618, paragraph 2 can be triggered even by the possibility of a disagreement¹⁰⁷. However, as specified by the Constitutional Court, “the approach stated in the decision of the Joint Chambers undoubtedly “aspires” to acquire stability and a general following: but these are just trends that are based on an essentially “persuasive”, non-binding effectiveness. Consequently [...] the decision of the body that ensures the exact observance and uniform interpretation of the law remains potentially susceptible to being misapplied at any time and by any judge of the Republic, even if [he/she is] charged with the obligation of

¹⁰⁵ GIALUZ, sub *Article 618 CCrP*, in *Codice di Procedura Commentato*, edited by GIARDA-SPANGHER, Vol. II, Milan, 2010, 7476-7480, according to whom the problem is that it is a “preferential”, not “exclusive” jurisdiction, since, as previously noted, the reformers did not impose the obligation to defer the matter to the enlarged commission.

¹⁰⁶ Article 618 CCrP represents an improvement compared to the 1930 CCrP. In the previous system the power of assigning appeals to the Joint Chambers was attributed exclusively to the First President. The new legislation grants the individual chamber the faculty of appealing deferring directly to the enlarged commission, independently of any intervention by the First President, and also when the disagreement has not arisen, but could yet come about. This reflects the intent to strengthen the channels of access to the Joint Chambers, and to give more weight to their decisions than in the past.

¹⁰⁷ This is the opinion of CADOPPI, *Il valore del precedente*, *supra* note 52, 215.



providing reasons”¹⁰⁸. The drafters of 1988 CCrP were not thorough enough to come up with a similar solution to the one adopted for civil trials, with the 2006 amendment of Article 374 CCP)¹⁰⁹.

6. The recent debate on revirement in the case law of the Joint Chambers and perspectives of law as it should be

As previously noted, a lively debate has recently begun on the value of case-law precedent and on the “crisis” of the *Corte di Cassazione*’s function of ensuring the exact observance and uniform interpretation of the law. Many are the topics on the table: on the one hand, the question of the effects of changes in interpretation of the Joint Chambers that entail a sort of *abolitio criminis*; on the other hand, the issue of the Court’s enormous workload, which is perhaps today the main cause of conflicts in case law.

With regard to the first scenario, it is important to note that the broad concept of “legality” in criminal law upheld by Article 7 of the ECHR¹¹⁰ has led some Italian judges to claim that changes in case law have similar consequences on criminal trials to legislative amendments¹¹¹.

The equalisation of law in the books with law in action emerged most significantly in a recent judgment by the Joint Chambers of the *Corte di Cassazione*, which stated that the change in case law, which came about with a decision by the Joint Chambers of the *Corte di Cassazione*, incorporates a “new point of law” that can allow the resubmission, during the

¹⁰⁸ Constitutional Court, judgment 2012, no. 230, *supra* note 57.

¹⁰⁹ See above, THE VALUE OF JUDICIAL PRECEDENT IN CIVIL MATTERS, §. 4.

¹¹⁰ Under the consolidated approach of the Court of Strasbourg, the term “law” encompasses statutory law as well as case law.

¹¹¹ On the subject see MAZZACUVA, *Mutamento giurisprudenziale e processo, Il libro dell'anno del diritto 2014 Treccani*, Istituto dell'Enciclopedia Italiana, Rome, 2014, at [http://www.treccani.it/enciclopedia/mutamento-giurisprudenziale-e-processo-penale_\(Il_Libro_dell'anno_del_Diritto\)/](http://www.treccani.it/enciclopedia/mutamento-giurisprudenziale-e-processo-penale_(Il_Libro_dell'anno_del_Diritto)/); VIGANÒ, *Retroattività della legge penale più favorevole*, at [http://www.treccani.it/enciclopedia/retroattivita-della-legge-penale-piu-favorevole_\(Il_Libro_dell'anno_del_Diritto\)/](http://www.treccani.it/enciclopedia/retroattivita-della-legge-penale-piu-favorevole_(Il_Libro_dell'anno_del_Diritto)/)



enforcement of judgment, of a request that had been previously rejected by the enforcement court (in the present case, a request to grant a pardon) and overcome the preclusion under Article 666 CCrP¹¹².

In the wake of this authoritative “precedent”, some trial judges have gone so far as to claim that the interpretative *revirement* of the Joint Chambers could determine a revocation of the criminal conviction (Article 673), at least in cases in which the change in the interpretation of the same law has decreed the fact is not deemed an offence. With respect to this approach, the Tribunal of Turin raised a question of constitutional legitimacy¹¹³. This question was aimed at obtaining the introduction by the Constitutional Court of a new case of revocation of the judgment, so as to make Article 673 CCrP consistent, on the one hand, with Article 7 ECHR, and on the other, with the role of absolute pre-eminence that the ordinary legislator ascribes to the consolidated case law, as a guideline for judges and for the citizens. To support the constitutional challenge, the Tribunal of Turin observes: “assuming that [after a judgement by the Joint Chambers], the subsequent decisions “generally” conform to the “living law”, the choice of continuing to punish – by not revoking the judgment of conviction – whomever behaved in a way that, according to the “supervening living law”, originating from a decision by the Joint Chambers, is no longer considered a crime by law, would seem manifestly unreasonable”¹¹⁴.

The Constitutional Court responded firmly to these “overtures” to the binding effect of precedent, rejecting all complaints and any attempt of equalisation between written law and

¹¹² Cassazione Sezioni Unite, 13 May 2010, no. 18288, in CED, no. 246651. For a comment see MACCHIA, *La modifica interpretativa cambia il “diritto vivente” e impone di rivalutare la posizione del condannato*, in *Guida al diritto*, 2010, issue no. 27, 70.

