diritto & religioni
Supplemento telematico – ISSN 1970-5301
https://www.rivistadirittocrcligioni.com
LUIGI PELLEGRINI EDITORE

Nomofilachia in the thought of Piero Calamandrei

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16 october 2024

Abstract

The paper explores the roots of the concept of 'nomofilachia' in the thought of Piero Calamandrei. It focuses on recent normative developments and outlines their impact on the role and significance of precedent in the Italian legal system.

Key Words: *Nomofilachia; Piero Calamandrei; Supreme Court; Precedent.*

There are many occasions on which the Florentine jurist Piero Calamandrei made his scientific and civil contribution by immersing himself in the legal experience of his time, a period marked by great reforms, especially the ones introduced in the 1940s. He stepped into the legislator's 'forge', first in the course of the work of the Ministerial Commission for the reform of the Code of Civil Procedure established in 1939 by the Justice Minister Dino Grandi, and then in the Constituent Assembly at the dawn of the new democratic system. Calamandrei played a central role in both these assemblies and was a real driving force in the first one.

The work of the Commission for the reform of the Code of Civil Procedure has been the focus of several recent studies[1], which have contributed fresh insights to the wide-ranging and on-going debate on the doctrinal framework of the Code of Civil Procedure. In this debate, there is, broadly speaking, agreement that the Code – irrespective of the propaganda artfully inserted into the *Relazione al Re*[2] – is the fruit not of the supposed fascist revolution of procedural institutions,

[1] GUIDO ALPA, SILVIA CALAMANDREI, FRANCESCO MARULLO DI CONDOJANNI (eds.), *Piero Calamandrei e il nuovo Codice di procedura civile (1940)*, il Mulino, Bologna, 2018.

[2] See *La Relazione al Re del Ministro Guardasigilli*, edited by Giulio Donzelli, in GUIDO ALPA, SILVIA CALAMANDREI, FRANCESCO MARULLO DI CONDOJANNI (eds.), pp. 23-124. The critical edition, based on a comparison between Calamandrei's manuscript and the text of the report published in the *Gazzetta Ufficiale*, sheds light on how officials working for the fascist regime manipulated Calamandrei's text. Some very significant differences emerged, demonstrating the pervasive nature of the markedly political modifications made to Calamandrei's manuscript in order

but rather of the complex process of sedimentation and reworking of legal studies whose roots can be traced back to the second half of the nineteenth century.

There is no space here to dwell on this interesting chapter in the history of the Italian legal system, except to note that Calamandrei's central role in the Commission is particularly useful for grasping the reasons that inspired certain procedural solutions, including those relating to legitimacy rulings and the 'nomofilactic' function of the Supreme Court. These are themes to which Calamandrei had devoted his very best energies, commencing with the two weighty volumes of *La Cassazione civile*[3], published in 1920 when he was still in his youth. He also continued to explore them in mature works, such as his exemplary entry for the *Nuovo Digesto Italiano*[4] and numerous minor essays, all written with his customary elegant style and originality of outlook.

In keeping with a tradition steeped in a cultural background shaped both by a sensibility for historical research and an aptitude for constructing new concepts, Calamandrei the scholar of the Supreme Court conducted, as a substantial premise to the systematic discourse, a thorough and invaluable investigation of the multiple institutions that, over the centuries, had overseen the decision-making activity of judges and guaranteed the uniform application of laws. The usefulness of drawing on past experiences and comparing the Supreme Court with other models of scrutiny of rulings is an essential element of the discourse[5].

Calamandrei focused on three aspects in particular: 1) the basic alternative between the Supreme Court model and the third instance model; 2) the incisive criticism *de iure condendo* of the "judicial monstrosity"[6] of the five regional Courts of Cassation; 3) and the nomofilactic function of the Supreme Court. These three aspects are closely intertwined, since only the Supreme Court model could guarantee the nomofilactic function, which in turn presupposed the superseding of the set-up of regional courts.

The basic alternative between the Supreme Court of Cassation model and that of the third instance has contributed to fuelling the *ambiguity*[7] of the top tier of civil jurisdiction in the Italian

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to give it "that fascist character that it […] did not have" (see PIERO CALAMANDREI, *Diario*, I, 1939–1941, Edizioni di Storia e Letteratura, Rome, 2015, p. 272).

