THE PRELIMINARY PRECEDENT

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I. INTRODUCTION

Judicial precedents serve as a pivotal reservoir of legal knowledge, even within civil law systems. Judicial decisions offer continual guidance to both litigants and judges faced with analogous cases, shaping the trajectory of subsequent judicial determinations. Within this framework, the pronouncements of supreme courts, positioned at the zenith of the judicial hierarchies, inherently wield heightened authority, exerting a profound influence over the jurisprudence of lower courts.

The conventional dichotomy between civil law and common law systems typically posits divergent roles for judicial precedents. In common law jurisdictions, precedents are deemed binding on parties involved in the litigation, individuals in analogous circumstances, and lower courts adjudicating similar matters. Conversely, within civil law jurisdictions, where statutory laws take priority, precedents assume a predominantly persuasive character, contingent upon their cogency and alignment with prevailing legal principles.

While the debate over the comparative efficacy of precedents in civil law versus common law systems remains contentious, it is indisputable that parties and courts alike draw

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inspiration from supreme court precedents in both systems, albeit through different lenses.

The cornerstone of civil procedure in the Italian legal system is the Italian Code of Civil Procedure ("Code of Civil Procedure").[1] On October 18, 2022, the Italian Government enacted Legislative Decree no. 149, which provides for an amendment to the Code of Civil Procedure ("2022 Amendment").[2] The 2022 Amendment, embedded within a broader overhaul of Italian procedural law, redefines the role of the Italian Court of Cassation ("Court of Cassation" or "Court"), which is the highest court of appeal in Italy's three-tiered judiciary system and ensures the uniform interpretation and application of the law, thereby maintaining legal consistency and integrity.[3] In particular, the 2022 Amendment introduces a mechanism for preliminary reference to the

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1. Codice di procedura civile [Code of Civil Procedure] (It.) [hereinafter Code of Civil Procedure], *translated and reprinted in* SIMONA GROSSI & MARIA CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE app. B (2010).

2. Decreto legislativo 10 ottobre 2022, n.149, in G.U. Oct. 17, 2022, n.243 (It.) (concerning the implementation of the Italian Law of 2021, Pub. L. No. 206). The 2022 Amendment applies to civil proceedings started in the Italian courts after February 28, 2023. Legge 29 dicembre 2022, n.197, art. 1(380), in G.U. Dec. 29, 2022, n.303 (It.).

3. Established in 1923 to ensure the uniform application and interpretation of the law, the Court of Cassation serves a crucial role in the Italian legal framework. *See* Regio decreto 24 marzo 1923, n.601, in G.U. Apr. 19, 1923, n.92 (It.) [hereinafter Law on the judicial district of the Italian Kingdom] (establishing the Court of Cassation of the Kingdom and abolishing the separate Courts of Cassation). The Italian judiciary system is structured into three primary levels. At the base are the justices of the peace and the tribunals, which act as courts of first instance. The courts of appeal comprise the middle tier, which review decisions made by the tribunals, providing an essential layer of judicial oversight. At the apex of this hierarchical structure is the Court of Cassation. Unlike the lower courts, which deal primarily with matters of fact, the Court of Cassation primarily addresses matters of law. Its primary function is to ensure that the law is interpreted and applied consistently across the country. This means that it does not typically re-examine the facts of a case but rather ensures that legal principles and procedures were correctly followed by the lower courts. *See* Code of Civil Procedure, *supra* note 1, arts. 7, 9, 341, 360 (explaining the role and functions of each court layer). For this reason, the Court of Cassation plays a crucial role in the Italian legal system by providing authoritative interpretations of the law, which lower courts are expected to follow. This helps maintain a coherent and predictable legal system, which is important for upholding the rule of law. *See* Regio decreto 30 gennaio 1941, n. 12, art. 65(1), in G.U. Feb. 4, 1941, n.28 (It.) [hereinafter

Court of Cassation through Article 363-bis in the Code of Civil Procedure, signifying a profound shift with significant implications for the role of judicial precedent in the Italian legal system.

II. The Preliminary Reference Procedure before the Court of Cassation

Article 363-bis of the Code of Civil Procedure allows lower courts to petition the Court of Cassation for a preliminary opinion, or "*rinvio pregiudiziale*" ("preliminary reference"), on a question of law.[4] More precisely, the provision allows the Court of Cassation, after receiving a preliminary reference request, to clarify a point concerning the interpretation of Italian law.[5] Lower courts are empowered, under certain circumstances, to ask the Court of Cassation to examine and resolve a question of law that is relevant to adjudicating their cases.[6] Although Article 363-bis of the Code of Civil Procedure expressly provides that the Court's decision is binding only for the requesting lower court,[7] the provision raises a host of questions concerning the degree of deference that the Italian legal system will actually accord to these precedents.

The argument that precedents are merely persuasive represents a traditional, though oversimplified, depiction of the Italian legal system.[8] This argument simply posits that the doctrine of *stare decisis* does not strictly apply in the Italian courts. Usually, civil lawyers conceptualize this idea by stating that, unlike the Constitution and statutes, precedents are not a source of law.[9]

Law on the Judicial System] (discussing the Supreme Court of Cassation as the country's highest court, ensuring uniform interpretation of the law).

4. Code of Civil Procedure, *supra* note 1, art. 363-bis(1).

5. *See id.* (providing for the referral of questions of law that present interpretative difficulties to be heard by the Court of Cassation).

6. *See id.* (conditioning the referral of questions of law to the Court of Cassation on necessity, interpretive difficulty, and likelihood of repetition).

7. *See id.* art. 363-bis(6) (mandating the precedential effect of Court of Cassation decisions to impact the proceedings in which the question was referred).

8. For a general analysis of precedents in the Italian legal system, see generally Michele Taruffo & Massimo La Torre, *Precedent in Italy*, in Interpreting Precedents: A Comparative Study 141 (D. Neil MacCormick et al. eds., 2016).

9. *See id.* at 151 (noting that "in Italy the precedent has no formally binding force").

