

# A European convergence towards a *stare decisis* model?<sup>1</sup>

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## ABSTRACT

The article revolves around the doctrine of precedent within the so-called European legal space, wondering whether and to what extent we can speak of a convergence towards a *stare decisis* model boosted by the harmonizing role of the Court of Justice of the European Union. The article argues that although there are still some differences between civil law and common law legal systems they regard more the style of reasoning and the deep understanding of the relationship between the present decision of a court and past judicial decisions than the very existence of the constraints of the latter upon the former. The article concludes that a sort of mechanism of *stare decisis* has in fact been created, even though, on the one hand, uncertainty remains as to the way in which the binding force of a precedent concretely operates in the system, and on the other hand, this mechanism relates exclusively to the relationships between past and future decisions of higher courts (horizontal effect). This change, far from being a shift towards a truly judge-made law system or a consequence of the final abandonment of the dictates of the rule of law, enhances legal certainty contributing to the fundamental requirement of stability of law as a feature of the ideal of the rule of law.

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## La convergencia europea hacia un modelo de *stare decisis*

### RESUMEN

El artículo analiza la doctrina del precedente al interior del espacio legal europeo, preguntándose si es posible y hasta qué punto es razonable hablar de una convergencia hacia un modelo de *stare decisis* impulsado por el rol de armonización que ha desempeñado la Corte de Justicia de la Unión Europea. Se argumenta también que aunque hay aún algunas diferencias entre el *common law* y el *civil law*, estas se refieren más a la forma de razonar y a la comprensión de las relaciones entre la decisión de una Corte y sus pasadas decisiones que a la existencia misma de limitaciones de la última en relación con la anterior. Recientes reformas del derecho contencioso administrativo que se refieren a la fuerza vinculante de las decisiones de las altas cortes administrativas han sido entendidas como un evento de cambio hacia un modelo de precedente, punto sobre el cual acá se hacen algunas consideraciones. Se concluye que una especie de mecanismo de *stare decisis* ha sido, en efecto, creado; aun así, de un lado, permanece cierta incerteza en relación con la forma en la que la fuerza vinculante de los precedentes opera de manera concreta en el sistema, y de otro lado, este mecanismo se refiere exclusivamente a la relación entre decisiones pasadas y futuras de las altas cortes (efecto horizontal). Este cambio, lejos de ser un cambio hacia un verdadero sistema de derecho creado por el juez o una consecuencia del abandono final de los principios del Estado de Derecho, refuerza la seguridad jurídica contribuyendo a la exigencia fundamental de estabilidad del derecho como una característica del Estado de Derecho.

**Palabras clave:** *stare decisis*, precedente, derecho europeo, derecho administrativo, responsabilidad judicial.

### INTRODUCTION

The purpose of this article is to portray some operational ways of the doctrine of precedent within the so-called European legal space and to discuss whether and to what extent we can speak of a progression towards a *stare decisis* model.

The first part of this article will examine the European Court of Justice (ECJ) jurisprudence (section 3), in light of the English common law system (section 2) and civil law systems such as France and Germany. From this

examination, distinct differences among these legal systems can be exposed. These distinctions are marked by a different approach regarding rationale and the understanding of the relationship between the current decision of a court and previous case law, more than the very existence of constraints of the latter upon the former.

Both similarities and differences can be observed in the ambiguous way in which the European Court of Justice (ECJ) has built its own peculiar doctrine of precedent. Such a picture of the precedent doctrine and practice aims to put in perspective the novelty of a discipline regarding the decisions of the Council of State, the Italian higher administrative court, which seems to pave the way for a mechanism of *stare decisis*.

Sections 4, 5 and 6 of the article are dedicated to analysing and discussing the legal discipline whose purpose, according to the drafters of the law, is not to introduce any form of binding precedent, because such doctrine would challenge the principle of the subjection of judges only to the statutory law.

I conclude by asserting that a sort of mechanism of *stare decisis* has been formed in the decisions of the Council of State. Although, uncertainty exists as to how the binding force of precedent concretely operates within the system, since it is obvious that this mechanism relates exclusively to the relationships between past and future decisions of higher courts (horizontal effect).

This change, anyway, far from being a shift towards a truly judge-made law system or a consequence of the final neglect of states of the rule of law, enhances legal certainty contributing to the fundamental requirement of stability of law as an idealized vision of the rule of law.

## I. THE COMMON LAW DOCTRINE OF PRECEDENT AND THE USE OF CASE LAW IN THE CIVIL LAW SYSTEMS

Our starting point must be the common law doctrine of precedent: the basic idea is that similar cases should be decided alike. This is first of all an empirical truth, for in every jurisdiction a judge tends to decide a case in the same way as another judge did in a similar case<sup>3</sup>.

When such a tendency is not only strong enough, but there is an obligation to follow a previous decision, in the absence of justification for departing from such a decision we can speak of a system which fully adheres to the *stare decisis* rule.

What we should bear in mind is that such a positive obligation means that a court must abide by a precedent just because of its status as precedent, without reasoning at all about the content and value of the precedent itself.

3 CROSS & HARRIS (1991, p. 3).

This is quite different from something like "learning from the past" and being persuaded to apply the same reasoning as used in a previous similar case by someone else. The values here are stability and predictability not creative jurisprudence. Such a doctrine, therefore, is fully consistent with the tenets of the ideal of the rule of law.

Secondly, this concept of likeness or similarity is probably the most ambiguous point. It is not referring to an identical case, just a similar one<sup>4</sup>.

