Chapter 9
Judicial Rulings with Prospective Effect in Italy

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Abstract In the Italian legal system there are just a few rules concerning precedents, but there is no binding precedent. Even the judgments of the supreme courts are not binding: they have just a weak persuasive force, mainly because of their high and excessive number. However, precedents are frequently quoted, but mainly in the form of short and general statements. In Italy there is no prospective overruling.

1. In the Italian legal system there are no general rules directly concerning precedents in the proper meaning of the word. Only in some rules of the code of civil procedure there are indirect references to precedents. For instance, art.118 disp. att., c.p.c. says that that judge may make a reference to corresponding precedents in the opinion that justifies the decision. Moreover, art.360 *bis* n.1 of the same code says that the appeal to the supreme court (the *Corte di Cassazione*) is not admissible when the decision appealed decided legal issue following the case law of the same court, and the appeal does not justify a further decision on the same issues. Notwithstanding the lack of general rules, in the last decades the quotation of precedents has become of a common –and even excessive- use at any level of civil and criminal jurisdiction.

The Italian legal theory is not unanimous about the problem of whether or not precedents should be considered as proper "legal sources" (such as statutes), but the prevailing opinion is positive, mainly because precedents are actually referred to in the legal practice as if they were true legal sources.[1] Moreover, the Italian case law includes every year dozens of thousands of decisions, mainly of the supreme court (the *Corte di Cassazione*), but also of the Constitutional Court and of the most important Appellate courts, and even –several times- of courts of first instance. The Constitutional Court issues just some hundreds of judgments per year, but the *Corte*

[1] See e.g. Pizzorusso, A., *Fonti del diritto,* 2nd ed., Bologna-Roma, 2011,705.

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di Cassazione produces an impressive flow of judgments: to consider only the civil justice, they are ordinarily more than 30,000 (thirty thousands!) every year. This court has a special office (called *Ufficio del Massimario*) performing the function of extracting from the court's opinions the most relevant legal rules (called *massime*) that are deemed to be published and quoted.

This is the most peculiar and maybe interesting feature of the Italian system of precedents.[2] Although the judgments (with their opinions) are published and can be read in their complete text (and many times they are published and commented in legal journals), the largely prevailing habit is to make reference to such short statements (usually of just a few lines), that are the *massime.* Of course such a use is now very easy because of the immediate connection with the data bank of the supreme court. Then it is now "normal" to find dozens of quotations almost at any paragraph of a legal brief or of a decision, independently of the real relevance of such quotations for the specific legal question.

It should be underlined that such a use (and abuse) of the *massime* has not much to do with the reference to precedents in the proper sense of the word. While precedents, and their force, are based upon the analogy between the *facts* of the former case and the *facts* of the case at hand, nothing similar happens with the Italian "precedent". Also because the *Corte di Cassazione* deals only with legal issues and does not consider the fact of the case, but mainly because of the general habit of Italian lawyers to deal only with legal questions and not with facts, the *massima* usually is just a short statement expressing a merely *legal* proposition: sometimes it simply repeats what is said in an article of a statute, while many times it says how a legal rule should be interpreted or how a general legal principle should be intended and applied. There is no reference to the facts of the case that has been decided (although, but very rarely, sometimes there is a reference to the specific *legal* questions of the case). It should be clear, therefore, that to speak of "precedents" in the Italian legal system may be misleading, if one has in mind the proper Anglo-American notion of a precedent.

2. Lacking any specific regulation of the force and effect of a precedent, there is no specific theory about it. Correspondingly, any precedent has only some merely *persuasive* effects. However, such effects may vary in their force from case to case. Usually the decisions issued by the *Corte di Cassazione* are said to be specially persuasive for the following judges, and also for the court itself. Actually in several cases a precedent of the supreme court is followed by the court and by lower judges, and the same *massima* is quoted in many decisions. When it happens, there is a *giurisprudenza consolidata* or *conforme.*

However, the persuasive effect of the precedent may be –and often is- very weak, for many reasons. On the one hand, the *Corte* itself contradicts its own case law, and

