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Judicial Precedent in the Italian Legal System:

A Shift Toward a *Stare Decisis* Model?

CHINA GUIDING CASES PROJECT

April 7, 2017 (Final Edition)*

* The citation of this Commentary is: Laura Baccaglini, Gabriella di Paolo, & Fulvio Cortese, *Judicial Precedent in the Italian Legal System: A Shift Toward a Stare Decisis Model?*, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Apr. 7, 2017, <http://cgc.law.stanford.edu/commentaries/19-baccaglini-di-paolo-cortese>. This essay presents shared insight that is the result of the collaboration of its authors. At the same time, Part III can be specifically attributed to Laura Baccaglini, Part IV to Gabriella Di Paolo, and Part V to Fulvio Cortese.

This Commentary was written in English and was edited by Roland Reimers, Jordan Corrente Beck, and Dimitri Phillips. We thank Lorraine Wan and Sean Webb for their assistance in finalizing it. The information and views set out in this Commentary are the responsibility of the authors and do not necessarily reflect the work or views of the China Guiding Cases Project.

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I. Introduction

In the Italian legal system, judgments issued by courts (for the purposes of this Commentary, “judicial precedents”)¹ are not a source of law and, therefore, do not bind judges in the decision of similar subsequent cases. In support of this statement, two constitutional provisions are commonly cited: Article 101, Paragraph 2, which provides that judges are subject to statutory law only, and Article 107, Paragraph 3, which distinguishes the courts in Italy on the basis of their functions without establishing clear hierarchical links between them.² However, despite the lack of formally binding judgments in Italy, there is a general expectation that precedents be followed. The difference between the law on the books and the law in action prompts the authors of this commentary to examine the actual binding “strength” of precedents as used in handling matters of civil, criminal, administrative, and constitutional law. The authors also discuss the “directional scope” of precedents by examining their “vertical” and “horizontal” binding effects, both of which are core topics of recent debate on the value of precedents in Italy. The authors offer conclusions on whether and to what extent one may argue there is a progression toward a *stare decisis* model in Italy.

II. Background on the Italian Court System

For a reader unfamiliar with the court system in Italy, a brief preliminary introduction to it should prove beneficial. According to the constitution adopted in 1948, there are two types of courts in Italy: courts of ordinary jurisdiction, which deal with civil and criminal matters, and courts of special jurisdiction, which handle, *inter alia*, administrative matters. In matters of ordinary jurisdiction, there can be up to three instances of adjudication (see **Table One**). First, by a Justice of the Peace or a Tribunal, depending on the seriousness of the case—or, for a serious crime, a *Corte di Assise* (“Court of Assizes”). Second, if appealed, by a Tribunal (if a Justice of the Peace delivered the first-instance judgment), a Court of Appeal (if a Tribunal delivered the first-instance judgment)—or, for serious criminal matters, the *Corte di Assise di Appello* (“Appellate Court of Assizes”). Third, and only in response to a challenge of a misapplication of substantive or procedural law, by the *Corte di Cassazione* (“Court of Cassation”). As will be relevant to later discussion, if, in the third instance, an appeal is upheld, the Court of Cassation does not directly decide the case, but rather voids the judgment, states the so-called “*massima*” (the “principle of law” that may provide guidance to subsequent cases), and transfers the case to another trial judge, who is called upon to settle the dispute in light of the *massima* pointed out by the Court of Cassation.

Turning to courts of special jurisdiction, administrative matters are handled in the first instance by the Regional Administrative Tribunals and, in the second (and final) instance, by the *Consiglio di Stato* (“Council of State”), the higher administrative court (see **Table One**).

¹ The terms “judgments”, “judicial precedents”, and “precedents” are used interchangeably throughout this commentary. For a discussion of different categories of judicial precedents in Italy, see Michele Taruffo, *Dimensioni del precedente giudiziario*, in SCINTILLAE IURIS. STUDI IN MEMORIA DI GINO GORLA 383, 388ff. (A. Giuffrè, 1994) and Michele Taruffo, *Precedente e giurisprudenza*, 61 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 709 (2007).

² Costituzione della Repubblica Italiana, available in English at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf



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As we will see, while it is up to civil courts to judge on rights,³ administrative courts have jurisdiction over the interests related to the exercise of administrative power or *interessi legittimi* (“legitimate interests”).

Table One: Instances of Judgment

	Ordinary Jurisdiction <i>(civil and criminal matters)</i>	Special Jurisdiction <i>(primarily administrative matters)</i>
Challenges of Law	Court of Cassation	None
Appeal	Tribunals; Courts of Appeal; Appellate Courts of Assizes	Council of State
First-Instance	Justices of the Peace; Tribunals; Courts of Assizes	Regional Administrative Tribunals

The *Corte costituzionale* (the “Constitutional Court”), whose task is to rule on disputes concerning the constitutionality of law and on conflicts between the State and the Regions⁴ as well as among the Regions, sits outside the court system. If the Constitutional Court declares a statute unconstitutional, it ceases to have effect from the day following the publication of the decision.⁵ This kind of review can only be triggered by a judge who, in deciding on a case, considers that the applicable law violates the Constitution: the court may stay the trial and refer the question to the Constitutional Court for a decision.

