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Are Our European Legal Systems Evolving towards a Precedent Mode of Adjudication?*

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Abstract The article revolves around the doctrine of precedent within the so-called European legal space, wondering to what extent we can speak of a convergence towards a stare decisis model boosted by the harmonising role of the Court of Justice of the European Union. The article argues that although there are still differences between civil law and common law legal systems they regard more the style of reasoning and the deep understanding of the relationship between the present decision of a court and past judicial decisions than the very existence of the constraints of the latter upon the former. Recent reforms of the administrative court procedural law regarding the alleged binding force of the rulings of the highest administrative court body are taken as an instance of such a shift towards a precedent-like stance. The article concludes that a sort of mechanism of stare decisis has in fact been created, even though, on the one hand, uncertainty remains as to the way in which the binding force of a precedent concretely operates in the system, and on the other hand, this mechanism relates exclusively to the relationships between past and future decisions of higher courts (horizontal effect). This change, anyway, far from being a shift towards a truly judge-made law system or a consequence of the final abandonment of the dictates of the rule of law, enhances legal certainty contributing to the fundamental requirement of stability of law as a feature of the ideal of the rule of law. L'articolo discute la dottrina del precedente vincolante all'interno dello spazio giuridico europeo, chiedendosi fino a che punto si può parlare di una convergenza verso un modello di "stare decisis" favorito dal ruolo di armonizzazione della Corte di giustizia dell'Unione Europea. Il lavoro sostiene che anche se ci sono ancora delle differenze tra ordinamenti a diritto civile e di diritto comune, queste riguardano più lo stile del ragionamento giuridico e la spiegazione profonda del condizionamento che le decisioni passate operano su quelle future che non l'esistenza di vincoli delle prime sulle seconde. Le recenti riforme del diritto processuale amministrativo per quanto riguarda una presunta forza vincolante delle sentenze del più elevato organo della giustizia amministrativa (l'Adunanza plenaria del Consiglio di Stato) sono prese come esempio di un tale orientamento verso l'accoglimento di un meccanismo formalizzato di precedente vincolante. Nell'opinione dell'autore un limitato meccanismo di stare decisis è stato in effetti introdotto, anche se, da un lato, si ha incertezza sul modo in cui la forza del precedente opera concretamente nel sistema, e dall'altro, questo meccanismo riguarda esclusivamente i rapporti tra le decisioni passate e future all'interno del Consiglio di Stato (effetto orizzontale del precedente

giudiziario). Questo cambiamento, peraltro, lungi dal costituire una resa al diritto giurisprudenziale, rafforzando il requisito della stabilità della legge, contribuisce al contrario alla certezza del diritto e quindi all'ideale dello Stato di diritto.

1. Introduction

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

In the first part I shall briefly comment on the ECJ case law (section 3) in the light of the England-Wales legal system (section 2), also referring to some civil law systems such as France and Germany.

It emerges that although there are still differences between such systems they regard more the style of reasoning and the deep understanding of the relationship between the present decision of a court and past judicial decisions than the very existence of the constraints of the latter upon the former.

Both such analogies and persisting differences can be observed in the ambiguous way in which the European Court of Justice (ECJ) has built its own peculiar doctrine of precedent.

Such a picture of the precedent doctrine and practice is meant to put in perspective the novelty constituted by the introduction in the Italian legal system of a discipline regarding the decisions of the Council of State – the Italian higher administrative court – which seems to pave the way for a mechanism of *stare decisis*.

Section 4, 5 and 6 are devoted to analysing and discussing such a legal discipline whose intent – according to the drafters of the law – is not to introduce any form of binding precedent, as this would be against the principle of the subjection of judges only to statutory law.

My conclusion is that a sort of mechanism of *stare decisis* has in fact been created, even though, on the one hand, uncertainty remains as to the way in which the binding force of a precedent concretely operates in the system, and on the other hand, this mechanism relates exclusively to the relationships between past and future decisions of higher courts (horizontal effect).

This change, anyway, far from being a shift towards a truly judge-made law system or a consequence of the final abandonment of the dictates of the rule of law, enhances legal certainty contributing to the fundamental requirement of stability of law as a feature of the ideal of the rule of law.

2. The Common Law doctrine of Precedent and the Use of Case Law in the Civil Law Systems

The starting point must be the English doctrine of precedent: the basic idea is that similar cases should be decided alike. This is first of all an empirical truth, for in every jurisdiction a judge tends to decide a case in the same way as another judge did in a similar case.[1]

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

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

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

Secondly, this concept of alikeness or similarity is probably the most ambiguous point. It is not to speak about the same (identical) case but just a similar one.[2]

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

As regards such a strict meaning of precedent there are a number of technicalities (the mechanics of precedent), the most essential of which are the following three: the distinction between "ratio decidendi" (holding) and "obiter dictum", the one between vertical and horizontal binding effect, and the concept of overruling.

What is binding, indeed, is not every part of a previous decision but just the point of law (the rule) used to reach a certain outcome.[3] This is something which in our civilian legal systems we are used to calling "principles" of laws, as we shall see further on.

Vertical effects refer to the operating of the hierarchical organisation of judiciary, where a court is bound to apply the rule established by a superior court, while horizontal effects refer to the fidelity of a court to its own case law.

Unlike lower courts faced with higher court decisions, courts considering their own previous decisions have the capacity to overrule them on occasions. Such a capacity has been expressly acknowledged in England under the House Lord Practice Statement of 1966 where the Lord Chancellor stated that precedents are binding on the Court unless it thinks it is right to depart from a past decision.[4]

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

It is worth stressing that the underlying idea about overruling lies in the desirability of an open and honest departure from a past decision. In other words it is not deemed fair to hide the change of law behind subtle distinctions about the circumstances of the case. Therefore, it is still a case for certainty which justifies the doctrine of overruling.[5]

This picture of a legal system based on precedent leads usually to underline the big divide between legal systems rooted in a case-law "method" and systems which reject it only relying on legal sources strictly established outside the judiciary.