[3] PIERO CALAMANDREI, *La Cassazione civile*, 2 vols., Fratelli Bocca, Milan, 1920, now in ID., *Opere giuridiche*, edited by Mauro Cappelletti, vols. VI and VII, Morano, Naples, 1976, republished in 2019 by RomaTrE-Press, edited by the Biblioteca e Archivio storico "Piero Calamandrei" of the Comune di Montepulciano and the Fondazione Centro di iniziativa giuridica Piero Calamandrei of Rome.

[4] PIERO CALAMANDREI, *La Cassazione civile*, in *Nuovo Digesto Italiano*, vol. II, Utet, Turin, 1937, pp. 981-1034, now in ID., *Opere giuridiche*, edited by Mauro Cappelletti, vol. VIII, Morano, Naples, 1979, pp. 3–145.

[5] PIETRO RESCIGNO, *La Cassazione e l'attualità del pensiero di Calamandrei*, in VINCENZO CARBONE (ed.), *La Corte di cassazione dalle origini ai giorni nostri*, Gangemi, Rome, 2016, pp. 43-49.

[6] PIERO CALAMANDREI, *Per il funzionamento della Cassazione unica*, in ID., *Opere giuridiche*, vol. VIII, cit., p. 370.

[7] A clear allusion to MICHELE TARUFFO, *Il vertice ambiguo. Saggi sulla Cassazione civile*, il Mulino, Bologna, 1991.

legal system, opening up paths towards a desirable harmonious coherence, but also towards potentially lacerating splits. Historically speaking, the Italian Supreme Court lies at the intersection of two different models, taking contrasting elements from both, which makes it particularly hard to reconstruct the structure and functioning of the institution. Purporting to be straightforward and unitary, it is actually complex and fragmented in many respects.

The first model is that of a Supreme Court that performs a 'pure' control of legitimacy, fulfilling a nomophilactic function that observes, through the interpretative unity of law, the principles of certainty and of the equality of citizens before the law. To ensure this, the Court is called upon to free itself to a certain extent, through strict regulation of the grounds for appeal, from the merits of the case that gave rise, at the initiative of the private individual, to the Supreme Court ruling.

The second model is instead that of a third instance court, which is supreme in that it is still at the top of the appeal system but performs its control over the appealed judgment by ruling on the merits of the dispute. The court does not therefore just limit itself to ascertaining that the substantive decision does not run counter to the general rules of law but examines every phase of the conducting of the individual trial. Its role thus becomes that of a third-instance judge of the individual case, tending to shape the interpretation of the rules according to the peculiarities of the concrete case, rather than producing interpretations designed to apply over and beyond it.

While the latter model is the fruit of traditions rooted in the legal systems of the pre-unification Italian states, the former model is of French derivation and its consolidation in Italy is due in large part to Calamandrei. Not only was he its greatest theoretical exponent but also its most fervent and influential champion when it came to the reform of the Code of Civil Procedure. It has certainly not escaped notice that his commitment to the Supreme Court model was facilitated by the political efforts of unitary governments to exert control over the orthodoxy of the lower courts in order to consolidate a power that was being organised in an authoritarian, centralised and bureaucratic manner.

Hence the propensity to embrace a strongly hierarchical and centralised conception of the judiciary, with the Supreme Court of Cassation at the top of the pyramid, exercising a controlling function. This conception was at odds with that of the third instance, whose supporters advocated a horizontal and decentralised model of the judiciary, the various bodies of which, it was believed, would be able to interact with equal dignity and independence. But the course of events is well known: the third instance, despite the tenacious resistance of its proponents, was swallowed up by

history, swept away by the tumultuous force of the victorious Supreme Court model, which soon proved to be a consolidating factor in the institutional structure established after unification.

Grafted onto the alternative between the Supreme Court model and that of the third instance was the question of the unity or plurality of the Courts of Cassation. In truth, it is a matter of two sides of the same coin, since the 'Cassation or third instance' alternative evokes and gives meaning to the other one, namely 'unity or plurality'. It is in fact irreconcilable with the characteristic institutional function of the Supreme Court of Cassation – namely, to guarantee the exact and equal application of the law through the uniformity of jurisprudential interpretation – to have a plurality of bodies invested with that function; whereas the function of a third instance body is perfectly reconcilable with a plurality of decentralised courts.

Calamandrei had himself clearly reaffirmed this during the work of the Constituent Assembly, in which the echo of the regional courts still reverberated. In his lively dialectic with Vittorio Emanuele Orlando and with the communist group that had become a mouthpiece for local calls for a plurality of courts, Calamandrei firmly maintained that the Supreme Court "is an institution […] whose structure is such that either the Supreme Court is unique, in which case it serves some purpose, or it is not, in which case it no longer serves any purpose at all"[8].