III. Growing Importance of Judicial Precedents in Civil Matters

1. The “Nomophylactic” Role of the Court of Cassation and its “Principles of Law”

The importance of judicial precedents, especially those of the Court of Cassation, has been reconsidered most frequently in civil law.⁶ The precedents of the Court of Cassation are of special importance because this Court not only has an appellate function, but also has been assigned a “nomophylactic” role to ensure “the correct observance and uniform interpretation of the law, as well as the unity of national objective rights”.⁷ This unique role is rooted in the Court’s historical evolution. Just as the French *Tribunal de Cassation*, after which it was

³ Legge (*Law*) 20 marzo 1865 n. 2248, Allegato (*Annex*) E, Article 2.

⁴ Italy is divided into 20 administrative regions (five being autonomous). The codification of Italy’s regional division stems from Italy’s transition from a kingdom into a republic and the adoption of the 1948 Constitution of the Italian Republic (see especially Title V). More information about Italy’s form of government can be found at <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html>

⁵ Costituzione, *supra* note 2, Article 136.

⁶ See, e.g., Decreto Legislativo 2 febbraio 2006, n. 40 and Legge 18 giugno 2009, n. 69.

⁷ Regio Decreto (*Royal Decree*) 30 gennaio 1941, n. 142 (known as the Law on the Organization of the Courts, currently in force), Article 65.



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modelled, the Court of Cassation was created “with the aim of keeping [judicial power] within the limits assigned to it”.⁸ Piero Calamandrei,⁹ who “designed” the Court of Cassation’s modern role, observed that the existence of a series of decisions issued in similar cases induces judges to adhere to existing precedent.¹⁰

When the Court of Cassation was established in Rome in March 1923 to replace what had been a system of multiple regional courts, it was expected to provide the definitive interpretation of applicable legal rules in specific cases and to guide the judges of subsequent trials in the application of those rules, with the goal of ensuring interpretations of the law that could guarantee equality among citizens.¹¹ The Court of Cassation performs its unique “nomophylactic” role through the principles of law it identifies in its judgments. A special agency within the Court of Cassation called the *Ufficio del Massimario* was created to extrapolate these principles of law from the Court’s judgments.¹² These principles of law are a form of individualised precept to be applied in subsequent cases, although the *massima* are written without any explicit connection to the facts of the case from which they are extracted.

The binding nature of these *massima*, or “principles of law”, has been subject to debate. While many scholars have insisted on their non-binding nature, some scholars, including Gino Gorla, have argued that the function of the Court of Cassation of ensuring the uniform interpretation of the law is an “institutional duty” which requires judges deciding cases to abide by the precedents of the Court of Cassation.¹³ Scholars have further argued that the Court itself cannot depart from its own precedent unless it has—and states in its judgment—well-founded reasons to support its non-compliance.¹⁴

There is evidence to support Gorla’s thesis concerning the central role of the Court of Cassation’s decisions. The Constitutional Court gives clear preference to the Court of Cassation’s interpretations when charged with a determination of constitutionality.¹⁵ Similarly, when Parliament delegates the drafting of a legislative decree to a governmental authority, Parliament requires adherence to the “principles of law” of Court of Cassation decisions in related legal fields.¹⁶

⁸ FRANCESCO CARNELUTTI, *LEZIONI DI DIRITTO PROCESSUALE CIVILE VOL IV* 251ff. (CEDAM, 1933).

⁹ Piero Calamandrei (1889–1956) was a prominent scholar, lawyer, and politician. As a member of the Italian Constituent Assembly, he was one of the Founding Fathers of the Italian Constitution. He also played a significant part in the drafting of the Code of Civil Procedure of 1942 (still in force).

¹⁰ Giuseppe Ianniruberto, *Le attribuzioni delle sezioni unite civili e l’efficacia del principio di diritto*, *IL CORRIERE GIURIDICO* 722 (2008).

¹¹ PIERO CALAMANDREI, *LA CASSAZIONE CIVILE: STORIA E LEGISLAZIONE*, 635ff. (Fratelli Bocca, 1920); Salvatore Satta, *Corte di cassazione*, in *ENCICLOPEDIA DEL DIRITTO VOL X* 798ff. (Giuffrè, 1962).

¹² Law on the Organization of the Courts, *supra* note 7, Article 67.

¹³ Gino Gorla, *Postilla su «l’uniforme interpretazione della legge e i tribunali supremi»*, 99 *IL FORO ITALIANO PARTE QUINTA* 127 (1976).

¹⁴ See Angelo Bonsignori, *Il precedente giudiziario in materia processuale*, 3 *CONTRATTO E IMPRESA* 405 (1987); Marino Bin, *Funzione uniformatrice della cassazione e valore del precedente giudiziario*, 3 *CONTRATTO E IMPRESA* 550 (1988).

¹⁵ See Francesco Galgano, *L’efficacia vincolante del precedente di cassazione*, 15 *CONTRATTO E IMPRESA* 893 (1999).