It is fair to notice, though, that such features are not at odds with the fact that the law (in England too) is also based on pieces of legislation enacted by legislative bodies and even that they prevail over case law.

This represents a first factor of alikeness between the two alleged ideal types as in actual fact the duty of the courts in both of them is often one of statutory interpretation, where reasoning by analogy is one of the crucial features.

France is often cited as a typical instance of the furthest side of the spectrum – Article 5 of the *Code civile* forbids judges both to lay down general rules when stating a decision and base a decision exclusively on a past decision.[6]

Having said that, one cannot properly claim that a French judge does not rely on case law. One should consider, for instance, that the *droit administratif* and the *Counseuil d'Etat* historically rely on case law.[7]

Perhaps the actual difference is that civil law judges do not feel themselves bound by a precedent as such but by the repetition of a certain number of precedents that are in agreement on a single point.[8]

If one looks at Germany the alleged absence of a precedent-based jurisprudence is even less tenable, although German academics are eager to claim that court decisions are not formally binding.[9] There is a number of statutes that somehow confers a direct or indirect binding effect of superior courts decisions on inferior courts. For example there are special rights of appeal to take on lower courts that fail to abide by the precedents established by one of the five federal sectorial courts which constitute the highest courts. Other rules, regarding for example the Constitutional Court, also deal with horizontal influence, seeking to prod the judges of the same court to follow the precedents of their own courts.[10]

This latter remark enables us to notice that a difference between the two models is that while the foundation of the doctrine of precedent in England is based on a rule of practice, in continental Europe it is often derived from a statutory provision (see *infra* section 4 about the Italian case).

Especially taking into account some distinctive characteristics of continental legal systems about the judiciary (the professional status of judges as civil servants; the distinction between district courts with adjudicative powers and a supreme court whose remit is limited to assessing the correct application of the law by inferior courts, and the absence of dissenting opinions) a plausible way of approaching this shifty area of law is to conceive judicial precedent – or better effects of past judgments – as something which covers a broad area, encompassing such things as res judicata, nomophylactic function and *stare decisis*.

Particularly between the nomophylactic function – the function of assuring conformity with legal rules throughout the legal system – and *stare decisis* the borders are pretty much blurred. It is well known that thanks to the nomophylactic function all apical jurisdictions should ensure a uniform application of law.[11]

In Italy, for instance, this function (vested in the Court of Cassation) has been long emphasised elaborating a concept of so-called «living law».

One of the first decisions of the Italian Constitutional Court (no. 3 of 1956) pointed out that a «court, even though it must interpret autonomously both the constitutional norm allegedly violated and the statutory norm which infringes the former, cannot ignore a constant judicial interpretation which bestows upon the legislative provision its own actual value in legal life».

Living law, according to the Constitutional Court, is derived from a well established case law even though it is not totally univocal. Whenever there is a certain amount of decisions about the meaning of a statutory disposition, above all made by the Court of Cassation – especially when it seats as United Chambers – the rule so determined is the one to be submitted to the Constitutional court, even though it looks *prima facie* different from the literal meaning. Thus, in such cases, although courts are not under a formal obligation to comply with the Court of Cassation case law, in actual fact a court which wants to diverge from the "living law" has to resort to serious and adequate arguments.

Recently, as we shall see in section 4, such a judge-made rule has been partly "translated" into the legislation, stating the inadmissibility of an appeal based on reasons which conflict with a principle established by the Court of Cassation.

There can be tension between precedent in the strictest sense and case law as well, making the picture even more complex. A thorough consideration of case law by judges, seeking out the essence of strands of judicial decisions, could be in fact in conflict with the most recent decision counting as a precedent. So this might be a way of departing from a binding precedent being faithful to case law.

From what precedes we can say that if the distinction between common law and civil law about precedent must not be taken as a dichotomy, existing substantial overlapping practices, there are still technicalities which make the common law tradition stand a bit apart. Leaving aside such technicalities, what seems to be at the heart of the English approach to precedent lies mainly in a certain style of reasoning, developed and refined through the practice of a fact-driven analysis in order to seek the rationale of a decision and exercising the art of distinguishing.

This is most probably further favoured by the individual opinion laid down – often in conflict with each other – by all the sitting judges, which is absent in the civil law tradition.

3. The ECJ Doctrine of Precedent

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

The ECJ was, namely, moulded on the French *Conseil d'Etat* and this is the reason why precedent initially did not play much role in its case law.[12] The influence of the French legal tradition can be

seen especially in the style of its judgment and its way of reasoning, which were both pretty formal.[13] Collective judgment and concise reasoning are not fecund grounds for a doctrine of precedent.[14]

However, once the Court had developed quite a significant bulk of case law it started the practice of extensively citing its own cases so as to justify successive judgments.[15] This is not sufficient, though, to affirm that the ECJ has since then embraced a true doctrine of precedent. What can be said is rather that the Court has progressively become more concerned with the consistency of new cases with the principles and directives established in its previous seminal cases.

It has been pointed out that it is the *acquis communautaire* that brings about a new attitude of the ECJ towards its earlier judgment. This precedent value namely regards a kind of vertical relationship, the one between the ECJ and the whole judiciary of each and every Member State, for one of the features of the EU law order is the function of national courts as decentralised organs of the Union.[16]

Hence, such a precedent value attaches more to the vertical side than to the actual meaning of *stare decisis*, which lies in the horizontal dimension of the doctrine of precedent.

