A Comparative Perspective on *Obiter dicta*: from persuasive authority to seriously considered *dicta*

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Abstract: *Una prospettiva comparata sugli obiter dicta: dall'autorità persuasiva ai detti seriamente considerati* – This paper addresses the use of "*obiter dicta*" in Australia and Italy, at first, two specimens of common law and civil law traditions. However, both countries have variations on their tradition – Italy with the maxim and recent judicial discussion of the value of *obiter dicta* in certain cases, and Australia with a direction from the High Court of Australia to lower courts to follow its "seriously considered" *obiter dicta* and to intermediate appellate courts to follow each other unless they are "plainly wrong". Both these moves show the complex nature of the legal process and the intricacies of persuasiveness across the jurisdictions.

Keywords: *Obiter dicta*; *Ratio decidendi*; *Stare decisis*; Maxim; Legal comparison

1. Introduction

This paper examines the concept of *obiter dicta* and its continuing relevance in both common law and civil law jurisdictions. While the distinction between *ratio decidendi* and *obiter dicta* is a cornerstone of common law precedent, its application in civil law systems may appear counterintuitive. Traditionally, civil law emphasizes legislative supremacy and judicial restraint in creating law. However, recent years have witnessed a growing acknowledgment of the judicial law-making function within civil law jurisdictions, alongside a heightened interest in the persuasive force of precedent.

This analysis focuses on two countries that exemplify these contrasting legal traditions: Italy, a civil law system, and Australia, a common law jurisdiction that adheres to the doctrine of *stare decisis*. However, both nations demonstrate fascinating variations within their respective legal frameworks. Notably, the Italian system has developed a unique method of condensing judicial pronouncements into maxims, which offer a form of "official" identification of the *ratio decidendi*, being independent from the full version of the pronouncements. Moreover, recent decisions from the Italian Court of Cassation and the Constitutional Court have focused on this very distinction, along with the binding nature of *res judicata*, as central elements of the *rationes decidendi* of their respective decisions. Notably, these pronouncements have provided insightful

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interpretations of these legal institutions, which are undoubtedly of significant relevance to the entire legal system.

Similarly, Australia's application of the distinction between *ratio decidendi* and *obiter dicta* exhibits its own nuances vis-à-vis a "traditional" view according to which Australia, consistent with other common law systems, acknowledges judge-made law alongside legislation. The principle of *stare decisis* compels lower courts to follow the *ratio decidendi*, the legal principle established by higher courts. However, pinpointing the binding *ratio decidendi* amidst *obiter dicta* can be intricate. This distinction becomes even more complex as multiple legal principles may emerge from a single case over time. This view has been significantly challenged by the *Farah* case, particularly the established principle that *obiter dicta* from the High Court are not binding on lower courts and intermediate courts of appeal within the Australian common law framework[1].

These deviations from the classic models present a compelling rationale for a comparative analysis. This paper delves into these variations, exploring the concept of *obiter dicta* in both Italy and Australia. Ultimately, this comparative framework will serve as a medium for a broader examination of the persuasive power of judicial pronouncements across legal systems. Through this analysis, similarities and differences in the relevance and treatment of *obiter dicta* within the Australian common law and Italian will be shown. Furthermore, these elements introduced a new dimension to the understanding of the persuasive authority of *obiter dicta*. Such evolutions highlight the dynamic nature of legal concepts and the potential benefits of cross-jurisdictional analyses.

2. The function of the distinction between ratio decidendi and obiter dicta in the doctrine of precedent and the relation between high, intermediate and lower courts in Australian common law

Australia, as a common law country, accepts judge-made law as law, as well as legislation. The doctrines of the *ratio decidendi* and *obiter dicta* are clearly the products of judge-made law. The doctrine of precedent applies, so that all courts below the highest court in the same hierarchy should follow the *ratio decidendi* of the highest court. This is a general rule for all common law countries and what is not *ratio decidendi* is *obiter dicta*.