¹¹³ The question of constitutional legitimacy raised by the Court of Turin was in reference to Article 673 CrP, “in the part in which it does not envisage the possibility of revocation of the judgment of conviction (or of the criminal decree of conviction or of application of the sentence by request of the parties) in the event of a change in case law (made by decision of the Joint Chambers of the Corte di Cassazione), according to which the matter under examination is not considered by the law to be a crime”, and it was raised by claiming the violation of Articles 3, 13, 25, second paragraph, and Article 117, first paragraph, Constitution, in relation to Articles 5, 6, 7 of the ECHR.

¹¹⁴ Constitutional Court judgment no. 230 of 2012, *supra* note 57, at §. 1. The judgment is also published in *Giurisprudenza costituzionale*, 2012, 3440, with notes by MAZZA, *Il principio di legalità nel nuovo sistema penale liquido*, *ibid.*, 3463, and MANES, *Prometeo alla Consulta*, *supra* note 53, 3474.



case law¹¹⁵. According to the Constitutional Court, the intervention required would result in a “a true overturning of the “system”, since it would create a relationship of “hierarchy” between the Joint Chambers and the enforcement judge, outside the referral trial after the annulment: with notably discordant results, since the rule of *stare decisis* is so far removed from the general coordinates of the legal system”. Also, after emphasising the reasonableness of a system that gives the precedent of the Joint Chambers “not binding but merely persuasive effectiveness”, it is stated in no uncertain terms that the real obstacle to the required equalisation of statutory law and judicial decision – and to the equation between “succession of laws” and “succession of contrasting case-law interpretations of the same law” – are to be found in the cardinal principles of the modern State of law: “Opposing this equation is not [...] only a consideration [...] of the lack of binding force of a case-law interpretation, even if endorsed by a statement from the Joint Chambers. In opposition, first and foremost, there is the [...] statutory reserve in criminal matters (Article 25, second paragraph, Const., together with the principle of separation of the powers, specifically reflected in the precept that rules that the judge is subject (only) to the law” (Article 101, second paragraph, Constitution). In other words, according to the Constitutional Court, a true “constitutional barrier” prevents bringing the Italian legal system closer to those founded on judicial precedent: the creation of criminal laws, just like their repeal, cannot depend, in the current Italian constitutional framework, on “case-law-based rules, but only on an act of will on the part of the legislator (*eius est abrogare cuius est condere*)”.

With regard to the second scenario, it is important to note that it is common opinion that the current crisis in the *Corte di Cassazione*’s function of upholding and protecting the law is connected most of all to its enormous workload¹¹⁶. The very high number of appeals inevitably limits the amount of time devoted to dealing with and deciding on appeals, as well as drafting judgments. This difficult operational situation causes a high rate of inconsistency

¹¹⁵ Constitutional Court, judgment no. 230 of 2012, *supra* note 57, at §§ 7-11.

¹¹⁶ The collected data indicate that in 2011 the *Corte di Cassazione* received 50,922 appeals and decided 49,954 proceedings. The data do not vary much for other years: the workload is about 50,000 proceedings per year. This is an enormous figure if compared with other European countries. On the subject see CHIAVARIO, *La garanzia della ricorribilità e i suoi costi. Riscrivere la norma costituzionale?* in AA.VV., *La corte assediata*, *supra* note 93, 27-28.



among the case law of the individual chambers. All this hinders the “uniform interpretation” (Article 65 of the Law on the Organisation of the Courts) that should stabilise future decisions¹¹⁷.

In order to find a “balancing point between the different functions of ensuring the exact observance and uniform interpretation of the law, and guaranteeing the review of legality to the accused person”¹¹⁸, scholars have proposed a wide range of remedies, which should contribute on different levels¹¹⁹. The basic idea is that it is necessary first of all to reduce the amount of appeals by decreasing the type of decisions that can be appealed to the *Corte di Cassazione*¹²⁰. This aim could be pursued abolishing Article 613 CCrP (in the part in which it envisages that the accused person can personally file an appeal) and developing a new system of appeals against decisions on personal freedom. Alongside the deflationary mechanisms there is also the idea that there should be change in the working method of the Court, especially with regard to the way for checking the grounds of the judgement (Article 606, paragraph 1, point CCrP and rewritten in Law no. 46/2006), so as to limit and/or preclude access to the records of the previous trials.

This is not the place to express an opinion on these proposals. In the interests of this analysis, it is worth noting that these proposals aim to improve the functioning of the *Corte di Cassazione* especially in terms of deflation, without taking into consideration the possibility of introducing adequate mechanisms for binding trial judges and the individual chambers of the *Corte di Cassazione* to the principle of law stated by the Joint Chambers. But perhaps this

¹¹⁷ BARGIS, *Ricorso per cassazione inammissibile e principio di diritto nell'interesse della legge ex art. 363 c.p.c.: un istituto esportabile in sede penale a fini nomofilattici?* In BARGIS-BELLUTA, *Impugnazioni penali*, supra note 93, 274.

¹¹⁸ *La “Carta di Napoli”*. *Per una riforma urgente del giudizio penale in Cassazione*, edited by the Associazione tra gli Studiosi del Processo Penale, in AA.VV., *La Corte Assediata*, supra note 93, 289.

¹¹⁹ The amendments should concern the legitimacy to file an appeal; the objective appealability; the working method of the Court, with particular regard to the access to the records of the previous trials. Again, *La “Carta di Napoli”*, supra note 93, 289.

¹²⁰ For example, excluding appeals to the Corte di Cassazione against judgments of “plea bargaining” (Article 444 CCrP) or judgments of no grounds to proceed (Articles 425, 607 CCrP). This solution requires a prior amendment of Article 111, paragraph 7, Const.



aspect should not be ignored. It is no coincidence that some scholars¹²¹ have suggested inserting in CCrP a provision similar to Article 374 CCP, so as to establish the “need to defer the question [to the Joint Chambers when] the judge intends to depart from precedent”, and subjecting the admissibility of such deferral to the explanation of new reasons compared to those at the basis of the previously resolved conflict of interpretation¹²². A similar solution – basically aimed at restoring the procedural mechanism described in Article 610-*bis* of the final draft of the CCrP¹²³ – was also suggested in recent draft laws. These drafts call for the introduction, in Article 618 CCrP, of a paragraph 1-bis, according to which “if a chamber of the Court does not intend to comply with the most recent principle of law with which the Joint Chambers have resolved a disagreement among the individual chambers, it should defer the appeal by order to the Joint Chambers”¹²⁴.