The importance of bedrock cases such as Van Gend en Loos and Costa v ENEL to the construction and legitimation of the EU order plays a key role also in this area.[17] These judgments laid down the principles of direct effect and primacy of EU law, triggering a process of constitutionalisation of the Treaties. One of the consequences of this process was to tear apart the monopoly of the States to grant individual rights, which hitherto had remained undisputed.

Thus, it was the necessity of preserving and reinforcing this legacy of Van Gend en Loos and Costa as to the guarantee of EU rights which favoured the increasing reliance on precedent.

The ECJ "worked assiduously to develop what is now a robust and taken-for-granted set of practices associated with precedent".[18]

Leaving aside the problem as to whether such practices embody an actual English-like doctrine of precedent or we should speak, say, of an informal precedent value[19], it is widely acknowledged that, especially thanks to the mechanism provided for by Article 267 TFEU,[20] the force of the decisions of the ECJ towards Members States is not limited to the traditional declarative (nomophylactic) function of a national higher court in a system of civil law.

It is especially the obligation of national laws, deducible from the Treaties, to provide effective remedies for the protection of EU rights which brings about the duty on national courts to treat the ruling of the ECJ as binding. The logical premise of this state of affairs is that it is the interpretation provided by the ECJ – which enjoys an exclusive competence on this – and not the law as it hypothetically springs out from the written sources of EU law, which determines a precise obligation to abide by such an interpretation.

Suffice it to think of the *acte clair* and *acte éclairé* doctrine of the ECJ, according to which only if either the meaning of any EU legal dispositions is clear beyond any doubt[21] or the point of interpretation in issue is materially identical to a matter already decided, is a court of last instance exempted to raise a question for a preliminary ruling under article 267.3 TFEU.

It is plain, then, that the *acte eclairé* doctrine implies a sort of normative effect well beyond the proceeding which has caused the ECJ interpretation to be made,[22] for the reverse of the said exemption is that all the courts (at least of last instance) are under an obligation to resort to the ECJ should they reckon that the interpretation already provided by the Court itself does not suit the case at hand.[23] This entails the consequence that not following the principle of law previously established by

the ECJ is not in the cards.

Also instrumental to this discipline is the line of cases through which the ECJ has come to establish a principle of liability of a Member State for breach of EU obligations when a court of last instance fails to comply with the duty to bring before the Court a matter concerning the interpretation of the Treaties.[24]

Having said that, as for horizontal effects, the approach of the ECJ to *stare decisis* is somewhat looser.

The ECJ regularly refers to its 'settled' case law, but it does not treat its past rulings as formally binding.[25]

It resorts pretty much often to the technique of distinguishing, whereby it can adjust its aim without disowning a previous decision.[26]

Both when the ECJ declares to follow one of its previous rulings and when it goes for distinguishing, it is rare it discusses analytically why and how it is doing so as an English court normally would do.

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

On the one hand, it is able to determine the outcome of certain cases ignoring previous case law.

On the other hand, the vagueness of principles and doctrines enunciated by the Court makes it rare that an actual change of the ruling is necessary.[27]

As has been noted, almost invariably the ECJ is then able to «encompass subsequent cases within the concept of a prior case. This lends a certain artificiality to the recitation of previous case law; it is the broad concepts, not so much particular prior cases, that can and do determine the outcome».[28]

We can conclusively observe that the ECJ has indeed developed an original doctrine of precedent, especially driven by its position at the apex of such a peculiar order as the EU. Due to such a case, the fact that we cannot definitely decide whether the EU law embraces a clear doctrine of binding precedent should not surprise us.

After all, as has been pointed out, the EU brings together many different legal orders from civil and common law traditions.[29]

As to the coercive and quasi-normative effects of the ECJ rulings down through the "hierarchy" of the integrated EU-Member States judiciary, the Court itself tends to resemble something in between a constitutional court of a civil law state and the English Supreme Court.

It departs from a pure English model, though, as to the uncertain status of the horizontal dimension of precedent (*stare decisis* in its strictest sense).

Anyway, it is plausibile to claim that – as in many other areas – the catalytic interaction between the ECJ and national courts of Member States concurs to favour a trend towards a more general reliance on coercive effects of past decisions beyond an individual case.

This is the case for the Italian legal system, where recent statutory amendments seem to introduce a kind

of formal mechanism of *stare decisis,* albeit limited in scope as we shall see in the following section.

4. The Case for Vertical and Horizontal Binding Effect of Precedent in Italian Administrative Law

My analysis is confined to the administrative jurisdiction, even though, as will emerge soon, much of the issues I am going to address affects the judiciary as a whole.

It is necessary to start by writing out the source of law I referred to at the end of the last section, that is Article 99 of the Code of Administrative Court Procedure (CACP) of 2010, which reads:

1. *The chamber to which a proceeding is assigned, if it maintains that the point of law submitted to its evaluation either has brought about or might bring about jurisprudential conflict, can, with a motivated order, either on a request of the parties or on its own motion, submit the decision of the recourse to the Plenary Session. The latter, if so deemed to be opportune, can send back the proceedings to the Chamber.*

2. Ahead of the decision, the President of the Council of State, on a request of the parties or on its own motion, can defer any recourse to the Plenary Session either to resolve general questions of particular importance or to settle jurisprudential conflict.

3. The Chamber to which a proceeding is assigned, which does not agree on a principle of law enunciated by the Plenary Session, shall submit to the Plenary Session itself, with a motivated order, the decision about the recourse.

4. The Plenary Session shall decide the whole proceeding, unless it only wants to pronounce on a principle of law sending back the remaining matter to the remitting Chamber.

5. If the Plenary Session evaluates that the question is of remarkable importance, it can anyway declare the principle of law to the interest of the legal system even though it either declares the recourse non receivable, inadmissible or non prosecutable or it states that the proceeding is extinct. In such cases the decision of the Plenary Session does not affect the challenged administrative decision.[30]

A very similar rule as the one in article 99.3 is provided for in article 374.3 of the Italian Civil Procedural Code (CPC) as regards the relationship between the United Chambers and each Chamber of the Court of Cassation.

