

**THE ROLE OF PRECEDENT IN THE ITALIAN LEGAL SYSTEM (WITH
SPECIFIC ATTENTION TO ITS USE MADE BY THE ITALIAN CORTE
COSTITUZIONALE)¹**

***O PAPEL DOS PRECEDENTES NO SISTEMA LEGAL ITALIANO (COM ATENÇÃO
ESPECIAL PARA A SUA APLICAÇÃO PELA CORTE CONSTITUCIONAL
ITALIANA)***

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ABSTRACT: The main aim of this article is analysing the use of precedent made by the Italian Constitutional Court and its effectiveness in the light of Michele Taruffo's 'dimensions' of the precedents.

KEYWORDS: precedents; dimensions; *Corte di cassazione*; *Corte costituzionale*; European Courts of Human Rights.

RESUMO: O principal objetivo deste artigo é analisar a aplicação dos precedentes feita pela Corte Constitucional Italiana e a sua efetividade à luz das dimensões dos precedentes de Michele Taruffo.

PALAVRAS-CHAVE: Precedentes; dimensões; Corte di Cassazione; Corte Costituzionale; Corte Europeia de Direitos Humanos.

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1. Some Preliminary Clarification on the Concept Examined and the Scope of the Article

It is often said that, as in other civil law systems, precedents in the Italian legal system are not legally binding, as they are simply persuasive (in other words, they affect the legal reasoning of judgments only *de facto*)².

For this reason, at a first glance, this topic would not deserve much attention by lawyers. However, it does, at least for three reasons.

First, precedent, although not legally binding, affects *de facto* the legal reasoning underpinning judgments. This is the main reason why it is worth studying their role: the way the Italian courts carry out their every-day legal reasoning is affected (even if only *de facto*) by precedents.

Secondly, it is worth studying the specific dimensions in the light of which precedents affect the legal reasoning of the courts in the Italian system, in order to understand how persuasive the precedent actually is there.

As Michele Taruffo has shown in his studies³, beyond the traditional dichotomy (legally binding precedent in common law system/persuasive precedent in civil law systems), in

² See A. ANZON, *Il valore del precedente nel giudizio sulle leggi. L'esperienza italiana alla luce di un'analisi comparata sul regime del richterrecht*, Milano, 1995, p. 15 and A. PIZZORUSSO, *Stare decisis e Corte costituzionale*, in R. Treves (ed.), *La dottrina del precedente nella giurisprudenza della Corte costituzionale*, Torino, 1971, p. 53 f.

both the common law system and the civil law system, the actual role of precedent in a jurisdiction depends on some specific dimensions, such as:

- an ‘institutional dimension’, i.e. the existence of more than one Supreme Court (like the Italian *Corte di Cassazione* and *Consiglio di Stato*) and/or the existence of a Constitutional Court (not in a hierarchical relation with the other courts) in the jurisdiction concerned⁴. The higher the quantity of Supreme Courts established in a jurisdiction, the higher the quantity of sources of potentially opposing precedents coexists there.

- an ‘objective dimension’, i.e. the way in which the precedent is framed (with regard to the *ratio decidendi* or to the *regula juris*, as will be explained later), the way in which the precedent is published (by reporting or by the *massimazione*, as will be seen later)⁵ and the overall number of judgments issued by the Supreme Court (the more numerous the judgments issued by a Supreme Court, the more potentially contradictory precedents might occur)⁶.

- a ‘structural dimension’, i.e. the way in which the precedent is identified as such⁷. One should bear in mind that strictly speaking what creates a precedent in the common law is the *ratio decidendi* of *one* previous decision⁸. In the Italian legal system, the thing which is persuasive and affects legal reasoning is not the *ratio decidendi* of *one* previous decision, but the *giurisprudenza costante*, which is *a group* of past judgments with the same constant underpinning *regula juris*. Clearly, the higher the quantity of judgments required to make a precedent, the higher the risk is of contradictory judgments and the higher the difficulty there is to work out when a case counts as a precedent.

- an ‘effectiveness dimension’, i.e. the degree of the binding force of the precedent, which can vary within common law jurisdictions too⁹.

³ See M. TARUFFO, *Dimensioni del precedente giudiziario*, in *Riv. Trim. Dir. Proc. Civ.*, 1994, p. 413 ff. See now also A. PIZZORUSSO, *Delle fonti del diritto. Disposizioni sulla legge in generale. Art. 1-9*, in F. Galgano (ed.), *Commentario del codice civile Scialoja-Branca*, Bologna-Roma, Seconda edizione, 2011, p. 709 ff. and 724 ff.

⁴ See M. TARUFFO, *Dimensioni del precedente giudiziario*, cit., p. 416 ff. and also ID., *Aspetti del precedente giudiziale*, in *Criminalia*, 2014, p. 44 ff.

⁵ See M. TARUFFO, *Dimensioni del precedente giudiziario*, cit., p. 421 ff. and also ID., *Precedente e giurisprudenza*, in *Riv. Trim. Dir. Proc. Civ.*, 2007, p. 712 ff.

⁶ See M. TARUFFO, *La Corte di cassazione tra legittimità e merito*, in *Foro It.*, 1988, V-13, p. 237 ff. and ID., *Precedente e giurisprudenza*, cit., p. 713 ff.

⁷ See M. TARUFFO, *Dimensioni del precedente giudiziario*, cit., p. 423 ff. and also ID., *Precedente e giurisprudenza*, cit., p. 711 ff.

⁸ See M. TARUFFO, *Aspetti del precedente giudiziale*, cit., p. 39 ff.

⁹ See M. TARUFFO, *Dimensioni del precedente giudiziario*, cit., p. 426 ff.

It will be seen later how these dimensions are characterized in the Italian legal system and how they affect the role of the precedent there.

Thirdly, some distinguished Italian academics stated that precedents in Italian system played a *legal* role, i.e. their force derives from legal provisions or principles of law¹⁰.

Their opinion is not shared by the rest of the academia¹¹. However, some pieces of legislation and some cases have recently expressly recognised the role of precedents at least with regards to some specific circumstances. These pieces of legislation and cases will be described here.

All that said, one of the aims of the article is examining whether such express recognitions of the role of the precedent are effective in the light of the dimensions mentioned above. In other words, one of the purposes of this article is in analysing, in the light of the dimensions mentioned above, how effective precedent is in the Italian legal system, under legislation and case-law which expressly recognise the role of the precedent.