Even if these proposals were successful, it would still be difficult to think of the *Corte di Cassazione* as a true “Court of precedent”, along the lines of other legal systems. That is not only because of the abovementioned constitutional obstacles, but most of all because such a system would involve only a (limited) negative obligation: the obligation not to diverge from the most authoritative interpretation without giving reasons for the disagreement. This would be a case of “weak” binding effectiveness, not an authentic case of *stare decisis*.

¹²¹ MARZADURI, *Linee guida per una riforma del giudizio in Cassazione*, in *Le impugnazioni penali nel prisma del giusto processo*, p. 29, in AA.VV., *Le impugnazioni penali nel prisma del giusto processo*, supra note 93, in http://www.unibo.it/NR/rdonlyres/C36BC3A7-7D6C-4C94-85DF-C0BF0E7385AA/211620/Leimpugnazioniipenali_BOLOGNA_maggio2011.pdf. Along these lines also is RICCIO, *Sulla Cassazione: annotazioni di Giuseppe Riccio*, at www.aspp.it, § 3.

¹²² To ensure the effectiveness of the provision, also in light of the experience in civil trials, there is also a proposal to establish that “in the event of failed deferral to the Joint Chambers, the inconsistent decision of the court having jurisdiction on the case can be voided by the Corte di Cassazione (as for the cause of the defect, which might include the inability of the judge); if an individual chamber of the Corte di Cassazione does not adapt to the bond, voidance should follow an extraordinary remedy that can be requested before the Joint Chambers based on Article 625-*bis* CCrP” (MARZADURI, *Linee guida*, supra note 121, 29).

¹²³ As proposed by some scholars. See CADOPPI, *Il valore del precedente*, supra note 52, 313; FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, in *Cassazione penale*, 2005, 1736.

¹²⁴ See draft law no. 1440 presented on 10 March 2009 by the Minister of Justice Alfano to the Italian Senate.



The value of precedent in administrative and constitutional matters

1. The importance of case law in administrative law

Even with regards to statement by the administrative judge there is an absence in the Italian system of an acknowledgement of the binding value of judicial precedent.

In spite of this, it is safe to say that most of the concrete creation of Italian administrative law found a basis in the case law of administrative courts. One can even argue that in Italy administrative law was born at the same time as administrative courts, precisely at the moment in which the legislator established the Fourth Chamber of the *Consiglio di Stato* (Council of State): the Chamber was given the task of “ruling on appeals on the basis of incompetence, misuse of power or breach of law against acts and decisions of an administrative authority (...), with regard to an interest of individuals or moral legal entities, when the appeals do not fall under the jurisdiction of the judicial authority” (Law no. 5992/1889, Article 3)¹²⁵.

Ever since then, while it is still up to the civil court to judge on subjective rights (in accordance with what was previously established by Article 2 of Annex E of Law no. 2248/1865), it is up to the administrative court to judge on the interests which relate to the exercise of an administrative power, and which were soon defined as “legitimate interests” (*interessi legittimi*). The Constitution of 1948 absorbed this criterion of division of jurisdiction (Article 103), which was previously consolidated in Royal Decree no. 1054/1924 (the so called “Text of the Laws of the Council of State”) and subsequently confirmed by Law no. 1034/1971 (the law that established Regional Administrative Tribunals¹²⁶, with regard to which the Council

¹²⁵ The formal and official recognition of the jurisdictional nature of the Fourth Section of the Council of State came about with Royal Decree no. 642/1907, which dictated the relative “regulations for the procedure”. On these aspects see TRAVI, *Lezioni di giustizia amministrativa*, Turin, 2012 (4th edition), 29 ff.

¹²⁶ There is a Regional Administrative Tribunal in every regional capital; in some regions there is even more than one chamber. The possibility of establishing in each Region first-instance administrative legal bodies, with separate chambers, is envisaged in the Constitution (Article 125). Before these courts were established, the administrative jurisdictional function was partially carried out, in first instance, by other bodies (provincial administrative



of State carries out the functions of appellate judge¹²⁷) and by Legislative Decree no. 104/2010 (Code of Administrative Procedure, abbreviated to CPA)¹²⁸.

In this way, right from the start the administrative courts were the most instrumental in the definition of the judicial relationship between citizens and administrative authorities, establishing – along the same lines of the French model, with the famous *arrêt Blanco* (1873)¹²⁹ – the fundamental principles of a fully-fledged special law. As has been efficiently noted, “The administrative process has for a long time, in some way, *incorporated* the very legal condition it is trying to protect”¹³⁰. Italian administrative law has been based on a “dual” preliminary choice of judges¹³¹: on the one hand ordinary judges, charged with applying civil law; on the other, administrative judges, dedicated to monitoring the administration’s compliance with the rules and principles imposed on it by the legal system, which are derived one by one from a very heterogeneous, incomplete and fragmented complex of regulations.

Administrative judges were the ones who clarified some of the most significant pivots of the system of administrative judicial protection, establishing, for example, which acts and decisions were appealable; what was the actual nature of the faults that could be effectively challenged before the courts; how to interpret the requirements of defensible legitimacy and interest; the specifics of the administrative process and system of judicial protection required,

governments), which could decide on appeals against the acts of certain local administrations and did not fully guarantee the constitutional principles of independence of the judge.

¹²⁷ The Council of State, whose functions are also laid out in Article 100 Constitution, is today composed of seven chambers: three carry out advisory functions (for the Government); the other four perform jurisdictional functions to all intents and purposes. In the Region of Sicily the functions of the Council of State are exercised by the Council of Administrative Justice of the Region of Sicily.