In the Code of civil court procedure there is another legal provision (article 360-bis c.p.c) – absent in the administrative court procedural code – according to which an appeal to the Court of Cassation «shall be inadmissible: when the impugned decision has settled the questions of law in a manner which abides by the Court case law and the motives for pleading the annulment do not offer elements either to confirm or deny such case law»[31] (as one can see this is the inverse of the rule adopted in Germany I referred to above).

The Court of Cassation, in turn, in interpreting this provision has stated that in the light of the principle

of effective judicial guarantee an appropriate balancing between the right of the parties to resort to the Court of Cassation for a violation of the law and the actual possibility for the court itself to achieve its function must be struck. This must be done by conferring to interpretative directives of the court not only a persuasive effect but also a certain degree of stability.

It has been argued in the literature, and we should agree on this, that such a mechanism implies a kind of binding force of precedent not far from what in the English legal system occurs as regards vertical effects.[32]

However, such a rule on vertical effects of the higher court rulings has not been put in the legislation with regard to the decisions of the Council of State *vis-à-vis* administrative courts of first instance.[33]

The legal provision reported above – namely its paragraph 3 – rather lays down something we can understand as a sort of horizontal effect of particular judgments.

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

It seems to me that the focus of this legal provision is on the "principle of law".

I assume that by principle of law in this context the provision means what in the doctrine of precedent is called *ratio decidendi*, that is to say the process of generalisation which makes a reasoning repeatable in a number of future cases on condition that they present some common features.

The provision at hand points out that such a principle is one that the CSPS has enunciated.

One wonders, therefore, whether this implies that such principles have to be clearly and expressly indicated as such in a previous decision or there is a duty on each chamber to actively search for them in the CSPS case law or even deduce them from previous decisions.

The use of such a verb as "enunciate"[34] suggests that the first alternative would be preferable. Besides, this interpretation is also recommendable because it is more coherent with the idea – which I shall express in the final part of the paper – that the aim of this mechanism is to enhance legal certainty. It is worth mentioning the opinion that the Plenary session should adopt a clearer and more controlled way of reasoning so as to make people (and fellow judges) aware of any relevant *ratio decidendi* and avoiding as much as possible *obiter dicta.*[35]

It must be favourably noted, then, that the CSPS has been carrying out for some time since the new rule was introduced a practice of enlisting at the end of its decisions the "principles of laws" enacted (so called "maxims"), so giving substance to the idea that only such principles triggers the mechanism provided for by article 99.3 CAPC.

The suggested interpretation is more plausible as well, as in actual fact only if the CSPS is able to state clearly which are the "principle of laws" to be taken as mandatory by the chambers is it likely that the latter are willing to acknowledge the obligation laid down in article 99.3 CACP.

It is anyway also possible to cast doubts on the very possibility that the above mentioned mechanism has introduced in any way a *precedent* rule. It could be interpreted as yielding just a negative bound, that is

to say not an actual obligation to accept the interpretation endorsed by the CAPC, but a prohibition to make an overruling accompanied by the duty to refer to the Plenary itself for the possible change of such an interpretation.[36]

Concerns about the compatibility of a precedent rule with the principle of legality and hierarchy between the legal sources as set in the Constitution are voiced in the governmental report on which the amendment to the the CSPC is based. It underlines that this new mechanism does not introduce *stare decicis*, for it would be in conflict with the principle according to which judges are only subject to the laws enacted by the Italian Parliament (art. 101.2 It. Const.).

Thus, it would be a limit of a strict procedural nature, since the obligation does not concern the content of a principle of law (which only the legislature can enact) but it only impedes a decision incompatible with a principle declared by the Plenary Session.

In my opinion such an argument – but procedural not substantive obligation – sounds a bit awkward.[37]

Perhaps a more serious objection to the binding effect of the ruling by the CAPC is that there seems to be no direct remedy against a decision of a Chamber which has been made irrespective of the alleged obligation. Nor, as has been pointed out by an astute commentator, do general remedies against the Council of State decisions look viable in such an event.[38]

There are three of such general remedies in the law: a) an appeal to the Court of Cassation; b) the so called “revocation” c) the opposition of a third party.

The appeal to the Court of Cassation regards only cases where the Council of State has decided a case outside its own jurisdiction, *ultra vires*. A commentator has suggested that if a chamber decides a case overruling a principle established by the Plenary rather than referring to the Plenary itself, then it is using a power that it does not possess and thus it is outside its own jurisdiction.[39] The advantage of this thesis would be to establish a link between a general external nomophilactic function – belonging to the Court of Cassation – and an internal one – exercised by the PSCS, thereby reinforcing the latter.

There have been no cases as such, but this proposal *de facto* would allow the Court of Cassation to deal with a question of merit, that is to say to assess how and to what extent a principle established by the Plenary session has to be applied by the Council of State, something that actually does not seem to deal with the external limits of the jurisdiction.[40] Besides, as I shall mention further below, the relationships between the PSCS and the chambers regard the internal organisation of the Council of State as a whole.

As to the second case, a recourse for revocation against a decision of the Council of State is admissible only in exceptional circumstances strictly provided for by the law, such as: new evidence that a party could not convey in the proceeding for causes not depending on his/her own will; a deceitful behaviour of one of the parties towards the other; a violation of the *res judicata*, etc. Thus, it is no use trying to apply this remedy to the case at hand.

Finally, the extraordinary remedy of the opposition of a party who was absent from the proceedings, even though he or she should have given notice as their rights were at stake, it is the only one which it appears a party could rely upon in the context at hand. Indeed such a party would be able to claim that the decision of one of the Chambers of the Council of State which he or she is challenging, in so far as its ruling overcomes a precedent of the Plenary, is void for not having referred to the Plenary itself. So there is a remedy after all, but it regards only the not very common case of a person who was not in the proceedings because he or she was unaware of it.