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[2]About this system see more broadly Taruffo, M., *Precedente e giurisprudenza*, in *Rivista trimestrale di diritto e procedura civile,* 2007, 709; Id., *Precedents in Italy,* in *Precedents and the Law. Reports of the XVIIth Congress International Academy of Comparative Law. Utrecht, 16–22 July 2006,* ed. by E. Hondius, Bruxelles 2007, 179.

this may happen dozens of times every year. For instance, different civil chambers of the court may decide the same legal issue in different ways. Even precedents issued by the *Sezioni Unite* of the court (a special panel whose function should be just that of fixing precedents and to solve conflicts among the decisions of the "simple" chambers), are often unable to condition and to orient subsequent decisions issued by these chambers. On the other hand, the judges of the lower levels (i.e. intermediate appellate courts and first instance judges) are not formally bound to follow the precedents of the supreme court. It may happen –and actually sometimes it happens- that a judge of first instance criticizes a decision of the supreme court and solves a legal issue in a completely different way. In such a case, the only obligation of the judge is to justify his "independent" decision.

In Italy there is no special theory of judicial decisions (such as the so-called declaratory theory). The general legal theory is coherent in acknowledging that any interpreter determines the meaning of the rule that is interpreted.[3] The same may be said about the judge (any judge): actually he has the inherent power to interpret the legal rules of any level (constitutional rules, general principles, statutory rules), provided he does it by means of the standards of legal interpretation that are commonly recognized. In a sense, the judge has a broad discretionary (and creative) power as an interpreter of the law. The supreme court is the authority of the last instance performing the function of controlling the correctness of the legal decisions made by the judges of the lower levels. Therefore, in most cases precedents are connected to statutory rules because they are *interpretations* of such rules or principles.

Being acknowledged the creative role of the judge-interpreter, there are no special problems about the "judge as legislator". It is usually recognized that in many cases the judges actually make the law, while the legislator is inefficient, slow and inadequate.

3. In the Italian system the main problems concerning precedents is –as abovesaid- the terribly excessive number of judgments issued by the *Corte di Cassazione*. This is the cause of great confusion, variability, disorder in the case law, and –in a word- of the usually weak force of precedents.

4. The retrospective effect of judicial decisions is not discussed in the Italian legal doctrine. It is assumed as normal and unproblematic that *of course* many decisions (with the exception of injunctions imposing or prohibiting specific future behaviors) deal with factual and legal situations that occurred in the past. Then the main function of the decision is to restore the violations of rights, to compensate damages, to provide a remedy to past illegal behaviors, and so forth. If, for instance, the decision says that a contract was void for lack of the conditions required by the law, necessarily the effect of the decision goes back to the moment in which the contract was concluded. If a car accident caused damages, of course the compensation is referred to the past, i.e. to the damages suffered by a person. In some cases this

[3] See e.g. Gentili, A., *Il diritto come discorso,* Milano 2013, 7, 151; Guastini, R., *L'interpretazione dei documenti normativi,* Milano 2004.

does not happen: for instance, a judgment of divorce does not go back, since its legal effects begin at the moment when the decision is final, but the conditions determining the divorce emerged in the past.

5.-6.-7.-8.-9. In the Italian legal system there is no prospective overruling in the proper sense of the word. As abovementioned, in the case law –and even in that of the *Corte di Cassazione*- there is an extremely high frequency of changes in the interpretation of the same legal rule or principle. But it happens when the court decides a specific case and interprets the law that has to be applied in that case. When there are precedents, normally the court (or any other judge) makes a reference to such precedents and sometimes the precedent is followed. When the decision does not follow the precedents, usually the judge explains the reasons why he decides that way. It may be said that it is an *overruling,* since the precedent is set aside, but it is not *prospective*, since it is already set aside just in the diverging decision. In a word: the judge does not overrule "for the future"; he simply decides not to apply the precedent and explains the reasons why he does not follow the precedent *just in that case*. Nothing strange in it, if it is considered –as abovementioned- that the judge has a broad discretionary power in the interpretation of the law. So to say, he is not an "undisguised legislator": he is acknowledged as an active and creative interpreter that determines the meaning of the rule that applies as a standard to decide the case. When a precedent is not applied, no problem. It simply means that the case is decided in a different way.