This sounds simple, but it is not as the dividing line between *ratio* and *obiter* is not always clear. The general rule is that the *ratio decidendi* is the rule which is required to answer the issue in the case or to found the court's orders. It will usually be the reason the court has decided that the particular facts give rise to a particular outcome. The facts are, of course, extremely important because it is like cases which must be treated alike. It is quite common for cases to have the possibility of multiple *rationes decidendi* over

[1] As said by Viscount Dilhorne in *Cassell & Co v Broome* [1972] AC 1027, 1107, the Court of Appeal "may justifiably refuse to follow" *obiter dicta* from the House of Lords. See also cases cited by M. Harding, I. Malkin, *The High Court of Australia's Obiter Dicta and Decision Making in Lower Courts*, in *Sydney L. Rev.*, 34:239, 243 (2012).

time. *Donoghue v Stevenson* is a classic example.[2] Lord Atkin, who gave the leading majority judgment gave this as the rule his decision was based on:

"…[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care. …"

This is what Australian common law calls the "narrow" rule. This rule is about manufacturer's liability and specifies that the issue of having no reasonable possibility of intermediate examination means that the manufacturer owes a duty of care. This is the *ratio* which the Privy Council in *Grant v Australian Knitting Mills* used to determine that the Mills owed to Dr. Grant a duty to take reasonable care that his long johns (underpants) were not contaminated by sulphites which might (and did) injure him. This rule applied because he had no possibility of inspecting his long johns before wearing them because what contaminated them was invisible (that is, he had no possibility of intermediate examination). This is clearly product liability, and presumably everything in his judgment which is not part of that paragraph is *obiter dicta*. That includes the following paragraph:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question – Who is my neighbour? – receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[3]

The second paragraph, however, is now regarded as the *ratio decidendi* of the case. These two possible rules of the case are interesting. The first one was seen at the time the case was decided as its rule. It is obviously narrower by far than the second one which we now call "the neighbour principle". By the 1960s and 1970s the neighbour principle had become what *Donoghue v Stevenson* stood for and the general principle of reasonable foreseeability of harm had become the touchstone of the duty of care in negligence.[4] This

[2] [1932] AC 562.

[3] Please note that in *Searle v Wallbank* [1947] AC 431 the House of Lords did not allow the general duty in *Donoghue v Stevenson* to override an ancient rule that landowners were immune from being held negligent for their stock straying on to highways and causing harm to users of the road. The High Court of Australia accepted this as the law in Australia in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617. The discussion was more about the receipt of English law into Australian, but only Murphy J saw that *Donoghue v Stevenson* was relevant. Legislation has overruled *Trigwell* in all Australian jurisdictions except Queensland and the Northern Territory. In Queensland it has been thoroughly distinguished: *Graham v Royal National Agricultural Association of Queensland* [1989] 1 Qd R 624.

[4] For example, the test for duty of care in *Anns* was first of all to use the neighbour principle – reasonable foreseeability of harm and then to consider policy reasons to

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tells us something about the relationship between the *ratio decidendi* and *obiter dicta*. First, that they are complementary to each other and that the balance between them may shift over time and cultural change. Secondly, it makes it clear how "slippery" the concepts are, and why determining the *ratio decidendi* of any decision is the first major skill of the common lawyer. The *ratio* will then apply to any case whose facts is on all fours with the rule in the higher court. Determining the similarity between cases is also "slippery", partly because of the use of language to do it, and also because it is always possible to use changing levels of generality or abstraction to change the reach of the rule which may or may not apply to the current case.

There is a well-known "fairy tale" about the process of making judicial decisions, which is that judges magically find the law somewhere and bring it back to the court and apply it. Australian judges have tended to foster this view in their desire not to be seen as "activist" judges.[5] Sir Owen Dixon's 'strict and complete legalism' amounted to this:

"It is taken for granted that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the Judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness."[6]

SAWER thought Australian judges were "dogmatic conservatives" compared with those in the United Kingdom or the United States.[7] Since then, the fairy tale has fallen into disrepute, but the concern about "judicial" activism' remains and requires a line to be drawn between the acknowledged "making the law" which judges clearly do, and judicial activism. The way in which judges use the doctrine of precedent is a tool in this battle. The use of a wide or narrow *ratio decidendi* - and therefore narrower or wider obiter dicta - is used to establish the adherence to precedent. If we go back to *Donoghue v Stevenson* again, and consider the cases which led up to it we can see the interplay of narrower and wider *rationes decidendi*, whereas, in *Heaven v Pender*, Brett MR used a wide version of a rule

"This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of any ordinary sense who did think would at once have recognised that if he did not use ordinary care and skill under such circumstances there would be such danger. And everyone ought by the universally received rules of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct, and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill and injury ensure, the law, which

deny a duty of care: *Anns v Merton London Borough Council* [1977] UKHL 4, [1978] AC 728.

[5] Please see T. Josev, *The Campaign Against the Courts, A History of the Judicial Activism Debate*, Sydney, 2017.

[6] Sir O. Dixon, 155 cited in M. Kirby, *Judges: the Boyer Lectures*, 1983, 37.