¹²⁸ An exception to this criterion of division is the so called “exclusive jurisdiction” of the administrative court (see again Article 103 Constitution, which however absorbed the framework established by Royal Decree no. 2840/1923): on “certain subjects” the legislator can allow the administrative court to rule on the protection of both legitimate interests and subjective rights.

¹²⁹ With this famous judgment, the French Court of Conflicts had established that administrative judges should have jurisdiction over disputes regarding the State’s liability for damages incurred to private individuals by activities of public service, in that these were not regulated by civil law. On this point, see CASSESE, *Le basi del diritto amministrativo*, Milan, 2000 (reprint of the 6th edition), 15.

¹³⁰ PAJNO, *Nomofilachia e giustizia amministrativa*, in *Rassegna forense*, 2014, 641 ff., in particular 649, which recalls, on this point, the corresponding reconstruction by NIGRO, *Giustizia amministrativa*, Bologna, 2002 (6th edition), chapters IV and V.

¹³¹ A. SANDULLI (ed.), *Diritto processuale amministrativo*, Milan, 2013 (2nd edition), 1.



in exclusive judicial capacity¹³², to guarantee also subjective rights; the type of system of legal protection (originally envisaged only as a suspension of the effects of the challenged act); how to guarantee the execution of the judgments vis-à-vis the administration; the feasibility and potential of a number of specific remedies, such as cross-appeal or appeal; what remedy to implement when faced with the inertia of the public administration.

With regard to all these questions, the legislator has always intervened by acknowledging what the administrative judges had already, entirely or partially, defined, relying also on the mediation of the most common interpretations of case law in other legal systems, those of the Constitutional Court and, more recently, of the, as it were, “qualified” ones from supranational legal bodies such as the European Court of Justice and the European Court of Human Rights¹³³.

Again, for an idea of the great creative ability of Italian administrative judges, one need only think that for a long time (until Law no. 241/1990) there was no general regulation of administrative actions. Yet, the majority of the principles subsequently upheld by the legislator had been previously envisaged by the judges themselves (such as the emblematic case of the duty to state reasons¹³⁴), who also drew the boundaries of a number of important administrative powers (such as automatic repeal or voidance, which is regulated with general provisions only in Law no. 15/2005¹³⁵) and of other major institutions, well beyond that is explicitly established by the law (for example, announcement of proceedings, notice of rejection in proceedings filed by one of the parties, the judge’s power not to void illegitimate measures in the presence of merely formal or procedural breaches, right of access to other administrative documents¹³⁶; one could say the same about the definition of judicial control

¹³² See above at note 123.

¹³³ We will return to these issues, *infra*, § 3.

¹³⁴ See Article 3 of Law no. 241.

¹³⁵ Cf. Articles 21 quinquies and 21 nonies of Law no. 241.

¹³⁶ See, in order, Articles 7, 10 bis, 21 octies and 22 of Law no. 241.



over technical and administrative discretion¹³⁷, and even the “invention” of abuse of process¹³⁸).

The importance of the fact that administrative judges were able to play a very innovative role because they were operating from outside the channels of civil justice can be appreciated in particular with regard to a very significant issue, the regime of liability of the public administration for damages from unlawful decisions. The Joint Chambers of the Court of Cassation, with the significant judgment no. 500/1999, established for the first time a regulation for this type of liability; however, with the passing of Law no. 205/2000, the jurisdiction over liability was handed over to administrative judges, who over time were able to shape a new special regime that was independent of the one designed, albeit with great authority, by civil judges¹³⁹.

2. *The role of the Council of State and its function of upholding and protecting the law*

This “dual” layout that was briefly mentioned was fundamental. It meant that the functions of upholding and protecting the law, as carried out by the Court of Cassation per Article 65 of the law on the organisation of the courts,¹⁴⁰ were ascribed to the Council of State, as the highest body of administrative jurisdiction (its judgments, like those of the Court of Auditors, can be appealed before the Court of Cassation “only for reasons concerning jurisdiction” – per Article 111 Constitution – and therefore, at least in principle¹⁴¹, the upper body of ordinary, civil and criminal jurisdiction cannot assess the approach of administrative and accounting judges according to a strict observance and consistent interpretation of the

¹³⁷ As recalled by PAJNO, *Nomofilachia e giustizia amministrativa*, *supra* note 130.

¹³⁸ See, ultimately, TROPEA, *L'abuso del processo amministrativo*. *Studio critico*, Naples, 2015.

¹³⁹ The literature on this subject is plentiful. For an overview of these evolutions see FALCON, *La responsabilità dell'amministrazione e il potere amministrativo*, in *Diritto processuale amministrativo*, 2009, 241 ff.

¹⁴⁰ See above, note 11.

¹⁴¹ See what is mentioned *infra*, in this paragraph.



law). Statements by the Council of State “validated”, in corresponding leading cases, the creative innovations listed in the previous paragraph¹⁴².

From this point of view, an essential role within the Council of State has always been played by the Plenary Assembly, the jurisdictional body, first sanctioned by Royal Decree no. 638/1907 and confirmed at different times (in particular, in 1924 and 1950), which is presided over by the President of the Council of State and brings together 12 councillors chosen by the Office of the President from among the components of the other jurisdictional Chambers¹⁴³. It is this authoritative “set up” that truly performs the function of upholding and protecting the law¹⁴⁴, since it is up to the Plenary Assembly to decide on cases that have given, or could give, rise to disagreements on the case law, and that were deferred to them as such by the individual chambers or by the President of the Council of State: the President can, in fact, defer to the Plenary Assembly, on the request of one party or *ex officio*, all the appeals that raise similar issues or are characterised by particularly significant questions of law (Article 99 CPA).