For the sake of clarity, we can say that in a legal system where case law is meant to produce a coercive effect, judges are not just obliged to take into some consideration a previous decision of another judge on a similar case but they have to decide the ensuing case in the same way: the precedent is said to be "binding" and not simply persuasive.

With such a strict meaning of precedent a number of technicalities arise, (the mechanics of precedent), and the most important are the following: (1) the distinction between "ratio decidendi" (holding) and "obiter dictum"; (2) the one between vertical and horizontal binding effect; and (3) the concept of overruling.

The binding part of a previous decision is limited in scope to the point of law (the rule) used to reach a certain outcome<sup>5</sup>, which in civil law systems is analogous to "principles" of law, as we shall see further in our discussion.

Vertical effects refer to how the hierarchical organisation of a judiciary operates, where a court is bound to apply the rule established by a higher court, while horizontal effects refer to the obligation of a court to follow its own case law.

Unlike lower courts facing higher court decisions, courts considering their own previous decisions have the capacity to overrule them on occasion. Such a right has been expressly acknowledged in England under the House Lord Practice Statement of 1966 (Statement) where the Lord Chancellor stated that precedents are binding on the Court however the court has the discretionary power to depart from a past decision<sup>6</sup>.

Nonetheless, the House of Lords has used this discretionary power on very few occasions. The revised Practice Direction: direction 3.1.3, under the newly established Supreme Court, reiterates that the Statement still applies and requires that an application for permission to appeal to the Supreme Court must state clearly if it is to ask "the Supreme Court to depart from one of its own decisions or from one made by the House of Lords".

4 See on this point SHAUER (2009, pp. 44-54).

5 That is precisely the *ratio decidendi*, on which see STONE (1959, pp. 597-620).

6 It is worth noticing that a common reason for the Justices to decline to depart from a precedent is that any change is better left to Parliament and this was the majoritarian view at least until 1966.

It is worth stressing that the underlying idea regarding overruling lies in the desirability of an open and honest departure from a past decision. In other words it is not considered fair to conceal the change of law behind subtle distinctions regarding the circumstances of the case. Therefore, it is still a case for certainty, which justifies the doctrine of overruling<sup>7</sup>.

This picture of a legal system based on precedent highlights the big division between legal systems rooted in a case law "method" and systems which reject it by only relying on legal sources strictly established outside the judiciary.

It is fair to notice, though, that such features are not at odds with the fact that the law (in England too) is also based on laws enacted by legislative bodies which can prevail over case law.

This represents a similarity between the two alleged models, as in actual fact the duty of the courts in both of them is often one of statutory interpretation, where reasoning by analogy is one of the primary features.

The French legal system is often cited as a system which lies on the extreme side of the spectrum. Article 5 of the *Code civile* (Civil Code) forbids judges both to set forth general rules when handing down a decision and base a decision exclusively on a past one<sup>8</sup>. However, one cannot definitively assert that a French judge does not rely on case law. One should consider, for instance, that the *droit administratif* and the *Conseil d'Etat* historically have relied on case law<sup>9</sup>.

Perhaps the current trend is that civil law judges do not feel themselves bound by a precedent as such, but by the repetition of a certain number of precedents that agree on a single point<sup>10</sup>.

7 The motivation for the 1966 Practice Statement, in which their Lordships recognized their ability to depart from prior decisions, was to free the judges from the awkwardness of the practice of distinguishing bad precedents, confining them to their facts, which ran the risk of both discrediting the highest court and bringing the law into disrepute. It was, therefore, an important addition to the judicial arsenal.

8 Article 5: Créé par Loi 1803-03-05 promulguée le 15 mars 1803: "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises".

9 See GARNER (1924, pp. 597-627), where the author significantly observes that a "striking difference between the French *droit administratif* and the administrative law of Anglo-Saxon countries, so far as there is any, is that the former is almost entirely jurisprudential (to employ a French term); that is to say, it is case law. It is largely the work of the council of state (the supreme administrative court of France), of the tribunal of conflicts (a special tribunal for deciding conflicts of competence between the civil and administrative courts) and to some extent of the court of cassation (the supreme judicial court of France). In this respect it bears a striking resemblance to the common law of England and the United States" (p. 598).

10 CROSS & HARRIS (1991, p. 11). See also DEOORTER & PARISI (2004, p. 667), on the evolution from a widespread use in early legal systems of a line of consistent past decisions as a way of make a sound present decision to the establishment of a doctrine of authoritative precedent in English law.

If one looks at Germany the alleged absence of a precedent-based jurisprudence is even less defensible, although German academics are eager to claim that court decisions are not formally binding<sup>11</sup>. There are a number of statutes that somehow confer a direct or indirect binding effect of superior court decisions on inferior courts. For example, there are special rights of appeal against lower courts that fail to abide by the precedents, established by one of the five federal sectorial courts; these five constitute the highest courts. Other rules regarding, for example, the Constitutional Court, also deal with horizontal influence, seeking to encourage the judges to follow the precedent of their own court<sup>12</sup>.

This latter assertion identifies a difference between the two models; the very foundation of the doctrine of precedent in England is based on a rule of practice, contrasted by continental Europe in which precedent is often derived from a statutory provision<sup>13</sup>.

Taking into account the distinctive characteristics of judiciaries in continental legal systems (the professional status of judges as civil servants; the distinction between district courts with adjudicative powers and a supreme court whose remit is limited to assessing the correct application of the law by inferior courts, and the absence of dissenting opinions), a plausible way of approaching this shifting area of law is to create judicial precedent – or better effects of past judgments – a concept that spans a broad area, encompassing such things as *res judicata*, the nomophylactic function and *stare decisis*.

