PROBLEMA

NÚMEROS DE PROBLEMA

LEGAL ARGUMENTS AND CASE LAW PRECEDENTS: AN EXPERIMENT IN JUDICIAL SOCIOLOGY BETWEEN PRACTICE AND THEORY*

ARGUMENTOS JURÍDICOS Y PRECEDENTES JURISPRUDENCIALES: UN EXPERIMENTO DE SOCIOLOGÍA JUDICIAL ENTRE LA PRÁCTICA Y LA TEORÍA

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Abstract:

The object of this paper is to analyze some main types of judicial arguments based on precedents to grasp their relevance and range in practice. The analysis is drawn from the case law of the Italian Court of Cassation Civil United Sections, to elicit a comparison between the uses of precedents in different legal systems. However, the analysis is of an explanatory or critical-reconstructive nature and illustrates a series of uses and problems linked to judicial reasoning, the scope of which is general and therefore goes beyond the specific juridical context at hand. The analysis is conducted from an internal point of view and, particularly from the standpoint of the decision-maker (i.e., the judge) and addresses some vexatae quaestiones surrounding the idea that case law is the source of law in practice. This study the opinion that the argument surrounding precedent is, in fact, a very heterogeneous and much more extensive family of arguments than what is usually assumed from traditional taxonomies of judicial arguments. Moreover, the study defends the opinion that case law is inevitably a 'source of law' for pragmatic reasons inherent to judicial reasoning.

Keywords:

Case Law Precedent, Judicial Arguments, Judicial Reasoning, Sources of Law, Stare Decisis Doctrine.

Resumen:

El objetivo de esta contribución es analizar algunas de las principales variantes de argumentos jurídicos que usan los precedentes judiciales, con el fin de captar su relevancia y variedad en la práctica. El análisis está inspirado en la jurisprudencia de Secciones Unidas Civiles de la Corte de Casación italiana, también para estimular una comparación entre los usos de los precedentes judiciales en los diferentes sistemas jurídicos existentes. Sin embargo, el análisis es de carácter explicativo o crítico-reconstructivo, e ilustra una serie de usos y

problemas vinculados con el razonamiento jurídico, que tienen un alcance general y, por tanto, van más allá del contexto jurídico concreto considerado. El análisis se realiza desde el punto de vista interno y, en particular, del decisor (es decir, el juez) y aborda algunas vexatae quaestiones en torno a la idea de que la jurisprudencia es una fuente del derecho en la práctica. El estudio defiende la tesis de que el argumento del precedente es, de hecho, una familia de argumentos muy heterogénea y mucho más extendida de lo que suele desprenderse de las taxonomías clásicas de los argumentos jurídicos. Además, el estudio defiende la tesis de que la jurisprudencia es inevitablemente una "fuente del derecho" por razones pragmáticas inherentes al razonamiento jurídico.

Palabras clave:

Precedentes judiciales, argumentos jurídicos, razonamiento jurídico, fuentes del derecho, doctrina del stare decisis.

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I. Introduction: the Context of the Analysis

Are case law precedents legitimate or not? In what sense are they judicial rules and what is their scope? These are just a few of the questions addressed on the controversial issue of the significance of case law precedents in legal systems.[1]

The theories and doctrine devised by scholars (including legal theorists, comparativists and proceduralists) to explain and/or justify the phenomenon of precedent are, as is well known, plentiful,[2] each of them the product of a variety of theoretical-philosophical premises and various conceptualizations of the law and its sources (although more often than not these premises and concepts seem to appear only implicitly).

This paper explores the issue according to its actual use, as seen in judges' use of legal argumentation putting legal argumentation into use.[3] Therefore, neither an ideal model of precedent and its application nor a general theory or jurisprudence on how it should be conceived and used will be put forth. The scope of this paper is more modest, namely an experiment in legal sociology: to provide an explanatory overview of it's usage. This analysis, on the other hand, is also the result of a certain methodological persuasion that is by no means neutral: the belief that observing actions in practice is essential if one wants to understand, beyond theories and ideal models, the true role case law precedents play in legal systems.

This practical side is only marginally examined in "*La construcción del precedente en el Civil Law: debates, conceptos y desafíos* [The construction of precedent in civil law systems: Debates,

concepts and challenges].”[4] Consequently, I have chosen to delve deeper into it to contribute to the debate sparked by this work.

This paper is necessarily selective and targeted, given the sheer breadth of the problems raised by the issue of precedent and the numerous contexts in which they can be examined. I will start from a specific judicial experience -contemporary Italian law- and a specific context -practical experience at the Italian Court of Cassation Civil United Sections (hereinafter, "SUTC"). I will focus on the most representative rulings from the standpoint of the SUTCs over the last decade, comparing them with the opinions expressed in the same time frame by simple sections of the Court of Cassation and the Constitutional Court.

Despite the “local” nature of the analysis, I believe there are useful lessons and general insights to be drawn, at least for the existing continental legal systems; i.e., those in the same legal tradition as the Italian one.

A close examination will show that case law precedents can be used in several ways and to serve diverse functions in the chain of justification. Judicial arguments referring to case law precedents cannot easily be reduced to a single argument. Rather than case law precedent argumentation in singular, it would be more appropriate to speak of them in the plural as arguments based on case law precedents. In fact, practice shows a complex and diverse family of arguments with numerous variants, some of which are even incompatible and substitutes for each other. As with many other legal arguments, those involving precedents can be arranged in different ways and placed on different levels of the argumentative-justifying chain, taking on a variety of functions. There are primary, secondary, auxiliary, concurrent, arguments to name just a few. As for judicial arguments referring to precedents, their place at the level of judicial argumentation, as well as their conflation with other arguments, is completely contingent as are their argumentative-justifying force.

This and what follows is already influenced by fundamental premises as to what is construed as “(existing) law”, “judge”, “grounds” (i.e., the justification of a practical case), and so on. However, I trust that the descriptive and explanatory intention of this paper will shed light on the most controversial or debatable premises, thereby proving useful to the discussion, even with those who do not share the same assumptions.

II. Some Preliminary Explanations on the Method Of Analysis And Terminology

Bearing in mind that the topic at hand is extremely controversial, the underlying premises and choices of methodology and terminology I propose are controversial, too, but they serve to explain the context of discovery and the context of the justification. The terminological clarifications below are not intended to provide general definitions of the concepts discussed, but should be considered useful for the analysis and, therefore, “operational” tools for conducting the research.

In the analysis, the term "judicial precedent", "case law precedent" or simply "precedent" refers to any judicial decision in the strict sense of the word, which was made at an earlier date and whose text is accessible (e.g., in databases or case law collections) and is referred to in a decision.

I would like to point out that the definition is stipulative and functional for the meta-legal analysis carried out based on a predominantly syntactic-semantic search, i.e., a search through databases of the texts of court-issued regulatory measures.

From a conceptual point of view, there may well be precedents that are not public or published, even though a precedent must at least be known by someone other than its issuer. The sole exception is self-precedent in the strict sense, i.e., concerning the same regulatory authority that decides over time based on what it has decided in the past.[5] I focus on "public" precedents because they are most relevant to the case law practices regarding existing laws.

Admittedly, this is not the only possible approach to study case law precedents. A conceptual analysis can be made without using textual data. On such a complex and controversial issue as this one, often considered a veritable jungle of things that have been said both for and against it, I believe it is nonetheless useful —for a comparison with a minimum of intersubjective, if not objective, grounds)— to examine what is explicitly expressed in the texts of regulatory measures issued by the courts.

Thus, I will examine case law precedents from the point of view of their express use, looking for explicit references both in the legislative context and in the rationales underlying judicial decisions.

Before analyzing judicial practice, I will briefly mention some main references to case law precedents found in official canonical sources (i.e., laws and equivalent acts in Italian law), so as to show the regulatory context in which judges use precedents. The regulatory context influences how judges view case law precedents, so it would be methodologically unsound to extrapolate the analysis of case law precedents without considering the regulatory context of reference. In other words, to understand how judges use precedents, it is necessary to look at the corresponding uses as well as in the context in which they are framed because regulatory context influences use, just as use contributes to the creation of regulatory context.

Needless to say, all of the above, and especially the decision to conduct text-based research, does not mean that case law precedents are not used tacitly.