The current debate on the existence of a formal rule of *stare decisis* in administrative trials is entirely focused on the interpretation of this regulation, since the law, as modified in 2010, established both that the Plenary Assembly must state a “legal principle” (often also “in the interest of the law”¹⁴⁵), and that the individual jurisdictional Chambers must defer the question to the Plenary Assembly, by “reasoned order”, when they claim to “disagree” with the

¹⁴² A collection of the most significant “historic” judgments was put together by A. SANDULLI, PASQUINI (ed.), *Le grandi decisioni del Consiglio di Stato*, Milan, 2001.

¹⁴³ See CORSO, *L’Adunanza Plenaria e la nomofilachia*, in *Rassegna forense*, 2014, 633 ff., in particular 634, which notes that between 1907 and the start of 2014, the Plenary Assembly “issued 1,263 rulings”.

¹⁴⁴ This point – which concerns not only the Council of State, but also the Court of Auditors and its Joint Chambers – was also highlighted by Constitutional Court, 27 January 2011, no. 30, in *Giurisprudenza costituzionale*, 2011, 856 ff., with commentary by SCOCA. For further commentary see also CROCE, *La “lunga marcia” del precedente: la nomofilachia come valore costituzionale?*, in *Forum dei Quaderni Costituzionali* (http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2011/0005_nota_30_2011_croce.pdf). On the issue see also TOSCHEI (ed.), *L’attività nomofilattica del Consiglio di Stato. Commentario alle sentenze dell’A.P. pubblicate nel 2011*, Rome, 2014. For an in-depth analysis see OGGIANU, *Giurisdizione amministrativa e funzione nomofilattica. L’adunanza plenaria del Consiglio di Stato*, Padua, 2011, in particular 165 ff.

¹⁴⁵ This is what happens when the Plenary Assembly is convinced that the case is of particular significance and the appeal is, however, unacceptable, inadmissible or inapplicable or should be considered settled.



“legal principle” that the Plenary Assembly may have announced on a different occasion (again, Article 99 of the Code of Administrative Procedure)¹⁴⁶.

It is easy to see that these two innovations are entirely parallel to those introduced in the regulation of civil trials before the Court of Cassation following the 2006 reform (Legislative Decree no. 40), which changed, as mentioned, Articles 363 and 374 ICCP. Consequently, most of the debate that was sparked in the regulation of civil trials can also apply to the regulations contained in the CPA, including conclusions at which the majority of scholars, in that context, have arrived¹⁴⁷.

In other words, on the one hand, we can confirm that the principle *stare decisis* has not been introduced into administrative trials either; on the other hand, however, we can see that the bond of precedent has had indirect (or *weak*) recognition: it is partially strengthened, especially from a procedural point of view, since the jurisdictional Chambers of the Council of State certainly are entitled to disagree with the interpretation of the Plenary Assembly, but in order to do so they need to state the reasons for their dissent and defer the decision to the upper court.

From a substantive point of view, however, that bond does not have “strong” remedial measures at its disposal since, as some have pointed out¹⁴⁸, faced with a dissenting jurisdictional Chamber that fails to defer the case to the Plenary Assembly, it is difficult to conceive of a reaction that is useful for the trial¹⁴⁹. In any case, it is true that the effect of this reform is that now the Plenary Assembly is involved more often than before 2010¹⁵⁰.

¹⁴⁶ Cf. CORSO, *L’Adunanza Plenaria e la nomofilachia*, *supra* note 143, as well as PAJNO, *Nomofilachia e giustizia amministrativa*, *supra* note 130.

¹⁴⁷ See above, THE VALUE OF JUDICIAL PRECEDENT IN CIVIL MATTERS, § 4.

¹⁴⁸ See FOLLIERI, *Rimedi avverso la violazione dell’art. 99, terzo comma, del codice del processo amministrativo*, in *Giustizia Amministrativa italiana*, no. 4/2013; G. PESCE, *L’Adunanza Plenaria del Consiglio di Stato diventa giudice di common law?*, in *IusPublicum* (May 2013) (http://www.ius-publicum.com/repository/uploads/30_05_2013_15_16_StaredecisisIT.pdf).

¹⁴⁹ See again CORSO, *ult.op.loc.cit.*, who specifies that the introduction into the Italian legal system of a formal rule binding to precedent would be “constitutionally illegitimate”: “in a system in which the judge is only subject to the law and in which case law is not a source of the law, a new source would be introduced (...) in breach of the principle according to which only the Constitution and constitutional laws determine the sources of the law. This would also damage the judge’s independent judgment, which the Constitution provides not only for the overall



It should be pointed out, in any case, that the Court of Cassation has repeatedly tried to impose its own stronger role with regard to the Council of State approach. This happened through the attempt to offer a much broader interpretation of the “reasons concerning jurisdiction” (Article 111 Constitution) that can help substantiate an appeal of the judgments of the upper court of administrative jurisdiction. In particular, the Court of Cassation has claimed it could “challenge” the judgments of the Council of State even when they offered interpretations that clash with the principle of effective judicial protection and that can be resolved with a denial of justice¹⁵¹: the Court of Cassation, in other words, has in some way admitted the possibility of exercising its function of protecting the law even in relation to administrative judges, in particular with regard to how they provide protection for specific claims¹⁵².

3. The vehicles “of precedents” in administrative trials

The importance of precedent in administrative trials emerges not only in reference to the role of the Council of State and, within that, the Plenary Assembly.

In trial regulations, there is an institution that seems to give significant value to precedent in all trials: judgment in simplified form (Article 74 CPA), which the judge pronounces, even when he believes he can already reach a verdict at the preliminary stage

legal system, but also each individual judge”. On the subject see also MALTONI, *Il “vincolo” al precedente dell’Adunanza plenaria ex art. 99, comma 3 c.p.a. e il rispetto dei principi costituzionali*, in *Foro amministrativo*, 2015, 137 ff.