The distinguishing line between the nomophylactic function – the function of assuring conformity with legal rules throughout the legal system – and *stare decisis* is not clear. It is well known that in accordance with the nomophylactic function, all apical jurisdictions should ensure a uniform application of law.

For instance, in Italy, the Court of Cassation is vested with this power which has long been characterized as a concept of the so-called concept of the “living law”. Decision n.º 3 of 1956, was one of the of the first decisions in which the Italian Constitutional Court asserted that a “court, even though it must interpret autonomously both the constitutional norm allegedly violated and the statutory norm which infringes the former, cannot ignore a constant judicial interpretation which bestows upon the legislative provision its own actual value in legal life”.

Living law, according to the Constitutional Court, is derived from well-established case law, even though it is not totally univocal. Whenever there

11 Historically, decisions of the Imperial Chamber Court founded in 1495 – the first appeals court to have jurisdiction over all decisions of lower courts in German territories – were considered as containing principles in a quasi-statute manner and had to be followed as binding precedents. See LUNDMARK (2012, p. 344).

12 LUNDMARK (2012, p. 357).

13 See *infra* section 4 about the Italian case.

is a certain amount of decisions about the meaning of a statutory disposition, made primarily by the Court of Cassation, sitting as United Chambers, the rule so determined is the one to be submitted to the Constitutional Court, even though *prima facie* it looks different from the literal meaning. Thus, in such cases, although courts are not under a formal obligation to follow the Court of Cassation case law, to diverge from the "living law", a court must resort to serious and adequate arguments to depart from such precedent.

Recently, and set forth in section 4, such a judge-made rule has been partly "incorporated" into legislation, stating the inadmissibility of an appeal based on reasons which conflict with a principle established by the Court of Cassation.

Tension between precedent in the strictest sense and case law as well can create complexities. A thorough consideration of case law by judges, seeking out the essence of strands of judicial decisions, could be in conflict with the most recent decision counting as a precedent. So this might be a way of departing from a binding precedent.

From this discussion, we can conclude that the distinction between common law and civil law regarding precedent does not function as a dichotomy, existing as substantial overlapping practices, where as there are still technicalities which make the common law tradition distinct in its own right. Leaving aside such technicalities, what seems to be at the heart of the English approach to precedent lies mainly in a certain style of reasoning, developed and refined through the practice of a fact-driven analysis in order to identify the rationale of a decision and exercising the art of distinguishing from prior case law. This observation is further supported by the fact that the single opinion handed down by a judge, often conflict with each other, which is absent in the civil law tradition.

## II. THE ECJ DOCTRINE OF PRECEDENT

The observations drawn in the previous section help us to assess the ECJ positions, whose original model is derived from the civil law tradition.

The ECJ was founded primarily on the French *Conseil d'Etat* and for this reason precedent initially did not play a major role in its case law<sup>14</sup>. The influence of the French legal tradition can be seen especially in the style of its judgment and its way of reasoning, which tend to be formal<sup>15</sup>. Collective judgment and concise reasoning are not fecund grounds for a doctrine of precedent<sup>16</sup>.

14 TRIDIMAS (2012, pp. 308-309).

15 See McAULIFFE (2013, pp. 483-493), on the influence that the same use of the French as the language of the deliberations of the ECJ exerts on the development of a *de facto* use of precedent.

16 TRIDIMAS (2012). It has also been pointed out that the power to depart from its previous

However, once the Court developed quite a significant amount of case law it started the practice of extensively citing its own cases in order to justify successive judgments.<sup>17</sup> However, this does not suffice to affirm that the ECJ has in fact embraced a true doctrine of precedent. Now the Court has become progressively concerned with the consistency of new cases with the principles and directives established in its previous landmark cases.

The *acquis communautaire* has been identified as a major influence in the ECJ's new attitude towards its earlier judgments. This precedent value establishes a kind of vertical relationship between the ECJ and the judiciary of each and every Member State, resulting from the EU law order as a function of national courts as decentralised organs of the Union<sup>18</sup>. Hence, such a precedent value attaches more to the vertical side than to the actual meaning of *stare decisis*, which lies in the horizontal dimension of the doctrine of precedent.

The importance of landmark cases such as *Van Gend en Loos* and *Costa v. ENEL* in the development of the EU order has played a key role in this area as well<sup>19</sup>. The judgments handed down by the court set forth principles of direct effect and primacy of EU law, triggering a process of constitutionalisation of the Treaties. One of the consequences of this process was breaking up the monopoly of the States to grant individual rights, which have remained undisputed.

Thus, it was necessary to preserve and reinforce the legacy of *Van Gend en Loos* and *Costa* to guarantee EU rights, which favoured an increasing reliance on precedent. It has been noted that the ECJ "worked assiduously to develop what is now a robust and taken-for-granted set of practices associated with precedent"<sup>20</sup>.

Setting aside the inquiry as to whether such practices embody an actual common law doctrine of precedent or an informal precedent value<sup>21</sup>, it is widely acknowledged that, due to the mechanism provided for by Article 267 TFEU<sup>22</sup>, the weight of the ECJ decisions towards Members States is not limited to the traditional declarative (nomophylactic) function of a national higher court in a system of civil law.

decisions was a necessary device of a court whose decisions could only be changed by amending the Treaties: ARNULL (1993, pp. 247, 248).

17 STONE SWEET & MCCOWAN (2003, pp. 109-115), who refer to data from the years 1961-1998 in which they record a cite of 2,057 different cases out of a total of 2,674 rulings.

18 TRIDIMAS (2012, p. 309).

19 Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585.