This is because, according to the separation-of-powers theory, deeply rooted in the legal traditions of continental Europe,[10] only legislatures—such as national parliaments—have the power to enact legal rules that exercise binding force. Courts, on the other hand, can only issue interpretations of the law to decide the claims of litigants. The Italian Constitution ("Constitution") states that "[j]udges are subject only to the law,"[11] meaning that judges only apply the law as it is stated in statutes and the Constitution. This provision legitimizes courts' ability to deviate from prior settled interpretations of constitutional or statutory law on the grounds of disagreement with previously-adopted legal rules. Ultimately, this is the reason why judicial precedents can only exert a persuasive or moral force in the Italian legal system.[12]

However, reality is more complicated than this simplified picture. In practice, Italian courts accord a high degree of deference to the Court of Cassation, especially when its precedents involve statutory interpretation. Lower courts are not required to follow precedents with which they disagree,[13] but the respect usually accorded to members of the Court for their insight into the proper interpretation of the law increases the likelihood that lower courts will adhere to the Court's precedents. Article 363-bis of the Code of Civil Procedure is an explicit effort to enhance the Court's precedent-setting value. This provision empowers the Court to propose interpretations of law to be followed by lower courts. As noted above, the provision establishes

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10. For the separation of powers theory, see generally Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws bk. 11 (Thomas Nugent trans., Hafner Publ'g Co. ed. 1949) (1748). For a general analysis of Montesquieu's thought, see generally Sharon Krause, *The Spirit of Separate Powers in Montesquieu*, 62 Rev. Pol. 231 (2000); James T. Brand, *Montesquieu and the Separation of Powers*, 12 Or. L. Rev. 175 (1933); *see also* Cesare Cavallini & Marcello Gaboardi, *Rights vs. Remedies: Towards a Global Model*, 28 U.C. Davis J. Int'l L. & Pol'y 171, 183–185 (2022) (discussing Montesquieu's separation of powers theory and the evolution of European court systems).

11. Art. 101(2) Costituzione (It.) [hereinafter Italian Constitution], *translated and reprinted in* Italian Constitutional Justice in Global Context app. I (Vittoria Barsotti et al. eds., 2016).

12. *See* Gino Gorla, *Giurisprudenza*, *in* Enciclopedia del Diritto 496 (Francesco Calasso ed., 1970) [*Case Law*] (discussing the commonality of the dialectic surrounding the extent of judicial precedents' persuasive value in both common law and civil law systems).

13. *See* Taruffo & La Torre, *supra* note 8, at 153 (noting that, in Italy, "precedents are treated as 'materials' to be compared with other materials").

the general principle that a lower court requesting the preliminary ruling is expressly bound by the Court's decision on the issue.[14] And, in addition to this binding authority, when the Court settles a question of law in a certain way, it is natural that other lower courts considering the same question will rely on the Court's ruling in shaping their own decisions even if they are not the requesting court.

This widespread reliance on the Court's preliminary rulings is reasonable and may stem from several sources, such as the expertise of the members of the Court or the persuasiveness of arguments made by the Court. The deference to the preliminary ruling is also enhanced by the fact that Italian law doesn't empower the Court to review a case but to resolve a question of law.[15] The implication is that the Court's decision is likely to affect all lower courts that may eventually be called upon to resolve the same question in deciding a dispute. By conforming their decision to the Court's interpretation of the law, lower courts reduce the risk that their decisions will be challenged and potentially overturned. This fear of reversal afflicts first and foremost the appellate courts because appellate court decisions can be appealed to the Court of Cassation under Italian law. For this reason, appellate courts have gradually infused their decisions with a high level of deference to the Court's rulings to preclude future reversals. Courts of first instance take a similarly careful approach because their decisions can be appealed to appellate courts and compared with the Court's precedents as well.

Article 363-bis of the Code of Civil Procedure demonstrates that the value of judicial precedents in the Italian legal system has changed dramatically over time. Judicial precedents are no longer merely persuasive or moral authorities because, under

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14. *See* Code of Civil Procedure, *supra* note 1, art. 363-bis(6) (mandating that Court of Cassation decisions made pursuant to this article apply to the proceedings in which the question was referred).

15. *See id.*, art. 363-bis(1) (allowing judges to refer questions of law without mention of reviewing cases). The Court of Cassation only deals with questions of law to ensure that legal principles are uniformly and coherently interpreted and applied across all lower courts in the judicial system and provide a final resolution on legal issues without re-examining factual determinations made by trial and appellate courts, which preserves the efficiency and integrity of the legal process. *See* Italian Constitution, *supra* note 11, art. 111(7) (noting that all cases may be appealed to the Court of Cassation in cases of violation of the law and measures concerning personal freedom).

certain circumstances, the Court of Cassation's interpretations of the law have binding authority over the lower courts. Additionally, lower courts are often persuaded to adhere to a previous ruling from the Court of Cassation when it is workable and soundly reasoned. The Court itself tends to adhere to its own precedents when they are easy to understand and apply because judges know that these precedents operate smoothly and efficiently at the trial and appellate court levels.

This complex evolution is a signal that the doctrine of *stare decisis* is at play in the Italian legal system and faces the same challenges it does in the American legal system. In the words of the United States Supreme Court, deference to precedents cannot be described as "an inexorable command"[16] but rather "a principle of policy"[17] that values the reliance on past decisions unless there are compelling reasons to deviate from them. Similarly, the Italian Constitutional Court ("Constitutional Court")[18] stated that in a legal system where *stare decisis* is not a binding rule,[19] the answer to the question of whether or not to adhere to an established precedent of the Court of Cassation remains, in the words of the Constitutional Court, "*una mera facoltà*" (a mere option) for the lower court.[20] The Court of Cassation has made clear that the Italian legal system gives lower courts the

16. Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see also* Hertz v. Woodman, 218 U.S. 205, 212 (1910) (noting that the rule of *stare decisis* is not inflexible and remains within the discretion of the court); Vasquez v. Hillery, 474 U.S. 254, 266 (1986) (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)) (considering that *stare decisis* is not an inexorable command).

17. Helvering v. Hallock, 309 U.S. 106, 121–22 (1940); *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (noting that, while *stare decisis* is a "principle of policy," it is still a basic governing principle).

18. In the Italian legal system, the Constitutional Court serves a different role from the Court of Cassation. While the Court of Cassation ensures consistent legal interpretation and application within the regular judiciary system, the Constitutional Court primarily deals with matters of constitutional law. It reviews the constitutionality of laws and ensures that legislation complies with the Italian Constitution. Its decisions can invalidate laws or legal provisions that are found to be unconstitutional. Italian Constitution, *supra* note 11, art. 134.

19. *See* Corte cost. (Constitutional Court), 16 maggio 2019, n. 120, Giur. cost., 2019, 1444, 1450 (It.) (stating that the Italian legal system does not adhere to a strict rule of *stare decisis*).

20. Corte cost. (Constitutional Court), 12 marzo 2004, n. 91, Giur. cost., 2004, 1042, 1047 (It.).

flexibility to determine the substantive interest protected by certain legal provisions in light of the variations that the law takes on in society over time.[21]

S*tare decisis* is a dynamic legal principle aimed at achieving certainty and predictability through deference to precedents. Nevertheless, it must allow for the possibility of legal evolution. This principle reflects a longstanding tension present in both the United States and Italian legal systems. On one hand, there is a desire for legal certainty and predictability, while on the other, there is the constant dynamism of society. *Stare decisis* plies the stormy waters between these two capes. In the Italian legal system, the power of lower courts to ask the Court of Cassation for preliminary rulings under Article 363-bis is part of the new apparatus that lower courts can use to stay afloat.