In fact, the opposite is true assuming that case law precedents are also (legal) rules whose scope of applicability is disputed (whether and to what extent they can be considered abstract and general or generalizable beyond the case concerning the individual decision). So, with respect to case law precedents, all the issues on the nature of rules and their regulatory statements, as well as the statements of these statements in judicial discourse, which appear in the general theory of judicial rules re-emerge. This analysis will not explore the merits of these

issues, but only note that it is conceptually possible (and actually happens) for case law precedents to be used in a way that is not expressed.

In other words, —and this will become clearer in the analysis— it is possible to refer to a case law precedent or use it for a certain reason in a decision (even when sharing or accepting it, i.e., making it a guide for decision-making processes or rejecting it), without mentioning it.[6]

On the other hand, the uses of precedent to be examined are not limited to a situation in which the *ratio decidendi* of a given case is consideredbinding in deciding a subsequent case. Thus, the precedent to be discussed does not necessarily refer to a specific case similar to another specific case, but that is simply the decision issued at t0, whose *ratio decidendi* of which is reflected in a decision at t1.[7] Precedents are also used when the similarity between cases is dubious or even non-existent. It also so happens that the similarity between specific cases is not relevant or cannot be justified because it uses a general-abstract principle contained in the precedent, which is unconnected to the circumstances of the case and/or is not the *ratio decidendi* of that case.

Somewhat proactively, one might say that this analysis aims to shed light, though not chiefly, on the "spurious"[8] uses or, at least, the broad range of uses reaching beyond the "pure" (according to traditional thought) case of binding precedent in which the decision at t1 is justified on the grounds of a decision to because the latter one stands as a binding rule for subsequent case at t1.

The objective is rather to show how judicial practice reveals that the uses of precedent are more heterogenous. This is not the place to discuss which definition of precedent is the most suitable, whether it is more appropriate to adopt a narrow or a looser[9] concept at the theoretical level. However questionable it may seem, the purpose of this analysis goes against the grain and consists in probing precisely those situations in which judges refer to precedents unorthodoxly according to the classical theory of precedent.

In other words, from the strictest point of view, only "true" or "pure" uses of judicial precedent reflect the rule of binding precedent.[10] Hence, it follows that the only judicial argument making use of precedent in its own sense is precisely the one justifying the subsequent decision on the basis of the precedent, assuming the "identity" of *ratio decidendi* in both cases. I do not dispute that this may be the "truest" or "purest" use of precedent, but it is a fact that practice goes far beyond this ideal. However, regardless of what is said about precedents in other cases or whether they are considered spurious or otherwise, judges do speak of precedents in many other cases even though the traditional perspective would not recognize them as precedents. On the other hand, even the most traditional and classical positions on precedent eventually diverge and, in fact, force practice to be based on a preconceived, so to say, laboratory definition of precedent.

In a deflated view of judicial practice, my analysis aims to fill a gap between theory and practice. The express uses of precedents show the possibility (as it happens in practice) that

precedents are only mentioned or cited, but not used in themselves as (let alone guiding or decisive) rules for the decision.

In all cases in which the use of precedent does not reflect the "pure" ideal type (according to a certain prevalent theory), the reference to precedent could seem, at least *prima facie*, spurious, declaratory, symbolic or fictitious in resolving a specific case. However, it would be rash to dismiss it as mere *flautus vocis* or emptiness from a semantic-pragmatic point of view. References that may seem "outlandish" can often fulfill their own oblique, indirect or expressive function in a variety of ways. As these functions will be analyzed later, I will simply point out that the influence and relevance depend, among other factors, on the informative purpose intended by both the sender and the receiver of the message, which are usually unrelated to the trial and pursue judicial and legal policies that go beyond the specific case. Furthermore, the target audience is often unrelated to the process and may also be unconnected to the judicial system (judges "talk" to politicians, public opinion, etc.).

In general, case law does contain relevant precedents (in the sense of relevant and effectively applied to resolve the case), but precedents that are only hypothetically relevant to deciding a specific case are also considered important. This is especially noticeable in the reasons given for a decision (i.e., their public and/or published texts), which should consider the parties' arguments in the proceedings, among other things.

Precedents adopted by judges guide the conduct of both the judge and the subjects of the decision. However, when each decision is made, no one can know whether the rulings will be shared by the other courts. Thus, the issuer may have, at most, a *de facto* hope or desire that their decision will become a precedent for others. It is also true that some decisions are made with a view, if not predominantly, to guide future decisions of other courts. The more or less pronounced tendency of some judges to address other judges, citizens or other regulatory or legal authorities —in the field of judicial sociology— accounts for (but does not necessarily justify) the extraordinarily widespread use of precedents in contemporary practice.

III. The "Internal" Point of View: the Regulatory Framework

To analyze the uses of SUTC case law, it is helpful to recall some legal provisions that expressly refer to them or are generally considered indicators of the relevance of precedents in law.[11]

The relevant parts of the regulatory texts are presented below and linked to other closely related provisions.[12]

Art. 65(1) "Powers of the Court of Cassation", Law on the Codification of the Legal Order enacted by Royal Decree No. 12 of January 30, 1941:[13]

> The Supreme Court of Cassation, as the supreme court of justice, shall ensure the correct application of the law and its uniform interpretation, the unity of the national objective law, and the respect for limits between the different jurisdictions. It shall resolve conflicts of jurisdiction and authority, and perform the other tasks conferred on it by law.

Article 360-bis “Inadmissibility of Appeal” of the Italian Code of Civil Procedure(M. Fornaciari, 2013, pp. 645 ss.):

> An appeal (before the Court of Cassation) is inadmissible: 1) when the disputed decision has resolved the legal issues pursuant to Court case law and the review of the grounds does not provide elements to confirm or modify its direction; 2) when the complaint concerning the violation of the principles regulating due process is clearly unfounded.

Art. 363 “Principle of Law in the Interest of the Law” of the Italian Code of Civil Procedure:[14]

> When the parties have not lodged an appeal within the term established by law or have waived their right to do so, or when the decision is not open to cassation appeal and cannot otherwise be contested, the Public Prosecutor of the Court of Cassation may request the Court to declare, in the interest of the law, the principle of law to which the trial judge should have deferred. The Court shall rule as a single chamber if it considers the matter to be of particular importance. In the event that the appeal of the parties is declared inadmissible, if the Court of Cassation considers the issue brought before it is of particular importance, the Court of Cassation may also rule ex officio on the principle of law in the interest of the law. The Court judgment does not affect the decision of the trial court.[15]

Art. 118 “Grounds of a Judgment”, provisions for the application of the Italian Civil Procedural Law (in conjunction with Art. 132 (2) No. 4 of the Italian Civil Procedural Law):[16]

> The grounds of the judgment, which must contain a succinct recital of the factual and legal reasons for the decision, consist of a concise statement of the relevant facts of the case and the legal reasons for the decision, as well as the references to the relevant precedents.[17]

Art. 348-ter “Ruling on the Inadmissibility on the Appeal” of the Italian Code of Civil Procedure (in conjunction with Art. 348-bis, paragraph 1 of the Italian Code of Civil Procedure):

> The judge, before proceeding to the review of the appeal, after hearing the parties, can declare the appeal inadmissible when it has no reasonable possibility of being upheld, by means of a concise and reasoned order, even referring to the facts contained in one or various documents and to relevant precedents.[18]

Lastly, the introduction of a “preliminary ruling” from the lower courts to the Court of Cassation is being discussed within the framework of the proposed reform to civil procedure,[19] according to which “*the lower court may order a preliminary ruling to the Court to decide a question of law when the following conditions are met: 1) the issue is exclusively a point of law yet to be addressed by the Court and of particular importance; 2) it poses serious difficulties as to its interpretation; 3) it is bound to appear in numerous lawsuits.”* The request for a preliminary ruling should be addressed to a simple section or, for issues of particular importance, to the SUTC, to establish the principle of law. The Court of Cassation’s decision defining the point of law shall be binding on the court where the question was raised in the proceedings. The decision shall also be binding in the proceedings resulting from a resubmission of the same application.[20]

Around the above provisions, which are the result of successive reforms over the years, a discussion which will probably never die out has burgeoned as to whether and in what say case law precedents are important to Italian law; whether case law precedents are binding or merely authoritative points of reference for the interpretation and application of the rules in subsequent cases; whether judges are creators of law and to what extent of case law itself is a source of law,

among other issues. Needless to say, there are arguments for and against each of the positions in this debate, as well as those that are still controversial and contentious.