[7] G. Sawer, *Australian Federalism in the Courts*, Melbourne, 1967, 29.

takes cognizance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury."[8]

This is a very broad statement, which was not accepted by the majority of judges in the case. But it is a statement which looks very similar to the neighbour principle. This is where the fecundity of the common law often lies – the paradox that like cases must be treated alike, but the law can change.

At common law whatever is in the judgment that is not part of the *ratio decidendi* might be thought of as *obiter dicta*. It is considered as the part that does not need to be followed. This sounds simple, but indeed even where it might be thought a *ratio decidendi* rules we can find that there is *obiter* on a number of bases including, for example that it is discussing something that was not necessary for the legal outcome. For example, where the court is discussing issues which are not in fact the subject of the litigation. It is said that Lord Denning's judgment in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 is all *obiter dicta* because the issue he was discussing was not actually the subject of the litigation. Similarly, where the reasons given are not essential to the judgment, that may be regarded as obiter. Examples of this include for example, *Hedley Byrne v. Heller*.[9] This case changed the law relating to negligently created pure economic loss by deciding that it was possible to get damages for pure economic loss when a negligent misstatement had been made in particular circumstances, but the decision was that there could be no loss here because the statement had expressly been given "without responsibility". On that basis, all the discussion of the duty in relation to pure economic loss could be seen as *obiter dicta*.

In this sense, a question may arise in the situation where the High Court makes a decision in which all seven judges give a judgment with the same outcome but for different reasons: are any of those reasons *obiter dicta?* For example, in *Lake v Quinton* [1973] 1 NSWLR 111, in deciding whether there was a clear *ratio decidendi*, Street CJ in Equity at 1340 decided that a statement was a "clear statement of the opinion of four justices upon the law, and in my view it is for the State courts to accept and apply that preponderant view". It was more difficult in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstadt'* (1976) 136 CLR 529 where there were two judgments taking a common approach and five judgments with different reasons. When considering dissenting opinions, it worth noticing that they generally do not form part of the *ratio decidendi* of the case, but they have their own rationes decidendi: 'A dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom". [10]

[8] *Heaven v Pender, Trading as West India Graving Dock Company* (183) 11 QBD 503 per Brett MR.

[9] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[10] *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 315, joint judgment of Mason CJ, Wilson, Dawson and Toohey JJ.

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3. The significance of the distinction between *ratio decidendi* and *obiter dictum* in exploring the role of judicial precedent in Italian law

The intricate nature of the doctrine of judicial precedent and the contrasting roles of *ratio decidendi* and *obiter dicta* – highlighted within the context of Australian common law – find clear justification in legal systems where precedent is binding. However, this distinction transcends these systems and holds significant value for civil law jurists as well.[11] By studying how common law grapples with the binding nature of precedent and the differentiation between *ratio decidendi* and *obiter dicta*, continental jurists gain a valuable counterpoint to legal creationism. The doctrine of judicial precedent serves as an invaluable counterexample, prompting them to consider not only the construction of more general legal theories but also a deeper understanding of their own legal systems.[12] Even within civil law systems like Italy, where precedent is not strictly binding[13], the distinction between *ratio decidendi* and *obiter dictum* finds ample scope and relevance. This is particularly true for the pronouncements of the Supreme Court of Cassation. Despite not establishing a hierarchical relationship between judges, the Court serves as the ideal apex of the court system.[14] Its decisions, through their clarification of legal principles and guidance on the interpretation of law, exert a significant influence on lower courts.[15]

The scope of the distinction between *ratio decidendi* and *obiter dictum* has been a subject of debate in Italy. This is particularly true given its role in selecting the binding elements within a precedent, especially in a legal system that does not apply the *stare decisis* principle and where precedent holds only persuasive value.[16] In civil law, invoking a precedent, but also an entire body of case law is not sufficient to justify a judicial decision, yet in continental law - and for Italy in particular - jurisprudence is even more decisive - albeit only as a complement, and not as an alternative to legislation - for the interpretation of the law: this would be severely indeterminate without something like a consistent case law (*jurisprudence constante*).[17]

[11] N. Duxbury, *The Intricacies of Dicta and Dissent*, Cambridge, 2021.

[12] M. Barberis, *Un'altra legalità esiste. Breve storia del precedente giudiziale*, in C. Storti (ed.), *Le legalità e le crisi della legalità*, Turin, 2016, 207 ff. (208).

[13] W. Tetley, *Mixed jurisdictions: common law vs civil law (codified and uncodified) (Part I)*, in 4(3) *Uniform L. Rev.*, 591–618 (1999), in particular at 613-614 and N. Duxbury, *The Nature and Authority of Precedent*, Oxford, 2010, 13.