20 STONE SWEET (2004, pp. 97-98).

21 Or of a precedent of interpretation rather than of solution (TRIDIMAS, 2012).

22 As as been noted the development of 'precedent' is inextricably linked to the procedure of preliminary ruling under TFEU Art. 267 TFEU (McAuliffe, 2013, p. 484).

It is especially the obligation of national laws, derived from the Treaties, to provide effective remedies for the protection of EU rights, which creates the obligation for national courts to treat the ECJ rulings as binding decisions. The logical premise of this state of affairs is that it is the interpretation provided by the ECJ – which enjoys an exclusive jurisdiction over this – and not the law as it theoretically originates from the written sources of EU law, which determines a precise obligation to abide by such an interpretation.

The ECJ doctrine of *acte clair* and *acte éclairé* establishes that courts of last resort are exempted from submitting a question for a preliminary ruling under article 267.3 TFEU, if either the meaning of any EU legal dispositions is clear beyond any doubt<sup>23</sup> or the point of interpretation in issue is materially identical to a matter already decided. The *acte éclairé* doctrine creates a sort of normative effect, well beyond the proceeding which has caused the ECJ interpretation to be made<sup>24</sup>, for absent this exemption courts of last resort are under an obligation to resort to the ECJ should they conclude that the interpretation already provided by the Court itself does not suit the case at hand<sup>25</sup>. Practically speaking, this means that not following the principle of law previously established by the ECJ is not an option.

Instrumental to this doctrine is a line of ECJ cases through which the Court has imposed liabilities on a Member State for the breach of EU obligations, when a court of last resort failed to comply with the duty to bring before the Court a matter concerning the interpretation of the Treaties<sup>26</sup>.

When examining the horizontal effects, the ECJ approach to *stare decisis* is more relaxed. The ECJ regularly refers to its 'settled' case law, but it does not treat its past rulings as formally binding<sup>27</sup>.

The Court employs the technique of distinguishing cases, whereby it can adjust its rationale without completely disregarding a previous decision<sup>28</sup>. However, when the ECJ either follows one of its previous rulings or makes a

23 The question is so obvious as to leave no scope for any reasonable doubt both to the courts of the other Member States and to the Court of Justice (283/81 CILFIT v. Ministry of Health [1982] ECR 3415, para. 16).

24 Despite the fact that Article 228 TFEU reads that the decisions of the ECJ are binding only on those to whom they are addressed.

25 JOINED CASES 28-30/62 *Da Costa v. Nederlandse Belasting-administratie* [1963] ECR 31, para. 13; CILFIT, supra n. 17 para. 14.

26 See below section 6 for references to case law.

27 TRIDIMAS (2012, pp. 313-314).

28 A good example is the position of the ECJ about legal certainty and *res judicata* as principles of EU law despite although it disregards them on occasions. This has been done without overruling past decisions but making particular legal and factual circumstances count as exceptions to the rule (Case C-119/05, *Lucchini v Ministero dell'industria del commercio e dell'artigianato* [2007] I-495; Case C-2/08, *Olimpiclub vs. Amministrazione dell'economia e delle finanze* [2009] ECR I-7501; Case C-224/01 *Koebler v. Austria* [2003] ECR I-10239).

distinction, rarely does the court discuss or provide an analysis or rationale, which is distinct from the tradition of English courts.

In conclusion, there are three main factors concerning the ECJ approach to precedent to be considered: the Court normally glosses over the problem of treating past decisions as binding; the sources to interpret (the Treaties) are highly general, indeterminate and often obscure; and the Court enjoys a self-conferred capacity to develop unwritten principles. Such factors allow the ECJ to operate in two apparently opposite directions.

The Court is able to determine the outcome of certain cases by ignoring previous case law, while the vagueness of principles and doctrines enunciated by the Court make it a rarity that an actual change of the ruling is necessary<sup>29</sup>. As previously noted, almost invariably the ECJ is then able to “encompass subsequent cases within the concept of a prior case. This lends a certain artificiality to the recitation of previous case law; it is the broad concepts, not so much particular prior cases, that can and do determine the outcome”<sup>30</sup>. We can conclusively observe that the ECJ has indeed developed an original doctrine of precedent, especially driven by its position at the highest position of such a peculiar order as the EU. Therefore it comes as no surprise that we cannot define with certainty whether the EU law embraces a clear doctrine of binding precedent. After all, as has been pointed out, the EU brings together many different legal orders from civil and common law traditions<sup>31</sup>.

Due to the coercive and quasi-normative effects that ECJ rulings have on the “hierarchy” of the integrated EU-Member States judiciary, the Court itself tends to resemble something in between a constitutional court of a civil law state and the English Supreme Court. It departs from a pure English model, though, as to the uncertain status of the horizontal dimension of precedent (*stare decisis* in its strictest sense).

The catalytic interaction between the ECJ and national courts of Member States tends to favour a trend towards a more general reliance on coercive effects of past decisions that extend beyond an individual case. This is the case for the Italian legal system, where recent statutory amendments seem to introduce a kind of formal mechanism of *stare decisis*, albeit limited in scope as we shall see in the following section.

29 There would be cases, albeit few, of express overruling, which anyway show that the ECJ gives respect to its precedents. See TRIDIMAS, *supra* n 11, 316, who mentions HAG I and II (Case C-10/89 CNL-Sucal v HAG GF (HAG II) [1990] ECR I-3711. (61) Case 192/73 VAN ZUYLEN v HAG (HAG I) [1974] ECR 731) as the first cases of express overruling.

30 CONWAY (2012, p. 245). The author maintains that “the broad concepts or principles of effectiveness and loyalty to the Community allowed the Court a choice as to whether to encompass liability for judicial error in the emergent doctrine of State liability, and it was several years before it did so in Kobler”.