¹⁵⁰ As reported by CORSO, *L’Adunanza Plenaria e la nomofilachia*, *supra* note 143, who also notes that the Plenary Assembly has tried to avoid excessive appeals to its jurisdiction, exercising its right, explicitly bestowed upon it by the law, to return the acts to the deferring Chamber.

¹⁵¹ See Cassazione civile, Sezione Unica, 23 December 2008, no. 30254. For an overview of the issue that caused the Court of Cassation to formulate this thesis, and for an analysis of the ensuing dispute with the Council of State, see CORTESE, *Corte di cassazione e Consiglio di Stato sul risarcimento del danno da provvedimento illegittimo: motivi ulteriori contro e per la c.d. “pregiudizialità amministrativa”*, in *Diritto processuale amministrativo*, 2009, 511 ff.

¹⁵² The Court of Cassation, has denied, for example, that this interpretation allows it to challenge the exactness of the judgments of the Council of State in terms of their inconsistency with European Union law: see Cassazione civile, Sezioni Unite, 4 February 2014, no. 2403.



(Article 60 CPA), “when he establishes clear merits or manifest unacceptability, inadmissibility, inapplicability or lack of foundation of the appeal”.

In this scenario, the law allows the reasons for the judgment “to consist of a summary reference to the point of fact or law deemed to be decisive or, if necessary, to a consistent precedent”¹⁵³. As we can see, the judge is not required to use the precedent; however, it is interesting to note that the legislator did consider the notion, although as a means to encourage the legal body with jurisdiction to come up with a quick definition of the “easier” disputes.

This is by no means a new institution, since it entered the legal system under Article 19 of Decree Law no. 67/1997 (on the subject of administrative trials on public works), which, while not making explicit reference to precedent, was interpreted in that way by the case law. Reference to precedent was also made by Law no. 205/2000 (Article 9), which provided general guidelines on how to provide reasons in simple form, later confirmed by the CPA in 2010¹⁵⁴.

This form of giving reasons is also mandatory for statements to be adopted in relation to types of trials regulated with special procedures: the process for accessing administrative documents (Article 116 CPA), the one regarding inertia of the public administration (Article 117 CPA), the one regarding procedures for assigning public works, services and utilities (Article 120, paragraph 10, CPA) and those regarding the acts of exclusion of local and regional electoral procedures (Article 129, paragraph 6, CPA). The institution’s aim of speeding up the process is very clear, since these are verdicts that require a rapid response from the judges.

It is also important to note that in administrative trials, the administrative judicial precedent (the one regarding judgments adopted by administrative judges, even last resort ones, as is certainly the case with the Plenary Assembly of the Council of State), is prone to being widely disputed because of the appeal by the administrative judges themselves for a

¹⁵³ In accordance with Article 118 of the provisions implementing the ICCP, as specified above (see THE VALUE OF JUDICIAL PRECEDENT IN CIVIL MATTERS, § 4)

¹⁵⁴ On the system in place before 2010, see CLINI, *La forma semplificata della sentenza nel “giusto” processo amministrativo*, Padua, 2009.



preliminary ruling before the Court of Justice, per Article 267 of the Treaty on the Functioning of the European Union (TFEU)¹⁵⁵.

This dynamic might also affect the other Italian judges, not only the administrative ones. Through this institution, the national judicial precedents might “short circuit” when they come into contact with the guidelines of the European court, and the relative precedents.

This happened, for example, in the administrative judgment, with regard to the definition of the concrete regulation of cross-appeal, particularly from the point of view of determining the order of assessment of the main appeal compared to the cross-appeal. A Regional Administrative Tribunal openly raised doubts on the compliance with the guidelines set forth in this regard by the Council of State¹⁵⁶ compared to the regulation established by Directive 89/665/EEC, which coordinates the legislative, regulatory and administrative provisions regarding the award of public contracts for services and work. It activated a preliminary ruling¹⁵⁷ and the Court of Justice assessed a partial conflict of the thesis of the Council of State with EU law¹⁵⁸. Since the Plenary Assembly¹⁵⁹, while reiterating the correctness of its interpretation, at the same time changed it, admitting that there might be situations in which reading by the Court of Justice must be observed. The “internal” precedent was therefore modified by the “European” precedent¹⁶⁰.

¹⁵⁵ The article in question states: “1. The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaties; b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. 2. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. 3. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. 4. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay”.

¹⁵⁶ See, above all, Council of State, Plenary Assembly, 7 April 2011, no. 4.

¹⁵⁷ See Regional Administrative Tribunal of Piedmont, order 9 February 2012, no. 208.

¹⁵⁸ Court of Justice, 4 July 2013, in case C-100/12, *Fastweb*. Cf. LAMBERTI, *Per la Corte di giustizia l'incidentale non è più “escludente”?*, in *Urbanistica appalti*, 2013, 1006 ff.

¹⁵⁹ Council of State, Plenary Assembly, 25 February 2014, no. 9. For a critical commentary on the complex solution devised by the Plenary Assembly, see BERTONAZZI, *Il ricorso incidentale nei giudizi amministrativi di primo grado relativi a procedure selettive: residue incertezze domestiche e gravi incognite di origine europea*, in *Diritto processuale amministrativo*, 563 ff.

¹⁶⁰ Cf. PAJNO, *Nomofilachia e giustizia amministrativa*, *supra* note 130.



On the other hand, we should note that the administrative court's need to take into account the Court of Justice guidelines also depends on cases in which, in general and not only on matters directly regulated by EU law, Article 1 of the Code of Administrative Procedure (entitled "Effectiveness") states that "administrative jurisdiction ensures a full and effective protection of the principles of the Constitution and European law".

It is worth mentioning on that note that the Plenary Assembly has performed, and still performs, an important function of "selection" of truly relevant European precedents, on a case-by-case basis. This happened, for example, in a very recent case, in which a Chamber of the Council of State, following guidelines from the Court of Justice, assumed that the administrative judge could order the voidance of a decision with immediate effect. The Plenary Assembly, on this occasion, pointed out that the "precedent" did not really exist, because it concerned the power of the Court of Justice itself, which could be exercised in that way as a result of an express provision of the TFEU¹⁶¹.