Actually, as the use of precedent made by the *Corte di cassazione* has already been studied in depth (especially by Michele Taruffo), the main scope of the article, after describing Taruffo's analysis¹², will be analysing the use of precedent made by the Italian Constitutional Court. On the one hand, the approach of the *Corte costituzionale* towards its own decisions will be examined, in order to test its effectiveness in the Italian legal order in the light of the dimensions set by Taruffo¹³; on the other hand, the role of precedent of two other courts (the *Corte di cassazione* and the European Court of Human Rights), as used by the *Corte costituzionale* itself in its jurisprudence will be examined, so as to see whether and to what extent the *Corte costituzionale* considers the precedent of these two courts¹⁴.

So as to understand better the actual role played by precedent in the Italian legal system, it is now time to describe the tasks of the Italian Supreme Court and of the Italian Constitutional Court¹⁵.

2. The Tasks of the Italian Supreme Court and of the Italian Constitutional Court

¹⁰ See G. GORLA, voce *Precedente giudiziario*, in *Enc. giur.*, 1990, vol. XXIII, p. 4 ff. e A. PIZZORUSSO, *Delle fonti del diritto*, cit., p. 717 ff.

¹¹ See among others A. ANZON, *Il valore del precedente nel giudizio sulle leggi*, cit., p. 86 ff.

¹² See paragraph 3.

¹³ See paragraph 4.1.

¹⁴ See paragraph 4.2 and 4.3.

¹⁵ See paragraph 2.

2.1. The *Corte di cassazione*

In English when we speak of ‘the Judiciary’ or ‘judicial power’ (in Italian: *potere giudiziario*), we refer to the entire system of the courts that interpret and apply the law. This name is usually used from the perspective of the separation of powers.

The Italian Judiciary is composed of *ordinary* judicial bodies (Judiciary in a narrow sense) and *special* judicial bodies. Ordinary judicial bodies are civil and criminal courts, such as Tribunals and Courts of Appeal (*Tribunali* and *Corti d’appello*), and the Supreme Court of Cassation (*Corte di cassazione*). Special judicial bodies are the Council of State (which is tasked with administrative justice), the Court of Auditors (which is tasked with justice in matters of public accounts) and military tribunals (which are tasked with military justice).

The *Corte di cassazione* is a *giudice di legittimità* (in other words it scrutinises whether the judgments of the lower courts have been issued in compliance with legislation) and not a *giudice di merito* like the lower courts, which decide on the merits of each case.

When a judgment of a lower court is in violation of the law, the Court of Cassation can declare it void (*cassare*). The Court of Cassation is not allowed to decide itself on the merits of the case. The annulment can be of two kinds: without a referral to (*senza rinvio*) or with a referral to the lower court (*con rinvio*). The annulment without a referral is issued when the lower court was not responsible for issuing that judgment; whereas the annulment with a referral is issued when the lower court was responsible for issuing that judgment but it did so in violation of the law. In the latter, the proceedings can be started again before the lower court which must avoid violating the law again.

The French *Cour de cassation* provided the model for the *Corte di cassazione*. Under Article 65 of the *Regio decreto 30 gennaio 1941, n. 12*, the Italian *Corte di cassazione* assures the correct observance and the uniform interpretation of the law, the unity of the legal order, the respect of the boundaries of different jurisdictions.

This task is carried out by the *Court of Cassation* because, as I mentioned, it is the Supreme Court before which decisions of the ordinary and special courts are referred to for any violation of the law. Under Article 111 of the Italian Constitution, decisions and measures affecting personal freedom issued by ordinary and special courts can be appealed

to the Court of Cassation in cases of violation of the law. Appeals to the Court of Cassation against decisions of the Council of State and the Courts of Auditors are permitted only for reasons of jurisdiction. Clearly, the *Corte di cassazione* can assure a uniform interpretation of domestic law by scrutinising any violation of the law made by ordinary and special courts.

In theory, the task of a Court of Cassation does not directly safeguard the rights of the claimant or the defendant in case law (this is the task of the Tribunals and of the Courts of Appeal). It gives a uniform interpretation of domestic law. In other words, the Court of Cassation's tasks in theory should not seek to grant a fair judgment for the claimant or the defendant but to assure the uniformity of judgments (or better, the uniformity of the interpretation of the law) within the legal order.

Piero Calamandrei, one of the most distinguished Italian legal scholars in the first half of the Twentieth century, was the main supporter of such a 'pure' model. The task of the Court of Cassation, he wrote, cannot be contaminated and distracted by matters which concern the only interests of the claimant and the defendant. Instead of giving a fair solution to the concrete case, according to Calamandrei, the *Corte di cassazione* should suggest for the future the theoretical interpretation of the law which fits best with the legislature's will. This is why, he stated that the *Corte di cassazione* should focus on framing the general principles of its judgments¹⁶.

However, the role played by the *Corte di cassazione* deviated from the 'pure' model in the following years.

First, the extent of the area of 'violations of the law' goes beyond the violation of substantive law and involves the violation of procedural law too. Clearly, this has led the *Corte di cassazione* to focusing on matters concerning the proceedings regarding concrete cases (in other words directly safeguarding the rights of the claimant and the defendant) instead of focusing mainly on matters concerning the abstract interpretation of the law (in other words giving a uniform interpretation of substantive law)¹⁷.

In particular, under Article 360 of the 1940 Code of the civil courts (*Codice di procedura civile*) judgments can be appealed to the Court of Cassation on grounds which seem to go beyond the violation of substantial laws: No. 1) issues concerning the

¹⁶ See P. CALAMANDREI, *Per il funzionamento della Cassazione unica (1924)*, now in ID., *Opere giuridiche*, Napoli, 1979, vol. VIII, p. 387.

¹⁷ See M. TARUFFO, *La Corte di cassazione tra legittimità e merito*, cit., p. 239 ff.

responsibilities of the court; No. 2) issues concerning the competence of the court; No. 4) issues concerning the validity of the judgment; No. 5) issues concerning the legal reasoning underpinning the judgment. Only No. 3) seems to reflect the ‘pure’ model: issues concerning the violation of substantive laws.

Secondly, the *Corte di cassazione* interpreted in a very broad way the word ‘decisions’ that can be challenged before it. Every act of a lower court that has an impact on a claimant’s or defendant’s rights, can be challenged before it; not only the main judgments which conclude the proceedings. Once again, this has led to the *Corte di cassazione* to focus on minor issues and not only on abstract interpretation of the law¹⁸.