¹⁶ See *id.*



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2. *The Strengthening of the Court of Cassation’s “Nomophylactic” Role in Recent Reforms: “Vertical” Precedent?*

The importance of the Court of Cassation’s “nomophylactic” function has been greatly strengthened by recent reforms to the Code of Civil Procedure (“CCP”). These reforms reflect an attempt to curtail an exponential increase of legal challenges brought to the Court rather than evincing a desire to bring the Italian legal system closer to a common law model.¹⁷ Nonetheless, the growing “nomophylactic” role of the Court of Cassation and trends in the treatment of certain aspects of its judgments as binding are worthy of study.

First, the revised CCP Article 384 requires the Court of Cassation to express a “principle of law” whenever it addresses a motion alleging a breach or misapplication of a legal provision or resolves an issue of law of particular importance. In such cases, the Court of Cassation must also explain how to interpret the *massima*. As a consequence, the principle of law is no longer a *lex specialis* (a law governing a specific subject matter) for a single case in a protracted decisional process. Rather, the *regula iuris* (general principle for interpretation) of the decision is instrumental in the Court of Cassation’s innate function.

Second, the amendment to CCP Article 363, which addresses “motions in the interest of the law”,¹⁸ is another relevant reform.¹⁹ Following the amendment, the Court of Cassation can establish a principle of law in relation to an unchallenged or non-appealable judgment. That a principle of law is stated even though the “motion in the interest of the law” will have no effect on any party to the decisions shows that the exercise of the Court’s duty to uphold and protect the law extends beyond adjudication.²⁰

Finally, the newly added CCP Article 360-bis and other related provisions have increased the use of precedent by lower-level judges. CCP Article 360-bis provides that an appeal can be rejected on procedural grounds if: (1) the challenged judgment is based on principles of law established by the Court of Cassation and (2) an assessment of the grounds for the appeal does not suggest a reason to change the principles of law. Under CCP Article

¹⁷ See GIOVANNI VERDE, IL DIFFICILE RAPPORTO TRA GIUDICE E LEGGE 21ff (Edizioni Scientifiche Italiane, 2012).

¹⁸ See Decreto Legislativo 2 febbraio 2006, n. 40. The name “motion in the interest of the law” is itself telling: the interest in re-examining the judgment does not come from a concrete (and admissible) challenge from a party, nor does it bring about a change that might affect the interests of the parties. Rather, 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. As one scholar noted, the expression “motion in the interest of the law” in place of “voidance in the interest of the law” is symptomatic: the old legal text, which displayed a merely destructive nature (“voidance”) is replaced today by a positive statement. See Michele Fornaciari, *L’Enunciazione del principio di diritto nell’interesse della legge ex art. 363 c.p.c.*, 68 RIVISTA DI DIRITTO PROCESSUALE 32, 35 (2013).

¹⁹ CLAUDIO CONSOLO, SPIEGAZIONI DI DIRITTO PROCESSUALE CIVILE VOL II 550ff (Giappichelli 2015).

²⁰ Elio Fazzalari, *Ricorso per cassazione nel diritto processuale civile*, in DIGESTO DISCIPLINE PRIVATISTICHE SEZIONE CIVILE VOL XVII 560, 602ff. (Utet Giuridica, 1998); Consolo, *supra* note 19, at 551; Bruno Sassani, *Tra “consapevolezza culturale” e “buona volontà organizzativa”: considerazioni sparse sulla deprecata funzione nomofilattica della Corte di cassazione*, in STATO DI DIRITTO E GARANZIE PROCESSUALI 269, 277ff. (Franco Cipriani ed., 2008).



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360-bis, appellants are required to identify the Court of Cassation principles of law which are relevant to resolve the case and show why they are not applicable to the challenged judgment or to give reasons to support a reconsideration of the principles of law. Article 67-bis of the Law on the Organization of the Courts established a special chamber of the Court of Cassation to assess these motions and carry out, in accordance with Article 360-bis, a preliminary trial on proposed challenges.

In the context of the framework set by CCP Article 360-bis, one wonders whether a few isolated judicial decisions are enough to constitute case law against which appellants should be measured. Scholarship suggests that there may not be one solution: only a few judgments may suffice (even not very recent ones) if they deal with areas of civil law that are not very inclined to change; in contrast, many analogous decisions may be needed, or just one intervention by the Joint Chambers of the Court of Cassation.²¹ Today, CCP Article 118, as recently amended by Law 69/2009, expressly allows judges to present their legal reasons by citing compliant precedents, but prohibits referral to legal scholars and works of legal theory.²² Further, CCP Article 360-bis likely has an indirect effect on lower courts, which are prompted to invoke precedents to show the parties that their interpretation is shared by appellate level judges. CCP Article 348-ter further encourages this in providing that a court of second instance can determine, *prima facie*, that a challenge does not have a reasonable probability of being upheld by means of a succinctly reasoned order that makes “reference to compliant precedents”.

3. *Deferral to Joint Chambers: “Horizontal” Precedent?*

This particular focus on judicial precedent and its “vertical scope” is coupled with an accentuation of the horizontal role ascribed to decisions of the Court of Cassation by CCP Article 374, Paragraph 3 (as modified by Legislative Decree 40/2006). According to the revised rule, if an individual chamber of the Court does not agree with a principle of law pronounced in a “Ruling of the Joint Chambers” relevant to an appeal before it, it can refer the appeal to the Joint Chambers.²³

The first draft of CCP Article 374 referenced a “bond” between an individual chamber and the Joint Chambers, requiring the former to defer to the latter should it intend

²¹ See Marco De Cristofaro, *sub art. 360-bis*, in CODICE DI PROCEDURA CIVILE COMMENTATO II 877 (Claudio Consolo ed., 2015).