To put it simply, on a theoretical level, there are skeptical or hyper-skeptical theories on the impossibility of arriving at organized and binding[21] system of precedents. In practice, there is a realistic perception -in no way compatible with the hyper-skeptical "theoretical" theories- that every case law decision is, at the very least, conditioned by the context in which case law is made. Actually, in practice there is rarely just one single guideline on a given matter, so that, when faced with case law that is usually fleeting or in any case split in several directions, there is always the possibility for each judge to decide their case by following or not following one precedent or another.

In other words, regardless of that fact that the ideal scenario would be to have a (well) ordered system of binding precedents (and to have it evolve in that direction), the practice of current legal systems seems to be quite far from this ideal.

It is clear, however, that to speak of a system of judicial precedents and, in particular, of a well-ordered system, is not something to be taken for granted. It means assuming that precedents are not simply a chaotic fact, that it is not simply a collection of de facto decisions. To speak of a system actually implies the existence of sorting criteria and connections. This is especially true if we consider the idea of a "well-ordered" system a value-laden one.

However, to speak of a badly ordered or chaotic system seems almost a contradiction in terms and, in any case, something that should not be pursued but in fact, should be curbed. On the other hand, it is equally clear that the criteria for a (good) organization in the field of precedents are far from being shared either in practice or in theory.

Considering the ideal of a well-ordered system of precedents as utopian and impossible, or on the contrary, assuming that existing rights can approximate it, is irrelevant in terms of legal and judicial policy.

If it is assumed that it is impossible to regulate precedents, the very reforms and provisions that seek to do so become meaningless. Meta-legislation on case law precedents would either be meaningless and doomed to its inevitable failure or would only have a detrimental symbolic effect: fictitiously cultivating the illusion of an impossible task. Reaching these hyper-skeptical conclusions seems a case of logical fallacy.[22]

On the other hand, if we assume that case law precedents are a phenomenon that can be governed from within, by the law itself (through meta-rules), then the key is to assess the merits, benefits and/or pitfalls of each attempt at regulation.

As will be seen, case law shows its conviction in the possibility of self-governance of case law precedents and plays a key role in this regard. Hence, the number of judicial principles issued in the interest of the law in rulings is significant.

IV. The "Internal" Point of View: on the Contribution of Case Law Precedents to Shaping Existing Law and Other Related Issues

Below I will go over some prominent cases with paradigmatic value for understanding how judges —and not only SUTC judges— see their activity. There are many reasons why the following analysis is paradigmatic. In short, in Italian law the activity of the SUTC has exemplary *iure condito* value (recalling the regulatory context referred to above). Moreover, judicial practice takes notice of SUTC activity and draws examples from it. If we examine the activity of lower courts, we find uses similar to those of the SUTC. From these decisions, in fact, latent ideas and ideologies typical of the function of *ius dicere* emerge and, therefore, potentially determine case law in other contexts and experiences. The principles set by the SUTC can be summarized as follows:

> (i) The constitutional precept that judges are subject only to the law (Art. 101 of the Constitution) precludes attributing the value of a source law to the interpretation of case law.[23]
>
> (ii) Case law precedent, however authoritative and even if it comes from the Court of Cassation and even from the United Sections, is not one of the sources of law and, therefore, is not directly binding on judges.[24]
>
> (iii) Interpretation is not a "mere declaration", according to the enlightened utopia of the "*bouche de la loi*" judge. Hence, the role of updating, adopting and adapting the rules is legitimate and constitutionally compliant, and can have innovative profiles, "creative" to a certain extent without being subversive with regard to the law.[25]
>
> (iv) The intrinsic "creativity" of case law interpretation must have a sense of proportion and, above all, of the interpreter's responsibility because, over and above the subjective technical-legal convictions of individual judges, the parameters of the "justice" part of the process, understood as a tendentially shared value, must always be considered.[26]
>
> (v) There are no objectively "correct" interpretations, save with regard to the method used to arrive at them, regardless of the interpreter's axiological references.[27]
>
> (vi) The nomophylactic aspect responds to the structural need to establish fixed points or "hierarchies" among the possible hermeneutical options.[28]
>
> (vii) Art. 65 of the legal statutes provide the only merely formal and extrinsic criterion for assessing the "correction" of an interpretation: the interpretation provided by the body in charge of reviewing the legitimacy of other judges' judgments (i.e., the Court of Cassation) should conventionally be considered -if not the "correct" one, at least- the most "accurate" one (possible) or, as the case may be, the most "correct" and/or the most "accurate/sound" one. Therefore, this interpretation cannot be disregarded.[29]
>
> (viii) The interpretation made by the Court of Cassation (and mainly by the Sections United) tends to be understood as a "conventional objectification of the meaning".[30]
>
> (ix) The problem of nomophilia lies precisely in guaranteeing the legal system the possibility to evolve, adapt and correct themselves and, at the same time, retain, within reasonable limits, the uniformity and predictability of interpretation, especially as regards "procedural rules".[31]
>
> (x) Safeguarding the unity and "stability" of the judicial interpretation (especially that of the Court of Cassation and, within it, that of Sections United) is a judicial criterion of absolute importance for interpreting judicial rules. [32]
>
> (xi) There must be good reasons to stray from a previous interpretation (especially if it is from the Court of Cassation and Sections United), and very good reasons if it is an interpretation of "procedural rules".[33]

(xii) Especially when it concerns the interpretation of procedural rules, (prior) "knowledge" of the rules and thereby, upwards, to be able to count on the reliability, predictability and uniformity of the interpretation is an essential prerequisite for equality among citizens and for "justice".[34]

(xiii) Overruling in procedural matters may not always be avoidable or *pro futuro*, but it is necessary to carefully assess whether there are good reasons to change the course of case law and, first of all, to identify the legitimizing conditions for the interpretation to evolve. There are no mathematical formulas for this; it is a matter of balance and measure: of responsibility.[35]

(xiv) An SUTC overruling of a procedural matter can only be justified when the interpretation provided by corresponding precedent is manifestly arbitrary and pretextual and/or, in any event, leads (possibly as a result of changes in law or society as well) to dysfunctional, irrational or "unfair" results.[36]

(xv) The judge is responsible for an inexcusable violation of the law when their decision is outside the scope of a conscious choice of interpretation, giving rise to a clear, gross and macroscopic violation of the applied rule, to an interpretation that departs from any logical criterion, to the adoption of aberrant options in reconstructing the will of the lawmaker, to the absolutely arbitrary manipulation of the regulatory text or lastly, to the encroachment of interpretation on invention or free law. This situation arises when clear, certain and indisputable legal solutions are ignored, or basic principles of law which a judge cannot justifiably disregard are violated.[37]

(xvi) The criterion of serious infringement of the law due to inexcusable negligence is the error consisting of attributing an impossible meaning, which goes against the semantic expression itself, meaninglessness, i.e., a meaning that goes beyond any possible meaning that can be extracted from the textual signifier of the provision, a meaning that the provision can neither linguistically nor legally have or that is not inherent to it because it belongs to another rule, to another institution.[38]

(xvii) However, adopting a solution that does not conform to precedent cannot be without justifications or reflection: it must be the result of a conscious and recognizable (interpretative) choice, i.e., one made explicit to the outside world by means of justification.[39]

(xviii) It is necessary to justify a different interpretative choice -making it explicit in its decision-making rationale- regarding the so-called law doctrine (i.e., departure from a precedent or of a case law guideline so consolidated that the given precept "lives" in its applied reality with a meaning that includes, beyond its strict literal content, the one constantly attributed to it in case law).[40]

Each of the above statements merits a detailed analysis. I do not know whether the concept described represents a noble dream or a nightmare. In any case, whether we agree or not, it is a real fact. And, that which follows from the meta-case law analysis is not only at the level of discourse. It reflects not only what judges say they do, but also what they actually do.