In any case, administrative legal theory has also argued that the Plenary Assembly's function of upholding and protecting the law and the obligation for the Chambers of the Council of State to observe its legal principles might be in contrast with EU law: it is no coincidence that the question was raised by the Court of Justice with a preliminary ruling, to assess whether a Chamber of the Council of State claiming a contrast between EU law and Plenary Assembly guidelines is required to raise the case preliminarily before the Assembly or act directly through the institution described in Article 267 ECHR¹⁶².

A question of adapting administrative case law to external and foreign precedents also arises in reference to the judgments of the European Court of Human Rights on the provisions

¹⁶¹ Cf. Council of State Plenary Assembly, 13 April 2015, no. 4: "Article 1 of the CPA states that "administrative administration ensures full and effective protection according to the principles of the Constitution and European law", but this happens according to the specific regulation of the administrative process, without necessarily applying EU procedural rules. The point here is not to absorb the principles of substantive or procedural EU law (proportionality, legitimate expectations, mutual recognition, fair trial, hearing of the parties, etc.), but to apply a provision that was designed for European trials to (entirely different) national trials".

¹⁶² Cf. Council of Administrative Justice of the Region of Sicily, order 17 October 2013, no. 848. The case is still pending before the European Court of Justice.



of the European Convention on Human Rights (Article 13 ECHR) on the guarantee, on the part of the State, of effective remedies.

With regard to this issue, it is worth noting that, despite the different opinion expressed in some judgments, even by the Council of State, the administrative judge, when finding a conflict between a national norm and an ECHR norm, as interpreted by a statement by the Court of Strasbourg, would have only one option: to raise the issue of constitutionality of the national norm before the Constitutional Court, if it conflicts with Article 117 Constitution; in accordance with the latter provision, the Italian legislator must always observe any constraints arising from international obligations, which in this way operate as an “interposed parameter” of constitutional legitimacy, as they are officially interpreted by the Court of Strasbourg¹⁶³.

4. The value of precedent in the judgment of constitutional legitimacy

In the Italian legal system judicial precedent is important also in the area of constitutional jurisdiction¹⁶⁴.

Naturally we are not alluding to the value that, following a judgment of constitutional legitimacy, the Court judgment (of repeal or acceptance) might have with regard to the individual dispute within which the question of constitutionality was raised¹⁶⁵. This value concerns, as stated in the introduction¹⁶⁶, the role of the constitutional judge considered in of

¹⁶³ This definition is indicated by two major judgments of the Constitutional Court, 24 October 2007, nos. 348 and 349.

¹⁶⁴ On the subject see TREVES (ed.), *La dottrina del precedente nella giurisprudenza della Corte costituzionale*, Turin, 1971; CALVANO, *Lo stare decisis nella più recente giurisprudenza costituzionale*, in *Giurisprudenza costituzionale*, 1996, 1279 ff.; PEDRAZZA GORLERO (ed.), *Il precedente nella giurisprudenza della Corte costituzionale*, Padua, 2008; CROCE, *Precedente giudiziale e giurisprudenza costituzionale*, in *Contratto impresa*, 2011, 1114 ff.

¹⁶⁵ In the Italian legal system the judgment of constitutional legitimacy is normally incidental in nature: it can be brought on by a judge, who will turn to the Constitutional Court when, in deciding on a dispute, he needs to apply a norm and believes it conflicts with the Constitution.

¹⁶⁶ See above, *Introductory Remarks*.



itself. Our aim here is to understand if the judgments of the Constitutional Court are binding for the Court's case law.

In this context, too, there cannot truthfully be said to exist a formal rule of *stare decisis*, except with regard to the question of constitutionality of a norm which has previously been declared illegitimate, and for which the Court can simply state the clear inadmissibility of the new question by referring to the precedent. Here, what is at fault in the second question is the object of the judgment, since the norm has already been eliminated by the legal system¹⁶⁷.

Besides this case, one might also note how the issue of precedent is not suitable for presenting to the Constitutional Court in the same way in which it might normally be presented to any other judge: the Court does not usually judge on "facts", or on the comparison between single facts and regulations, but rather, while still taking the facts into account, on the "mutual comparison between different norms"; so, in ruling on constitutional legitimacy, the element that indicates most the existence of a potential precedent (the relationship between the concrete case and the *ratio decidendi*) is certainly more blurred and is founded, not so much on the potential of finding an identical *regula iuris*, but rather on the possibility of evoking a common principle, even though stated in a completely different dispute or when examining not entirely corresponding issues¹⁶⁸.

Before the Court, reference to precedent makes sense only when evoking relatively established principles, whose relevance to future cases is very elastic: the principles are by their very nature the product of more flexible interpretation. Sometime the Court limits itself to stating these principles as *obiter dictum*, so the precedent in this case can pre-empt approaches and opinions that do not concern the matter put to the attention of the Court and that might have concrete applications only in the future. And it might also be the case that the Court decides to declare a certain provision constitutionally illegitimate, while notifying the legislator

¹⁶⁷ BARTOLE, *Ricorso alla regola stare decisis o sommarietà della motivazione? (a proposito dei meriti della trattazione nella stessa udienza di giudizi concernenti questioni simili)*, in *Giurisprudenza costituzionale*, 1986, 1247 ff.

¹⁶⁸ This point is discussed by CROCE, *Precedente giudiziale*, *supra* note 159, 1147, who recalls CHELI, *Sulla correzione degli errori materiali e sull'ammissibilità della revocazione per le sentenze della Corte Costituzionale*, in *Giurisprudenza costituzionale*, 1959, 303.



that, if the regulations on this subject do not change in a constitutionally compliant way, in a possible future occasion it might accept the matter¹⁶⁹. More generally, the Court has always reserved the right to give an “authentic” interpretation of its rulings, confirming the possibility of a precedent¹⁷⁰.