A. *The Dual Role of the Court of Cassation*

The Court of Cassation plays two roles in the Italian judicial system. First, the Court of Cassation is a court of last resort.[22] Italian law establishes the general principle that a party who loses in a court is allowed to appeal the decision to a higher court.[23] Parties are always entitled to an appeal, as a matter of right. While trial court determinations can be appealed to an appellate court,[24] the rulings of appellate courts may be reviewed by the court of last resort, the Court of Cassation.[25] Litigants may file a petition asking the Court to review a case, and to overturn or modify the decision, when they are dissatisfied with the

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21. *See* Cass. civ. (Civil Court of Cassation), sez. un., 11 luglio 2011, n. 15144, Giur. cost., 2012, 3153, 3158–59 (It.) (emphasizing a judge's role in pursuing an evolutionary understanding of the law when applying provisions in new contexts to protect the trust of the interested parties involved).

22. *See* Piero Calamandrei, La Cassazione Civile: Storia e Legislazioni 664–65 (1920) [The Civil Cassation: History and Legislation] (discussing the initial Italian courts of Cassation as sites where limited appeals could be heard that had no other avenue for appeal).

23. *See* Code of Civil Procedure, *supra* note 1, arts. 323, 341 (listing the exhaustive set of circumstances under which a decision can be appealed and summarizing the procedural requirements to do so).

24. *See id.* art. 341 (establishing that appeals against judgments issued by trial courts (*Tribunale*) shall be filed before the appellate court (*Corte d'Appello*)).

25. *See id.* art. 360 (setting out that the judgments issued in the appeal proceeding may be challenged by motion before the *Corte di Cassazione*).

outcome of the proceedings.[26] In the Italian legal system, the Court of Cassation has jurisdiction over the legitimacy of judgments. The Constitution explicitly states that judgments can be reviewed by the Court on grounds of violation of the law.[27] Such a provision provides that the Court can only be asked to decide whether a judgment conflicts with existing legal provisions, without delving into the specific evidence and facts alleged in the case. This feature reflects the relationship between the history of the Court and its legitimacy.[28]

The concept of establishing a Court of Cassation traces back to the Seventeenth Century when the French monarchy, under Louis XIV, expanded the powers of the Council of the King ("*Conseil du Roi*").[29] Originally conceived as an advisory body to the French king primarily engaging in administrative tasks, the *Conseil du Roi* gradually took responsibility for reviewing appeals filed with the king by the losing party that concerned a judge's violation of the law.[30] In particular, this function was taken over by a section of the *Conseil du Roi* named the Council of the parties ("*Conseil des parties*").[31] While lacking jurisdictional functions and the authority to review cases on the merits, the *Conseil des parties* provided a remedy for the uncertainties prevalent

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26. *See id.* art. 366 (providing that litigants challenging a final judgment must do so by motion and indicate the substantive grounds underlying the motion to quash).

27. Constitution, *supra* note 11, art. 111(7). It is worth noting that the Constitution refers generally to the law. *See id.* (citing "violations of the law"). Nevertheless, the concept of law is commonly interpreted in a restrictive manner, confining it exclusively to *statutory law.* Thus, in the Italian legal system, the Court of Cassation can only be called upon to hear cases of violation of statutory law. *See* Cesare Cavallini & Marcello Gaboardi, *Rights vs. Remedies: Towards a Global Model*, 28 U.C. DAVIS J. INT'L L. & POL'Y 171, 188 (2022) (noting that the competency of the Court of Cassation is the adjudication of disputes over statutory law rather than reviewing constitutionality).

28. *See* CALAMANDREI, *supra* note 22, at 656 (discussing limited legal violations that would support restitution granted by precursors to the Court of Cassation).

29. *See* Pierre Bellet, *Grandeur et Servitudes de la Cour de Cassation*, 32 REVUE INTERNATIONALE DE DROIT COMPARÉ 293, 293–94 (1980) [*The Grandeur and Limitations of the Court of Cassation*] (explaining that the Court of Cassation succeeded the Council of Parties as an element of the Royal Council with its own unique competency).

30. *See id.* at 293–96 (discussing the Court of Cassation's limited role in reviewing express contraventions or errors of written law as opposed to finding facts or creating its own law).

31. CALAMANDREI, *supra* note 22, at 295–96.

in the legal system. These uncertainties existed because the multiple existing legal sources, including *ius commune*,[32] royal decrees, local customs, and court precedents, contributed to legal ambiguity and facilitated unjust judicial rulings that contradicted established laws.[33]

As time passed, the *Conseil des parties* acquired the role of defending legal certainty and consistency.[34] Following the French Revolution of 1789, this function was transferred to a new body with proper judicial functions,[35] initially known as the Tribunal of Cassation ("*Tribunal de Cassation*") and later renamed as the Court of Cassation ("*Cour de Cassation*").[36] As it

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32. The expression "*ius commune*" refers to a legal framework that originated in medieval Europe. It was based on Roman law principles and legal scholarship, which were compiled and systematized by scholars such as Justinian in the *Corpus Juris Civilis*. The *ius commune* served as a universal legal system that was shared and applied across different regions and jurisdictions, transcending local customs and laws. It provided a common foundation of legal principles and rules that were recognized and applied throughout Europe. The *ius commune* played a significant role in shaping legal thought and practice during the Middle Ages and the early modern period, particularly in civil law jurisdictions. However, it gradually declined in influence with the emergence of national legal systems and codifications in various countries. *See generally* Peter Stein, *The Ius Commune and its Demise*, 25 J. Legal Hist. 161 (2004) (describing the original construction of the *ius commune* and eventual demise due to the growth of natural law and the abandonment of Latin).

33. *Cf.* Cesare Beccaria, On Crimes and Punishment (1764), *reprinted in* On Crimes and Punishment and Other Writings 3 (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press 1995) ("A few odd remnants of the laws of an ancient conquering race codified twelve hundred years ago by a prince ruling at Constantinople, and since jumbled together with the customs of the Lombards and bundled up in the rambling volumes of obscure academic interpreters - this is what makes up the tradition of opinions that passes for law across a large portion of Europe.").

34. *See* Calamandrei, *supra* note 22, at 300–01 (explaining that the *Conseil* eventually gained the special function of quashing contradictory sentences or judgments).

35. *See generally* Letter from Georg Wilhelm Friedrich Hegel to Christian Gotthold Zellmann (Jan. 23, 1807), *translated in* Carl J. Friedrich, *Hegel's Politics from His Letters*, 18 Revue européenne des sciences sociales 43, 44 (1980) ("The French nation has been freed by the bath of its revolution of many institutions which the spirit of man had transcended as if they were his baby shoes, and which therefore weighed down upon it (as they still do upon others) as fetters without spirit.").