The Civil Procedure Code of 1865 already presupposed that there would only be one Court of Cassation in the State, but it was not like that in practice because Article 285 of the law regarding the judicial system of the same year had left in place the pre-existing regional Cassations, which were a legacy of the disaggregating tendencies that had survived unification. Suffice it to mention that, in the very early phase of the national unification movement, there were no fewer than four Courts of Cassation, in Turin, Florence, Naples and Palermo, and a fifth one, in Rome, was set up in 1875.

As a result, an open contrast arose between the legal *rationale* of the Court of Cassation and the de facto situation of the Italian legal system, which, in Calamandrei's view, was a "glaring contradiction in terms"[9]. His position was echoed by Mortara, who observed that a "traveller journeying through the territory of the State, transported rapidly by locomotive from one province to another, could find himself subject to different laws from one hour to the next, by virtue of the different interpretations given to a single text by the respective courts"[10].

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[8] See the afternoon sitting of Thursday 27 November 1947, p. 2573. Calamandrei's reports and speeches in the Constituent Assembly on judicial power are now in PAOLO GROSSI, ENZO CHELI, GUIDO ALPA (eds.), *Piero Calamandrei. Garanzie e limiti del potere giudiziario. Relazioni e interventi all'Assemblea costituente*, Marietti, Genoa, 2016.

[9] PIERO CALAMANDREI, *La Cassazione civile*, vol. II, cit., p. 332.

[10] LODOVICO MORTARA, *Commentario del Codice e delle Leggi di Procedura Civile. Teoria e sistema della giurisdizione civile*, vol. I, Vallardi, Milan, 1923, p. 65.

As is well known, the unification of the regional courts that Calamandrei had advocated in *La Cassazione civile* of 1920 was finally achieved in 1923 under the Justice Minister Aldo Oviglio. Even this complex outcome attests to how important Calamandrei's contribution was to the evolution of the Italian legal system, so much so that his teachings were the centrepiece of the recent celebrations to mark the centenary of the single Supreme Court. This is borne out by the two important conferences organised by the Scuola Superiore della Magistratura at the Supreme Court, one in 2020 and the other in 2023. The first was entitled *Passato e futuro della Cassazione. A cent'anni dalla* Cassazione civile *di Piero Calamandrei*; the second was entitled *I Cento anni della Corte di cassazione "Unica"*.

Displaying great profundity of doctrine and clarity of argumentation, Calamandrei's criticisms *de iure condendo* in the 1920s were already aimed at the unification of jurisprudential orientations, even though this aim was still extraneous to positive law. According to the 1865 and 1925 laws concerning the judicial system, in fact, the Court of Cassation had been established to "maintain the exact observance of the law". There was no reference whatsoever to the unification of jurisprudence, nor could there have been given the fragmentation of the Italian legal system owing to the plurality of courts.

Following the unification of the regional cassations in 1923, the 1940 Code of Civil Procedure and, in particular, Article 65 of the law on the judicial system (Royal Decree no. 12, 30 January 1941) attributed the nomofilactic function to the Supreme Court. This was graphically set out by the legislator in these terms: "The supreme court of cassation, as the supreme organ of justice, ensures *the exact observance and uniform interpretation of the law, the unity of national objective law*, and respect for the boundaries of the different jurisdictions".

As Taruffo has pointed out, Article 65 clearly echoes the principles that Calamandrei had placed at the centre of his rationalising reconstruction of the institution of the Court of Cassation[11], beginning with the Court's position at the top of the judicial system as the "supreme organ of justice", charged with ensuring, first and foremost, "exact observance of the law", as a necessary premise for its "uniform interpretation", which in turn serves to guarantee the "unity of objective national law".

Claudio Consolo considers the wording of Article 65, as "articulated by the (uncoincidentally Tuscan) Calamandrei" to be "a bit mocking", since "one would have expected the wording 'exact interpretation and uniform observance'; the decision to reverse the natural

[11] MICHELE TARUFFO, *Il vertice ambiguo. Saggi sulla Cassazione civile*, cit., p. 63.

crossover between nouns and adjectives, and thus this chiasmus, is not […] accidental but indicates not only how impossible the naive yearning for a judge who offers just the least inexact of interpretations really is but constantly and, even more so, it reveals the authoritarian conception of the judicial order that was being justified in 1940–42"[12].