Should we claim, then, that at the end of the day such new rules are far from attaching any legal force to the ruling of the Plenary Session? This would be equally misleading.

The facts stand that a chamber, the law reads, cannot make a decision which conflicts with a principle of law enunciated by the CSPS. But what happens then if a chamber fails to do so?

Like in other cases provided for in the Italian legislation, the consequences of the violation do not concern the decision made irrespective of the procedural requirement – sanctioning it as invalid – but they do affect the individual conduct of people who acted in such a way.[41]

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

As a matter of fact much controversy about the liability of judges revolves around the limits to their activity of interpreting the law when departing from well established case law.

This is of course slippery terrain, especially and again in the light of the principle of the subjection of judges only to statutory law.

With the novelty at hand, though, there seems to be sufficient grounds to affirm that a decision of a chamber which overrules a principle established by the Plenary is a clear and gross violation of a rule which does not provide for exception, thereby paving the way for a case of judicial liability.

I shall cope with this issue in the following section.

Before moving on to this, it is worth clarifying in what sense such legal provisions would be reconcilable with a *stare decisis* (horizontal effect) mechanism. In fact there is also something of a hierarchical nature at stake here, namely a sort of hierarchical relationship between the CSPS and each chamber of the Council of State. The latter, though, is just an internal division of labour, a matter of organisational kind which does not affect the jurisdictional role of the Council of State as one court.

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

To this respect the position of the CSPS recalls the one which characterises the ECJ. At the end of the day the fact that the mechanism laid down by the law is built on the internal functioning of the apparatuses which compose the Italian higher courts yields yet another particular type of binding precedent rule, somewhat hybrid between a vertical and horizontal effect.

First level (regional) administrative courts remain, in turn, disaffected by the reform, as neither are they formally bound to follow a PSCS precedent nor are there provisions about indirect binding effect in the vein of what the law establishes as regards the proceedings in matters of private law litigation.

On the other hand, on a more pragmatic note, one can easily envisage that the aforesaid horizontal effect will inevitably end up influencing the vertical dimension too, strongly reinforcing the persuasive effect of the Council of State case law when entrenched into a principle of law enunciated by the PSCS.

5. Judicial Responsibility for Circumventing a Precedent?

As we have mentioned in the last section, whatever the regime of precedent in the higher administrative court might be, its efficacy will largely depend on its linkage with the legal discipline of judicial responsibility.

Judicial liability has been regulated in Italy by the Parliament act 1988, n. 117. Those who seek for compensation have to propose an action before an ordinary court against the State, which, in turn can act against judges who have been charged with responsibility for damages.

There are of course strict requirements as to the action being successful: a) a causal nexus between the damages and the decision which has failed to comply with the remittal duty; b) such a failure has to be deemed pretty harsh.

The provision reads that a judge shall be liable in case of "grave violation of law determined by inexcusable negligence". Such responsibility is, anyway, ruled out when the activity at stake is about the ordinary "interpretation of norms of law" and the "evaluation of evidence".

According to the case law such a case of grave guilt has been interpreted in a way which leads one virtually to always deny it. It is commonly said indeed that there is responsibility only when a judge behaves in a way that yields a macroscopic and coarse violation of legal sources. It is so when he or she provides an interpretation conflicting with elementary criteria of logic, producing abhorrent consequences in reconstructing the will of the legislator or manipulating the text of law so as to spill over into "free law".

In other words it is not just a grave negligence but something which is due to a sort of inexplicable behaviour in the context of the proceedings, a behaviour, in other words which is either almost cognate with madness or plainly deceitful.

One can easily explain this strand of case law both as a self-defensive attitude of the courts and as an example of the difficulty of striking a balance between the independence of the judiciary and its accountability to the law.

Leaving aside this general picture, if we turn our attention to article 99.3 of CAPC the scene looks a bit different. Here the duty to abide by the principles expressed by the Plenary Session is assisted by a procedural device which cannot be doubted. Almost paradoxically it is the use of an allegedly weak (in the view of the skeptics about the introduction of a stare *decisis rule*) procedural device which makes the judicial duty stronger.

Ahead of the introduction of this mechanism in the legal system, indeed, according to the case law when an inferior court departed from the interpretation provided for by the United Chambers of the Court of Cassation, the responsibility of the judges would have to be ruled out if they gave reasons of law for their choice. Only if they utterly failed to do so would they be charged with responsibility.

Now, however – at least within the relationship between the chambers and the plenary – that option has

been expressly ruled out. If the departing judges give reason of law, then they do acknowledge that there is a conflict and in such a case they are necessarily aware that they are expected to resort to the Plenary. A violation of this duty, therefore, albeit "procedural", stands in my view for an inexcusable negligence which opens the way to state/judicial liability.[42]

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

More puzzling is the case where the Chamber wants to depart from an *obiter dictum* of the Plenary, which as such, as we have seen before, should not be binding neither for successive nor inferior courts. In fact, dealing with *obiter dicta* entails carrying out a normal "activity of interpretation of norms of law" which cannot lead to liability.

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

As to the actual discipline of this kind of professional responsibility, it is worth briefly lingering on it as there seems to be a legal vacuum. The relevant statute (act of Parliament no. 186/1982) refers – as regards cases of violations and sanctions – to the discipline provided for for ordinary judges. Oddly the latter (A. of P. no. 109 of 2006) states that it shall apply to ordinary judges only, expressly excluding administrative judges.