²² It is no coincidence that there has been talk of the value of the “existence of precedent as a formal instrument of stability and rationalization” and of an accentuation of the Court of Cassation’s role in providing a rule of adjudication as a criterion for clarifying and directing decisions in similar cases (*see* Ulpiano Morcavallo, *Sistema di principi e tutela dei diritti*, in IL NUOVO GIUDIZIO IN CASSAZIONE 3, 7ff. (Giuseppe Ianniruberto & Ulpiano Morcavallo eds., 2nd ed., 2010)) even though the reference to precedents mentioned in Article 118 of the provisions implementing the Code of Criminal Procedure should be understood as referring also to decisions issued by the courts with jurisdiction over the matter.

²³ The Court of Cassation, in civil matters, operates through five distinct chambers to which appeals are assigned by the First President of the Court of Cassation. Prior to its reform, CCP Article 374 provided that if an appeal raised questions of appropriate jurisdiction or if an appeal to the Court of Cassation raised questions of law decided differently among the individual chambers, the appeal could be submitted to the Joint Chambers.



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not to adhere to the principle of law previously announced.²⁴ Many opposed this construct, which seemed to prevent an individual chamber from declaring its own ruling and therefore raised questions of compatibility with constitutional provisions which provided that judges were subject only to law.²⁵ Opponents also raised the issue of compatibility with the rules governing criminal proceedings, in which a similar provision was lacking.²⁶ This reference to a “bond” is missing in the final draft, which may give the individual chamber the freedom to refer the matter to the Joint Chambers without requiring it do so.²⁷ Nevertheless, this indirect acknowledgement of the institutional duty of trial judges to take into account the principles pronounced by the Court of Cassation, and the option to diverge from them, has resulted in the common description of the current version of the law as a statutory nod to the value of judicial precedent in the Italian civil law system.²⁸

In conclusion, the growing focus on precedent, especially on matters pronounced by the Court of Cassation, becomes indisputable in light of these amendments to statutory law.

IV. Judicial Precedents in Criminal Matters

1. The Peculiarities of Criminal Matters

While the issue of the value of judicial precedents affects all areas of law, it takes on particular significance and complexity in criminal law,²⁹ where criminal matters are governed by the “principle of legality”,³⁰ i.e., the principle that in order to be convicted of an offense, that offense must have been put into law prior to the activity that resulted in the offense and with enough provision to give notice that such an offense is criminal.

²⁴ Note that the final form of the regulation does not use the word “precedent”, but instead “principle of the law”, which has taken on a central role in Court of Cassation trial reform.

²⁵ Auletta 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. Ferruccio Auletta, *Profili nuovi del principio di diritto (il «vincolo delle sezioni semplici al precedente delle sezioni unite»)*, in DIRITTO PROCESSUALE CIVILE E CORTE COSTITUZIONALE 1, 9 (Elio Fazzalari ed., Edizioni scientifiche italiane, 2006). 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 Court of Cassation’s precedent (and in any case partially saves the immediate challenge to that decision). On the contrary, in the text of CCP Article 374 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. 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, *supra* note 10, at 725.

²⁶ See, e.g., Antonio Carratta, *Il «filtro» al ricorso in Cassazione fra dubbi di costituzionalità e salvaguardia del controllo di legittimità*, GIURISPRUDENZA ITALIANA 1565, 1597 (2009). On this point, see below, under section IV.

²⁷ Consolo, *supra* note 19, at 555; Ianniruberto, *supra* note 10, at 727.

²⁸ Angelo Riccio, *La rivitalizzazione legislativa della funzione nomofilattica della Cassazione*, 22 CONTRATTO E IMPRESA 825, 827 (2006).

²⁹ See ALBERTO CADOPPI, IL VALORE DEL PRECEDENTE NEL DIRITTO PENALE passim (Giappichelli, 2nd ed., 2014).

³⁰ Costituzione, *supra* note 2, Article 25, Paragraph 2.



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Traditionally, the “principle of legality” has constrained the prevailing idea in Italian legal science that the process by which the law is made does not end with the setting down of written laws but rather includes, *inter alia*, the implementation of laws and their practical application to the fields of civil and administrative law, as discussed in Parts III and V of this Commentary. However, this interest in the “law in action” has begun to emerge in the field of criminal law,³¹ bringing the question of the value of precedents into the limelight, in particular where the Joint Chambers of the Court of Cassation departs from past decisions.