At the end of the day, instead of issuing a judgment which looks at the future (in other words with general principles to be applied in future cases), the *Corte di cassazione* looks at the past (in other words by establishing a principle that must be used by the lower court to solve the concrete contestation)¹⁹.

Finally, for the aim of this analysis, it is worth mentioning how the *Corte di cassazione* is structured and works.

The *Corte di cassazione* is composed of thirteen chambers: six civil chambers, seven criminal chambers. The First president of the Court of Cassation may state that a case is to be decided by united chambers when the same legal issues have been previously decided by two or more different chambers in a different way one from another or when the issue is of a relevant nature.

2.2. The *Corte costituzionale*

The task of the *Corte costituzionale* is to carry out constitutional judicial review.

In Italy constitutional judicial review is carried out by a single and specialized Court (centralized scrutiny), the *Corte costituzionale*²⁰.

The *Corte costituzionale* is composed of fifteen judges: one third is appointed by the President of the Republic; one third is elected by the Parliament in joint sitting; one third is elected by the ordinary and administrative supreme Courts (Section 135, subsection 1,

¹⁸ *Ibidem.*

¹⁹ *Ibidem.*

²⁰ On the Italian *Corte costituzionale*, see V. BARSOTTI-P.G. CAROZZA-M. CARTABIA-A. SIMONCINI (eds.), *Italian Constitutional Justice in Global Context*, Oxford, 2015.

Italian Constitution). This complex way of appointing/electing constitutional Judges is of great value because it makes the *Corte costituzionale* a neutral and non-partisan body, which reflects the many opinions which are in our society.

Constitutional Judges shall be chosen from Judges, including those retired, of the ordinary and administrative higher Courts, from full university professors of law and lawyers with at least twenty years of practice (Article 135, subsection 2, of the Constitution). This is also important because it allows the *Corte costituzionale* to be composed of experts in law.

The *Corte costituzionale* (Article 134, of the Constitution) is mainly tasked with judging on constitutional legitimacy of Acts of Parliament and decrees issued by the State and laws enacted by the *Regioni*.

A case can be brought before the *Corte costituzionale* in two ways, giving rise to either a concrete or abstract constitutional judicial review.

When a Court believes that a piece of primary legislation, which has to be applied to a specific case, is not consistent with the Constitution, the Court may challenge this piece of legislation before the *Corte costituzionale*. This is the case of a *giudizio di legittimità in via incidentale*: a concrete review, that is to say that the review carried out by the *Corte costituzionale* arises from a specific and concrete case brought before a Court.

A regional piece of primary legislation can be challenged before the *Corte costituzionale* also by the State and a State primary piece of legislation can be challenged by a *Regione* because they believe that their own constitutional powers have been compromised by this piece of legislation. In this case the review carried out by the *Corte costituzionale* is called *giudizio di legittimità in via principale*. It is an abstract review, that is to say that it does not arise from a concrete case brought before a Court.

In the light of the current analysis of the role of the precedent in the Italian legal system, it is also important to bear in mind that the judgments of the *Corte costituzionale* are based on:

- the *oggetto*: the object whose validity is scrutinized by the Court (e.g. Acts of Parliament and decrees issued by the State, laws enacted by the *Regioni*, etc.);
- the *parametro*: the standard in the light of which the scrutiny is carried out by the Court (e.g. the Constitution, the supreme values, etc.);

- the *motivi*: other legal or non legal factors which influence the judgments (e.g. the *tertium comparationis* which is used when the scrutiny on the respect of the principle of equality is carried out).

3. The Analysis of the Precedent in the Italian Legal System Carried Out by Michele Taruffo

3.1. The Features of the Precedent in the Italian Legal System

It is now time to focus on the features of precedent in the Italian system.

Before doing this, it is worth reminding ourselves the main features of precedent in the common law system.

First, the concept of precedent in the common law system is one of the sources of the law, beside the statutes²¹.

Secondly, as already mentioned, a *single* decision of a court on a matter of law can be taken into account as a precedent.

Thirdly, not every legal observation which is stated by a court can be taken into account as a precedent. Only the *ratio decidendi* (literally: the rationale behind the decision) creates a precedent. Other legal propositions in a judgment are considered merely as *obiter dicta* (literally: incidental statements).

The *ratio decidendi* is the proposition of law concerning the material facts of the case, on which implicitly or expressly the court has framed their judgment. The *ratio decidendi* is not something abstract: it is the rule concerning the material facts concerning the concrete case.

Therefore, when a judgment has been issued, any subsequent court will frame the precedent with regards to the material facts of the previous case and will apply it to their own judgment only if those material facts do not have any reasonable legal distinction²².

Fourthly, when it is said that the precedent is legally binding (i.e. the rule of the *stare decisis*), this means that any subsequent court must apply the *ratio decidendi* underpinning

²¹ See R. CROSS, *Precedent in English Law*, Oxford, 1977, p. 153 ff. and in Italian G. CRISCUOLI, *Introduzione allo studio del diritto inglese. Le fonti*, Milano, 2014, p. 44.

²² See C.K. ALLEN, *Law in the Making*, Oxford, 1964, p. 259 ff. and in Italian G. CRISCUOLI, *Introduzione allo studio del diritto inglese*, cit., p. 330 ff.

the previous judgment, unless there is a reasonable legal distinction between the two cases. In other words, the rule of the *stare decisis* legally binds the legal reasoning of any subsequent court²³.

When any subsequent court states that a reasonable legal distinction occurs in the case brought before them, this is the case of a distinction made by the court: strictly speaking this is not an exception to the rule of the *stare decisis* as there is no analogy between those two cases. However, the rule clearly affects the legal reasoning of any subsequent court anyway, as the court must explain why those two cases are different from one another.

The only exception to the rule of the *stare decisis* is an overruling, that is when a court does not follow a precedent (in other words it does not apply a previous *ratio decidendi* notwithstanding the analogy between the two controversies). Only Supreme Courts can depart from precedents made by lower courts. Lower courts cannot overrule precedents made by Supreme Courts. In some cases Supreme Courts can overrule their own precedents: for example, the British Lord Chancellor stated in 1966 that the House of Lords (nowadays the UK Supreme Court) would deviate from their precedents, when it would appear right to do so²⁴.

All that said, it is now time to explain the features of the precedent in the Italian legal system.

First, precedents in the civil law system are not considered to be sources of the law. Sources of the law are only: Constitution; Acts of Parliament; some decrees of the Executive which are primary legislation; *regolamenti* (a sort of statutory instruments); customs²⁵.