In summary, the following points stand out:

a) As far as the sources of law are concerned, case law is anchored in the formal (or if you will, traditional or "legal positivist") view for axiological reasons, i.e., in deference to the ideal of the rule of law and, therefore, to the ideal model of the separation of powers.
b) In the gamut of theories of interpretation advanced by legal theorists (from extreme formalism towards extreme skepticism, passing through all the different combinations built over the decades), judges seem to be on a moderate side of conventionalist skepticism. It is a dual type of conventionalism in which the relevant conventions are both linguistic, linked to the so-called "literal meaning" and those linked to the meanings authoritatively attributed by the upper echelons of the judicial system.
c) What happens in practice seems to find a coherent theoretical explanation in Luka Burazin and Giovanni Battista Ratti's[41] proposal to separate the concept of rule of recognition into two more specific concepts: one has to do with identifying the standard

sources of law (the rule of recognition of standard sources), which does not entail the use of any interpretative canons, and the other which has to do with identifying the rules (the rule of recognition of rules), which does entail the use of canons by the bodies in charge of identifying the law. This distinction makes it possible to explain the twofold fact that there is often general agreement among legal scholars on the "legitimate" sources, but at the same time there is much disagreement on their interpretation. This seems to coincide with the findings of the meta-case law analysis.

d) In the area of legal interpretation and, specifically judicial interpretation, I find the observations of Damiano Canale and Giovanni Tuzet[42] important in their clear explanation of the fact that the meanings in judicial discourse depend on the linguistic interaction undertaken by participants in practice. The very criteria of correctness in the use of language depend on the participants' pragmatic interaction. This primarily results from the highly variable contextual background of legal action and interpretation. There is no single set of conditions for a judicial ruling and, at the same time, there is no single criterion that identifies the conditions of variability of such a set. The type of contextual dependence of semantic determination depends on the context itself. Second, the participants in this discussion have different levels of mastery and propositive attitudes and their use of language depends precisely on that. I somewhat disagree with Tuzet and Canale when they claim that what we call the "correct" use of a concept is neither a presumption of legal practice shared by participants, nor the simple result of the practice itself. It follows from practice and the meta-case law analysis that there is a shared assumption of "correctness" as an ideal to be pursued, and it is entirely contingent and local for there to be shared "correctness" in the results. Admittedly, this is always an inevitably precarious and unstable outcome since judicial interpretation is ongoing. Thus, judicial interpretation hinges on an ideal of correctness, but there is no consensus on its content nor on the rules and criteria for achieving it in such a way that a judicial agreement is reached in every case.

e) From a judge's internal viewpoint, interpretive discretion is considered inherent to the task of interpretation, i.e., inalienable, and a fairly high degree of discretion is permitted, where the boundaries of "creativity" are left undetermined.

f) An ideal limit of discretion/creativity should be the signifier understood as the literal sense of the words used in legal texts, whose multiple signifieds, however, are unanimously recognized.[43]

g) There are only general and axiologically denoted formulas to discriminate between signifieds that are possible/impossible to trace to the signifier and thus draw the line between what (discretionary, and creative if needed, but in any case permitted) interpretation is and what is not.

h) Theories, conceptual tools, etc. developed by general semiotics to better understand the relationship between signifier/signified and the connections between syntax and semantics/pragmatics, as well as, for instance, the linguistic vagueness and other properties of ordinary and legal language, do not seem to be part of judges' training or knowledge.

i) In the absence of guidelines on the workings of ordinary and legal language, the express justification of interpretive choices is the "residual" bastion to unravel what is permitted and what is not.

j) In this context, the human factor has the last word: the last real bulwark against arbitrariness is the interpreter's sense of proportion and of responsibility.

V. Case Law Precedents: a Review of Some Emblematic Uses

In the framework of such a concept and ideology, in practice, judges make constant and extensive use of case law precedents. The following is simply an illustrative review of the

arguments they use. The analysis is based on the texts of the decisions in their entirety, without referring to any "*massima*" because of the known problems afflicting the "*massimazione*". Given that the references are extraordinarily varied, it seems fitting to speak of a family of interpretive arguments, rather than an argument or argumentative canon. The review is by no means exhaustive[44] and the list is not arranged by importance or frequency of use. A name was invented for each argument solely for the sake of clarity. In fact, judges use and/or mention precedents in various ways in their reasoning, without being explicit or naming their legal arguments. There are only two exceptions in this regard: (i) the so-called adaptive interpretation, also known as interpretation according to the Constitution, *secundum Constitutionem*, constitutionally oriented and the like (the terminology greatly varies);[45] and (ii) the so-called living law doctrine (sometimes known by other names).[46] However, each of these interpretive-argumentative canons has far too many variants to be discussed herein.

Lastly, I stress that in reviewing these arguments, I do not intend in any way to legitimize their use. My analysis in no way predetermines the matter of their legitimacy (for each law in force) and under what conditions, if any. However, a general maxim applies to each of these arguments and can be applied to any other legal argument, i.e., every legal argument can be used well or badly (misused) depending on who uses it.

(i) *Ratio decidendi precedent argument:* Express reference is made to a given *ratio decidendi* so as to use it as a decisive binding argument in deciding a subsequent case. This would be the "true" precedent, in which the same *ratio decidendi* is applied in a subsequent case, presumably identical or, better said, similar in relevant aspects (and dissimilar in irrelevant aspects) to the one already resolved. Both the existence of a relevant similarity and the irrelevance of the differences are not always explicitly argued. A weak variant of this argument is one whereby the reference to the *ratio decidendi* precedent is not decisive, but only a supporting or concurrent argument reinforcing the decision on the basis of that *ratio decidendi*, but also based on other arguments.[47]

(ii) *Precedent as a point of law argument:* an interpretive solution can be justified by referring to a precedent as a general and abstract point of law without needing to develop its own legal arguments.[48] Unlike the "*ratio decidendi* precedent" argument, it is of no relevance for the point of law to be the *ratio decidendi* of the previous case for a "precedent as a point of law." The point of law is invoked for the subsequent decision as a general and abstract rule that lives a life of its own, i.e., it exists independently of the case in which it was first decided or of the series of cases in which it has been repeatedly applied. It is neither automatic nor necessary, but this argument may be used especially when a certain convergence is established within case law whereby the *ratio decidendi*-precedent is detached from the circumstances of the case and is conceived as a rule of decision in itself.

(iii) *Precedent as authority argument:*[49] In this case, the reference to precedent is, so to say, more procedural than substantive: what matters is who decided it and not what was decided. This use of precedent is often criticized by those who believe that the proper outcome of cases should depend on what is ruled on and not by who rules on it. On closer examination, this argument does not seem to be particularly sound, especially in today's systems where many decision-makers and the "hierarchies" between branches, especially top-level ones, are quite obscure. In contexts where the authority of different judicial bodies is subject to conflicts of power (*de facto* or *de jure*), such an argument runs the risk of being unconvincing or even stoking disagreement. It must be remembered that, *inter alia*, justifying a subsequent decision based on an *ex acutoritate* precedent weakens the position of the subsequent decision-maker (who admits that they are subject to the authority of the previous decision-maker). Therefore, this argument gains strength and seems attractive, especially in the case of self-precedent. In this case, invoking the *ex auctoritate* precedent is also a way of asserting one's own authority. The flaw, naturally, is that one runs the risk of a vicious circle since the authority appeals to itself.

(iv) *Precedent by analogy argument:* whereby the application of a precedent is expressly based on an analogy or a similarity. It may be explicitly explained or simply invoked without explanation, simply referring to it "by analogy."[50] The mere fact of justifying a decision on a subsequent case on the basis of a precedent cited "by analogy", without specifying the nature of the alleged analogy is evidently, at least, a partial form of argument. While it is true that by comparing the allegedly "analogous" precedent and the case to be decided, it is possible to grasp the relevant similarity underlying the analogy, the selection of similarities and differences is a highly discretionary activity, which runs the risk of there being no analogy or that the analogy is poorly constructed or incomprehensible. In any case, it is necessary to make a distinction between three different situations: (a) an argument *a simili*, in which it is justified to attribute the legal consequences of a similar, already decided case (by law or case law decision) to a case yet to be decided (*de iure condito*) on the basis of relevant similarity (and the irrelevance of the differences); (b) the "precedent by analogy" argument, in which it is justified to apply the precedent applied in Case A to Case B on the basis of the analogy between cases B and A, and (c) the condition that the choice among the myriad of existing precedents for every subsequent case is also made by searching for relevant similarities.
A distinction must be made between them because precedents are not always or solely chosen or selected based on analogy. It is also untrue that an argument *a simili* and "precedent by analogy" are mutually overlapping. On the contrary, much has been discussed as to whether an argument *a simili* fits when there is an applicable precedent. According to some, the very premise of the analogy argument is missing from this premise because there is no regulatory gap to fill.