2. *Evaluating the Effectiveness of Criminal Court of Cassation Precedents: An Ongoing Debate*

The Court of Cassation’s “nomophylactic” role discussed in Part III applies in criminal cases and is reflected in several provisions of the Code of Criminal Procedure (“CCrP”) and the Implementation Provisions of the Code of Criminal Procedure (“IPCCrP”). The broad concept of “legality” in criminal law as upheld by Article 7 of the European Convention of Human Rights (“ECHR”)³² has led some Italian judges to claim that changes in case law have similar consequences on criminal trials as do legislative amendments.³³ The equalization of law on the books with law in action emerged most significantly in a recent judgment by the Joint Chambers of the Court of Cassation which stated that a change in case law through a decision by the Joint Chambers of the Court of Cassation becomes a “new point of law” that can allow the resubmission, during the enforcement of a judgment, of a request that was previously rejected by that enforcement court and overcome preclusion under CCrP Article 666.³⁴

In the wake of this authoritative “precedent”, some trial judges have gone so far as to claim that an interpretative *revirement* (reversal) of the Joint Chambers could revoke a criminal conviction. With respect to this claim, the Tribunal of Turin has raised a question of constitutional legitimacy.³⁵ In its constitutional challenge, the Tribunal of Turin argued that

³¹ See, e.g., ALBERTO CADOPPI, *IL VALORE DEL PRECEDENTE NEL DIRITTO PENALE* (Giappichelli, 1999); *INTERPRETAZIONE E PRECEDENTE GIUDIZIALE IN DIRITTO PENALE* (Giovanni Cocco ed., CEDAM, 2005).

³² Under the consolidated approach of the Court of Strasbourg, the term “law” encompasses statutory law as well as case law. See, e.g., *Contrada v. Italy* (no. 3), Eur. Ct. H.R. 2015 (no. 66655/13).

³³ See, e.g., Francesco Mazzacuva, *Mutamento giurisprudenziale e processo penale*, in TRECCANI: IL LIBRO DELL'ANNO DEL DIRITTO 2014 (Istituto dell'Enciclopedia Italiana, 2014), [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)); Francesco Viganò, *Retroattività della legge penale più favorevole*, in TRECCANI: IL LIBRO DELL'ANNO DEL DIRITTO 2014 (Istituto dell'Enciclopedia Italiana, 2014), [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)).

³⁴ Cass., sez. un., 13 maggio 2010, no. 18288, in *CASSAZIONE PENALE* 17 (2011). For a comment, see Alberto Macchia, *La modifica interpretativa cambia il "diritto vivente" e impone di rivalutare la posizione del condannato*, in *GUIDA AL DIRITTO* 27, May 2010, at 78.

³⁵ The Tribunal of Turin argued that CCrP Article 673 is unconstitutional in that “it does not envisage the possibility of revoking a judgment of conviction (or a criminal decree of conviction or an 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 Court of Cassation) according to which the matter under examination is not considered by the law to be a crime”. Corte costituzionale, 8 ottobre 2012, no. 230, §§ 7–11.



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it would be “manifestly unreasonable” to continue “to punish—by not revoking the judgment of conviction—whoever behaved in a way that [...] is no longer considered a crime by law”.³⁶

The Constitutional Court rejected the Tribunal’s complaints and attempt to equalize written law with case law. According to the Constitutional Court, such an intervention 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, [...] with notably discordant results” because “the rule of *stare decisis* is so far removed from the general coordinates of the legal system”.³⁷ After emphasizing the reasonableness of a system that gives the precedents of the Joint Chambers “not binding, but merely persuasive effectiveness”³⁸, it stated that the real barrier to the required equalization of statutory law and case law is to be found in certain fundamental principles, namely, the separation of powers and the doctrine that judges are subject only to the law. In other words, according to the Constitutional Court, a true “constitutional barrier” prevents the Italian legal system from coming closer to a legal system founded on judicial precedent. The creation of criminal laws, just like their repeal, cannot depend on “case law–based rules, but only on an act of will on the part of the legislator”.³⁹

Another factor weighing on the effectiveness of criminal Court of Cassation precedents comes from the Court’s inordinate workload and consequent—alleged—inability to perform its function of upholding and protecting the law. The large number of appeals limits the amount of time devoted to deciding them as well as to drafting judgments. This situation causes a high rate of inconsistency among the judgments of the individual chambers and hinders “uniform interpretation”.⁴⁰

Scholars have proposed a wide range of remedies 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.”⁴¹ One is to reduce the number of appeals by limiting the type of decisions that can be appealed to the Court of Cassation. This could be done through the repeal of CCrP Article 613 (which allows an accused to personally file an appeal). Another approach would be to alter the method through which a court confirms the grounds of a judgment⁴² so as to limit and/or preclude another assessment of the evidence, reasoning, etc. of lower judgments.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Marta Bargis, *Ricorso per cassazione inammissibile e principio di diritto nell'interesse della legge ex art. 363, comma 3, C.P.C. un istituto esportabile insede penale a fini nomofilattici?*, in MARTA BARGIS & HERVÉ BELLUTA, *IMPUGNAZIONI PENALI* 274 (Giappichelli, 2013).

⁴¹ See Associazione tra gli Studiosi del Processo Penale, *La “Carta di Napoli”*. *Per una riforma urgente del giudizio penale in Cassazione*, in LA CORTE ASSEDIATA. PER UNA RAGIONEVOLE DEFLAZIONE DEI GIUDIZI PENALI DI LEGITTIMITÀ, *ATTI DEL CONVEGNO DELL’ASSOCIAZIONE TRA GLI STUDIOSI DEL PROCESSO PENALE* 289 (Giuffrè, 2014).

⁴² CCrP Article 606, Paragraph 1.