31 KOMAREK (2008-09, p. 399).

### III. THE CASE FOR VERTICAL AND HORIZONTAL BINDING EFFECT OF PRECEDENT IN ITALIAN ADMINISTRATIVE LAW

My analysis is confined to the administrative jurisdiction, although many of the issues addressed below could have an effect on the judiciary as a whole.

Article 99 of the Code of Administrative Court Procedure (CACP) of 2010, reads as follows:

1. The chamber to which a proceeding is assigned, if it maintains that the point of law submitted to its evaluation either has brought about or might bring about jurisprudential conflict, can, with a motivated order, either on a request of the parties or on its own motion, submit the decision of the recourse to the Plenary Session. The latter, if so deemed to be opportune, can send back the proceedings to the Chamber.
2. Ahead of the decision, the President of the Council of State, on a request of the parties or on its own motion, can defer any recourse to the Plenary Session either to resolve general questions of particular importance or to settle jurisprudential conflict.
3. The Chamber to which a proceeding is assigned, which does not agree on a principle of law enunciated by the Plenary Session, shall submit to the Plenary Session itself, with a motivated order, the decision about the recourse.
4. The Plenary Session shall decide the whole proceeding, unless it only wants to pronounce on a principle of law sending back the remaining matter to the remitting Chamber.
5. If the Plenary Session evaluates that the question is of remarkable importance, it can anyway declare the principle of law to the interest of the legal system even though it either declares the recourse non receivable, inadmissible or non prosecutable or it states that the proceeding is extinct. In such cases the decision of the Plenary Session does not affect the challenged administrative decision<sup>32</sup>.

Article 374.3 of the Italian Civil Procedural Code (CPC) provides a similar rule in article 99.3 regarding the relationship between the United Chambers and each Chamber of the Court of Cassation.

Article 360-bis of the civil court Procedural Code provides a legal provision (absent in the administrative court procedural code) in which an appeal to the Court of cassation "shall be inadmissible: when the impugned decision has settled the questions of law in a manner which abides by the Court case law and the motives for pleading the annulment do not offer elements either

32 Translated into English by the author.

to confirm or deny such case law<sup>33</sup>, which is the inverse of the rule adopted in Germany and referred to above.

The Court of cassation interprets this provision in light of the principle of effective judicial guarantee in which an appropriate balance between the right of the parties to resort to the Court of cassation for a violation of the law and the actual possibility for the court itself to achieve its function must be established. This must be accomplished by conferring the interpretative directives of the court not only a persuasive effect but also a certain degree of stability.

I agree with recent publications that have argued on this point, and have stated that such a mechanism implies a kind of binding force of precedent not too different from the English legal system in regard to vertical effects.<sup>34</sup> However, such a rule on vertical effects of the higher court rulings has not been written into legislation with regard to the decisions of the Council of State *vis-à-vis* administrative courts of first instance.<sup>35</sup>

The legal provision referred to above – namely paragraph 3 – establishes a type of horizontal effect on particular judgments.

There the case of one of the four jurisdictional chambers of the Council of State dealing with the application of a “principle of law” previously set by the highest body within the Council of State – the Plenary Session (CSPS) is displayed. The clause is worded in a negative fashion, demanding the chamber (not in agreement with such a principle), to yield to the decision of the CSPS. However, there is a positive command in which the chamber is expected to abide by the principles of law established by the CSPS.

It seems that the focus of this legal provision is on the “principle of law” and can be interpreted with what is known in the doctrine of precedent as *ratio decidendi* – the process of creating a principle in which such reasoning can be applied in future cases on the condition that they present some common features.

The provision in discussion embodies such a principle and is one that the CSPS has enunciated. The logical inquiry is whether this implies that such principles have to be clearly and expressly defined in a previous decision, or there is a duty on each chamber to actively identify them in the CSPS case law, or even make reasonable deductions from previous decisions.

33 Translated into English by the author.

34 SPEZIALE (2011, p. 1009).

35 The broadest scope for a binding precedent is made by the law with regard to the proceedings before the Italian Court of Auditors. The mechanism is the same as the one provided for by article 99 CPAC, but the obligation to bring the question about the principle of law before the “united chambers” is extended to the court of first instance (article 42 Act of Parliament n.º 69 of 2009).

The use of such a verb as “enunciate”<sup>36</sup> suggests that the first alternative is preferred and it seeks to provide a mechanism for enhancing legal certainty, which shall be discussed in my conclusion. It is worth noting the opinion that the Plenary session should adopt a clearer and more controlled way of reasoning so as to make people (and fellow judges) aware of any relevant *ratio decidendi* and avoiding as much as possible *obiter dicta*.<sup>37</sup>

It is worth noting that for some time now the CSPS has progressed by implementing a new rule that was introduced as a practice of listing at the conclusion of decisions the “principles of laws” enacted (so called “maxims”), thus providing substance to the idea that only such principles triggers the mechanism provided for in Article 99.3 CAPC.

The suggested interpretation is more plausible, if the CSPS is able to state clearly “principle of laws” which serves as mandatory authority by the chambers. It is likely that the latter are willing to acknowledge the obligation set forth in Article 99.3 CAPC.