36. *See* Calamandrei, *supra* note 22, at 396–97, 459–60 (noting that the post-revolution *Tribunal de Cassation* formed the foundation of the later judicial system structured around a Court of Cassation which functioned as a guardian of the law).

transitioned from the *Conseil des parties* to the *Cour de Cassation*, this advisory body maintained its responsibility of evaluating the conformity of judicial decisions with the law.[37] At the same time, legal principles began to be consolidated into codifications, starting with the French Civil Code of 1804 under Napoleon's direction.[38] Nevertheless, the role of the *Cour de Cassation* in terms of checking the conformity of judgments with the law remained unchanged.

The change occurred when the *Cour de Cassation* was granted jurisdictional power it previously lacked. The institutional changes influenced by the French Revolution and its political doctrines reshaped the advisory body with administrative functions into a full-fledged court.[39] One significant consequence was that access to the *Cour de Cassation* no longer relied on a complaint to the king, but rather on a complaint to a panel of judges who were obligated to issue a decision. This shift bestowed upon the *Cour de Cassation* the function of a court of last resort, primarily tasked with resolving disputes between litigants.[40] While the *Cour de Cassation* continued its primary duty of overseeing the adherence to the law in decisions issued by lower courts, access to it was confined to complaints specifically related to instances where a lower court had committed a violation of law.[41] As a result of the Revolution of 1789, the French judicial system introduced a court of last resort that could be accessed through an appeal against a lower court's decision, exclusively to resolve matters pertaining to the interpretation and implementation of the law.[42]

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37. *See id.* (supporting conceptions of the early Court of Cassation of one that served to supervise or check governing power and maintain the rule of law); *see also* Bellet, *supra* note 29, at 294 (describing the role of the new Court of Cassation as being the inspector of the laws).

38. *See* Alain Levasseur, *Code Napoleon or Code Portalis*, 43 TUL. L. REV. 762, 762–765 (1969) (discussing the genesis of the French civil code under Napoleon in order to unify civil laws across French territories).

39. *See* Bellet, *supra* note 29, at 294 (describing the foundations and role of the Court of Cassation).

40. *See* CALAMANDREI, *supra* note 22, at 473–74 (discussing the expansion of the role of the Court of Cassation into one that developed legal reasoning on cases that lower courts would adopt and deploy in resolving individual cases).

41. *See id.* at 501–02 (discussing the avenues for appeal to the French Court of Cassation).

42. *See id.* (discussing the limitation on reasons one can appeal to the French Court of Cassation).

This innovation was confirmed by the French Laws of 1790 and 1804, which designated the *Cour de Cassation* with the authority to nullify—as stated in the French Law—"*tout jugement qui contiendra une contravention expresse ou text de la loi*" ("any judgment that contains an express contravention of the text of the law"),[43] while explicitly excluding its jurisdiction over matters related to the merits of a case.[44] The French Laws swiftly emerged as a benchmark for numerous other European nations, including the pre-unification Italian States, which often integrated the model of the *Cour de Cassation* into their respective legal systems.[45] Following this tendency, the Italian Code of Civil Procedure of 1865, enacted subsequent to the Unification of the Italian States in 1861, incorporated a system of Courts of Cassation akin to the French model.[46] For several decades after the Unification, the Italian legal system maintained the four pre-existing Courts of Cassation established in some of the former pre-unification States, establishing a fifth one in Rome in 1875.[47] Finally, in 1923, a unified Court of Cassation was established in Rome, which replaced the previous five courts and has since exercised jurisdiction over the entire territory of the Italian Republic.[48] The model of the *Cour de Cassation* has been reaffirmed by the Code of Civil Procedure in 1942[49] and the Constitution in 1948.[50]

Second, the Court of Cassation is the final authority on matters of law and ensures that lower courts abide by the law.

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43. Décret du 27 novembre 1790 d'ensemble sur l'organisation du tribunal de cassation [Decree of November 27, 1790 on the Organization of the Tribunal of Cassation], Archives Parlementaires [Parliamentary Archives], art. 3 (Fr.) (concerning the organization of the Tribunal of Cassation); *see also* 1804 Const. 136 (Fr.). (describing the court system of the French Empire) (concerning the Constitution of the French Empire).

44. *See* Decree of November 27, 1790 on the Organization of the Tribunal of Cassation, *supra* note 43, art. 3.

45. *See* Calamandrei, *supra* note 22, at 633, 647–48 (noting the influence of the French Revolution and Napoleonic institutions on early Italian states).

46. Gian Franco Ricci, Il Giudizio Civile di Cassazione 25 (3d ed. 2019) [The Civil Proceedings of Cassation].

47. *See id.* at 23–25 (discussing the evolution of the five courts' structure and jurisidiction between the unification of Italian states and 1923).

48. *See* Law on the judicial district of the Italian Kingdom, *supra* note 3, art. 1 (abolishing the Courts of Cassation of Forence, Naples, Palermo, and Turin in favor of the Roman court exercising power over the kingdom).

49. Code of Civil Procedure, *supra* note 1, art. 360.

50. Italian Constitution, *supra* note 11, art. 111(7).

Its authority is expressed in the cassation of the appealed judgment. The word "cassation" derives from "*casser,*" a French verb, originally denoting the activity of breaking or breaking up with somebody.[51] It is the semantic basis of the Italian verb "*cassare*" and the English verb "quash." Its etymological root is the old Latin word "*cassus*" which simultaneously means empty, useless, and futile. Several European legal systems have recovered the word "cassation" to describe the Court's authority to set aside a judicial decision contrary to law.[52] Such a word suggests that the Court merely *empties* the appealed decision of its illegal content without going further by reviewing the case on the merits.

As the Court merely sets aside the appealed decision, however, there is still a need to ensure judicial review and protection on the merits. The Code of Civil Procedure provides that the party that prevailed in the appellate court has the burden of resuming the case in the court[53] that issued the decision overturned by the Court of Cassation.[54] And, in turn, the appellate court is asked to redecide the case on the merits following the reasoning of the Court's ruling.[55] This mechanism demonstrates that the Court of Cassation, while not adjudicating the merits of the case, decides in favor of the party that has experienced a violation of the law by the appellate court. Therefore,

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51. *See* Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 105 (1994) (noting that the French revolutionary government's tribunal of cassation was "not permitted to rule on the merits, but only to 'quash' (*casser*) erroneous decisions of lower courts and remand the case to a different lower court for reconsideration"). *See generally* JOHN HENRY MERRYMAN & ROGELIO-PÉREZ PERDOMO, THE CIVIL LAW TRADITION 40 (3d ed. 2007) (discussing the original, nonjudicial nature and function of the Tribunal of Cassation and comparing this to the American system); ARTHUR T. VON MEHREN & JAMES R. GORDLEY, THE CIVIL LAW SYSTEM 104 (2d ed. 1977) (noting the creation of the Cour de cassation in France as a descendant of the Counsel Des Parties).