(v) *Serial precedent argument:* happens when reference is made to a series of judgments, without specifying their content and without giving details of the specific cases involved, it being a serial case.[51] This use of precedent deserves to be isolated because of its specificity. First of all, its application implies the existence of serial cases. Second, it embodies the ideal of "economy" that often justifies, even *de iure condendo*, the use of precedent. The underlying commonsense principle that makes this argument "easy" and generally less open to criticism than other precedent-related arguments is that repetition is futile and counterproductive if it can be avoided. Although each case is unique in law, in serial situations, the idiosyncrasy of each case is left unguarded due to cognitive biases that characterize our perceptions and beliefs. Hence, different participants in the judicial practice tend to recall serial situations. In short, when weighing the pros and cons in serial situations, the risk (which is considered low) of losing the specificity of individual decisions and particular cases loses out to the advantage of saving time, intellectual effort, etc.

(vi) *Inspiring precedent argument:* is found when referring to guidelines, principles that guide/inspire the overall decision-making reasoning, whereby a hermeneutical solution that has already been reached by using other reasons is presented as more in line, for instance, with the system of due process, based on the reference to the general principles that govern it.[52] This argumentative use is aligned with the argumentation of legal principles and therein lies its interest. In other words, studying this usage helps shed light on the interference between arguments that invoke precedents and those that invoke legal principles. Interference is patent in all cases in which the legal principles invoked are not expressed and originate in previously adopted case law decisions. Besides, it is necessary to factor in the interference with the interpretation in accordance with the Constitution, i.e., with case law precedents from the Constitutional Court and/or SUTC on their reading of the Constitution. This often refers to principles that are not expressed or incorporated into the system but that in a very roundabout way, end up invoking case law interpretations (mainly unwritten rules).[53] The difference between an "inspiring precedent" and a "precedent as a point of law" is that the latter is a principle-precedent inherent to the specific case (i.e., it refers to the *thema disputandum*) while the former only illustrates a background context outside the specific case at hand. From this point of view, the "inspiring precedent" argument more often refers to the frequency of rules of judgment or procedure than to the substance of the dispute.

(vii) *Established precedent argument:* by referring to a legally established tendency or approach (which may in turn be understood in different ways) a hermeneutical solution is legitimized. The issue of possible alternate or conflicting interpretations is usually not explicitly addressed and its use is very vague and ambiguous. The established case law, living law or other formulas are invoked and supplemented with a reference to particular rulings.[54] The established precedents does not necessarily become *ratio decidendi*; it can only serve to support the decision-making reasoning and, therefore, can be situated at different levels of reasoning, if only as a reinforcement of the *ratio dicidendi* precedent. Its argumentative and persuasive power is all the more

pronounced the more participants and judges adopt a compliant attitude. This argument is mostly used to strengthen, unless the intention is to break with the continuity. Then, the reference to the established precedent is made precisely to become a target of criticism so as to justify a change.

(viii) *Obscure or fictitious precedent precedent:* by which the established guidelines are broadly appealed, without reference to specific decisions.[55] It can also be seen as an ambiguous variant of the "established precedent" argument. Abstractly speaking, reference to a precedent cannot be made without giving any specific indication or introducing it as "established case law or interpretation" (or something similar). In this case, the boundary with fabrication becomes blurred, so much so that the precedent may well be the result of invention if the interpreter takes their creativity to an extreme (beyond the acceptable limit). It is clear that this is more of a hypothetical case than a real one. However, it may come to be true, for instance, through error or oversight from an interpreter motivated by certain political or ethical reasons or seeking to pursue personal interests or those of third parties.

(ix) *Conservative precedent argument:* by which, when faced with several possible interpretation, the preferred one is based on a stable practice of application over time and consistency with the economic workings of the system.[56] It can be considered a variant of the "established precedent" argument, but with a particular expressive connotation in comparison. It is transparent in its objectives in terms of not being innovative in its deciding-making. This conservative objective can be limited to individual cases or extended to the legal system in its entirety. The best example of this is the *prospective overruling* that only innovates *pro futuro* but not for concrete cases, which are decided conservatively with strict adherence to what has been decided previously.

(x) *Evolving precedent argument:* refers to a precedent not so as to apply it directly, but as an indicator of an ongoing process of evolution, thus justifying a hermeneutical variation of the case at hand.[57]

(xi) *Precedent extra vagantes argument:* when not relevant to deciding a specific case, reference is made to it for the sake of thoroughness and/or to diverge from it, thereby demonstrating knowledge of its existence.[58]

(xii) *Precedent ad pompam argument:* refers to a precedent with no bearing on deciding the case, but to show the judge's knowledge and education or "legal culture" in deciding the subsequent case. The use of this argument is especially common in certain styles of argumentation, such as the so-called "treaty rulings,"[59] i.e., rulings in which judges aim to show off their legal education in the subject matter or in general.

(xiii) *Doubt of the precedent argument:* by which the precedent is invoked only as a starting point to raise an interpretive-applicative query that gives rise to the judge's argumentative process.[60] Like the *precedent ad pompam* argument, this also arises from certain argumentative styles and serves more for rhetorical purposes than to give content to judicial reasoning.

(xiv) *Majority and/or most current precedent argument:* used as the decisive criterion in choosing an interpretive solution from among other possible ones.[61] The two factors (i.e., "majority" and "current") are, of course, different and autonomous. However, as progressive factors, the greater the majority of the precedent and the more current it is and the more these two factors are combined, the greater the argumentative-persuasive force will be.

(xv) *Minority and/or obsolete precedent argument:* is, in a way, the alter ego or shadow argument to the "*majority*" and/or "*most current*" precedent argument. It is used symmetrically as a criterion to depart from a given interpretation considered unacceptable.[62] It is not unusual to see both arguments combined, thus rendering the argumentation particularly compelling. Given their complementary nature, their combined use gives the impression of a judicial reasoning unassailable by either party.

(xvi) *Isolated precedent argument:* (with two variants): either it ends up having the same role as the *ratio decidendi* precedent or its uniqueness is a reason to diverge from it. It represents the polar extremes of the two previous arguments. A single isolated precedent is either deemed relevant/decisive or is discarded based on its uniqueness and thereby its unreliability.

(xvii) *Conflicting precedents argument:* to justify a new interpretation (and possibly a new point of law) inconsistencies and conflicts between precedents are stressed.[63]

(xviii) *Comparative precedent argument:*to justify a specific interpretative solution, reference is made to the case law of other legal systems outside the legal context of the case to be decided, but it is invoked to substantiate an internationally agreed approach based on the assumption that what has been decided elsewhere is an example to follow.[64]

VI. Conclusions

In view of the above analysis, the following critical observations can be drawn, expressed as proactive and critical reflections for further study.

(i) Case law precedents are an integral part of existing legal systems, even if case law is not recognized as a source of law.[65] Regardless of the idea of the source of law adopted, the binding nature of case law precedents is not something that can be established in the abstract or once and for all. Even if the binding nature of case law precedents were established in the abstract through a principle or meta-standard, the *sceteris paribus* shall always apply:it would be a flawed or defeasible principle or a meta-standard from which one can and should depart whenever there are better reasons to decide otherwise.[66] In other words, regardless of whether case law is formally recognized as a source of law, and whether there is an ideology or legislation that formally sanctions the binding nature of precedents, in any given legal system precedents may be binding or non-binding, authoritative or not depending on the case and on various pragmatic and value-based factors.

(ii) Since interpretative and applicative discretion is unavoidable and each life case is "unique", judicial decisions are an unavoidable part of any existing law, assuming a connection between the concept of law and justice (even without any particular "moral" connotation of justice). The justice-equality (generality) demands that similar cases be regulated similarly, and that the differences between cases and their handling be commensurable and proportionate. This implies that if it is going to be fair or right under the law, no decision can be made in a vacuum, independently of the regulation of other cases. The pragmatic context, at macro and micro levels, conditions the judges' decision-making process, as well as their argumentative styles. This may lead to arguing more from the perspective of analogy, proportion, equality, etc. (generally valuing similarities) or, on the contrary, more from a distinctive perspective (generally highlighting differences).