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Withholding our ultimate judgment on the strength of these proposals, they have the potential to improve the functioning of the Court of Cassation without binding trial judges and the individual chambers of the Court of Cassation to the principles of law stated by the Joint Chambers or other courts. Some scholars have suggested adding to the CCrP a provision similar to CCP Article 374 to establish the “need to refer the question [to the Joint Chambers when] the judge intends to depart from precedent”.⁴³ With such an addition, for an individual chamber to re-submit a question to the Joint Chambers, it would have to provide new reasons demonstrating the inappropriateness of the latter’s previous interpretation and resolution of the question. The restoration of the procedural mechanism described in Article 610-bis of the final draft of the CCrP⁴⁴ has also been proposed in recent draft laws to provide that “if a chamber of the Court does not intend to comply with the most recent principle of law with which the Joint Chambers has resolved a disagreement among the individual chambers, it should refer the appeal by order to the Joint Chambers”.⁴⁵

Even if these proposals are successful, the Court of Cassation would still not be a true “court of precedent” along the lines of common law legal systems. This is not only because of existing constitutional checks, but also because such a system in Italy imposes only a limited negative obligation (i.e., 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*.

V. Judicial Precedents in Administrative and Constitutional Matters

1. *The Particular Importance of Case Law to Administrative Law*

There is no formal acknowledgement in the Italian legal system of the binding value of judicial precedent in the realm of the administrative courts. Despite this lack of acknowledgement, it is generally accepted that Italian administrative law has been largely “created” by the administrative courts. Italian administrative law was arguably born at the same time as the administrative court system, at the moment in which the legislature established the Fourth Chamber of the Council of State and granted it 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.”⁴⁶ Since then, administrative judges—through statements made by the Council of State in certain leading cases—established some of the most significant tenets of the system of

⁴³ Enrico Marzaduri, *Linee guida per una riforma del giudizio in Cassazione*, in LE IMPUGNAZIONI PENALI NEL PRISMA DEL GIUSTO PROCESSO, PROGETTO DI RICERCA DI RILEVANZA NAZIONALE 29 (2007).

⁴⁴ For scholars who have proposed this remedy, see CADOPPI, *supra note* 29, at 313, and Giovanni Fiandaca, *Diritto penale giurisprudenziale e ruolo della Cassazione*, 5 CASSAZIONE PENALE 1722, 1736 (2005).

⁴⁵ See Disegni di legge (*draft law*) no. 1440, presentato dal Ministro della giustizia (Alfano) (*presented by the Ministry of Justice (Alfano)*), comunicato alla presidenza il (*announced to the Senate*) 10 marzo 2009.

⁴⁶ Legge 31 marzo 1889, no. 5992, Article 3. The formal and official recognition of the jurisdictional nature of the Fourth Section of the Consiglio di Stato came about with Regio Decreto (*Royal Decree*) 17 agosto 1907, no. 642, which dictated the relative “regulations for the procedure”. On these aspects, see ALDO TRAVI, LEZIONI DI GIUSTIZIA AMMINISTRATIVA 31ff. (Giappichelli, 12th ed., 2016).



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administrative judicial protection, concerning, *inter alia*: which acts and decisions are appealable, the nature of the faults that can be challenged before an administrative court, how to interpret the requirements of defensible legitimacy and interest, the guarantee of subjective rights, specific remedies, such as cross-appeal or appeal, and the selection and application of appropriate remedies when faced with the inertia of public administration.⁴⁷ The approach of the legislature with regard to these questions has been to acknowledge what the administrative judges have already entirely or partially defined, relying on the most common interpretations of case law by other national legal bodies such as the Constitutional Court and, more recently, supranational legal bodies such as the European Court of Justice and the European Court of Human Rights.

2. *The Role of the Council of State in Upholding and Protecting the Law*

The functions of upholding and protecting the law, as carried out by the Court of Cassation per Article 65 of the Law on the Organization of the Courts, were also ascribed to the Council of State, the highest body of administrative jurisdiction. In the exercise of this function, the Plenary Assembly—a jurisdictional body of 12 councillors selected from various chambers by the Office of the President of the Council of State—has played an essential role. The Plenary Assembly performs the function of upholding and protecting the law, since it decides cases that have given, or could give, rise to disagreements in the case law. The individual chambers or the President of the Council of State defer these powers to the Plenary Assembly.

The current debate about the existence of a formal rule of *stare decisis* in administrative trials focuses on the interpretation of Article 99 of the Code of Administrative Procedure (“CPA”). According to CPA Article 99, the President can defer, at the request of an appellant or *ex officio*, an appeal that raises a similar issue to a previously determined case or an appeal that is characterized by particularly significant questions of law. The law, as modified in 2010, establishes both that in each instance the Plenary Assembly must state a “legal principle” and that individual chambers must defer an appeal to the Plenary Assembly by “reasoned order” when they claim to “disagree” with the relevant “legal principle” that the Plenary Assembly announced on another occasion.