52. For an analysis of the French Court of Cassation, see generally JACQUES BORÉ & LOUIS BORÉ, LA CASSATION EN MATIÈRE CIVILE (2015) [CASSATION IN CIVIL CASES]; Bellet, *supra* note 29. For the Spanish legal system, see generally Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain*, in INTERPRETING PRECEDENTS. A COMPARATIVE STUDY, *supra* note 8, at 259, 261.

53. *See* Code of Civil Procedure, *supra* note 1, art. 383(1) (stating that when the Court of Cassation reverses a judgment with remand, "it remands the case to a different judge of the same instance of the judge who issued the reversed judgment").

54. *See id.* art. 392(1–2) (noting when the Court of Cassation issues the revocation of a judgment, the court often remands the case to the judge who issued the reversed judgment).

55. *Id.* art. 384(2).

the Court of Cassation aims to protect and redress the unjust outcome faced by the party who lost the appeal in the appellate court due to the erroneous application of the law.

Additionally, Italian law requires the Court of Cassation provide the most accurate interpretation of law so that legal principles can be consistently applied within the legal system and guidance for future decisions in similar cases.[56] In the terms of Italian law, the Court is asked to ensure "*l'esatta osservanza e l'uniforme interpretazione*" ("the exact observance and uniform interpretation") of the law.[57] Italian legal scholars describe this duty of the Court using the term *nomofilachìa*.[58] This Italian word originates from the combination of two ancient Greek words, the noun *νόμος* (*nómos*) – that is, law – and the verb *φυλάσσω* (*fylásso*) – that is, literally to watch and protect. Therefore, the expression *nomofilachìa* can be understood as a doctrine that imposes the duty to protect and guard the law on the Court.[59] When the Court of Cassation reviews a case, it is asked not merely to determine whether the appellate court applied the law correctly but also to continuously promote the correct interpretation and consistent application of the law. Requiring the Court to derive the proper meaning of a legal provision, however, is in tension with the notion of giving deference to the Court's precedents. It is important to recognize that, despite the doctrine of *nomofilachìa*, the meaning ascribed by the Court cannot be presumed to be the definitive or exclusive meaning of a legal provision. In other words, the doctrine of *nomofilachìa* cannot be interpreted and applied in a restrictive manner. Rather, it must be balanced with the fact that the Court may misinterpret the law simply because that is the inevitable reality of any human effort. Nevertheless, as the highest court in

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56. *See* Law on the Judicial System, *supra* note 3, art. 65(1) (stating that the Court of Cassation ensures the correct observance and uniform interpretation).

57. *Id.*

58. *See, e.g.*, Piero Calamandrei, La Cassazione Civile: Disegno Generale dell'Istituto 33, 52–56 (1920) [The Civil Cassation: Overview of the Institute] (noting the function of the Italian Court of Cassation as a nomophylactic one and explaining generally the meaning behind that).

59. *See id.*(describing generally the nomophylactic function of the Italian Court of Cassation in defending objective law); *see also* Ricci, *supra* note 46, at 29 (explaining the literal meaning of the term); Cavallini & Gaboardi, *supra* note 10, 196–97 (explaining the Italian Court's posture toward precedent interpretation in relation to the concept of *nomophilchìa*).

the land, the Court of Cassation cannot shirk its duty to promote the best possible interpretation of the law. The judges' influential authority, thorough analyses of the law, and refined legal arguments generate significant reliance on the Court by lower courts and society at large.[60]

Thus, the doctrine of *nomofilachìa* suggests that the value of the Court's precedents goes beyond mere persuasiveness. However, the reason why lower courts and the Court itself decide to follow the Court's precedents remains opaque and uncertain. While the U.S. legal system promotes the doctrine of *stare decisis* but allows higher courts to overturn or reverse precedents when societal changes occur, the Italian legal system promotes the doctrine of *nomofilachìa* but ensures that each court is completely independent in interpreting the meaning of the law. As noted above, the Constitution states that Italian judges are subject only to the law written in statutes and the Constitution as opposed to judicial law created by precedent.[61] Exclusive dependence on the law makes judges independent because it leaves them free to interpret the law according to their personal understanding.[62]

While interpretative independence may exist in theory, it is fragile and uncertain in practice. The experience of litigation in Italy demonstrates that lower courts actually tend to conform their decisions to the most authoritative precedents.[63] For several decades, the absence of legal provisions requiring lower courts to follow precedent has been the primary characteristic of the Italian judicial system.[64] Such a characteristic has

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60. *See* Taruffo & La Torre, *supra* note 8, at 159 (maintaining that the precedents of the *Corte di Cassazione* are among those with the highest degree of effectiveness).

61. *See* Italian Constitution, *supra* note 11, art. 101(2) (providing that Judges are subject only to the law).

62. *See* Taruffo & La Torre, *supra* note 8, at 154–55 (accounting for a court's ability to decide against following precedent based on their own reasoning).

63. *See generally* Mauro Cappelletti, *The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference-or no Difference at All?*, *in* FESTSCHRIFT FÜR KONRAD ZWEIGERT 388–89 (Herbert Bernstein et al. eds., 1981) (noting that Italian judges, like their English, German, or French counterparts, will follow decisions of higher courts if the facts of the case are applicable).

64. *See* Taruffo & La Torre, *supra* note 8, at 155 (noting that "[s]ince in the Italian system no precedent in the proper sense is formally and binding, there are no defeasibly binding precedents"); *see also* Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L. J. 333, 344 (1999) (explaining

been problematic in several respects: if courts are not bound by precedent, it follows that stakeholders' expectations may be threatened by interpretative changes because stakeholders rely on precedent to shape their behaviors and understandings. Nevertheless, Italian stakeholders rarely perceive this risk, proving that there are compelling reasons to follow precedents even when the law does not require it.

B. *Court of Cassation Precedents: Deference in Legal Practice*

The most obvious way that the Code of Civil Procedure accord enhanced deference to the Court's precedents, even prior to the 2022 Amendment, has been by impeding the Court's own ability to overrule its most reliable—meaning, accurate and thorough—precedents.

The Court ordinarily reviews cases in its simplest "composition," known as the "*Sezione Semplice*" or "Simple Chamber."[65] In this composition, the Court reaches decisions with the participation of a five-judge panel only.[66] In the Italian legal system, the Court of Cassation is divided into six Simple Chambers, each with its own specific jurisdiction by subject matter.[67] Generally speaking, this composition is used for cases that are considered less complex or have fewer legal implications.[68] It allows for a more streamlined and efficient decision-making process for cases that require less effort from the Court.