(iii) The difficulty of having a well-ordered system of case law precedents depends on (the so-called macro and micro) pragmatic reasons of law and its language. It is quite clear that this concept value-laden and by no means neutral. Even then, it underscores the fact that in speaking of precedents, it is not of individual precedent, but of precedent as a whole. and that while no one is satisfied with a given system of precedents, they would like it to be well-ordered. The whole problem, of course, lies in what this a good order consists of. Therefore, the discussion of whether precedents are binding or persuasive, whether they should be this way or that, does not make it sufficiently clear that this alternative, like any other issue concerning the binding or non-binding nature of precedents, is somehow wrong and fallacious.

(iv) It is not entirely possible, from a theoretical-pragmatic point of view, to have a law in force characterized by a well-ordered system of precedents, but it is extraordinarily complex to implement. This is not so much for technical, political and value reasons, but because of the inevitable "human factor" ("… if men were angels/But if men are not devils, neither are they angels," to recall Hart's famous observation) (Herbert Hart, 2012, p. 169).

(v) It is evidently not enough to proclaim very general values or principles, like equality, certainty, predictability, reasonable duration, due process, etc. Each of these values or principles is much too diffuse to give judges sufficiently specific guiding criteria to implement a kind of spontaneous self-regulating process in the application of precedents.

(vi) On the other hand, even the most refined regulatory reforms and technicalities are incomplete and have proven to be ineffective in legal practice.

(vii) Precisely because of the "human factor", a well-ordered system of precedents basically depends on practice itself. It is built "from the ground up," so to say, by creating a legal and judicial culture that is as

sensitive, sharp, far-sighted and responsible as possible.

(viii) In other words, what Bobbio wrote about the good legislator also applies to judges (Norberto Bobbio, 1982, pp. 1-12): like any legal institution, judicial precedents live or die according to the ideals of the people on whose ideas, minds and actions the judicial institution itself is based.

(ix) A well-ordered system of precedents is an ideal to be pursued to improve the quality of existing legal systems.

(x) Therefore, whenever certain basic values are shared, it makes sense to address the regulation of judicial precedents, provided that they take into account the pragmatic characteristics of legal language and law, and the inevitable human factor that conditions any judicial case and its resolution.

Based on these premises, a legal sociological approach seems crucial to understanding how precedents actually work.

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Notes

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1 For the sake of simplicity and brevity, this text will only mention precedents, in the understanding that I am only speaking of judicial precedents. It is well known that case law precedents are not the only types of precedent. For example, in many legal systems based on the principle of the rule of law, precedents set by executive bodies are also important and debate is underway as to whether these precedents are binding or self-binding on the executive itself and on citizens. This question is often raised in the debate regarding the principle of certainty and legitimate expectations. However, this analysis will not address non-judicial precedents.
2 Due to the extraordinary breadth of literature on the topic, subsequent bibliographical references are limited to only those deemed essential for the analysis.
3 In this text, judicial argumentation means, strictly speaking, a justifying process that is explicit, goes from general to abstract and serves as the bases for a given judicial conclusion. In this context, judicial arguments the reasons that are given in an argument to support a practical conclusion. More specifically, judicial arguments will be discussed as regards the reasons provided to justify a given interpretive solution "in the abstract" and/or the application of one or more legal rule to a concrete case.
4 Coordinated by M. Gascón Abellán, Á. Núñez Vaquero, Atelier, Barcelona, 2020.
5 It should be pointed out that current legal systems have the additional problem of not having a specific individual acting as the regulatory authority (neither in the case of collegiate bodies nor in the case of monocratic bodies where the important consideration is the body as an institution and not the individual who occasionally holds authority). This implies that even self-precedent could exist without public knowledge of the decisions, except for its author. This

does not apply in the residual case of self-precedent related not to the regulatory body or authority, but to the individual who authored it and who, by keeping an "individual" memory of it, can apply what has already been decided at a later date.

6 On this, see the study conducted by N. Muffato, 2009, pp. 589-623. *http://www.dirittoequestionipubbliche.org/page/2009_n9/05_studi-07_N_Muffato.pdf* .

7 This narrow idea of precedent has been adopted by M. Taruffo, Aspetto del precedente giudiziale, in Criminalia, 2014, 37-57, who rightly observes that case law is "composed of a series of decisions, which may also be many —as in the case of our Court of Cassation— and may include hudnreds or thousands of judgments on the same legal matters. It is therefore not surprising that case law can be —and often is— redundant, variable, ambiguous and contradictory, because there can be different and variable interpretive approaches on the same legal matter. It can even be said that case law like that produced by the Italian Supreme Court is like "an enormous supermarket where, with due patience, everyone can find what they want (and even the opposite)" (p. 39; n.d.r. author's translation). Continuing with the metaphor, this analysis is research on what this "supermarket" has to offer.

8 This adjective is used to imagine the point of view of traditional jurisprudence towards this research. It is not the point of view taken for this analysis, as explained in the text.

9 I would like to point out that this is in no way intended to deny the importance of studies on binding precedent and the understanding of its merits and workings in the theory of the rule. On the contrary, I believe these studies [See in particular the study by María Arriagada, 2021, pp. 365 ss.] are also essential in the perspective explored here and this analysis is meant to be more of a descriptive complement to what judges say they do and/or actually do with case law precedents.

10 That is to say that the meta-rule secondo la qual assuming the "identity" of *ratio decidendi* in both cases 0 and 1. Decision t1 is justified on the basis of decision t0 because the latter emerges as a binding rule for the subsequent case in t1.

11 Based on these provisions, judges themselves have also created protocols and guidelines to simplify the drafting of judicial acts and measures, as well as "projects" on specific topics to inform case law. Recent examples are the "Executions Project" and the "Health Project" of the 3rd Civil Section of the Court of Cassation. In this regard, see A. Spirito, Il "progetto esecuzioni" della terza sezione civile della Corte di Cassazione, en Rivista dell'esecuzione forzata n. 1/2019; L. La Battaglia (ed.), La nuova responsabilità sanitaria nella giurisprudenza di legittimità, report, November 27, 2019: *https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/REPORT_Luigi_La_Battaglia_27.11.2019_Nuova_responsabilita_sanitaria.pdf*and R. Pardolesi (ed.), Responsabilità sanitaria in Cassazione: il nuovo corso tra razionalizzazione e consolidamento, en Il Foro italiano No. 1/2020, 1-462.

12 Only provisions concerning civil proceedings will be mentioned in the text with footnote references to those relating to administrative proceedings. There are similar provisions for criminal proceedings (see Article 618, paragraph 1-bis of the Italian Code of Criminal Procedure) and the debate on criminal law and the nomophilia of the Civil United Sections of the Court of Cassation is becoming increasingly lively. To understand the common features of the problems from a general theoretical point of view, see: M. Vogliotti, Indipendenza del giudice e rispetto del precedente, in La legislazione penale, 19.10.2020, *https://www.lalegislazionepenale.eu/wp-content/uploads/2020/10/Vogliotti.REV_.pdf*; A. Caputo e G. Fidelbo, Appunti per una discussione su ruolo della Corte di Cassazione e "nuova" legalità, in Sist. pen., 3/2020, 91-112 *https://www.sistemapenale.it/pdf_contenuti/1583358421_caputofidelbo-2020a-nuova-legalita-corte-di-cassazione.pdf*.

13 For further comments, see G. Canzio, Nomofilachia, valore del precedente e struttura della motivazione, in Il Foro Italiano Vol. 135, No. 10, 2012, 305/306-311/312.

14 For a critical commentary on the application of the provision by the Court of Cassation in recent years, see B. Capponi, 2020.