The Constitution has a markedly “open” character, being able to offer different solutions, especially over time, and when its provisions leave room for different interpretations by legislators and by all institutions involved in its application¹⁷¹. At the same time, however, this flexibility cannot be absolute, since the interpretation in question concerns the reasonable, manageable and well founded reconstruction of constitutional regulation¹⁷²: this is why the Court pays concrete attention to its own precedents; they are the first support for reasons that are rationally founded, technically legitimised and free of politicised suspicions or reproach¹⁷³.

The value of these precedents reflects the need, in a broad sense, for consistency and adequacy in the constitutional judge’s approach. Some have mentioned the existence of a “principle of critically examined case-law continuity”¹⁷⁴, which is not the fruit of abstract legal theory.

The Court refers to its own precedents, for example, to draw from it very specific concrete consequences, in a consistent or inconsistent way.

The classic case regards rejection judgments – where the Court denies the authenticity of the question of constitutional legitimacy – because with regard to identical questions (in

¹⁶⁹ This is the case of the so called “warning judgments”, with which the Court warns the legislator of the need to adapt the regulations to a few constitutional principles. This type of statement is normally used when the regulations are too complex to be “corrected” with a simple Court judgment or when the potential elimination of the regulations would create a void – and potential harm – that the legal system could not sustain.

¹⁷⁰ On the subject see GRANATA, *Le sentenze e le ordinanze “autointerpretative” della Corte costituzionale fra “novazione” e “ricognizione” del precedente decism*, Milan, 2009.

¹⁷¹ Cf., among all, BARTOLE, *La Costituzione è di tutti*, Bologna, 2012.

¹⁷² V. PALADIN, *Ragionevolezza (principio di)*, in *Enciclopedia del diritto*, Aggiornamenti, I, Milan, 1997, 910. Cf. also BIN, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*, Milan, 1992, in particular 169.

¹⁷³ As observed by CROCE, *Precedente giudiziale*, *supra* note 159, 1158-1159, many Presidents of the Constitutional Court have always ascribed particular importance to the Court’s ability to systematically know all its previous statements and use them in single judgments. See the converging remarks by G. ZAGREBELSKY, *Principi e voti. La Corte costituzionale e la politica*, Turin, 2005, in particular 83.

¹⁷⁴ See G. ZAGREBELSKY, *La giustizia costituzionale*, Bologna, 1988, 60.



terms of object, parameter and reasons), previously dealt with in previous statements and consequently rejected, the constitutional judge can, one after the other, either quickly reject the questions themselves (motivated through a third party¹⁷⁵), because they have already been ruled upon (and are clearly unfounded), or change his opinion, on the basis of new considerations, perhaps from the acknowledgment of a new social sensibility, new regulatory factors or the influence of intervening legal facts.

Quite frequent is the case in which the Court, despite having previously rejected a specific question based on its own reinterpretation of the legal fact that is allegedly unconstitutional (availing itself of an “interpretative judgment of rejection”), determines that fact is still always interpreted by the uniform and consolidated case law in the opposite way: in this case, the Court can diverge from its own precedent because, unlike judgments of acceptance, judgments of rejection are not effective *erga omnes*, and the duty to uphold the Constitution requires it to consider the actual way in which the norm under examination is interpreted and applied.

A similar mechanism is used by the Court also in the case of judgments of acceptance, often regarding similar situations: it might happen that the Court upholds both questions consistently – the old one and the new one – by using the positive precedent, but it might also be the case that the Court arrives at this result in a different way (for example, by defining the effects of its judgment in a different way, perhaps only for the future) or, on the contrary, the Court might opt for all-out rejection (because other factors have intervened or because it is trying to avoid even greater unconstitutionality than the one determined by the existence of the contested norm)¹⁷⁶.

¹⁷⁵ Cf. CARTABIA, *La motivazione per relationem nelle decisioni della Corte costituzionale*, in Aa. Vv. (ed.), *La motivazione delle decisioni della Corte costituzionale*, Turin, 1994, 258 ff.

¹⁷⁶ Cf. CROCE, *Precedente giudiziale*, *supra* note 159, 1151.



5. Concluding Remarks: judicial precedent and the liability of judges

At the end of this overview of the value of judicial precedent in the Italian legal system, we should consider a very recent innovation, brought about by the reform in regulation of the civil liability of judges (see Law no. 18/2015, which modified Law no. 117/1988)¹⁷⁷. This is a regulation, which, thus modified, might have a very significant indirect impact on how all Italian national judges are required to consider guidelines and precedents from the European Court of Justice.

Among cases in which it is possible to request from the State compensation for the damages incurred as a result of legal malpractice, due to wilful default, gross negligence or denial of justice, the reform (see new Article 2, paragraph 3, Law no. 117/1988) implies that there is gross negligence also in cases of “clear breach of the laws and rights of the European Union”. To assess this specific breach, “one must also take into account the failure to observe the obligation of preliminary ruling in accordance with Article 267, third paragraph, of the Treaty on the Functioning of the European Union, as well as the conflict of the act or provision with the interpretation by the European Court of Justice”.

As one can see, for last-resort Italian judges, the need to take into account the “precedents” of the Court of Justice can become even more pressing since underestimating the “constraint” might end up being a source of civil liability for the State and, consequently, for the individual judge (from whom the State can request compensation, as long as the error has been determined to be, case by case, from wilful default or gross negligence). So how will the judges of the higher national courts behave? The danger of them starting to take on a “defensive case law”, aimed at avoiding any kind of reproach, is not an entirely imaginary risk.

¹⁷⁷ For an initial commentary see CORTESE, PENASA, *Brevi note introduttive alla riforma della disciplina sulla responsabilità civile dei magistrati*, in *Responsabilità civile e previdenza*, 2015, 1026 ff.