Secondly, as already mentioned, what affects legal reasoning is the *giurisprudenza costante*, which is not *one* precedent but it is *a group* of past judgments with the same constant underpinning *ratio decidendi*²⁶.

²³ On the doctrine of precedent also as an institutional form of public reason that operates in a democratic context see A. GEARY-W. MORRISON-R. JAGO (eds.), *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions*, Second edition, 2013, p. 114 ff.

²⁴ Practice Statement [1966] 3 All ER 77. On the Practice Statement and the recent cases in which the UK Supreme Court has referred to it (as it now forms part of the Court's Practice Directions), see J. LEE, *Fides et Ratio: Precedent in the Early Jurisprudence of the United Kingdom Supreme Court*, in *European Journal of Current Legal Studies*, 2015, 21 (1).

²⁵ See A. ANZON, *Il valore del precedente nel giudizio sulle leggi*, cit., p. 115 ff. *Contra* A. PIZZORUSSO, *Delle fonti del diritto*, cit., p. 723 ff.

²⁶ See M. TARUFFO, *Aspetti del precedente giudiziale*, cit., p. 39 ff.

Thirdly, it is not entirely correct to speak of *ratio decidendi* itself in our system as it is hard to identify a *ratio decidendi* in past judgments, in the sense this concept is used in the common law world (where, as said, the *ratio decidendi* is the proposition of law concerning the *material* facts of the concrete case, on which implicitly or expressly the court has framed their judgment). In the Italian system, the precedent is made by the *abstract* proposition of law which can be extracted from a group of past judgments. I would call it *regula juris*, instead of *ratio decidendi*.

Therefore, any subsequent courts will base their decisions on the abstract proposition of law extracted from the *giurisprudenza* only when they successfully argue that the material facts concerning the case brought before it, can be regulated by that same abstract proposition of law.

At the end of the day, in the common law system such a court compares material facts and applies the precedent to the controversy before itself only if those material facts do not have any reasonable legal distinction; whereas in the civil law system any subsequent courts follow the *giurisprudenza* only when they argue that the material facts can be regulated by the same abstract proposition of law that can be extracted from the *giurisprudenza* itself²⁷.

Fourthly, as already said, the *giurisprudenza* is not legally binding. The *giurisprudenza* of domestic court is simply persuasive. It affects the legal reasoning governing subsequent judgments (i.e. when the subsequent court decides to deviate from the *giurisprudenza*, it has to explain in depth the reasons why it does so) but only *de facto*²⁸.

As the Italian Court of Cassation stated in 2014²⁹ the safeguarding of the unity and the stability of the interpretation of the law (especially the one given by the Court of Cassation and by the united chambers in it) is to be considered ‘*alla stregua di un criterio legale di interpretazione delle norme giuridiche*’ (i.e. a legal criterion of interpretation), especially after the amendment of article 374 c.p.c. in 2006 and of art. 360-*bis* c.p.c. in 2009 (which will be examined later). This is not the only nor the main legal criterion but surely it is a criterion of much importance. Therefore, the subsequent courts can derogate to it only if there are ‘*buone ragioni*’ (i.e. good reasons) to do this.

²⁷ *Ibidem*.

²⁸ See A. ANZON, *Il valore del precedente nel giudizio sulle leggi*, cit., p. 75 ff.

²⁹ See Cass. civ., sez. un., 6 novembre 2014, n. 23675.

In the same judgment the Court of Cassation also underlined that the courts play an important role in making the law flexible in a legal order. However, this could be problematic in the light of the unity and the stability of the interpretation of the law when a lower court overrules a precedent (literally, in Italian: ‘precedente’) of the Court of Cassation. This is even more problematic when the precedent is recent. Therefore, lower courts should act responsibly in interpreting the law. This does not mean that courts should avoid overruling or should only overrule for the future. This means that courts have to look carefully to ensure that there are good reasons to overrule. There is no mathematical formula for this. It is a matter of responsibility.

As the Court of Cassation stated in 2015, in our system the rule of the *stare decisis* does not exist. However, when they overrule, the following courts have to explain the reasoning behind the overruling³⁰.

These are the reasons why the word ‘precedent’, strictly speaking, does not fit into the civil law system³¹.

3.2. How Persuasive is the precedent in the Italian legal system?

At the end of the day, in both common law and civil law jurisdictions, precedents affect the legal reasoning behind any subsequent judgments, as in both systems the subsequent court has to explain why it deviates from the precedent. As already seen, following Michele Taruffo’s analysis, beside the dichotomy between legally binding/persuasive precedents, the actual role of the precedent in each legal system depends on the role played by the aforementioned dimensions.

All that said, it is now worth analysing how persuasive precedent is in the Italian system in the light of the first three dimensions pointed out by Taruffo. The fourth dimension (which concerns the degree of the binding force of precedents) seems to be a sort of general key which summarises the nature of precedents in the common law and civil law jurisdictions.

(i) The first dimension to be analysed is the institutional one.

³⁰ See Cass. civ., sez. VI, 9 gennaio 2015, n. 174.

³¹ See M. TARUFFO, *Aspetti del precedente giudiziale*, cit., p. 41.

As already seen, it concerns the relations between courts. From this perspective, there are vertical precedents and horizontal precedents. Vertical precedents are those which come from Supreme Courts, such as the *Corte di cassazione*. On the other hand, Taruffo speaks of horizontal precedents when a court follows its own precedents.

According to Taruffo, the effectiveness of vertical and horizontal precedents of the Italian Court of Cassation is rather weak, though. The role of the *Corte di cassazione* is not that of the ‘pure’ model (i.e. a court which gives a uniform interpretation of domestic law): the Italian Court of Cassation nowadays is tasked with directly safeguarding the rights of the claimant or the defendant in case law. This means that the *Corte di cassazione* does not focus only on giving a uniform interpretation of substantive law but also on provisions concerning proceedings before the courts. This has led the *Corte di cassazione* to focus on concrete matters instead of general principles³². As already said, such a framework leads to weak precedents.

(ii) Secondly, there is an objective dimension: it concerns the boundaries of what constitutes a precedent.

As said, in the common law system the *ratio decidendi* (the proposition of law concerning the *material* facts of the controversy) constitutes the precedent. In the Italian system we tend to refer to the *regula juris* which can be extracted from the *giurisprudenza* (the *abstract* proposition of law which can be extracted from a group of past judgments). This is perhaps a consequence of the different way Judges are used to dealing with cases in the two systems: on the one hand, Judges in civil law systems are used to dealing with abstract and general *statutory* provisions to apply to material facts; on the other hand, Judges in the common law system are used to dealing with material facts to be solved via propositions of *case law* concerning material facts.