Weighing heavily on the *exactness* invoked by Article 65 is the dogmatic burden of the Enlightenment conception of the relationship between the judge and the law. Infatuated with the idea that the nascent codification would have made provision for everything on its own, the French reformers had believed Montesquieu when, in a famous page, he described judges as "la bouche qui prononce les paroles de la loi", whence the fortune of the syllogistic model of the subsumption of the particular and concrete case in the general and abstract normative forecast[13].

Article 65 is thus an expression of the traditional doctrine of positivistic formalism, according to which the interpretation of the law is the result of a conceptual 'calculation' with a logical-deductive structure, which postulates an idea of the legal system as a closed, complete and hierarchical system of norms, capable of guaranteeing – this at least is what is assumed by the doctrine in question, which has long been challenged by hermeneutic theories of interpretation – certain and objective solutions, free from evaluative or creative solutions on the part of the judge.

Article 65 thus presupposes that the Supreme Court clarifies interpretative confusion arising from judicial decisions concerning the substance by eliminating 'erroneous' interpretations and indicating the sole 'exact' interpretation of the law. Only after achieving this result is the Supreme Court called upon to guarantee the additional objectives, namely the uniform interpretation of the law and the unity of national objective law. It follows that uniformity of interpretation is conceived of as being closely correlated with the exactness of the interpretation itself, since what the Supreme Court is called upon to standardise is not any interpretation of the law, but its (supposedly) correct interpretation.

Uniformity of interpretation thus manifests itself as the constancy of the *exact* preceptive content of a normative provision in all cases in which it is applied, while the *unity* of national objective law is the consequence of this interpretative process, through which the Supreme Court fulfils its institutional function. In this perspective, it is possible to see how nomofilachia pursues

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[12] CLAUDIO CONSOLO, *La funzione nomofilattica della Corte di cassazione, tra nuove (auspicabili) prospettive e (gravi) rischi di deriva dallo* ius litigatoris, *Rassegna Forense*, 3-4/2014, p. 626; ID., *La base partecipativa e l'aspirazione alla nomofilachia*, in ITALIADECIDE (ed.), *La nomofilachia nelle tre giurisdizioni. Corte Suprema di Cassazione, Consiglio di Stato, Corte dei Conti*, il Mulino, Bologna, 2019, pp. 161-177.

[13] With specific reference to Cassation proceedings, see in particular GIROLAMO MONTELEONE, «*Giudizio di fatto e giudizio di diritto*» *nel ricorso alla Cassazione civile*, in CARMINE PUNZI, *Giudizio di fatto e giudizio di diritto*, Giuffrè, Milan, 2022, pp. 239-250.

an interest of a public legal nature, which consists of the unity of national objective law, achieved through exact observance of the law and its uniform interpretation.

This public law approach stemmed from the crisis of the liberal notion of civil justice. This process, which had been interpreted with great far-sightedness by Giuseppe Chiovenda, had ended up drawing civil justice into the sphere of public law, elevating jurisdiction, especially that of legitimacy, to being a fundamental function of the State. One can therefore understand the radical overtones of Calamandrei's argument that the task of the Supreme Court was to "attend to, rather than to resolve, the concrete case according to justice, to suggest for the future the theoretical interpretation corresponding in abstract terms to the will of the legislator". As a consequence, the Supreme Court had to be left "to its pure office of formulating maxims, without its work being clouded by direct contact with the facts"[14].

In other words, Calamandrei sustained that the task of the Supreme Court was to render "justice to individuals *only to the extent that this could serve to achieve its aim of unifying jurisprudence*"[15]. For this reason, he was the greatest theoretician of the 'pure' conception of nomofilachia, extolling its hieratic vocation for abstractness in that it was aimed at guaranteeing *ius constitutionis* rather than protecting *ius litigatoris*. The institution of appeal to the Cassation was thus regarded as being functional to the pursuit of interests pertaining to public law, which are reflected in the certainty of law and the predictability of the resolution of disputes[16].

Such a conception of nomofilachia has been questioned by a series of studies, of which the ones by Mario D'Addio[17], Michele Taruffo[18], Ferdinando Mazzarella[19] and Andrea Panzarola[20] stand out for their depth of inquiry and critical acumen. Among others, these authors deserve credit for having investigated the structure and function of the Supreme Court not just on the plane of abstract legal dogmatics, but also on the more concrete plane of the politics of law. This has also been carried out by historicising Calamandrei's teachings, which have informed and shaped the studies of generations of jurists.

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[14] PIERO CALAMANDREI, *Per il funzionamento della Cassazione unica*, cit., p. 387.

[15] ID., *La Cassazione civile*, cit., p. 13.