To avoid a situation where there would be a procedure about disciplinary responsibility without a substantive regulation of such a responsibility, the only solution is to consider the reference to the law applicable to ordinary courts as made to the statute existing at the point in time when such a reference was made, that is to say the royal legislative decree n. 511 of 1946, albeit repealed by the cited 2006 act.

According to article 18 of such a decree the disciplinary illicitness of a judge occurs whenever he or she "fails to comply with her own duties or he or she behaves in or out of the office in a manner that makes he or she unworthy of the trust and consideration which he or she is expected to enjoy, or which negatively affects the prestige of the judiciary order".[43]

This provision sounds as broad as to let us claim that it covers the behaviour of a judge who does not refer to the Plenary while overruling a precedent of the Plenary itself.

In such cases disciplinary sanctions range from milder punishment, such as warnings and formal disapprovals, to more serious ones, such as the loss of benefits from seniority, dismissal, and destitution which also entails the loss of the right to a pension.

It is obviously very difficult to establish which of the sanctions is suitable for such a violation as the disregarding of a principle of law established by the PSCS and quite a remarkable margin of appreciation is bestowed upon the Presidency council here.

6. Problems about state responsibility for breach of European

Union Law

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

As we know since Van Gend en Loos the EEC Treaty has been more than an agreement which merely creates mutual obligations between the contracting states. The Union constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and whose subjects are not only the Member States but also their nationals.

The status of EU law in the national legal systems is not a matter of domestic constitutional law, but a matter of EU law itself.

According to Costa v. ENEL "The law stemming from the Treaty, an independent source of law, cannot, because of its special and original nature, be overridden by domestic provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

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

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

In Kobler [44] the ECJ held that in the light of the essential role played by the judiciary in the protection of rights derived by individuals from EU rules, the full effectiveness of those rules would be called into question and the protection of those rights weakened if individuals were precluded, under certain conditions, from obtaining reparation when their rights are affected by an infringement of UE law attributable to a decision of a court of a MS adjudicating at last instance. And this happens even if the decision in question has become final so gaining the status of *res judicata*.

Therefore, a judge can incur in a responsibility to the purpose of the A. of P. 1988, n. 117 also if he or she does not refer to the ECJ for a preliminary ruling erroneously assuming that Italian law is not in conflict with EU law.

Indeed a court is under a duty to give full effect to the provisions of European Union law, if necessary refusing its own motion to apply any conflicting provision of national legislation, including procedural provisions (such as the preclusion to raise questions for the first time in the appellate stage), and it is not necessary for the court to await the prior setting aside of that national provision by legislative or other constitutional means (Case C□173/09 Elchinov [2010] ECR I-8889, paragraph 31).

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

infringement of that law.[45]

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

One could simply say that such a conflict should be seen but as a reason to object to the soundness of the national principle and refer the question to the Plenary, activating the device provided for in Article 99.3 CPAC. Yet, it would hardly be the answer of the ECJ, which does not mind procedural rules being set aside if this is necessary to directly bring the question before itself.[46]

On a practical note, we can observe that if a court directly applies the EU principle rather than submitting the question to the Plenary, it would be very unlikely that the judges incurred in any responsibility at all in the light of the aforementioned requirement of the "grave guilt" imposed by the law on judicial liability.[47]

7. Some Final Considerations

Although we cannot claim that EU law is the driving force of the change which has occurred in the Italian legal system regarding a more robust influence of the higher administrative court decisions on its own successive case law, it is plausible to maintain that the inclination of the ECJ for a precedent-like stance within the integrated European judicial order is an important factor to explain and justify such a change.

As for the understanding of the change discussed above, it seems to be the combination between a doctrinal tradition unwilling to acknowledge the existence of a precedent rule in civil law systems and the objective narrowness[48] of the rule as formulated by the legislator which leads someone to deny that a genuine mechanism of *stare decisis* has been introduced.

As it happens according to the drafters of the law themselves a rule imposing a system of binding precedent would be in conflict with the constitutional principle of the subjection of judges only to statutory law.

Without entering this slippery terrain, suffice it to say that also in the English legal system case law is supposed to yield to the legislature, for the rule of recognition is rooted in the principle of parliamentary sovereignty.

Hence, leaving aside the unworkable case of a conflict between common law and the will of Parliament[49], in practical terms very often a binding precedent is a rule which is derived from the interpretation of legal provisions enacted by the political law-maker. Therefore, claiming that the principle of the subjection of judges only to the statutory law entails a ban on a precedent-like system ends up advocating a quite implausible and old fashioned concept of legal interpretation as a pure cognitive enterprise, one which would be able to unravel the actual will of the legislator.

There is no need here to commit ourselves to one or another theory of legal interpretation, being

sufficient to point out that it is nowadays broadly acknowledged that the intellectual endeavour called legal interpretation is better explained as a discourse belonging to the domain of decision and justification than to the domain of revelation of a preexisting meaning encapsulated in a text.[50]

Taking into account such an unavoidable feature of legal practice, we need to be aware of the actual goal of this acknowledgement of a kind of *stare decisis* in Italian public law, however it is to be conceived. In fact, such a change does not represent a late endorsement of the creative role of administrative courts, which in Italy, like in France, historically have been to a very large extent the champions of the construction of administrative law.

A case law-based legal system (at least an Enlish-like one) is barely a place of "free-law", as from time to time some enthusiast believes, rather the opposite. In other words the adoption of a system of *stare decisis* is not a way of reconciling "real facts" ("living law") and the law, but quite oppositely of harnessing and controlling too large a creativity among the ranks of the judiciary, thereby boosting legal certainty and almost paradoxically a more genuine endorsement of the subjection of judges to the law as enshrined in article 101 of the Italian Constitution.

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[1] R. Cross, J.W. Harris, 'Precedent in English Law' (1991), Clarendon Press, 3.

[2] See on this point F. Shauer, 'Thinking Like a Lawyer' (2009) Harvard University Press, 44-54.