However, as far as Italy is concerned, it is worth mentioning two elements which makes the effectiveness of the precedents of the Court of Cassation rather weak.

First, the quantity of the judgments issued by the *Corte di cassazione* is tremendously high. The Supreme Court in the UK issues around 75 judgments per year; the Supreme Court of the United States of America issues less than 200 judgments per year; the Italian Court of Cassation issues around 50,000 judgments per year.

³² See M. TARUFFO, *La Corte di cassazione tra legittimità e merito*, cit., p. 239 ff.

Clear precedents can easily be identified when judgments are few. On the other hand, it is not easy to frame precedents from amongst thousands of often contradictory judgments as those of the *Corte di cassazione*³³.

Secondly, in Italy the abstract propositions of law (*massime*) are extracted from every single judgment of the *Corte di cassazione* by the *Ufficio del Massimario della Corte di cassazione* which is the office of the *Corte di cassazione* composed of nine Judges of the Court of Cassation which is tasked with extracting the *massime* from the judgments.

This system leads to the creation of a paradox. *Massime* are extracted from all the judgments of the Court of Cassation as such, regardless of their value or not as precedents. In doing so, no attention is paid to the distinction between *ratio decidendi* and *obiter dicta*³⁴.

(iii) Thirdly, the structural dimension concerns the number of judgments needed to have a precedent. As already said, in the common law system *one* judgment is enough to create a precedent. In the civil law system, the *giurisprudenza* arises from *a group* of past judgments with the same constant *regula juris*.

Clearly, as the number of judgments to be taken into account as to extract the *giurisprudenza* is higher, this is hard work because judgments, even of the Court of Cassation itself, are often in contradiction one another and it is not so easy to understand when a *giurisprudenza* is *costante*, i.e. with the same constant underpinning *regula juris*. Taruffo calls this *caos giurisprudenziale* (chaotic jurisprudence)³⁵.

At the end of the day, due to these dimensions, it is clear that the persuasive strength of precedents of the *Corte di cassazione* in the Italian legal system is rather weak.

3.3. The Express Recognitions of the Persuasive Role of the Precedent of the *Corte di cassazione* (with regards to some Specific Circumstances) by Some Pieces of Legislation

³³ *Ibidem*, p. 237 ff. and ID., *Precedente e giurisprudenza*, cit., p. 713 ff.

³⁴ See M. TARUFFO, *Dimensioni del precedente giudiziario*, cit., p. 421 ff. and also ID., *Precedente e giurisprudenza*, cit., p. 712 ff.

³⁵ See M. TARUFFO, *Dimensioni del precedente giudiziario*, cit., p. 425.

As said, from a legal perspective, it is worth seeing whether the role of the precedent in the Italian legal system is expressly recognised by any legislative provision with regards to some specific circumstances.

Among others³⁶, three provisions have been enacted by the legislature during the last twelve years.

(i) First, article 374, subsection 3, *codice di procedura civile* (the code of the proceedings before civil courts), as amended in 2006.

This subsection reads as follows: if one of the chambers of the *Corte di cassazione* does not agree a proposition of law stated by the United Chambers, it shall refer the decision to the United Chambers³⁷.

The aim of this amendment was clearly to protect the unity of the *giurisprudenza* of the United Chambers of the Court of Cassation. However, no sanction has been set if the chamber does not refer the decision to the United Chambers. This provision is basically ineffective³⁸.

(ii) Secondly, article 360-bis, n. 1, *codice di procedura civile* (the code of the proceedings before civil courts), as amended in 2009.

This new article reads as follows: a challenge before the *Corte di cassazione* against a judgment is inadmissible, when the decision on matters of law in that judgment is based on the *giurisprudenza* of the *Corte di cassazione* and the claimant does not introduce any element which could lead to an overruling of that *giurisprudenza*³⁹.

The aim of this amendment was clearly to ‘protect’ the unity of the *giurisprudenza* of the Court of Cassation. However, the *giurisprudenza* in our system is hard to identify, due to the way the three dimensions are shaped in the Italian legal systems, and this makes it hard for the *Corte di cassazione* itself to declare a challenge inadmissible on those grounds set out in article 360-bis, n. 1, *codice di procedura civile*⁴⁰.

³⁶ For an overview see A. PIZZORUSSO, *Delle fonti del diritto*, cit., p. 717 ff.

³⁷ ‘Se la sezione semplice ritiene di non condividere il principio di diritto enunciato dalle sezioni unite, rimette a queste ultime, con ordinanza motivata, la decisione del ricorso’.

³⁸ See M. TARUFFO, *Precedente e giurisprudenza*, cit., p. 720.

³⁹ ‘Il ricorso è inammissibile: 1) quando il provvedimento impugnato ha deciso le questioni di diritto in modo conforme alla giurisprudenza della Corte e l’esame dei motivi non offre elementi per confermare o mutare l’orientamento della stessa’.

⁴⁰ See M. TARUFFO, *La giurisprudenza tra casistica e uniformità*, in L. Vacca (ed.), *Casistica e giurisprudenza*, Napoli, 2014, p. 37 f.

(iii) Thirdly, article 118, *disposizioni di attuazione del codice di procedura civile* (the implementing regulations to the code of the proceedings before civil courts), as amended in 2009.

This article reads as follows: the legal reasoning of a judgment of a lower court shall also refer to precedents⁴¹.

The aim of this amendment was clearly to protect the unity of the *giurisprudenza* of the Court of Cassation and of other courts. However, this provision has led to some concerns⁴².

At the end of the day, these three provisions have not recognized any legally binding nature of the precedent in the Italian legal order. However, with these three provisions the legislature has clearly tried to expressly recognise the (persuasive) role of precedents with regards to some specific circumstances. After all, as mentioned above, the *Corte di cassazione* in 2014⁴³ stated that the safeguarding of the unity and the stability of the interpretation of the law is to be considered as a legal criterion of interpretation, *especially after the amendment of article 374 c.p.c. in 2006 and of art. 360-bis c.p.c. in 2009*.

However, as the precedent in the Italian legal system is so difficult to identify, due to the three dimensions already analysed, its persuasive role is weak, also with regards to those circumstances set out in these provisions.