[14] See Network of the Presidents of the Supreme Judicial Courts of the European Union and their specific insight on the Italian system at: https://reseau-presidents.eu/content/italy.

[15] W. Tetley, *Mixed jurisdictions* …, quot.., 614, fn. 115 where Tetley, discussing about the role of the *Cour de cassation* states: "In practice, however, the Cour de cassation is feared by judges of lower courts".

[16] M. Barberis, *Un'altra legalità esiste…*, quot., 208-209. In a macro-comparison context for the so called "civil law family" see W. Tetley, *Mixed jurisdictions…*, quot., 613-614.

[17] M. Barberis, *Un'altra legalità esiste…*, quot., 208-209.

Some legal scholars have even advocated for the complete abandonment of the distinction.[18] They argue that both *obiter dicta* and *rationes decidendi* – the former irrelevant and the latter relevant to the adjudication and formation of *res judicata*[19] – ultimately carry the same "weight of persuasion." Both types of pronouncements would then fall within the content of the so-called "maxim" (*massima*) of the judgment. The maxim is a peculiar feature of the Italian legal system - with a competent Maxim and Digest Office being established at the Supreme Court of Cassation - and its complexities warrant a dedicated discussion in a separate section (3.1). It serves as a concise summary of the *res judicata*, designed for independent circulation vis-à-vis the full text and intended to capture the core legal holding of the judgment. However, discerning the true essence of the maxim, the commingled content with extraneous elements within the *ratio decidendi* and *obiter dicta*, and the distinction with the "legal principle" that the judgment is expected to indicate presents inherent risks and complexities.

Despite arguments suggesting the distinction might ultimately prove elusive – with many unsure of its current nature and even fewer able to define its ideal form[20] – the proposal to abandon it entirely has found little traction in Italy. However, according to other scholars, both the territorial courts and the Court of Cassation make "a very careful and correct use of the descriptive criterion on which the distinction is based," and the two concepts are used "to motivate, respectively, adherence to a precedent or the refusal to recognize the *status* of precedent to the argument contained in a previous judgment". [21]

Commentators underscore the enduring significance of the distinction between *ratio decidendi* and *obiter dicta*. The distinction serves several key purposes. Firstly, the *ratio decidendi* constitutes the "foundation of the decision in the actual conflict between the parties, the real and present case before the judge" [22] or what is truly "decisive of the dispute" and which for

[18] This thesis is fundamentally attributed to V. Denti, in the Genoa Conference on the theme of "Case Law by Maxims and the Value of Precedent" (*Giurisprudenza per massime e il valore del precedente*), held on March 11 and 12, 1988. See V. Denti, *Relazione di sintesi*, in G. Visintini (ed.), *La giurisprudenza per massime e il valore del precedente*, Padova, 1995, 113.

[19] Court of Cassation decision no. 1438 dated March 16, 1981 in *Mass. Foro.it*, 1981 and *ibid.* Court of Cassation decision no. 1815 dated February 8, 2012.

[20] "This distinction is not unknown in our jurisprudence, but it is not applied with the necessary rigor: not infrequently, maxims contain obiter dicta, since the formulator of the maxim often extracts from the text of the judgment any legal statement without verifying that it is the actual basis of the decision; in judicial practice, one often behaves in the same way, citing any part of the judgment that seems useful to invoke as a precedent. In this way, it becomes completely uncertain what is used to strengthen the justification of the subsequent decision, so that even the *obiter dictum* can, albeit improperly, "make precedent." (M. Taruffo, *Precedente e giurisprudenza*, in *Riv. trim. dir. e proc. civ.*, 2007, 709 ff.).

[21] M. Bin, *Funzione uniformatrice della Cassazione e valore del precedente giudiziario*, in *Contr. e impr.*, 1988, 545 ff. and L. Nanni, Ratio decidendi e obiter dictum *nel giudizio di legittimità*, *ibid.*, 1987, 865 ff.

[22] G. Gorla, *Lo studio interno comparativo della giurisprudenza e i suoi presupposti: le raccolte e tecniche per la interpretazione delle sentenze*, in *Foro.it.*, V., 73 ff. (1964).