There can be significant doubts as to whether the aforementioned mechanism has been introduced in any way as a *precedent* rule. It could be interpreted as yielding just a negative bound, that is to say not an actual obligation to accept the interpretation endorsed by the CAPC, but a prohibition to make an overruling accompanied by the duty to refer to the Plenary itself for the possible change of such an interpretation.<sup>38</sup>

Concerns about the compatibility of a precedent rule with the principle of legality and hierarchy between the legal sources, as provided for in the Constitution, are expressed in the governmental report on which the amendment to the CSPS is based. The report emphasizes that this new mechanism does not introduce *stare decisis*, because such doctrine would conflict with the principle according to which judges are only subject to the laws enacted by the Italian Parliament (art. 101.2 It. Const.).

Thus, it would serve as a strict procedural limitation, since the obligation does not concern the substantive principle of law (which only the legislature can enact) rather blocks a decision incompatible with a principle declared by the Plenary Session. In my opinion such an argument – a procedural one and not a substantive obligation – appears to be misplaced in this context.<sup>39</sup>

36 Both in the Italian (“enunciare”) and in the English the meaning of “to enunciate” is making a statement “in clear or definite terms”.

37 FOLLIERI (2012, p. 1255).

38 In the literature a trend to minimise the meaning and impact of such a provision seems to prevail. See VERDE (2012, p. 25); SASSANI (2006, p. 217), both actually referring to the Court of Cassation very similar rule.

39 The same can be observed as regards such a claim as the one according to which one thing is to oblige a chamber to the adoption of a consistent decision with a Plenary session precedent another is the non adoption of a dissenting decision. This is maintained by LUISSO (2003, p. 820).

Perhaps a more serious objection to the binding effect of the ruling by the CAPC is that there seems to be no direct remedy against a Chamber decision, which has been made irrespective of the alleged obligation. Moreover, and a highly regarded scholar has noted, no general remedies against the Council of State decisions look viable in such an event<sup>40</sup>.

There are three general remedies available under the law: a) an appeal to the Court of Cassation; b) the so called "revocation"; and c) the opposition of a third party. The appeal to the Court of Cassation is only available in cases where the Council of State has decided a case outside its own jurisdiction, *ultra vires*. A commentator has suggested that if a chamber decides a case overruling a principle established by the Plenary rather than referring to the Plenary itself, then it is using a power outside of its jurisdiction<sup>41</sup>. The advantage of this thesis would be to establish a link between a general external nomophilactic function – belonging to the Court of Cassation – and an internal one – exercised by the CSPS, thereby reinforcing the latter.

To date there have been no such cases, however, this proposal *de facto* would allow the Court of Cassation to deal with a question of merit, assessing how and to what extent a principle established by the Plenary session has to be applied by the Council of State, a matter that actually does not relate to the external limits of the jurisdiction<sup>42</sup>. Furthermore, and to be discussed below, the relationships between the CSPS and the chambers regard the internal organisation of the Council of State as a whole.

The second remedy, a recourse for revocation against a decision of the Council of State, is only admissible in exceptional circumstances strictly provided for by the law, including but not limited to the following: (1) new evidence that a party could not convey in the proceeding for causes not depending on his/her own will; (2) a deceitful behaviour of one of the parties towards the other; or (3) a violation of the *res judicata*, etc. Thus, this remedy is not applicable for purposes of this discussion.

Lastly, the extraordinary remedy of the opposition of a party absent from the proceedings, even though he or she should have given notice as their rights were at stake, is the only which appears to be applicable for the case at hand. For instance, a party would be able to claim that the decision of one of the Chambers of the Council of State, which he or she is challenging, in so far as its ruling overcomes a precedent of the Plenary, is void for not having referred to the Plenary itself. Thus a remedy is available, however is applies to an unlikely case in which a person did not participate in the proceedings because he or she was unaware.

40 FOLLIERI (2012, pp. 1261-6).

41 OGGIANU (2011, p. 87).

42 FOLLIERI (2012, p. 1263).

Should we conclude that these new rules are far from attaching any legal force to the ruling of the Plenary Session? This would be equally misleading. The facts stand that a chamber, as dictated by law, cannot make a decision which conflicts with a principle of law enunciated by the CSPS. But what happens then if a chamber fails to do so?

Like in other cases provided for in the Italian legislation, the consequences of the violation do not concern the decision made irrespective of the procedural requirement – sanctioning it as invalid – but they do affect the individual conduct of people who acted in such a way<sup>43</sup>.

In other words, the judges assume a risk of incurring disciplinary liability and being sued for damages if a party adversely affected by the decision sues the State for compensation claiming that the decision was gravely negligent.

Significant controversy related to the liability of judges surround the limits to their activity in interpreting the law, especially when departing from well established case law. This presents a slippery slope, especially in light of the principle of the subjection of judges only to statutory law. There seems to be sufficient grounds to affirm that a decision of a chamber which overrules a principle established by the Plenary is a clear and gross violation of a rule which provides no exception, thereby creating potential judicial liability, which will be discussed in the following section.

However, it is worth clarifying in what sense such legal provisions would be reconcilable with a *stare decisis* (horizontal effect) mechanism. In fact, there is hierarchical order at stake here regarding the relationship between the CSPS and each chamber of the Council of State. The latter is only an internal division of labour, an organizational matter, which does not affect the jurisdictional role of the Council of State as one court.

Hence, the mechanism at hand remains a case of horizontal binding precedent, in so far as it compels the Council of State, which normally operates via one of its chambers, to follow the principle of law previously enunciated by the same court (in its plenary composition though). Nevertheless, one should note that a pure common law mechanism of *stare decisis* has not been achieved for a different reason from the one discussed above. In fact, there are no rules which constrain the CSPS to follow its own rules, so it remains free to overrule a "principle of law" previously enunciated.