The Code of Civil Procedure sometimes empowers the Court to decide a case in its most authoritative composition called the "*Sezioni Unite*" or "Joint Chamber."[69] This means that the case is heard by a joint panel of nine judges from different

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that in the absence of a complete Civil Code, Italian judges, in practice, have long resulted to utilizing judge-made law).

65. *See* Code of Civil Procedure, *supra* note 1, art. 374(4) (providing that the single divisions of *Corte di Cassazione* decide all other cases).

66. Law on the Judicial System, *supra* note 3, art. 67(1) (amended in 1977).

67. For a useful illustration of the competence of each Simple Chamber, see the Decreto del Presidente della Corte di Cassazione 6 maggio 2013, *available at* https://www.cortedicassazione.it/resources/cms/documents/Tabella_di_organizzazione_1.pdf (last visited July 31, 2023).

68. *See* Code of Civil Procedure, *supra* note 1, art. 374(4) (providing that the single divisions of Corte di Cassazione decide all other cases).

69. *See id.* art. 374(1–2) (providing the ability for the Corte di Cassazione to sit en banc in another composition).

chambers of the Court.[70] This composition is typically reserved for cases that involve complex or significant legal issues.[71] The purpose of having a panel of nine judges occupying the bench is to ensure a more thorough examination of the legal issues at hand and to establish a unified interpretation of the law to guide future decisions. In summary, the main difference between the two compositions lies in the size and scope of the panel of judges involved. While the Joint Chamber is used for more complex and significant cases, the Simple Chamber is employed for less complex cases.

The Code of Civil Procedure was amended in 2006, with the introduction of Article 374(3), to authorize the Joint Chamber to decide appeals that raise, among other things, a legal issue decided differently by the Simple Chambers.[72] When a legal issue has caused a rift between two or more Simple Chambers, eventually, one or more of the legal precedents will be overruled in order to mitigate the disruption that conflicting decisions create for stakeholders who rely on precedent for organizing their behavior. When each Simple Chamber has addressed the same issue but comes to an opposite conclusion, the Code of Civil Procedure provides a mechanism that the Joint Chamber may use to resolve the interpretive differences. The Joint Chamber is authorized to review any case that raises the same legal issue debated among the Simple Chambers.[73] In its decision, the Joint Chamber may either (i) reaffirm one of the existing precedents and overrule the other(s) or (ii) overrule the existing precedents and provide a new solution to the issue. When the Joint Chamber reviews a case, the decision receives significant precedential force because it cannot be further overruled by any of the Single Chambers.[74] A Single Chamber is only empowered to express dissent toward the decision of the Joint Chamber, requiring it to reexamine the case

70. Law on the Judicial System, *supra* note 3, art. 67(1) (amended in 1977).

71. *See* Code of Civil Procedure, *supra* note 1, art. 374(2) (noting that the Corte di Cassazione sitting en banc can decide on issues of law decided differently by single divisions and motions of utmost importance).

72. *Id.*, art. 374(3) (amended in 2006); *see also* Decreto legislativo 2 febbraio 2006, n.40, in G.U. Feb. 15, 2006, n.38 (It.), art. 8 (noting that the Court shall rule by Joint Sections on appeals which present a question of law which has been decided differently by the simple sections).

73. Code of Civil Procedure, *supra* note 1, art. 374(3).

74. *Id.*

and decide whether to reaffirm or overrule its own precedent.[75] In other words, a Single Chamber is not required to follow the precedent set by the Joint Chamber, but it cannot simply overrule it. Instead, it can provide a valid reason for not following the precedent and request the Joint Chamber to re-examine the case.

Italian scholars believe that this mechanism supports the doctrine of *nomofilachìa* because it ensures a unified interpretation of the law and promotes consistency in the application of legal principles by resolving conflicting decisions.[76] Most notably for present purposes, this mechanism also reveals the differing degrees of deference that the Court's precedents receive within the Italian legal system. The Simple Chambers' decisions have limited precedential force because both the Simple Chambers themselves and the Joint Chamber can overrule them when they are considered wrong. To the contrary, the Joint Chamber's decisions carry significant precedential value and are regarded as strong precedents. The Joint Chamber's decisions are entitled to more deference than the Simple Chamber's decisions precisely because the Code of Civil Procedure impedes the Simple Chambers' ability to overrule the Joint Chamber's precedents.[77] Erroneous though they may be, the Joint Chambers' precedents can be reversed by that chamber only.

Historically, the Italian legal system has only accorded persuasive force to precedents, so a legal provision that impedes a Simple Chamber's ability to overrule the Joint Chamber's precedents highlights an important shift. The Simple Chamber that disagrees with the Joint Chamber's precedent is *neither* entitled to overrule *nor* constrained to follow that precedent but is only allowed to refer the case to the Joint Chamber.[78] Thus emerges what can be described as a relatively binding force of the Joint

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75. *Id.*

76. *See* Ricci, *supra* note 46, at 29 (discussing *nomofilachìa* in the Italian legal system); Antonio Briguglio, *Il rinvio pregiudiziale interpretativo alla Corte di Cassazione*, 2022 Judicium 1 (2022) *available at* https://www.judicium.it/il-rinvio-pregiudiziale-interpretativo-alla-corte-di-cassazione/ (last visited Sept. 29, 2024) [*The preliminary interpretative reference to the Court of Cassation*] (noting that the preliminary reference system aides in the nomophylactic function of the court).

77. Code of Civil Procedure, *supra* note 1, art. 374(3).

78. *Id.*

Chamber's precedents. In other words, the deference owed to these precedents depends on something more than the persuasiveness of their rationale, which is what traditionally justifies the deference to prior decisions under Italian law. The reason why the Joint Chamber's precedents can be considered binding is the fact that the law empowers only the Joint Chamber itself to decide whether to reaffirm or overrule its precedents. The law dictates that the Simple Chambers can only manifest their dissent if they disagree with the Joint Chamber's decision,[79] which not just allows but obliges the Joint Chamber to redecide the legal issue involved.

Finally, Article 374(3) of the Code of Civil Procedure substantially changed the role of precedents in the Italian legal system as a whole. The Simple Chamber's decisions are generally accorded little deference because Italian law does not pose any real obstacle to overruling them. Enhanced deference is accorded to the Joint Chamber's decisions because the implications of overruling a precedent of the Simple Chambers are less harmful than those of overruling a precedent of the Joint Chamber. Since Italian law allows a Simple Chamber to easily reverse its course, the reversal of a Simple Chamber's decisions only marginally frustrates the expectations of those who have acted in reliance on existing rulings. The greater the ease of overruling a precedent, the lesser stakeholders rely on the stability of that precedent. In contrast, the disruption of expectations is greater when a Joint Chamber's precedent is overruled. The Joint Chamber does not simply review a case, but rather resolves an interpretative conflict between the Simple Chambers; and through that solution, it promotes reasonable and consistent interpretations of legal principles under the doctrine of *nomofilachìa*.