[16] ID., *Fede nel diritto*, edited by Silvia Calamandrei, Laterza, Rome-Bari, 2008, with essays by Guido Alpa, Pietro Rescigno and Gustavo Zagrebelsky.

[17] MARIO D'ADDIO, *Politica e magistratura (1848–1876)*, Giuffrè, Milan, 1966.

[18] Michele Taruffo's writings on the Civil Court of Cassation are in *Il vertice ambiguo. Saggi sulla Cassazione civile*, cit.

[19] See in particular FERDINANDO MAZZARELLA, *Passato e presente della Cassazione*, in *Rivista trimestrale di diritto e procedura civile*, 26, 1972, 1, pp. 88-111; ID., *Analisi del giudizio civile di cassazione*, Cedam, Padua, 2003[3].

[20] See in particular ANDREA PANZAROLA, *La Cassazione civile giudice del merito*, 2 vols., Giappichelli, Turin, 2005.

This has resulted in a new balance between *ius constitutionis* and *ius litigatoris*. The relationship between them lends itself to being reconstrued in terms of prevalence rather than of conceptual opposition, since "the Supreme Court does both"[21], the difference being that, on the one hand, the interpretation of a provision is the instrument reaching the right decision in the concrete case and, on the other, the review of the concrete case is the occasion for establishing in general terms what the correct interpretation of the provision is.

Ius constitutionis and *ius litigatoris* are therefore consubstantial in judging legitimacy, in that the former "appears to be the best means of approaching the latter without abstraction"[22]. From this perspective, nomofilachia sheds the 'pure' guise Calamandrei had packaged for it to remain anchored to jurisdiction, claiming that it is a 'clinical product' originating from concrete cases, in order to avert the danger of the Supreme Court becoming "what Jhering derided as a legal clinic of 'cases made for hatboxes', in short, blockheads"[23].

The 'pure' nomofilachia advocated by Calamandrei appears nowadays to be an "obsolescent concept"[24]. Its stubborn and artificial bolstering through procedural alchemies deriving from the combination of a succession of reforms produces effects that cannot always be considered favourably. But Calamandrei himself was well aware of this. In his mature writings he questioned the epistemological postulates of the cultural climate that had shaped him and had abandoned the clear-cut distinction between *quaestio iuris* and *quaestio facti* that had constituted the logical framework of the syllogistic matrix of the judgement[25].

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[21] MICHELE TARUFFO, *Il vertice ambiguo. Saggi sulla Cassazione civile*, cit., p. 66.

[22] CLAUDIO CONSOLO, *La funzione nomofilattica della Corte di cassazione, tra nuove (auspicabili) prospettive e (gravi) rischi di deriva dallo* ius litigatoris, cit., p. 622.

[23] ID., *La Cassazione multifunzionale nella compiuta globalizzazione socio-economica (diagnosi e prognosi progredienti, al di là del puro anelito di nomofilachia)*, in *Questione Giustizia*, 3, 2017, p. 24.

[24] LUCA PASSANANTE, *Il postulato del 'primo' Calamandrei e il destino della Cassazione civile*, paper delivered on 11 November 2020 at the conference *Passato e futuro della Cassazione. A Cent'anni dalla* Cassazione civile *di Piero Calamandrei* organised by the Scuola Superiore della Magistratura at the Supreme Court (https://www.judicium.it/wp-content/uploads/2020/11/Passanante.pdf).

[25] The illusory nature of the Enlightenment conception of the interpretation of the law, the subject of Calamandrei's youthful essay *La genesi logica della sentenza civile* of 1914, became glaringly apparent in the Mexican lectures of 1952, when Calamandrei pointed out that the individual inspiration of the judge was always decisive in interpretation. He is a "living man: and the function of specifying the law and applying it in the concrete case, which *in vitro* can be represented as a syllogism, is in reality an operation of synthesis, which is accomplished, mysteriously, in the heat of the sealed crucible of the spirit, where the mediation and fusion between abstract law and concrete fact requires, in order to be accomplished, the intuition and sentiment kindled in an industrious conscience. […] Reducing the function of the judge to a pure syllogism means impoverishing it, drying it up, desiccating it. Justice is something better: it is creation that springs from a living, sensitive, vigilant, human conscience" (see PIERO CALAMANDREI, *Processo e democrazia. Conferenze tenute alla Facoltà di diritto dell'Università Nazionale del Messico*, Cedam, Padua, 1954, p. 61, republished in 2019 by Pacini, edited by Elena Bindi, Tania Groppi, Gianmaria Milani and Andrea Pisaneschi). On the evolution of Calamandrei's thought, see also GIULIO DONZELLI, *Diritto e politica nel pensiero di Piero Calamandrei*, il Mulino, Bologna, 2022.