4. The Use of Precedent Made by the *Corte costituzionale*

The use of precedent made by the *Corte di cassazione* has been already studied in depth, especially by Michele Taruffo. Therefore, as already said, the main scope of this article is analysing the use of precedent made by the Italian Constitutional Court: on the one hand, it will be examined the role of precedent of the *Corte costituzionale* towards itself, as to test the grade of its effectiveness in the Italian legal order in the light of the dimensions set by Taruffo; on the other hand, the role of the precedent of two other courts (the *Corte di cassazione* and the European Court of Human Rights), as used by the *Corte costituzionale* itself in its judgments will be examined, as to see whether and to what extent the *Corte costituzionale* considers the precedent of these two courts.

⁴¹ ‘La motivazione della sentenza [...] consiste nella succinta esposizione [...] delle ragioni giuridiche della decisione, anche con riferimento a precedenti conformi’.

⁴² See M. TARUFFO, *Addio alla motivazione?*, in *Riv. Trim. Dir. Proc. Civ.*, 2014, p. 375 ff.

⁴³ See Cass. civ., sez. un., 6 novembre 2014, n. 23675.

4.1. The Highly ‘Political’ Role of the *Corte costituzionale* and the Need for a Strict Legal Reasoning when it Overrules

The general features already seen with regards to the precedent in the Italian legal system in general, can be found in the precedent of the *Corte costituzionale*.

First, precedents of the *Corte costituzionale* are not considered to be sources of the law, as from this perspective the nature of the judgments of the *Corte costituzionale* does not differ from the judgments of the other courts⁴⁴.

Secondly, it is worth mentioning that also with regards to the *Corte costituzionale* the concept of *ratio decidendi* hardly fits.

As already said, the *ratio decidendi* is the proposition of law concerning the material facts of the controversy, on which implicitly or expressly the court has framed their judgment. However, the judgments of the *Corte costituzionale* do not refer to material facts. As already said, they refer to the constitutionality of a piece of primary legislation and they are based on the *oggetto*, the *parametro* and the *motivi*. All these elements are not material facts. Therefore, the concept of *ratio decidendi* in its strict meaning does not fit with the nature itself of the judgments of the *Corte costituzionale*⁴⁵. Once again, strictly speaking, we can only speak of *regula juris* instead of *ratio decidendi* with regards to the *Corte costituzionale*.

Thirdly, the *giurisprudenza* of the *Corte costituzionale* does not legally bind the *Corte* itself. The *giurisprudenza* is simply persuasive. It affects the legal reasoning governing its subsequent judgments (i.e. when the *Corte costituzionale* decides to deviate from its past precedent, it has to explain in depth the reasons why it does so) but only *de facto*.

However, if we look at the dimensions set by Taruffo, the strength of the precedents of the *Corte costituzionale* towards itself is stronger than that of the *Corte di cassazione*.

From the perspective of the ‘institutional dimension’, the existence of one single Court (the *Corte costituzionale*) and the existence of one single Chamber within this Court tasked with constitutional judicial review, avoids opposing precedents from different courts or chambers.

⁴⁴ See A. ANZON, *Il valore del precedente nel giudizio sulle leggi*, cit., p. 168 ff. *Contra* A. PIZZORUSSO, *Delle fonti del diritto*, cit., p. 728.

⁴⁵ See among others A. ANZON, *Il valore del precedente nel giudizio sulle leggi*, cit., p. 130 ff.

From the perspective of the ‘objective dimension’ and of the ‘structural dimension’, the small number of judgments issued by the *Corte costituzionale* (around 300 judgments per year) and the small number of Judges in the *Corte* itself (15 Judges, appointed for 9 years) avoids potential contradictory precedents.

All that said, one should bear in mind another important feature of the *Corte costituzionale*, perhaps even more crucial. For the *Corte costituzionale* there is always the risk of being seen as a kind of political actor, as the issues concerned are of the highest ‘political’ nature (i.e. they concern the constitutionality of statutes and acts of the main constitutional bodies of the State). Therefore, any overruling by the *Corte costituzionale* might run the risk of being seen as a purely political choice.

To avoid this, when the *Corte costituzionale* overrules its own *giurisprudenza*, its legal reasoning has to be even more strict than the legal reasoning of other courts, as to be legitimate in the eyes of the public opinion⁴⁶.

Once again, this is not a matter of a legally binding duty but something which is rooted in the moral authority of the *Corte costituzionale* which needs to be legitimised before the court of public opinion in a constitutional legal order.

At the end of the day, as Alessandro Pizzorusso wrote, in the light of the aforementioned features of the *Corte costituzionale*, the effectiveness of its precedent from the perspective of the horizontal dimension is quite high⁴⁷.

4.2. The Coexistence of a Supreme Court and a Constitutional Court in the Italian system (the *Corte costituzionale* and the *Corte di cassazione*) and the Issue of the *diritto vivente*: is the *Corte costituzionale* bound by it?

As already observed, things are rather complicated from the perspective of the effectiveness of the precedent, when a Constitutional Court coexist with a Supreme Court in a legal order, like in Italy with the *Corte costituzionale* beside the *Corte di cassazione*.

As already mentioned, the *Corte di cassazione* is tasked with scrutinising whether the judgments of the lower courts have been issued in compliance with legislation and in this way protecting the unity of the interpretation of the law in a legal order. In Italy the

⁴⁶ See A. PIZZORUSSO, *Stare decisis e Corte costituzionale*, cit., p. 56 and A. ANZON, *Il valore del precedente nel giudizio sulle leggi*, cit., p. 166.

⁴⁷ See A. PIZZORUSSO, *Stare decisis e Corte costituzionale*, cit., p. 55 ff.

interpretation of a provision constantly given by most of the courts and especially based on the interpretation of the *Corte di cassazione* is called ‘diritto vivente’⁴⁸: literally, it means the ‘living law’.

On the other hand, as said, the *Corte costituzionale* is tasked with judging whether a piece of primary legislation is in compliance with the Constitution.

Their tasks are different. The interpretation of the law is *primarily* allocated to the *Corte di cassazione*; the interpretation of the Constitution is *primarily* allocated to the *Corte costituzionale*⁴⁹.

From the perspective of the precedent which matters here, the issue which might arise is the following.

A provision might be constantly interpreted by the courts in a way which becomes *diritto vivente* (let us call it: norm A). However, a lower court might believe that this provision, as interpreted with a different meaning (let us call it: norm B), is not in compliance with the Constitution and might challenge it before the *Corte costituzionale*. In this event, is the *Corte costituzionale* bound by the *diritto vivente*, i.e. by the norm A?