15A similar provision exists in administrative procedure, in Art. 99 "Referral to the Plenary Session" (of the Council of State) of the Italian Code of Administrative Procedure: "*If the section of the Council of State to which the appeal is assigned considers the point of law submitted for its review has given or may give rise to differences in case law, it may, at the request of the parties or* ex officio*, refer the appeal to the plenary session for review. Before ruling, the President of the Council of State may, at the request of the parties or* ex officio*, refer any appeal to the plenary session to resolve issues of principle of particular importance or to settle differences of case law. If the Chamber to which the appeal was assigned deems that it does not agree with the principle of law established by the plenary, it shall remit the decision on the appeal to the plenum by means of a reasoned order. The full court shall decide the case in its entirety unless it decides to uphold the principle of law and return the remainder of the case to the chamber to which the appeal was assigned. If the matter is considered to be of particular importance, the plenary session may, however, declare the principle of the law in the interest of the law, even when the appeal is declared inadmissible, out of order or unenforceable, or when the proceedings are declared closed. In these cases, the plenary decision shall not affect the contested act".*

16 See G. Caruso, 2020.

17 A similar provision exists in administrative procedure, in Article 74 "Simplified Judgments" of the Italian Code of Administrative Procedure: *"If the court deems the appeal is manifestly well-founded or manifestly inadmissible, out of order or unfounded, it shall decide by means of a simplified judgment. The grounds of a judgement may consist of a concise reference to the point of fact or law deemed decisive or, where appropriate, to a relevant precedent."*

18 Es probable que la disposición sea modificada por la reforma del proceso civil que se está redactando actualmente: véase el art. 6-bis de la enmienda-13 al proyecto de ley AS 1662 sobre "Delegación en el Gobierno para la eficacia del proceso civil y la revisión de la disciplina de los instrumentos de resolución alternativa de conflictos", en la versión del 16 de junio de 2021.

19 La reforma prevé también una Oficina para el juicio en los tribunales y cortes de apelación, así como en el Tribunal de Casación, con la tarea de perseguir la mejora y la provisión de precedentes a nivel interno, para aumentar la capacidad productiva de la oficina; y, a nivel externo, perseguir un efecto deflactor a través de la difusión de directrices jurisdiccionales: Ministero della giustizia Ufficio Legislativo Commissione per l'elaborazione di proposte di interventi in materia di processo civile e di strumento alternativi (Pres. Prof. P.F. Luiso) Proposte normative e note illustrative 24 maggio 202,*https://www.giustizia.it/cmsresources/cms/documents/commissione_LUISO_relazione_finale_24mag21.pdf*. There is a similar provision in Bill A.C. 2435-A, which amends the system of criminal trials and penalties, approved by the Chamber of Deputies on August 3, 2021, the text of which and its constantly updated information can be accessed at: https://www.sistemapenale.it/.

20 See Art. 6 of Amendment 12 to Bill AS 1662 on "Government delegation for the effectiveness of civil proceedings and the review of alternative conflict resolution instruments" in the version of June 16, 2021.

21 See in particular L. Passanante, Il precedente impossibile. Contributo allo studio di diritto giurisprudenziale nel processo civile, Torino, Giappichelli, 2018. Despite the title of the work, it in no way defends a hyper-skeptical view; it examines with dismay the numerous problems that make it difficult to establish the adequate regulation of case law precedents in a legal system (Italian and others) and, therefore, the building of a well-ordered system of precedents.

22 From what I have learned, there is also talk of "crazy consequentialism" or "slippery slope" in the literature on argumentation fallacies.

23 *Ex plurimis*, SUTC No. 15144 from 2011.

24 Except for the court of reference since this is expressly provided for by law.

SUTC, 03-05-2019, No. 11747. The judgment in question is particularly significant as it addresses the following point of law: "In the presence of legal rules that are free of ambiguities or uncertainties, in view of the principles of law constantly reaffirmed for over 60 years by the Court of Legitimacy and the consolidated and unequivocal interpretation of the rules outlined above regarding the settlement of a compensatory debt stemming from a civil wrong, it is possible for a different approach reserved by a ruling of legitimacy to an economic compensatory debt, derived from a civil wrong (failure to deduct and apply the legal interest from the date of the request), to be considered ex se as falling within the scope of the "activity of interpreting the rules" -understood as the search for and conferral of prescriptive meaning to the wording which can be derived from the lemmas and syntagms of the provisions read individually, in relation to the logical connection within the structure of the source act and the systematic relationship with the other rules in the legal system. Therefore, to be considered "objectively speaking" as an appraisal activity which -however erroneous or implausible- falls under the scope of safeguard clause L. Nº 117 of 1988, Art. 2, paragraph 2 (regulating "Compensation for damages caused in the exercise of judicial functions and the civil liability of justices") or conversely

whether the level of consolidation of the meaning of the rules applying to the settlement of pecuniary damages arising from torts in the sphere of civil liability (regarding pecuniary damage due to expropriation): see SUTC No. 1464 of 26/02/1983; SUTC No. 12546 of 25/11/1992; id. SUTC No. 494 of 20/01/1998; id. Sec. 1, Judgment No. 4070 of 20/03/2003; id. Sec. 1, Judgment No. 19511 of 06/10/2005; id. Sec. 1, Judgment No. 22923 of 09/10/2013; id. Sec. 2, Judgment No. 11041 of 28/05/2015; id. Sec. 1, Judgment No. 18243 of 17/09/2015. As to the compensation of lost profits using the interest technique: id. Sec. 1, Judgment No. 1814 of 18/02/2000; id. Sec. 1, Judgment No. 9410 of 21/04/2006; id. Sec. 1, Judgment No. 9472 of 21/04/2006; id. Sec. 1, Judgment No. 13585 of 12/06/2006; id. Sec. 1, Judgment No. 15604 of 09/07/2014; id. Sec. 1, Judgment No. 18243 of 17/09/2015. The only exception is the solitary decision issued by the Court of Cassation, Sec. 1, Judgment No. 4766 of 03/04/2002 with a view to include compensation for expropriation and compensation for damages in the category of financial obligation according to compensation criteria as per L. 8 of August 1992, No. 359, Art. 5 bis, Section 7 bis). For this safeguard clause to apply, this implies the need to ensure, at least, the Judge's complete detachment from the interpretive options of a case law ruling that may be defined as unequivocal and "crystallized" by an apparent dubious application of the intended rule to the specific case in the sense attributed to it, or by a revised interpretive solution -whether grounded or not- in such a way that the ruling adopted is the result of an assessment activity and not of a mere "distraction" or disregard to consolidated case law principles." (n.d.r. Author's translation). Ultimately, the issue is whether and under what conditions the judge can be held liable for attributing a different meaning to established case law. In the wording applicable ratione temporis before the reform made by Law No. 18 of February 27, 2015, Article 2 of Law No. 117, of April 13, 1988, establishes that a person is entitled to compensation for loss of earnings. Law No. 18 of February 27, 2015, states that a person is entitled to compensation for damages resulting from a judicial action taken by a high court judge with malice or gross misconduct in the performance of their duties or from the denial of justice, stipulating that, on the one hand, "in the exercise of *jurisdictional duties, the activity of interpreting legal rules or assessing the facts and evidence cannot give rise to liability," and on the other hand, serious misconduct constitutes "a serious breach of the law caused by inexcusable negligence."*

25 SUTC, 06-11-2014, No. 23675. See also SUTC, 18-05-2011, No. 10864 and, as regards the so-called "living law doctrine", among others, Constitutional Court No. 350/1997 and Constitutional Court No. 122/2017.

26 SUTC, 06-11-2014, No. 23675.

27 *Idem.*

28 SUTC, 06-11-2014, No. 23675; SUTC, 03-05-2019, No. 11747.

29 *Idem.*

30 *Idem.*

31 *Idem.*

32 *Idem.*

33 *Idem.*

34 *Idem.*

35 *Idem.*

36 *Idem.*

37 See, for instance, Tribunal de Casación No. 6791 in 2016; Tribunal de Casación No. 2637 in 2013; Tribunal de Casación No. 2107 in 2012; Tribunal de Casación No. 11593 in 2011, and other references therein.

38 See SUTC, 03-05-2019, no. 11747. 39 *Idem.*

40 *Idem*.

41 Luka Burazin & Battista Ratti, 2021, p. 137.

42 Damiano Canale & Giovanni Tuzet, 2007, p. 35.

43 The concept of "literal meaning" is susceptible to a plethora of different interpretations and judges are usually well aware of this type of interpretation. On the plurality of meanings in which "literal meaning" is understood, there is the book by V. Velluzzi, 2000.

44 By way of comparison, the range of techniques used by jusdges is worth noting, as seen in J. Marshall (1996, pp. 29 ss).