[3] That is precisely the *ratio decidendi*, on which see J. Stone, 'The Ratio of the Ratio Decidendi', Modern Law Review, 22(6) (1959), 597-620.

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

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

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

[7] J.W. GARNER, 'FRENCH ADMINISTRATIVE Law', the Yale Law Journal, Vol. 33, No. 6 (Apr., 1924), 597-627, where the author significantly observes that a "striking difference between the French droit administratif and the administrative law of Anglo-Saxon countries, so far as there is any, is that the former is almost entirely jurisprudential (to employ a French term); that is to say, it is case law. It is largely the work of the council of state (the supreme administrative court of France), of the tribunal of conflicts (a special tribunal for deciding conflicts of competence between the civil and administrative

courts) and to some extent of the court of cassation (the supreme judicial court of France). In this respect it bears a striking resemblance to the common law of England and the United States" (p. 598).

[8] R. Cross, J.W. Harris, supra n 1, 11. See also B. Deoorter, F. Parisi, 'Legal Precedents and Judicial Discretion', C.K. Rowley, F. Schneider, eds, The Encyclopedia of Public Choice, Kluwer, 2004, 667, on the evolution from a widespread use in early legal systems of a line of consistent past decisions as a way of make a sound present decision to the establishment of a doctrine of authoritative precedent in English law.

[9] Historically, decisions of the Imperial Chamber Court founded in 1495 – the first appeals court to have jurisdiction over all decisions of lower courts in German territories – were considered as containing principles in a quasi-statute manner and had to be followed as binding precedents. See T. Lundmark, 'Charting the Divide between Common Law and Civil Law' (2012), Oxford University Press, 344.

[10] *Ibidem*, 357.

[11] As regards the Italian legal system, article 65 of the law on judiciary (Royal decree no. 12 of 1941) establishes that the Supreme Court of Cassation shall make sure that the law is exactly observed and interpreted and that it shall guarantee the unity of "national objective law". As for how this can actually be done without conferring to the ruling of the Supreme court a precedent (binding) value, the usual explanation is that a lower court is under a duty to fully and fairly consider the Court of Cassation case law, giving precise reasons should it decide to depart from it (see L. Montesano, G. Arieta, 'Trattato di Diritto Processuale Civile', Vol. I, CEDAM, 2001, 1849-50). It is worth noting that according to article 68 of the law on judiciary a special office within the Court of Cassation (called 'Massimario') is bestowed with the task of elaborating and collecting "precedents", that is to say «not only general *regulae iuris* enunciated by the Court, but also concrete *rationes decidendi* of individual decisions» (*Ibidem*). These devices are clearly aimed at conditioning new decisions by way of making them heed past authoritative decisions. As regards such an issue it is still hugely beneficial to read G. Gorla, 'Raccolta di saggi sull'interpretazione e sul valore del precedente giudiziale in Italia', Quaderni de "Il Foro Italiano", Rome, 1966, where he distinguishes between an abstract and concrete value of precedent in the Italian legal system and argues that even though precedent does not enjoy binding force in Italy, this does not mean that precedent lacks any abstract legal value. This argument is based on legal provisions such as the aforementioned articles 65 and 68 of the law on judiciary, article 363 of the civil procedural code, which provides for a recourse of the general prosecutor to the Court of Cassation "in the interest of law", and article 111 of the Italian constitution which provides for a general remedy of last instance before the Court of Cassation when a "violation of law" has been perpetrated (in this latter case Gorla cites extensively G. Flore, 'La Corte di Cassazione e la Costituzione', Giustizia Civile, IV, 1965, 105). The well-known conclusion drawn by Gorla is that the abstract value of precedent in Italy is of a persuasive nature.

Another piece of work on this matter well worth reading is J. H. Merryman, 'The Italian Style', Stanford Law Review, 18, 1965, 606.

[12] T. Tridimas, 'Precedent and the Court of Justice. A Jurisprudence of Doubt?', J. Dickson, P. Eleftheriadis, eds, Philosophical Foundations of European Union Law, Oxford University Press, 2012, 308-9.

[13] See K. McAuliffe, 'Precedent at the Court of Justice of the European Union: The Linguistic Aspect', M. Freeman, F. Smith, eds., Law and Language: Current Legal Issues, Vol. 15, Oxford University Press, 2013, 483-493, on the influence that the same use of the French as the language of the deliberations of the ECJ exerts on the development of a *de facto* use of precedent.

[14] T. Tridimas, *Ibidem*. It has also been pointed out that the power to depart from its previous decisions was a necessary device of a court whose decisions could only be changed by amending the Treaties: A Arnull, 'Owning Up to Fallibility: Precedent and the Court of Justice' (1993) 30 Common Market Law Review, 247, 248.

[15] A. Stone Sweet and M. McCowan, 'Discretion and Precedent in European Law', O. Wiklund, ed., Judicial Discretion in European Perspective, The Hague: Kluwer (2003), 109-115, who refer to data from the years 1961-1998 in which they record a cite of 2,057 different cases out of a total of 2,674 rulings.

[16] T. Tridimas, supra n 11, 309.

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

[18] A. Stone Sweet, 'The Judicial Construction of Europe', Oxford University Press (2004), 97-8.

[19] Or of a precedent of interpretation rather than of solution (T. Tridimas, *Ibidem*).

[20] As as been noted the development of 'precedent' is inextricably linked to the procedure of preliminary ruling under TFEU Art. 267 TFEU (K. McAuliffe, supra n 12, 484).

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

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

[23] Joined Cases 28–30/62 Da Costa v Nederlandse Belasting-administratie [1963] ECR 31, para 13; CILFIT, supra n 17 para 14.

[24] See below section 6 for references to case law.

[25] T. Tridimas, supra n 11, 313-4.