Reversing a Joint Chamber's decision could harm the Court's credibility because the Joint Chamber's rulings address fundamental legal inquiries. These decisions generally find immediate and wide acceptance with lawyers, litigants, and society at large.[80] The Joint Chamber's arguments, for example, may be debated by scholars, but lower courts, as well as lawyers and litigants, accord a high level of deference to those

79. *Id.*

80. *See* Taruffo & La Torre, *supra* note 8, at 151 (noting that the Court of Cassation decisions are usually considered precedential).

precedents.[81] Lower courts act consistently with these precedents, and lawyers and litigants seriously examine and discuss them with great care. Following these precedents reduces the risk of erroneous results in terms of debatable decisions by lower courts or inconvenient choices by lawyers and litigants. The high degree of deference these precedents receive leads the Joint Chamber itself to act cautiously in overruling its own precedents because the serious implications of reversing course can undermine the credibility of the Court.

C. *The Court of Cassation's Preliminary Reference Mechanism: A Closer Look*

The foregoing analysis shows the growing importance of precedent in the Italian legal system. This conclusion is reinforced by the 2022 Amendment. As noted above, Article 363-bis of the Code of Civil Procedure has introduced a preliminary reference procedure that allows lower courts, such as trial and appellate courts, to seek guidance on a question of law from the Court of Cassation.[82] Specifically, lower courts can seek a preliminary ruling from the Court of Cassation when clarification on a question of law is required to properly adjudicate their cases.[83]

The new amendment requires certain standards for when lower courts may seek preliminary references. Preliminary references may occur when: (i) the legal question is indispensable for resolving the case on its merits (specificity),[84] (ii) the legal question is yet unresolved by the Court of Cassation (originality),[85] (iii) the legal question poses significant interpretive challenges (arguability),[86] and (iv) the

81. *See id.* (noting that the decisions of the Joint Chamber "are usually considered as precedents in the proper sense, that is, as judgments that should be taken into account in a later case").

82. Code of Civil Procedure, *supra* note 1, art. 363-bis.

83. *Id.* The concept of *question of law* generally refers to an issue that revolves around the interpretation and application of a particular law or legal principle. Under Article 363-bis of the Code of Civil Procedure, the question of law specifically relates to matters of legal interpretation pertaining exclusively to statutory law. *Id.* Thus, the preliminary reference procedure requires the Court of Cassation to determine the meaning of a statute for the referring court to apply it in a particular case.

84. *Id.* art. 363-bis(1)(1).

85. *Id.*

86. *Id.* art. 363-bis(1)(2).

legal question is expected to recur in multiple future cases (commonality).[87]

The first requirement concerns the *specificity* of the legal question, indicating that a preliminary reference is only admissible when the legal question is specific and is indispensable to resolving the pending case before the referring court.[88] This requirement is met when the referring court demonstrates that it is indispensable for adjudicating the current dispute to ascertain what the Court of Cassation's interpretation of the legal rule in question has been made by the Court of Cassation. The assessment of the question's specificity by the referring court is intricate due to the intertwined nature of legal and factual questions in the dispute. Consequently, a preliminary reference request is deemed viable only after the referring court has fully grasped the factual and legal context of the dispute. This precaution is necessary to prevent the Court of Cassation from prematurely adjudicating a legal question that may not align with the actual crux of the case, risking its decision being disregarded by both the referring court and the litigants.

The second requirement addresses the *originality* of the legal question. This requirement applies when there is no existing Court of Cassation decision on the legal question, as may be the case with new legal rules or interpretations.[89] Consequently, if a Court of Cassation precedent exists on the question, the preliminary reference is not permitted in order to avoid circumvention of the mechanism established by Article 374(3) of the Code of Civil Procedure.[90]

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87. *Id.* art. 363-bis(1)(3).

88. *See* ANTONIO CARRATTA, LE RIFORME DEL PROCESSO CIVILE 114 (2023) [THE REFORMS OF CIVIL PROCESS] (quoting article 363-bis of the Code of Civil Procedure); Antonio Mondini, *Il Rinvio Pregiudiziale Interpretativo*, *in* LA RIFORMA DEL PROCESSO CIVILE 312, 321 (Domenico Dalfino ed., 2023) [The Interpretative Preliminary Reference] (explaining that the specifically necessary requirement avoids abstract rulings and precludes judges from applying the provision to uncontroversial facts); Michele A. Comastri, *La Pregiudiziale Interpretativa Innanzi alla Corte di Cassazione*, *in* IL PROCESSO CIVILE DOPO LA RIFORMA 141, 154 (Claudio Cecchella ed., 2023) (explaining that judges must find necessity of application in 363-bis proceedings).

89. *See* CARRATTA, *supra* note 88, at 114; Mondini, *supra* note 88, at 313 (explaining that, in order for 363-bis proceedings to occur, the law requires that there be no legitimate precedent in the relevant jurisprudence).

90. *See supra* Section II.B (discussing Article 374(3) as a mechanism to resolve conflicts, not change established precedent).

The third requirement deals with the *arguability* of the legal question. In other words, the legal question should be capable of multiple interpretations, each equally valid from both logical and legal perspectives.[91] It is not imperative that these interpretations stem exclusively from lower court precedents that have addressed the same legal question. The existence of multiple interpretations may also stem from an inherent ambiguity in the meaning of the legal provision under scrutiny.

Finally, the fourth requirement focuses on the *commonality* of the legal question. The decision to make a preliminary reference depends on whether the legal question is likely to arise again in future cases.[92] Predicting if the same question will come up before the Court of Cassation is challenging. Therefore, such an assessment is speculative and focuses on specific aspects of the legal question, such as its relevance to interpreting legal rules related to consumer contracts or industry-specific labor regulations.

The fact that the preliminary reference involves a question of law is a matter of *legal interpretation*; it means that the Court of Cassation is asked to clarify the meaning of a legal provision when the referring court finds the provision so uncertain that it hinders the adjudication of the dispute.[93]

The crucial point raised by the preliminary reference procedure under Italian law is that there is a functional relationship between the Court's ruling and the pending litigation. In the preliminary reference procedure, the referring court cannot diverge from the Court's resolution of the question of law. If a request arises to address a question of law impacting a case's

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91. *See* Comastri, *supra* note 88, at 155–57 (discussing the requirements for a legal question that gets considered in 363-bis proceedings); Mondini, *supra* note 88, at 314 (explaining that questions taken up under this mechanism must present serious interpretive difficulty).