45 To avoid any misunderstanding, it is worth noting noted that constitutionally oriented interpretation is not necessarily based on Constitutional Court precedents, although this is in fact the most common case. Thus, it is an interpretation that is constitutionally oriented toward and by Constitutional Court precedents. Reference to case law precedents by, but not only by, the SUTC assumes the form of interpretive and argumentative guidelines on compliance with the Constitution. Some examples are: (i) Among several possible meanings, the one conforming to the Constitution should take precedence (SUTC, 16-12-2013, No. 27986);

(ii) Of several possible meanings, precedence must be given to the interpretation most consistent with or most closely aligned with the Constitution (Tribunal de Casación, Sección V, 07/07/2021, No. 19368);

(iii) If it is not possible to interpret it according to the constitution, the rule/provision must be deemed constitutionally illegitimate and, therefore, should not be applied (and the issue of constitutionality must be raised; Tribunal Constitucional No. 356/1996 and Tribunal Constitucional No. 49/2011);

(iv) An interpretive judgment by the Constitutional Court rejecting a rule requires the non-application of the "rule" found not to conform to the constitutional parameter invoked and scrutinized by the Constitutional Court, but it does not exclude the possibility of following "third interpretations" found to be compatible with the Constitution, or of raising a new point of constitutional legitimacy with respect to a different constitutional parameter (Tribunal de Casación, Sección trabajo, No. 1581 de 2010; No. 166 de 2004; Tribunal de Casación, Sección II, 21-03-1990, No. 2326; Tribunal de Casación, Sección trabajo, 30-07-2001 No. 10379). An interpretive judgment by the Constitutional Court rejecting a rule is a judgment in which both the interpretation of the precept of ordinary law in the light of constitutional principles and the operative part thereof, which usually is indicated by *P.Q.M.* [for these reasons], are decisive.

46 If "living" law stems from judges' interpretation, living law -in the strict sense- would not be confined only to the "higher" courts. In practice, however, the idea is limited to the law that comes from the pinnacle of the judicial system. In the Italian case, this is the Constitutional Court, the Court of Cassation (and its Sections United), the Council of State and the Court of Audit, according to their respective jurisdiction. Hence, there are possible conflicts between living rights. Some specific interpretive guidelines emerge from practice: (i) The retroactive application of rules may be justified to the extent that they are rules recognizing principles that constitute a living law (see Tribunal de Casación, Sección II, 12/03/2021, No. 7051);

(ii) Living law does not necessarily conform to the Constitution, which is why the judge may depart from it, requesting a review of its compatibility with constitutional parameters (see Tribunal Constitucional, No. 180/2021; Tribunal Constitucional, 09/03/2021, No. 33);

(iii) If the action is pretextual because it contradicts living law and/or established case law, it may constitute a misuse of the procedural instrument (Tribunal Roma Sez. IV Sent., 04/01/2021).

47 Tribunal de Casación, Sección II, 18-08-2021, No. 23108.

48 See, for example, Tribunal de Casación, Sección VI - 5, 03-07-2018, No. 17403.

49 According to some authors, the principle of authority justifies the reference to precedent. It is not the object of this analysis to investigate the possible theoretical foundations or the ethical-political justifications for the use of precedent, so I will limit myself to observing that there is no agreement on the fact that the reasoning based on the precedent can be traced back to the reasoning former authoritative It is clear that judges are endowed with normative authority, but this is not enough to conclude that the argument based on precedent is nothing more than an ex auctoritate argument. For more details, see for example S. Gómora Juárez (2018, pp. 110 ss).

50 See, for instance, Tribunal de Casación. Sección V, 22-07-2021, No. 21013. I share the views presented in the contribution of Á. Núñez Vaquero (2020, pp. 81-105): "precedents as jurisdictional decisions expressing rules relevant to the decision and analogy as a form of interpretation or reasoning […] can be contextually combined (or not)". On the one hand, practice shows that precedents are not always or necessarily applied analogically. On the other hand, there is no ontological incompatibility between precedent and analogy; there is no empirical, logical or other type of obstacle to applying precedent analogically. In

other words, under certain circumstances it is true that there is a rule of precedent that consists of extending —by analogy— the application of a given rule to similar cases. I believe can only be claimed incidentally and not in principle or in general terms that "the traditional understanding of the rule of precedent would be the extension —by analogy of the application of a given rule (which embodies a general rule) to similar cases". (D. Sierra Sorockinas, 2020, p. 77).

51 For example, Tribunal de Casación, Sección V, 29-07-2021, No. 21712: "With a view to define the grounds of appeal described above, it is necessary to examine the regulatory framework of reference already set out by this court in dozens of judgments, as well as handed down in proceedings in which some of the current plaintiffs were also parties, which have substantially resolved the stated issues in the light of supranational law and constitutional principles and whose reasons are expressly endorsed herein and refer to the provisions of Article 118 of the Civil Procedure Law (in particular, invoking Section 5 of the Court of Cassation, 30/03/2021, No. 8757, as well as to the ex. The reasons for which they are included and expressly referred to in this document, in accordance with Art. 1118 Of the Civil Procedure Code (refers particularly to Court of Cassation, Section 5, 30/03/2021, No. 8757, as well as, *ex plurimis,* to subsequent ordinances Nos. 8907, 8908, 8909, 8910, 8911, 9079, 9080, 9081, 9144, 9145, 9146, 9147, 9148, 9149, 9151, 9152, 9153, 9160, 9162, 9168, 9176, 9178, 9182, 9516, 9528, 9529, 9530, 9531, 9532, 9533, 9534, 9729, 9730, 9733 and 9735 of 2021)" (n.d.r. Author's translation).

52 SUTC, 19-02-2020, No. 4247.

53 Tribunal de Casación, Sección V, 04/05/2021, No. 11604; Tribunal de Casación, Sección trabajo, 11/05/2021, No. 12424; Tribunal Administrativo Regional Lombardia Milano Sec. II, 10/02/2021, No. 374; Tribunal de Cuentas Lazio Sez. contr. delib., 10/09/2020, No. 73.

54 Tribunal Constitucional, 30-07-2021, No. 182.

55 SUTC, 09-09-2021, No. 24414 on the display of crucifixes in classrooms. The display of crucifixes is not established in Italian law. However, according to the Court, "On the one hand, they are directed by the particular strength of the fundamental principles at stake, ranging from religious freedom to the principle of secularism in their various forms, pluralism, non-discrimination and academic freedom in public schools open to all. These principles, defined by the Italian Constitution, by the Bills of Rights and by the Courts that interpret them, provide the driving force to find the rule to resolve the case. In addition, they are sustained by a dense network of legal precedents and contributions from legal scholarship: the first represent the paths already taken by case law experience to solve disputes with similar elements and are all the more important in the absence of an Act of Parliament; the second provide insights into reconstructing the framework of the system and developing approaches in line with the expectations of the interpreting community; and lastly, there are the contributions afforded by the process and its course throughout the proceedings between the parties".

56 See, for instance, Tribunal de Casación, Sección trabajo, 04-08-2021, No. 22251.

57 Tribunal de Casación, Sección V, 22-07-2021, No. 20977: For example, in this way reference is made to a certain slightly older precedent to comment on its unsoundness, irrelevance, etc., as opposed to another slightly later precedent whose point of law is applied in the case at hand.

58 Tribunal de Casación, Sección trabajo, 04-08-2021, No. 22251.

59 From an internal point of view, there is a tendency, or at least some judges believe, "treaty judgments should be avoided. See L. Mancini (2018). Instead, they continue to be dictated and the underlying reasons, which are generally not stated, are probably: the conviction that it is necessary to "instruct/educate", the desire to "teach", excessive ego or *hybris*, the conviction that it is a "lesser evil" of a situation that needs to be addressed head-on and the complete picture of the legal issue under discussion.

60 Tribunal de Casación, Sección V, 31-07-2018, No. 20253.

61 Tribunal de Casación, Sección V, 23-06-2021, No. 17924.

62 Tribunal de Casación, Sección VI - 5, 24-05-2021, No. 14209.

63 Tribunal de Casación, Sección III, 04-12-2018, No. 31233.

64 See, for instance, SUTC, 09-09-2021, No. 24414: "Denial of religious freedom deserves the same protection as positive religious freedom. [...] This is, moreover, the lesson that emerges from comparative case law.": German Federal Constitutional Court (Ruling of May 16, 1995); Swiss Federal Court (Judgment of September 26, 1990); Constitutional Court, 26-05-2017, No. 123.

65 This seems to be in line with S. Gómora Juárez, 2019, pp. 799-839.

66 This reconstruction seems to also arise from the study on the Mexican experience made by R. Camarena González (2018, pp. 103 ss).