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

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

[28] G. Conway, 'The limits of legal reasoning and the European Court of Justice', Cambridge University Press (2012), 245. The author maintains that «the broad concepts or principles of effectiveness and loyalty to the Community allowed the Court a choice as to whether to encompass liability for judicial error in the emergent doctrine of State liability, and it was several years before it did so in Kobler».

[29] J Komarek, 'Judicial lawmaking and precedent in supreme courts: The European Court of Justice compared to the US Supreme Court and the French Cour de cassation' (2008-09) 11, Cambridge Yearbook of European Legal Studies, 399.

[30] Translated into English by the author.

[31] Translated into English by the author.

[32] V. Speziale, 'Le sezioni unite della cassazione nel 2010 sul termine di impugnazione del licenziamento e sul deposito del testo del contratto collettivo', Rivista It. Diritto del Lavoro (2011), 3, 1009.

[33] The broadest scope for a binding precedent is made by the law with regard to the proceedings before the Italian Court of Auditors. The mechanism is the same as the one provided for by article 99 CPAC, but the obligation to bring the question about the principle of law before the "united chambers" is extended to the court of first instance (article 42 Act of Parliament no. 69 of 2009).

[34] Both in the Italian ("enunciare") and in the English the meaning of "to enunciate" is making a statement "in clear or definite terms".

[35] E. Follieri, 'L'introduzione del principio dello stare decisis nell'ordinamento italiano, con particolare riferimento alle sentenze dell'Adunanza Plenaria del Consiglio di Stato', Dir. Proc. Amm., 2012, 1255.

[36] In the literature a trend to minimise the meaning and impact of such a provision seems to prevail. See G. VERDE, '*Ius litigatoris* e *ius constitutionis'*, Id, ed., Il difficile rapporto tra giudice e legge, Napoli (2012) 25; B. Sassani, 'Il nuovo giudizio di Cassazione', Riv. Dir. Proc., 2006, 217, both actually referring to the Court of Cassation very similar rule.

[37] The same can be observed as regards such a claim as the one according to which one thing is to oblige a chamber to the adoption of a consistent decision with a Plenary session precedent another is the non adoption of a dissenting decision. This is maintained by F.P. Luiso, 'Il vincolo delle Sezioni semplici al precedente delle Sezioni unite', Giur. It., 2003, 820.

[38] E. Follieri, supra n 29, 1261-6.

[39] S. Oggianu, 'Giurisdizione amministrativa e funzione nomofilattica. L'adunanza plenaria del Consiglio di Stato' Cedam (2011) 87.

[40] E. Follieri, *Ibidem*, 1263.

[41] We could think for example of the rules establishing certain formal and procedural requirements of the decision-making process, whose violation not necessarily causes the invalidity of the decision itself but can bring about the liability of the decision-makers (see article 21-*octies* of administrative procedure Act no. 241 of 1990 in connection with articles 4-11 of the same Act).

[42] In the same vein see E. Follieri, supra n 29 ,1237.

[43] Translated into English by the author.

[44] Case C-224/01 Köbler [2003] ECR I-10239. See also case C-173/03 Traghetti del Mediterraneo SpA v. Italian Republic [2006] ECR 00000, where the ECJ held that that the exclusion of liability for

errors committed by national supreme courts when interpreting the law and assessing the facts and the evidence is to be considered in breach of EC law. Concerning the requirement of intention or gross negligence, the ECJ did not explicitly deal with the Italian rules at stake, but reinstated that the threshold for liability cannot be higher than the one of "manifest violation of the applicable law". Such a ruling was prompted by a preliminary question raised by an Italian court (Tribunale di Genova) asking whether the rules providing for the exclusion of State liability for judicial errors falling within the scope of the activity of finding the facts and interpreting the applicable law, and anyway for those errors that are not a result of intention or gross negligence, are, indeed, to be considered in breach of the principle of effective judicial protection.

[45] JUDGMENT OF THE COURT (Fourth Chamber) 18 July 2013 in Case C□136/12, Consiglio Nazionale dei Geologi.

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

[47] By the way the research of a decent solution of the issue of the tension between primacy and effectiveness of EU law and the so called "procedural autonomy" of Member States is still on the table. Regarding this see. S. Civitarese Matteucci, G. Gardini, 'Il primato del diritto comunitario e l'autonomia processuale degli Stati membri: alla ricerca di un equilibrio sostenibile', Diritto Pubblico, 1/2013, 1; S. Civitarese Matteucci, 'Obbligo di interpretazione conforme al diritto UE e principio di autonomia procedurale in relazione al diritto amministrativo nazionale', forthcoming, Riv. It. Dir. Pubblico Comunitario.

[48] The mechanism of *stare decisis* we are speaking about indeed relates exclusively to horizontal effect, namely the binding force of the ruling of the Plenary session upon the decisions of any chambers.

[49] As regards which see recently R. Rawlings, P. Leyland, A. L Young, eds, 'Sovereignty and the Law – Domestic, European, and International Perspectives, Oxford University Press, 2013, and especially the essay by Lord Hope of Craighead. For a discussion see S. Civitarese Matteucci, 'Sovereignty and the Law', Forthcoming European Public Law, 1/2015.

[50] See, among many others, N. Maccormick, 'Legal Reasoning and Legal Theory', Oxford University Press, 1994. As to the distinction between the context of justification and the context of discovery which I hint at, elaborated in the field of the philosophy of science, see H. Reichenbach, 'Experience and Prediction', Chicago, The University of Chicago Press, 1938, 9-11, 104-7. One has to bear in mind, however, that this distinction – which even in the philosophy of science is disputed as to the actual scope – is not mechanically transplantable in the field of legal reasoning (see E. Diciotti, 'Intepretazione della legge e discorso razionale', Giappichelli, Torino, 1999, 151-3).