In this respect the CSPS is similar to the ECJ position. The mechanism established by the law is built on the internal functioning of these judicial bodies

43 We could think for example of the rules establishing certain formal and procedural requirements of the decision-making process, whose violation not necessarily causes the invalidity of the decision itself but can bring about the liability of the decision-makers (see article 21-*octies* of administrative procedure Act n.º 241 of 1990 in connection with articles 4-11 of the same Act).

(the Italian higher courts), producing yet another particular type of binding precedent rule, which is a hybrid between a vertical and horizontal effect.

First level (regional) administrative courts are not affected by the reform, as they are not formally bound to follow a CSPA precedent, and there are no provisions regarding indirect binding effects in what the law establishes, related to the proceedings in matters of private law litigation.

One can easily envisage that the aforementioned horizontal effect will inevitably influence the vertical dimension too, strongly reinforcing the persuasive effect of the Council of State case law when bound by a principle of law enunciated by the CSPA.

#### IV. JUDICIAL RESPONSIBILITY FOR CIRCUMVENTING A PRECEDENT?

As previously discussed, regardless of the regime of precedent employed in the higher administrative, its efficacy will largely depend on the emphasis placed on judicial responsibility.

Judicial liability is regulated in Italy by the Parliament Act 1988, n.º 117. Those who seek remedies must file an action before an ordinary court against the State, which can be filed against judges who have been charged with negligence.

In these cases, the following strict elements must be proven: a) a causal nexus between the damages and the decision which has failed to comply with the remittal duty; and b) such a failure has to be deemed pretty harsh.

The Italian provision sets forth that a judge shall be liable in cases of a "grave violation of law determined by inexcusable negligence". Judges are not held when the activity involves the ordinary "interpretation of norms of law" and the "evaluation of evidence".

According to the case law, cases of gross negligence have been interpreted in a way which leads judges virtually to always deny it. It is commonly said, indeed, that there is responsibility only when a judge behaves in a way that yields a macroscopic and coarse violation of legal sources. It is so when he or she provides an interpretation conflicting with elements of logic, producing unacceptable consequences in reconstructing the will of the legislator, or manipulating legal texts as to enter into "free law".

In other words acts are not limited to gross negligence, but can classify as inexplicable behaviour in the context of the proceedings that can be associated with insanity or outright deceit.

One can easily explain this tendency in case law both as a protective attitude of the courts, and as an example of the difficulty of striking a balance between the independence of the judiciary and its allegiance to the law.

On a more detailed level, Article 99.3 of CAPC presents a different approach. Here the duty to abide by the principles expressed by the Plenary Session is assisted by a procedural device which cannot be questioned. Almost paradoxically it is the use of an allegedly weak (in the viewpoint of those skeptical about the introduction of a *stare decisis rule*) procedural device which makes the judicial duty stronger.

Before introduction of this mechanism into the legal system, and according to the case law when an inferior court departed from the interpretation provided for by the United Chambers of the Court of Cassation, the responsibility of the judges would be eliminated if they provided reasons grounded in the law to defend such decisions. Only if they utterly failed to do so would they be charged with the responsibility.

Now, however, at least within the relationship between the chambers and the plenary, this option has been expressly ruled out. If the departing judges give reasons based on law, then they know that there is a conflict, and in such a case they are necessarily aware that they are expected to resort to the Plenary. A violation of this duty, although "procedural", stands in my view for an inexcusable negligence which opens the way to state/judicial liability<sup>44</sup>.

This is especially true when the parties have expressly mentioned a certain precedent/principle of law during the proceedings. If this is not the case, then such a gross negligence can still occur when the principle at stake has been frequently applied by the Council of State.

More puzzling is the case where the Chamber wants to depart from an *obiter dictum* of the Plenary, which as such, as we have seen before, should not be binding for successive nor inferior courts. In fact, dealing with *obiter dicta* entails carrying out a normal "activity of interpretation of norms of law" which cannot lead to liability.

As for the alternative device, represented by the disciplinary action aiming at punishing an administrative judge who fails to abide by the "precedent rule", it can be promoted both by the Prime Minister and the President of the Council of State before the Presidency Council for the Administrative Justice, a kind of self-governing body of the judiciary. In this case, parties have no chance of using it as a means to put pressure on magistrates, even though they can still request one of these two competent authorities to act in the manner previously mentioned.

The actual disciplinary consequences of this kind of professional responsibility, seem to function in a legal vacuum. The relevant statute (Act of Parliament n.º 186/1982) refers to cases of violations and sanctions as disciplinary measures provided for ordinary judges. Strangely the latter (Act of Parliament

44 In the same vein see FOLLIERI (2012, p. 1237).

n.º 109/2006) states that it shall only apply to ordinary judges, thereby expressly excluding administrative judges.

To avoid a situation where a disciplinary proceeding occurs without a substantive regulation related to such responsibility, the only solution is to consider the reference to the law applicable to ordinary courts which is the royal legislative decree n.º 511/1946 (Decree), which was repealed by the 2006 Act referred to above.

According to Article 18 of the Decree, the disciplinary illicitness of a judge occurs whenever he or she "fails to comply with her own duties or he or she behaves in or out of the office in a manner that makes he or she unworthy of the trust and consideration, which he or she is expected to enjoy, or which negatively affects the prestige of the judiciary order"<sup>45</sup>.

This provision is broad in scope and permits applicability to the behaviour of a judge who does not refer to the Plenary while overruling a precedent of the Plenary itself. In such cases disciplinary sanctions range from mild punishment, such as warnings and formal reprimands, to more serious ones, such as the loss of benefits from seniority, dismissal, and destitution which also entails the loss of the right to a pension. It is obviously very difficult to establish which of the sanctions is suitable for a violation based on the disregard for a principle of law established by the CSPS and a large amount of discretion is bestowed upon the Presidency council.