However, since the 1980s, weighed down by the overwhelming burden of the petitions brought before it, especially on the basis of grievances presented on the basis of Article 360, paragraph 1, no. 5 of the Code of Civil Procedure, the Supreme Court has entered a prolonged state of crisis and has developed, as Bruno Sassani points out, a veritable "siege syndrome" in the face of an "alleged barbarisation of the Cassation proceedings, reduced to a kind of third instance and with a need to recover the lost purity of the authentic judgement of legitimacy"[26].

Calamandrei's notion of the 'pure' nomofilactic function and the idea of a meaningful guarantee of *ius constitutionis* have thus returned to the fore, as shown in particular by the period of nomofilachia-inspired reform that began in 2006. This would enable the Supreme Court – that, at least, is the legislator's hope – to deal with the large volume of appeals that come its way, a number quite unknown to foreign supreme courts. There is also an organisational aspect to this, if only for the choice of which procedural track to follow (council chamber or public hearing), depending on whether the cases have nomofilactic implications or not.

All this may certainly appear surprising, especially if one considers that nomofilachia had been substantially relegated to the periphery of the legal system in the text of the royal decree promulgated back in 1941. What is more, it represented just one of the functions of the Supreme Court and was at the very least of dubious constitutional importance. Admittedly, this function can be inferred by way of interpretation from the combined provisions of Articles 3 and 111 of the Constitution, but the fact remains that the members of the Constituent Assembly decided not to accept the proposal – advanced by Calamandrei himself[27] – to formally acknowledge the constitutional status of the Supreme Court's nomofilactic function[28].

Nonetheless, nomofilachia has had a genuine palingenesis and has led to a significant increase in the weight of precedent in general and of the precedent of the united sections in particular, albeit without formally affecting the constitutional principle of the judge's subjection to the law alone. This resulted in the advancement of the process of osmosis between *civil law* and *common law* systems, although by no means insignificant differences still exist. Therefore, the thesis

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[26] BRUNO SASSANI, *La deriva della Cassazione e il silenzio dei chierici*, in *Rivista di diritto processuale*, 74, 2019, 1, p. 43.

[27] In the session of 20 December 1946. Article 12 of the draft contained in the *Relazione sul potere giudiziario e sulla Suprema Corte costituzionale*, presented by Calamandrei to the second subcommittee of the Commission for the Constitution, stated as follows: "Against the sentences pronounced in the last instance by any ordinary or special body, recourse can always be made to the Supreme Court of Cassation, *established to maintain the unity of national law through the uniformity of jurisprudential interpretation* and to regulate competences between judges".

[28] GIULIANO SCARSELLI, *La nomofilachia e i suoi pericoli*, in *AmbienteDiritto*, 23, 2023, 1, pp. 1-20; ANDREA PANZAROLA, *Una lezione attuale di garantismo processuale: le conferenze messicane di Piero Calamandrei*, in ID., *Principi e regole in epoca di utilitarismo processuale*, Cacucci, Bari, 2021, in particular pp. 161-164.

– supported by the Supreme Court[29] and by some of its authoritative magistrates[30] – that the Italian system has taken on board a 'weak version' of the principle of *stare decisis* is perplexing.

One might object that if this principle means that precedent has *binding* value (the doctrine of binding precedent), then it is not liable to graduation: either it is binding or it is not, *tertium non datur*[31]. And yet, the legal landscape within which we are moving is too uneven to fit into this rigid binary logic and, indeed, the process of convergence between *civil law* and *common law* systems is not advancing on the terrain of the binding nature of precedent, which is hindered by Article 101, paragraph 2 of the Constitution, but on the more fraught terrain of the rigidification of the legal system through a series of institutes that give ever greater importance to precedent[32].

In truth these are tendencies going back a long time, which Calamandrei had already grasped with foresight in the 1920s, when he declared that "*auctoritas rerum similiter iudicatarum*, even if one does not want to consider it a source of objective law, exerts a great influence on the practical course of law: and every legal professional knows that even in our age […] many legal debates boil down to a battle of jurisprudential precedents"[33].