Strictly speaking, the *Corte costituzionale* is not legally bound by the *diritto vivente* because, once again, precedents are not legally binding in our legal order, because the relation between *Corte di cassazione* and *Corte costituzionale* is not one of hierarchy and because their tasks are different. However, the *diritto vivente* affects the *Corte costituzionale de facto*.

(i) Usually the *Corte costituzionale* interprets the provisions accordingly to the *diritto vivente* (norm A). This means that the *Corte costituzionale* usually rejects the challenge, gives a different interpretation of the provision and states that the lower court has misinterpreted that provision by giving a different interpretation (norm B). Such types of decision of the *Corte costituzionale* is called (*decisione*) *interpretativa di rigetto correttiva*. It literally means that the *Corte costituzionale* rejects the challenge (*rigetto*) and that its decision (*decisione*) is based on an interpretation of the provision (*interpretativa*) which has changed (*correttiva*) from B to A the meaning of the provision given by the lower court. On the other hand, it is very uncommon that the *Corte costituzionale* agrees with the

⁴⁸ See E. MALFATTI-S. PANIZZA-R. ROMBOLI, *Giustizia costituzionale*, Torino, 2016, p. 339, G. ZAGREBELSKY-V. MARCENÒ, *Giustizia costituzionale*, Bologna, 2012, p. 368 ff. and A. RUGGERI-A. SPADARO, *Lineamenti di giustizia costituzionale. Quinta edizione*, Torino, 2009, p. 139 ff.

⁴⁹ This has been noted by A. SPADARO, *Limiti del giudizio costituzionale in via incidentale e ruolo dei giudici*, Napoli, 1990, p. 19 ff.

lower court and declares the unconstitutionality of the provision, after interpreting it according to what the lower court has suggested (norm B).

(ii) In the light of what has been said above about precedent in the Italian legal system, it is not so easy to say when the *diritto vivente* has been established.

When no *diritto vivente* is made yet, the *Corte costituzionale* is freer.

In this case the *Corte costituzionale* might agree with the lower court, interpret the provision in the way suggested by the court (norm B) and quash it as unconstitutional (*decisione di annullamento*: a judgment of annulment).

On the contrary, the *Corte costituzionale* might interpret the provision in a way (norm A) which is in compliance with the Constitution. In such a case, the judgment would be a (*decisione*) *interpretativa di rigetto adeguatrice*. This means that the *Corte costituzionale* rejects the challenge (*rigetto*) and that the decision (*decisione*) is based on an interpretation of the provision (*interpretativa*) which has changed (*adeguatrice*) the meaning of the provision given by the lower court (norm B) in a way (norm A) that makes it compatible with the Constitution.

Obviously, as no *diritto vivente* has been established yet, in the event of new cases, the final say on the meaning of the provision will always be up to the *Corte di cassazione* itself.

At the end of the day, the *diritto vivente* is not seen as legally binding the *Corte costituzionale*. However, in the light of the techniques established by the *Corte costituzionale* (especially the *decisione interpretativa di rigetto correttiva*), the *Corte* itself has shown to be available to bow to the *diritto vivente*. Once again, as already said, controversies might arise (and arise frequently) when it is not clear what the *diritto vivente* is.

4.3. The *Corte costituzionale* and the *giurisprudenza consolidata* of the European Court of Human Rights

In his analysis of the precedent in the Italian system, Alessandro Pizzorusso noted that, according to the *Corte costituzionale*, the interpretation of EU law given by the European

Court of Justice legally binds the Italian courts⁵⁰ (and the *Corte costituzionale* itself⁵¹). This is surely an example of a precedent (of a supranational Court) which is legally binding in the Italian legal order⁵².

However, the *Corte costituzionale* carried out a more-in-depth analysis of the role of precedent (of an international Court) as such and its binding force only with regards to the precedent (better: the ‘giurisprudenza consolidata’) of the European Court of Human Rights.

The *Corte costituzionale* has taken into account in its judgments the role of the ‘giurisprudenza consolidata’ of the European Court of Human Rights since 2009.

In order to understand this, it is worth saying a few words on the mechanism which is used by the *Corte costituzionale* to scrutinise whether a statute is in compliance with the European Convention on Human Rights.

As already said, when the *Corte costituzionale* review the validity of a statute, it resorts to three main kind of standards (*parametro*). The *norma interposta* is one of these.

The method to overcome a conflict between the European Convention on Human Rights and domestic law is the following, as stated by the *Corte costituzionale* in 2007⁵³.

First of all, every court shall try to interpret domestic legislation in accordance with the Convention, as it is interpreted by the European Court of Human Rights.

However, if this is not possible, the court shall bring the case before the *Corte costituzionale*, having believed that domestic law is not in compliance with the domestic Act of Parliament which let the Convention come into force in the Italian legal system.

This Act of Parliament is considered to be a so called *norma interposta*, as it is a piece of primary legislation which is strictly grounded on a Section of the Constitution (in this case: Section 117, subsection 1, of the Constitution). Under Section 117 legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations. In fact, the Convention is an international obligation. Therefore, if an act of Parliament is not in compliance with the piece of primary legislation which let the European Convention on

⁵⁰ See Corte costituzionale, sentenza 30 ottobre 1975, n. 232, Corte costituzionale, sentenza 23 aprile 1985, n. 113 and Corte costituzionale, sentenza 11 luglio 1989, n. 389.

⁵¹ See Corte costituzionale, ordinanza 15 aprile 2008, n. 103 and Corte costituzionale, ordinanza 18 luglio 2013, n. 207.

⁵² See A. PIZZORUSSO, *Delle fonti del diritto*, cit., p. 714.

⁵³ See Corte costituzionale, sentenza 24 ottobre 2007, n. 347.

Human Rights come into force in the Italian legal system, it is to be indirectly considered not in compliance with Section 117, subsection 1, of the Constitution itself, which established that legislative powers shall be in compliance with international obligations⁵⁴.

Compared to other international law treaties, the ECHR has the particular characteristic of having provided for the jurisdiction of a court, the European Court of Human Rights, which is charged with the role of interpreting the provisions of the Convention. Therefore, the final say on the interpretation of the European Convention on Human Right is on the European Court of Human Rights. Its eminently interpretative function assures that, after completing an interpretative comparison involving the community of interpreting bodies in as broad a manner as possible, a rule may be inferred from the Convention provision which is capable of guaranteeing legal certainty and uniformity amongst the states offering a minimum level of human rights protection⁵⁵.