## V. PROBLEMS ABOUT STATE RESPONSIBILITY FOR BREACHING EUROPEAN UNION LAW

Something conceptually alike in terms of judicial responsibility occurs with regard to the application of EU law.

Following the *Van Gend en Loos* case, the EEC Treaty has served as an agreement which merely creates mutual obligations among the contracting states. The Union constitutes a new legal order of international law, for the benefit of which the Member States have limited their own sovereign rights, although within limited fields, and whose subjects are not only the Member States but also their nationals.

The status of EU law in the national legal systems is not a matter of domestic constitutional law, rather a matter of EU law itself. According to *Costa v. ENEL* "The law stemming from the Treaty, an independent source of law, cannot, because of its special and original nature, be overridden by domestic provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

45 Translated into English by the author.

From these fundamental tenets, which embody the principle of primacy of EU law over national law, a number of consequences arise, primarily the duty of every national authority to set aside domestic law when it conflicts with EU law and the obligation on higher national courts to refer a preliminary question to the ECJ, when they have doubts regarding the meaning of any EU legal rules.

What is the consequence if a higher court – such as the Italian Council of State – fails to comply with such obligations and thwarts the rights conferred on individuals by a provision of a European directive? According to the Francovich doctrine of the ECJ, this brings about state responsibility for the damages suffered by a private party.

In *Kobler*<sup>46</sup> the ECJ held that in the light of the essential role played by the judiciary in the protection of rights derived by individuals from EU rules, the full effectiveness of those rules would be called into question and the protection of those rights weakened if individuals were precluded, under certain conditions, from obtaining reparation when their rights are affected by an infringement of EU law attributable to a decision of a court of a Member State adjudicating at last instance. And this happens even if the decision in question is final, and subject to the principle of *res judicata*. Therefore, a judge can incur a liability to the purpose of the A. of P. 1988, n. 117 also if he or she does not refer to the ECJ for a preliminary ruling erroneously assuming that Italian law is not in conflict with EU law.

Indeed a court is under a duty to give full effect to the provisions of European Union law, if necessary refusing its own motion to apply any conflicting provision of national legislation, including procedural provisions (such as the preclusion to raise questions for the first time in the appellate stage), and it is not necessary for the court to await the prior setting aside of that national provision by legislative or other constitutional means<sup>47</sup>.

The ECJ has recently reaffirmed such a rule answering a question raised by the Italian Council of State, which sought to know the circumstances under which non-compliance with the obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU may constitute a clear breach of European Union law, as a prerequisite for non-contractual liability on the part of the State for infringement of that law<sup>48</sup>.

So we can imagine a case in which a Chamber evaluates that a principle of law established by the Plenary is in conflict with a EU norm or principle. Here, the Chamber finds itself in the difficult position of respecting both the national law and European law.

46 Supra n. 17.

47 Case C-173/09 Elchinov [2010] ECR I-8889, para. 31.

48 Judgment of the Court (Fourth Chamber) 18 July 2013 in Case C-136/12, Consiglio Nazionale dei Geologi.

One could simply say that such a conflict should be seen but as a reason to object to the soundness of the national principle and refer the question to the Plenary, activating the device provided for in Article 99.3 CPAC. Yet, it would not be the ECJ response, which will set aside procedural rules if it is necessary to directly bring the question before itself<sup>49</sup>.

On a practical note, we can observe that if a court directly applies the EU principle rather than submitting the question to the Plenary, it would be very unlikely that the judges incur any liability at all, in the light of the aforementioned requirements of the "gross negligence" imposed by the law on judicial liability<sup>50</sup>.

## A FINAL THOUGHT

A final brief observation is prompted by an inquiry into the meaning of a type of *stare decisis* integrated into Italian public law?

However, I presume that this shift does not represent a late endorsement of the creative role of administrative courts, which in Italy and France, has historically been to a very large extent the champions of the construction of administrative law.

A case law-based legal system (at least an English one) is barely a place of "free-law", as from time to time some enthusiast believe the exact opposite. In other words, the adoption of a system of *stare decisis* is not a way of reconciling "real facts" ("living law") and the law, but rather a way of harnessing and

49 Such a point has been actually made by the Sicilian Council for Administrative Justice (Consiglio di Giustizia Amministrativa per la Regione Siciliana), Order of 17 ottobre 2013, n.° 848/o, which has raised a preliminary ruling before the European Court of Justice, Case C-689/13, pending at the time of writing, seeking the Court's opinion on whether "in the event that doubts arise as to whether a principle of law already stated by the Council of State in plenary session is in conformity with or is compatible with European Union law, is the Chamber or Division of the Council of State to which the case is assigned under an obligation to make a reasoned order referring the decision on the appeal back to the plenary session, even before it is able to make a request to the Court of Justice for a preliminary ruling as to whether the principle of law in question is in conformity with or is compatible with European Union law; or, instead, may – or, rather, must – the Chamber or Division of the Council of State, being national courts against whose decisions no appeal lies, independently refer – as ordinary courts applying European Union law – a question to the Court of Justice for a preliminary ruling so as to obtain the correct interpretation of European Union law?"

50 By the way the research of a decent solution of the issue of the tension between primacy and effectiveness of EU law and the so called "procedural autonomy" of Member States is still on the table. Regarding this see Civitarese MATTEUCCI & GARDINI (2013, p. 1) and Civitarese MATTEUCCI (forthcoming).

controlling the abundant creativity among the ranks of the judiciary, thereby boosting legal certainty.

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