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[29] See in particular Cass. Civ., Sec. VI-2, ord., 26 July 2016, no. 15513. On the other hand, the opinion of the United Sections can be shared to a greater degree. It affirmed that "although there is no rule in our procedural system that imposes the rule of *stare decisis*, it is, however, a value or, in any case, a guideline directive immanent in the system, according to which it is not permitted to deviate from an interpretation of the Supreme Court, institutionally invested with the function of nomofilachia, without strong and appreciable justifying motivations" (see *ex plurimis* Cass. civ, Sec. Un., 31 July 2012, no. 13620; Cass. civ., Sec. Un., 12 October 2022, no. 29862).

[30] An 'attenuated form' of the principle of *stare decisis* is discussed by LUIGI LOMBARDO, *Il sindacato di legittimità della Corte di cassazione*, Giappichelli, Turin, 2015, p. 90; GIOVANNI CANZIO, *Calcolo giuridico e nomofilachia*, in ALESSANDRA CARLEO (ed.), *Calcolabilità giuridica*, il Mulino, Bologna, 2017, pp. 169-173; ID., *Nomofilachia e diritto giurisprudenziale*, in ALESSANDRA CARLEO (ed.), *Il vincolo giudiziale del passato. I precedenti*, il Mulino, Bologna, 2018, pp. 27-34; PIETRO CURZIO, *Il giudice e il precedente*, in *Questione Giustizia*, 4, 2018; GIOVANNI AMOROSO, MARIO ROSARIO MORELLI, *La 'funzione nomofilattica' e la 'forza' del precedente*, in MARIA ACIERNO, PIETRO CURZIO, ALBERTO GIUSTI (eds.), *La Cassazione civile. Lezioni dei magistrati della Corte suprema italiana*, Cacucci, Bari, 2020[3], pp. 465-495; RENATO RORDORF, Stare decisis*: osservazioni sul valore del precedente giudiziario nell'ordinamento italiano*, in *Il Foro Italiano*, 2016, V, p. 279; ID., *Il precedente nella giurisprudenza*, in ALESSANDRA CARLEO (ed.), *Il vincolo giudiziale del passato. I precedenti*, cit., p. 95.

[31] VALENTINA CAPASSO, *Il ricorso per cassazione avverso... la giurisprudenza. Contro uno* stare decisis *«all'italiana»*, in *Rivista trimestrale di diritto e procedura civile*, LXXIII, 2019, 2, pp. 627-651.

[32] These institutions have been perceptively and thoroughly investigated by scholars of civil proceedings and it is not possible to dwell on them here, except to note some of the main innovations: *a)* the binding obligation of the simple sections to the principles of law expressed by the unified sections of the Supreme Court, so as to give stability to these principles, with a special procedure being required to change them (art. 374, paragraph 3 of the Code of Civil Procedure); *b)* the broadening of the cases in which the Attorney General at the Court may request the enunciation of the legal principle in the interest of the law (but irrelevant for the parties in the proceedings) and the possibility of this legal principle being pronounced *ex officio* also in the case of an appeal by the party declared inadmissible (art. 363 of the Code of Civil Procedure); *c)* the reduction, among the grounds for appeal to the Supreme Court, of the scope of the defect of reasoning and the complete exclusion of this defect in cases of double conformity regarding the same facts (art. 360 of the Code of Civil Procedure); *d)* the limiting of the public hearing just to decisions regarding a "question of law of particular significance" (art. 375, paragraph 1 of the Code of Civil Procedure), with decisions concerning other petitions being made in chambers; in the first case, the decision is issued in the form of a judgement, while in the second case it takes the form of an order; *e)* the preliminary referral of the court of merit to the Supreme Court for the resolution of "an exclusively legal question", when, among other requirements, it "is likely to arise in many judgements" (art. 363-*bis* of the Code of Civil Procedure).

[33] PIERO CALAMANDREI, *La Cassazione civile*, vol. II, cit., p. 68.

These words are still wholly pertinent today, a century later, warning of the potential dangers of nomofilachia, which can contribute as much to greater legal certainty as it can to the rigidification of the legal system, limiting its development, which, serious fluctuations and contrasts aside, has enabled significant achievements, for instance in matters concerning the right to privacy and personal identity, the right to health and of biological damage, non-contractual liability and breach of contract, abuse of economic dependence and the protection of the weaker party[34].

This is undoubtedly a merit of civil law systems, and it is necessary to avoid the danger of the evolution of the legal system being sacrificed on the altar of what may soon prove to be a stale legal certainty. This is precisely why Calamandrei affirmed that the "unification of jurisprudence does not mean […] the immutability of judicial interpretation, which would amount to the *stasis of law*"; instead, it means a "tendency towards the uniformity of judicial interpretation *in space* (so that in a given moment the same legal norm is interpreted in the same way across the whole territory of the State) but *not in time* (so as not to exclude the jurisprudential evolution of the law, that is, the possibility of replacing, at some later point in time, an outdated interpretation with a new one that is socially more suited to the spirit of the times, provided it is done uniformly throughout the State)"[35].