These innovations parallel those introduced in the recent reform of the regulation of civil trials before the Court of Cassation outlined in Part III. Much of the debate sparked by civil reforms extends to the realm of administrative law. As in the civil context, while the binding force of precedents may traditionally have been characterized as “weak”, it has been strengthened by these reforms, at least with regard to the practical effects of procedural requirements. From a substantive point of view, however, the binding force of precedents is less clearly “strengthened”. As some have pointed out,⁴⁸ the lack of remedies in the event of a

⁴⁷ A collection of the most significant “historic” judgments was put together by Gabriele Pasquini and Aldo Junior Sandulli in *LE GRANDI DECISIONI DEL CONSIGLIO DI STATO* (Giuffrè, 2001).

⁴⁸ See, e.g., Enrico Follieri, *Rimedi avverso la violazione dell'art. 99, terzo comma, del codice del processo amministrativo*, in WWW.GIUSTAMM.IT, Sept. 2013, at 13; Giovanni Pesce, *L'Adunanza Plenaria del Consiglio di Stato diventa giudice di common law?*, *IUSPUBLICUM*, May 2013, http://www.ius-publicum.com/repository/uploads/30_05_2013_15_16_StaredecisisIT.pdf.



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dissenting jurisdictional Chamber's failure to defer a case to the Plenary Assembly effectively averts any impact to the trial.⁴⁹ Nevertheless, that the Plenary Assembly is involved more often than it was prior to 2010 cannot be challenged.⁵⁰

3. *Administrative Procedure and Interaction with the European Court of Justice and European Court of Human Rights*

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, but in the mandates of administrative procedure. One judicial mechanism in particular that gives significant value to precedent is the judgment in simplified form, made at the preliminary stage if “clear merits or manifest unacceptability, inadmissibility, inapplicability or lack of foundation of the appeal” have been established.⁵¹ Here, 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”.⁵² While not requiring the judge to refer to precedent, the legislation does make explicit reference to it, albeit as a means to encourage the legal body with jurisdiction to more efficiently resolve “easier” disputes. This requirement to provide reasons also applies to statements adopted in trials regulated by special procedure, such as those involving access to administrative documents (CPA Article 116), the inertia of the public administration (CPA Article 117), the procedures of public procurement (for example, the assignment of public works, services and utilities; CPA Article 120, Paragraph 10), and acts of exclusion of local and regional electoral procedures (CPA Article 129, Paragraph 6). Here, as in the civil context, there is practical motivation for allowing judges to refer to precedents: the ability to refer to a prior case in support of a determination speeds up the judicial process, which is critical in matters that require a rapid response.

In administrative trials, judicial precedents are prone to additional disputes because of the ability of administrative judges to unilaterally appeal for preliminary rulings before the European Court of Justice.⁵³ This dynamic can also affect Italian judges of ordinary

⁴⁹ See Guido Corso, *L'Adunanza plenaria e la funzione nomofilattica*, RASSEGNA FORENSE 633 (2014) (specifying 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 legal system, but also each individual judge.”) See also Andrea Maltoni, *Il “vincolo” al precedente dell'Adunanza plenaria ex art. 99, comma 3 c.p.a. e il rispetto dei principi costituzionali*, IL FORO AMMINISTRATIVO 137 (2015).

⁵⁰ As reported by Corso, *supra* note 49, 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 cases to the deferring Chamber.

⁵¹ CPA Article 74.

⁵² Article 118 of the provisions implementing the CCP. See *supra* III.2.

⁵³ See Treaty on the Functioning of the European Union (“TFEU”), Article 267, which provides:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of the Treaties;



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jurisdiction and the Constitutional Court by “short circuiting” decisions that come into contact with the guidelines of the European court and related precedents. An example of this is a recent administrative judgment regarding the order in which a primary appeal and a cross-appeal should be assessed. A Regional Administrative Tribunal openly raised doubts concerning compliance with the guidelines of the Council of State⁵⁴ on the matter as 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 works. It initiated a preliminary ruling⁵⁵ and the Court of Justice assessed a partial conflict between the approach of the Council of State and EU law.⁵⁶ The Plenary Assembly⁵⁷ admitted that there might be situations in which a reading by the Court of Justice must be observed—an instance of “domestic” precedent being modified by “European” precedent.⁵⁸ The decisive role the Plenary Assembly performed here, as the body that “selects” on a case-by-case basis the relevant European precedents that can modify domestic precedents, is particularly important.

A further question of how to adapt administrative case law to the precedents of other domestic courts and supranational precedents also arises in reference to the judgments of the European Court of Human Rights on its provisions concerning the guarantee, on the part of the State, of effective remedies.⁵⁹ With regard to this issue, it is worth noting that, despite a contrary opinion being expressed in a judgment, even of the Council of State, an administrative judge, when identifying a conflict between a national norm and an ECHR norm, as interpreted by a statement of the Court of Strasbourg, would have only one option:

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where any such 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.

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.

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.

⁵⁴ See, above all, Adunanza plenaria del Consiglio di Stato (*Plenary Assembly of the Council of State*) 7 aprile 2011, no. 4.

⁵⁵ See TAR Piemonte (*Regional Administrative Tribunal of Piedmont*), ordinanza (*order*) 9 febbraio 2012, no. 208.

⁵⁶ Case C-100/12, *Fastweb SpA v Azienda Sanitaria Locale di Alessandria*, European Court of Justice, ECLI:EU:C:2013:448; cf. Cesare Lamberti, *Per la Corte di giustizia l'incidentale non è più "escludente"?*, URBANISTICA APPALTI 1003, 1006ff. (2013).