The arguments set out above do not imply that the ECHR, as interpreted by the European Court of Human Rights, acquires the force of constitutional law and is therefore immune to assessments by the *Corte costituzionale* of its constitutional legitimacy. This means that the constitutional judicial review on it cannot be limited to the possible violation of fundamental principles and rights. It must extend to any contrast between interposed sources and the Constitution⁵⁶.

Coming now to the issue which more matters here (the ‘giurisprudenza consolidata’ of the European Court of Human Rights as taken into account by the *Corte costituzionale*), the *Corte costituzionale* stated in 2009⁵⁷ (but pointed out in depth in 2015) that national courts are required (‘il giudice interno è tenuto’ and ‘il giudice italiano sarà vincolato’) to base their interpretation only on the ‘giurisprudenza consolidata’ resulting from the case law of the European Court. There is no obligation (‘nessun obbligo’) to do so in cases involving rulings that do not express a position that has not become final⁵⁸.

This conclusion, the Corte stated, is coherent with the organisation of the Strasbourg Court. The European Court of Human Rights is structured into sections, it allows dissenting opinions and it operates a mechanism capable of resolving contrasts within ECHR case law by referral to the Grand Chamber. The ECHR itself postulates the

⁵⁴ *Ibidem*, paragraph 3.3. and 4.5.

⁵⁵ *Ibidem*, paragraph 4.6.

⁵⁶ *Ibidem*, paragraph 4.7.

⁵⁷ See Corte costituzionale, sentenza 26 novembre 2009, n. 311, paragraph 6.

⁵⁸ See Corte costituzionale, sentenza 14 gennaio 2015, n. 49, paragraph 7.

progressive nature of the formation of case law, incentivising dialogue until the force of argument has resulted in a definitive choice in favour of one approach as opposed to another. Moreover, that perspective does not involve solely a dialectical relationship between the members of the Strasbourg Court, but by contrast – at least ideally – involves all courts required to apply the ECHR, including the Constitutional Court⁵⁹.

According to the *Corte costituzionale*, the notion of ‘giurisprudenza consolidata’ is recognised in Article 28 of the European Convention on Human Rights, under which the persuasive force of rulings is a matter of degree. This force can vary until ‘well-established case-law’ emerges⁶⁰. According to the explanatory report to Article 8 of Protocol no. 14, which amended Article 28 ECHR: (a) this ‘normally means case-law which has been consistently applied by a Chamber’; (b) exceptionally, it is conceivable that a single judgment on a question of principle may constitute ‘well-established case-law’, particularly when that judgment is issued by the Great Chamber.

Finally, the *Corte costituzionale* admitted that it is not always clear when the ‘giurisprudenza consolidata’ has been established. However, it stated that there are, without doubt, signs: the creativity of the principle asserted compared to the traditional approach of European case law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy⁶¹.

At the end of the day, according to the *Corte costituzionale*, the judgments of the European Court of Human Rights are recognised to be persuasive, until a well-established case law emerges. The *Corte costituzionale* expressly speaks of ‘persuasive force of rulings’ as a matter of degree⁶², until well-established case-law emerges. When a

⁵⁹ *Ibidem*.

⁶⁰ *Ibidem*.

⁶¹ *Ibidem*.

⁶² ‘Si ammette che lo spessore di persuasività delle pronunce sia soggetto a sfumature di grado’.

‘giurisprudenza consolidata’ of the ECHR emerges, domestic courts are obliged⁶³ to follow the interpretation of the Convention given by the European Court of Human Rights.

In the light of the analysis carried out here, this statement of the *Corte costituzionale* can be considered as a relevant express recognition of the binding force of the ‘giurisprudenza consolidata’ of the European Court of Human Rights in the Italian legal system. Moreover, the *Corte costituzionale* pointed out some signs in light of which the force of the rulings of the European Court of Human Rights can be considered legally binding in the Italian system.

5. Conclusions

One of the aims of this article was describing the express recognitions of the role of precedent in the Italian legal system by examining whether it is effective in the light of the dimensions of the precedent set by Michele Taruffo. In other words, one of the purposes of this article was to analyse, in the light of these dimensions, how effective precedent is in the Italian legal system, under the pieces of legislation and case-law which expressly recognise the role of precedent.

As far as the precedent of the *Corte di cassazione*, the legislature has tried to expressly recognise the role of precedents with regards to some specific circumstances. However, as precedent in the Italian legal system is so difficult to identify, due to the dimensions analysed by Taruffo, its role is weak, also with regards to those circumstances set out in these provisions.

As the use of precedent by the *Corte di cassazione* has been already studied in depth by Michele Taruffo, the main scope of the article was analysing the use of precedent by the Italian Constitutional Court.

On the one hand, the *Corte costituzionale*’s approach to its own decisions has been examined, so as to test its effectiveness in the Italian legal order in the light of the dimensions set by Taruffo. As Alessandro Pizzorusso has already written, in the light of some features of the *Corte costituzionale*, the effectiveness of its precedent in the horizontal dimension is quite high.

⁶³ ‘Il giudice interno è tenuto’ and ‘il giudice italiano sarà vincolato’.

On the other hand, the role of precedent of two other courts (the *Corte di cassazione* and the European Court of Human Rights), as used by the *Corte costituzionale* itself in its judgments, has been examined, so as to see whether and to what extent the *Corte costituzionale* considers the precedent of these two courts.

As far as the precedent of the *Corte di cassazione* and the *diritto vivente* are concerned, this is not seen as legally binding upon the *Corte costituzionale*. However, in the light of the techniques established by the *Corte costituzionale* (especially the *decisione interpretativa di rigetto correttiva*), the *Corte* itself has shown to be available to bow *de facto* to the *diritto vivente* and the precedent of the *Corte di cassazione*. Controversies might arise (and arise frequently) when it is not clear what the *diritto vivente* is.

As far as the precedent of the European Court of Human Rights, the *Corte costituzionale* has recognised since 2009 the role of the ‘*giurisprudenza consolidata*’ of the European Court of Human Rights in the Italian legal order. The *Corte costituzionale* has stated that when a ‘*giurisprudenza consolidata*’ emerges, domestic courts are obliged to follow the interpretation of the Convention given by the European Court of Human Rights. This seems to be an express recognition of the binding force of the ‘*giurisprudenza consolidata*’ (of the European Court of Human Rights) in the Italian legal order. Moreover, in 2015 the *Corte costituzionale* pointed out some signs in light of which the force of the rulings of the European Court of Human Rights can be considered legally binding in the Italian system.

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