The heuristic value of nomofilachia is therefore expressed *in space* rather than *in time*. Following Calamandrei's lesson, it has been argued that the stability of jurisprudential orientations, inherent in the certainty of law and overseen by the Supreme Court, "is not an absolute but a methodological value" which, in the unstoppable evolution of jurisprudence, flows dynamically into the "functional duty of reasonable maintenance of the solution reasonably obtained"[36]. It follows that the question of stability does not arise when "a supreme court changes orientation and does not passively follow its own precedents", but only "when these variations are too frequent,

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[34] GUIDO ALPA, *I contrasti di giurisprudenza e la nomofilachia*, in *Rassegna Forense*, 3-4, 2014, pp. 599-604; ID., *La responsabilità civile. Principi*, Utet, Turin, 2018², especially pp. 229-384; ID., *La giurisprudenza e le fonti del diritto*, in *Lo Stato*, 2, 2019, pp. 335-343; ID., *Il ruolo nomofilattico della cultura giuridica*, in ITALIADECIDE (ed.), *La nomofilachia nelle tre giurisdizioni. Corte Suprema di Cassazione, Consiglio di Stato, Corte dei Conti*, cit., pp. 137-147, where the author notes that many protection requirements would not have been met "if the gates had not been opened to evolutionary, constitutionally oriented interpretation sensitive to social needs. To curb creativity for the benefit of certainty and continuity is to choose to fossilise the interpretation of the judge and the creativity of lawyers" (p. 143).

[35] PIERO CALAMANDREI, *La Cassazione civile*, cit., p. 136. This aspect was highlighted in particular by GIOVANNI VERDE, *Conclusioni*, in GUIDO ALPA, VINCENZO CARBONE (eds.), *Giurisdizione di legittimità e regole di accesso. Esperienza europee a confronto*, il Mulino, Bologna, 2011, pp. 233-242.

[36] GIUSEPPE BORRÈ, *L'evoluzione della Corte nel diritto commerciale e del lavoro, nel diritto pubblico e proceduale civile*, in *La Corte di cassazione nell'ordinamento democratico. Atti del Convegno tenutosi a Roma il 14 febbraio 1995 in occasione dei 50 anni dal ripristino dell'ordinamento democratico*, Giuffrè, Milan, 1996, p. 252.

arbitrary, random and without serious justification, as not infrequently occurs in the jurisprudence of our [Italy's] Court of Cassation"[37].

A different conception of nomofilachia, which aims to operate *in time* rather than *in space*, would lead to a fatal rigidification of the legal system and a paradoxical heterogenesis of ends. The risk is of a severing of all ties between what we are accustomed to calling 'living law' and the life of the legal system, which would become, so to speak, less and less 'living'[38]. This has also been clearly affirmed by constitutional jurisprudence, when it emphasised that the "decision of the organ of nomofilachia remains potentially liable to being disregarded at any time and by any judge of the Republic, albeit with the burden of adequate motivation"[39].

No immediate solution, let alone a miraculous one, can be imposed on the stability of jurisprudential orientations, especially through reforms that give ever greater importance to precedent. Like all rhetorical-argumentative activities, the jurisprudence of legitimacy also fits into the dimension of the reasonable, the plausible, the convincing, the verisimilar. As a result, the Supreme Court can only perform its nomofilactic function virtuously if its pronouncements are accompanied by a genuinely *persuasive* quality, capable of *convincing* prior even to *deciding*.

[37] MICHELE TARUFFO, *Precedente e giurisprudenza*, Editoriale Scientifica, Naples, 2007, p. 30.

[38] LUIGI ROVELLI, *Certezza del diritto: dalla legge all'interpretazione consolidata e possibile eterogenesi dei fini*, in *Ars Interpretandi. Rivista di ermeneutica giuridica*, VIII, 2019, no. 1, pp. 135-146.

[39] See Constitutional Court, sentence no. 230 of 2012, which states that "the unified sections themselves may have to revise their positions, even as a result of impulse from individual sections, as has in fact happened on several occasions". The Constitutional Court specifies that this does not mean that the orientations of the Supreme Court do not aspire "to achieve stability and a general continuation", but rather that these are "only 'tendential' connotations in that they are based on a non-binding and essentially 'persuasive' effectiveness".