⁵⁷ Adunanza plenaria del Consiglio di Stato (*Plenary Assembly of the Council of State*) 25 febbraio 2014, no. 9. For a critical commentary on the complex solution devised by the Plenary Assembly, see Luca Bertonazzi, *Il ricorso incidentale nei giudizi amministrativi di primo grado relativi a procedure selettive: residue incertezze domestiche e gravi incognite di origine europea*, DIRITTO PROCESSUALE AMMINISTRATIVO 544, 563ff. (2014).

⁵⁸ Cf. Alessandro Pajno, *Nomofilachia e giustizia amministrativa*, RASSEGNA FORENSE 641 (2014).

⁵⁹ European Convention on Human Rights, Article 13.



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to raise the issue of the constitutionality of the national norm before the Constitutional Court. The Italian legislature 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 Strasbourg.⁶⁰

4. *The Role of Precedent in Judgments of the Constitutional Court*

Rulings of the Constitutional Court that reject a challenge of constitutionality do not have a binding effect on other judges in the legal system; in addition, the Constitutional Court can later accept and uphold another challenge on the same matter, thus disregarding or overruling its previous rejection of the challenge. However, this does not mean that Constitutional Court decisions have no precedential value. In fact, the Court pays concrete attention to its own precedents. Its own precedents are the Court’s first means to support the notion that its reasons are rationally founded, technically legitimised, and free of politicised suspicions or reproach.⁶¹ The value of these precedents reflects the need for consistency in the constitutional judge’s approach.

The Court refers to its own precedents to effect specific, concrete consequences in a number of ways. The classic case is a rejection of a constitutional challenge on the grounds that a materially comparable issue was dealt with in previous rulings and rejected. This allows the Court to either quickly reject the question as already ruled upon or choose to change its 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. A similar mechanism is used by the Court in accepting constitutional challenges, often those involving a similar situation to one it has already ruled upon.

VI. **Concluding Remarks: Judicial Precedents and the Liability of Judges**

In the last decade, Italian legal scholarship and legislative reforms have given increasing weight to the existence of “case law” and the value of binding precedent. In the criminal sphere the acknowledgement of the doctrine of *stare decisis* continues to be something of a taboo.⁶² However, recent reforms in civil and administrative procedural law have strengthened the force of precedent: to be more precise, the “horizontal” effects of precedent delivered by the higher courts (i.e., the Court of Cassation and the Council of State). But even in these areas it is difficult to infer a real shift towards a system of *stare decisis*. This is not only because of existing constitutional obstacles, but also because new procedural rules have introduced merely negative obligations (like the duty not to depart from the most

⁶⁰ This is indicated by two major judgments of the Constitutional Court, nos. 348 and 349, both rendered on October 24, 2007.

⁶¹ As observed by Croce, many Presidents of the Constitutional Court have ascribed particular importance to the Court’s ability to systematically know all its previous statements and use them in individual judgments. Marco Croce, *Precedente giudiziale e giurisprudenza costituzionale*, 22 *CONTRATTO E IMPRESA* 1114, 1158–59 (2006); *see also* GUSTAVO ZAGREBELSKY, *PRINCIPI E VOTI. LA CORTE COSTITUZIONALE E LA POLITICA* 83 (Einaudi, 2005).

⁶² *See* Vittorio Manes, *Prometeo alla Consulta: una lettura delle resistenze costituzionali all’equiparazione tra “diritto giurisprudenziale” e “legge”*, *GIURISPRUDENZA COSTITUZIONALE* 3474 (2012).

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authoritative interpretation without providing reasons for doing so). It is equally difficult to speak of the Court of Cassation or the Council of State as true “courts of precedent” in the vein of common law legal systems. What constrains a judge, albeit only at a functional level, is not any decision of the Court of Cassation itself, but rather the principles of law that they contain. In sum, a case can be made for the emergence of what one might call “weak” precedent.

Perhaps what may gradually shape the debate concerning the effectiveness of judicial precedent (and create a stronger binding precedent in the Italian legal system) is not to be found in laws regulating civil, criminal, or administrative law or procedure, but rather in a recent reform to the law governing the civil liability of judges. Law no. 18/2015, which modified Law no. 117/1988, allows an individual to request compensation from the State for damages incurred as a result of legal malpractice due to willful default, gross negligence, or denial of justice. The reform implies there is “gross negligence” in a case of “clear breach of the laws and rights of the European Union” and instructs that in assessing whether there has been such a breach “one must also take into account the failure to observe the obligation of a preliminary ruling in accordance with Article 267, Paragraph 3 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”.⁶³ This reform indirectly requires last resort Italian judges to consider the guidelines and precedents of the European Court of Justice at the risk of incurring civil liability.

How, then, will the judges of the higher national courts behave? We may begin to see a “defensive case law” aimed at avoiding this kind of liability through strict adherence to the guidelines and precedents of the European Court of Justice. However, it remains to be seen what effect this may have on legislative reforms and the continued debate on the role of precedents in the Italian legal system.

⁶³ Legge 13 aprile 1988, n. 117, Article 2, Paragraph 3-bis.