92. *See* CARRATTA, *supra* note 88, at 114–15 (discussing likelihood of repetition as a requirement for preliminary references).

93. It is worth noting that in from 2023 through September 2024, there have been fifty-one instances where a referring court has initiated a preliminary reference to the Court of Cassation. Among these cases, twenty were deemed inadmissible due to insufficient fulfillment of the procedural requirements for commencing the preliminary reference procedure. Conversely, twenty-three cases have been accepted for consideration by the Court, with two currently undergoing preliminary examination. *See Rinvii pregiudiziali ex art. 363-bis c.p.c.*, CORTE SUPREMA DI CASSAZIONE, https://www.cortedicassazione.it/it/rinvii_pregiudiziali_ex_art.page (last visited Sept. 29, 2024).

outcome, it indicates that the decision in the ongoing matter depends necessarily on the Court's resolution of that question. This functional relationship explains why Article 363-bis(6) of the Code of Civil Procedure provides that the Court's decision is binding on the lower court that made the preliminary reference. The binding force of the preliminary ruling reflects the need to use the Court's legal interpretation to serve the interests of the parties to the pending dispute. When referring courts decide their cases in accordance with the Court's preliminary rulings, the parties enjoy the benefits of stable decisions that reduce the risks of appeal to a higher court. While violation of the Court's ruling is grounds for appeal, compliance with the Court's ruling leaves little room for new arguments to move to the forefront. Consequently, appellate courts reviewing the case tend to defer to the Court's ruling to prevent their decisions from being overturned by the Court itself, which has the authority to review appellate court rulings.

III. The Compelling Influence of Persuasion and Judicial Precedents

The question of how a preliminary ruling must be applied to a pending dispute cannot be easily answered. It is worth noting that Article 363-bis(6) of the Code of Civil Procedure specifically requires that the decision of the pending dispute will be driven, in the words of Italian law, by the "*principio di diritto*" ("principle of law") articulated by the Court of Cassation in its preliminary ruling.[94] These words describe the central legal tenet of the Court, which encompasses all legal arguments in support of a given interpretation of the law.[95] There are strong similarities between the concept of "*principio di diritto*" and that of *ratio decidendi*. The latter traditionally refers to the key rationale in judicial decisions that is generally comprised of various

94. Code of Civil Procedure, *supra* note 1, art. 363-bis(6).

95. The concept of "*principio di diritto*" indicates the Court's interpretation of the legal provision that is the subject of the question of law referred to the Court. Thus, the referring court is required to apply this legal provision according to the interpretation provided by the Court. It is worth noting that the concept is also employed in other provisions of the Code of Civil Procedure with identical significance. *See, e.g.*, Code of Civil Procedure, *supra* note 1, arts. 363, 374 (providing issuances and agreement on "*principio di diritto*" in other Court of Cassation procedures).

factors, ranging from the key factual points to the chain of legal reasoning.[96] The former refers to the standard Italian courts apply in interpreting legal rules. The difference between these two concepts is stronger in civil law legal systems than common law systems, where the *ratio decidendi* tends to identify the specific reasons that led the court to issue the final judgment in a particular case.[97] In common law legal systems, however, this difference does not exist or, at least, is more attenuated because the *ratio decidendi* tends to be interpreted as a principle applicable to similar cases.[98] In the Italian legal system, this feature is common to the concept of "*principio di diritto*", which summarizes the court's interpretation in a general rule to grasp the essential principle upon which the decision rests.[99]

The rule that the binding effect of the Court of Cassation's decision in a preliminary reference applies only to legal principles significantly strengthens the authority of its precedent. This is because the legal principle not only embodies the core rationale for resolving the question of law referred to the Court, but also serves as a broad formula applicable to both the referring court and any other court adjudicating a similar legal question.

In this respect, the preliminary reference procedure is a suitable means of ensuring legal uniformity in the judicial system at large. When the Court of Cassation clarifies the meaning of a legal provision, its decision is likely to guide the lower courts, other than the referring court, when handling similar legal issues in future cases. Even if the Court's ruling cannot have a binding effect on other lower courts, it is reasonable to

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96. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 763–67 (1988) (describing different theories of precedent, including the notion of *ratio decidendi*).

97. *See generally* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161 (1930) (outlining guiding principles for determining the *ratio decidendi* of cases for the purpose of common law litigation); J.L. Montrose, *The Ratio Decidendi of a Case,* 20 MOD. L. REV. 587 (1957) (contending with competing conceptions and theories of the *ratio decidendi*); Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959) (arguing that the *ratio decidendi* of cases are what maintain consistency and strength in common law jurisprudence across generations); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 572 (1987) (analyzing the role of precedent in legal argument).

98. *See* Stone, *supra* note 97, at 598 (noting that future developments in common law exist in the current common law, waiting to be extended via inquiries about applications of *ratio decidendi* to future cases).

99. *See* RICCI, *supra* note 46, at 575 (defining "*principio di diritto*" as the statement of the law as it applies to a particular set of facts under examination).

assume that lower courts called upon to decide cases involving the same question of law that the Court has already resolved in an earlier preliminary reference procedure will tend to apply the Court's ruling to their own cases.

The extensive persuasive influence of the Court of Cassation's precedent established in a preliminary reference proceeding poses challenges to the Italian legal system. Although the preliminary reference procedure strengthens the doctrine of *nomofilachìa*[100] by expanding the Court's authority in shaping the interpretation of legal rules and preemptively guiding the behavior of lower courts, the persuasive authority of the Court's decision disrupts the conventional process of setting precedents. Typically, precedents emerge from the resolution of cases on their merits, where a coherent rule can be derived to address similar future cases. However, in the context of a preliminary reference to the Court, the precedent is established *prior* to the resolution of the case on its merits, aiming to influence the decision-making of the referring court.

The fact that the decision on the preliminary reference is focused on a legal question is precisely why all lower courts, other than the referring court, are implicated. Despite its interpretative nature, the resolution of a legal question by a higher court increases the likelihood that such a decision will receive deference in subsequent adjudications. The need to interpret legal rules usually leads lower courts to resolve their cases, at least in part, based on what a higher court has decided by interpreting the same rules. Generally, higher courts interpret legal rules by exercising appellate jurisdiction. Thus, lower courts can face risks of misinterpretation and misapplication due to the factual differences between the pending case and the prior precedent. Interpretive precedents mitigate risks associated with factual differences between cases. Such precedents suggest a preferred legal interpretation and dictate that any dispute concerning that question must be resolved on the basis of the suggested interpretation. Factual differences may lead to different results on the merits, but any result must be based on the same legal reasoning.

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100. *See supra* Section II.A ("Therefore, the expression *nomofilachìa* can be understood as a doctrine that imposes the duty to protect and guard the law on the Court.").