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this reason "must be presumed to have been taken with greater deliberation and a sense of responsibility."[23] Conversely, the obiter is dictated incidentally or "in passing," enunciated in the judgment but superfluous to the resolution of the dispute.[24] Second, the *ratio decidendi* reflects the considered judgment of the entire court (typically all or a majority of the judges). The *obiter dicta*, conversely, may represent the views of just the judge who drafted the opinion i.e., "may have emerged from the pen of the drafter".[25] However, even "in a weakened form of *stare decisis*, which relies on persuasion rather than compulsion", necessitates respect for previous rulings. This respect translates to applying the legal principles established in those precedents to the specific case at hand. There's no legal basis for extending such deference to portions of the judgment where the judge, straying from the core arguments necessary for the case, delves into broader and more abstract pronouncements.[26]

Scholars further advocate for maintaining the distinction, prompting a critical re-evaluation of the criteria and methods employed in drafting maxims of judgments as well as the use of maxims in scholars' work and law reviews.[27] This distinction bears particular significance in the context of judicial jurisdiction, the state's authority to intervene in legal disputes upon request from an external party, subject to the principles of standing and justiciability. Scholars question whether a judge addressing a substantive or procedural legal issue in *obiter dicta* is exercising a pure judicial function i.e., answering a *quaestio iuris*. While not asserting the illegitimacy of such action, scholars note that even esteemed courts like the Supreme Court of Cassation acknowledge that they are "operating outside the scope of the case" when issuing *obiter dicta*[28] and that such statements will be disseminated through legal journals and law reviews "often eager for newsworthy content".[29] Interestingly, scholars emphasize the varying weight of *obiter dicta*, with greater persuasive value accorded to pronouncements from unanimous and cohesive higher courts. These *obiter dicta*, "akin to dissenting opinions, may foreshadow potential future shifts in jurisprudential trends".[30] Conversely, obiter dicta emanating from lower courts with numerous judges carry diminished predictive power and, consequently, reduced significance.[31]

Scholars further emphasize the significance of distinguishing *obiter dicta* from *ratio decidendi* in the judicial approach. They observe that when

[23] F. Galgano, *L'interpretazione del precedente giudiziario*, in *Contr. e impr.*, 701 ff. (1985).

[24] F. Galgano, *L'interpretazione del precedente…*, quot., 705-706.

[25] L. Passanante, *Il precedente impossibile. Contributo allo studio del diritto giurisprudenziale nel processo civile*, Torino, 2018, 165.

[26] M. Bin, *Funzione uniformatrice della Cassazione…*, quot., 547-548.

[27] See the opinions of V. Andrioli, *Tre aspetti della Corte di Cassazione*, in *Dir. e giur.*, 189 (1966) and F. Galgano, *Dei difetti della giurisprudenza, ovvero dei difetti delle riviste di giurisprudenza*, in *Contr. e impr.*, 504 ff. (1988).

[28] L. Passanante, *Il precedente impossibile…*, quot., 169.

[29] *Ibid.*

[30] L. Passanante, *Il precedente impossibile…*, quot., 170.

[31] *Ibid.*

speaking "*in obiter*", the judge "does not decide the fate of anyone" and thus "interprets without deciding." In contrast, the burden of judging subjective positions "binds the *jus dicere* to the specific case" and in this sense is "beneficial because it serves as an antidote against hasty and abstract interpretations as well as against displays of legal knowledge that are not always necessary. "[32] From these observations, which once again place the superior relevance of the *ratio decidendi* at the centre of analysis[33], a reading of the role of the Court of Cassation would emerge that is not and should not be an "authentic interpreter" of the provisions it is called upon to apply. Otherwise, in prof. CARNELUTTI's metaphor[34], we would have a Supreme Court that "is not half-teacher and half-judge but only a teacher."[35]

In this context, the debate surrounding the value of precedent in common law and civil law systems, as well as the oft-cited distinction between *ratio decidendi* and *obiter dicta*, assumes further significance for Italian legal interpretation in light of the Supreme Court of Cassation case law on procedural matters as well as recent civil procedure reforms. These considerations gained even greater weight with a landmark 2022 ruling by the Supreme Court of Cassation, sitting in its Joint Sections. This ruling directly addressed the distinction between *ratio decidendi* and *obiter dicta* in a case involving the Council of State, Italy's highest administrative court, and the application of two decision of the Constitutional Court (*Corte Costituzionale*) (3.2). Thus, the country's highest courts engaged with the issue of applying precedent through the distinction between the elements of a decision, which, as correctly noted, represents both a point of convergence and differentiation to other legal systems in a comparative perspective.

3.1 The Italian peculiarity with regard to the "maxim / maxima" concept and the role of the Maxim and Digest Office (*Ufficio del Registro e del Massimario*)

Professor GALGANO's words aptly capture the essence and systematic significance of precedents and the peculiar element of maxims in the Italian legal system: "Whether we like it or not, the issue of interpreting judicial precedents has, in our system, an indispensable reference point in maxims".[36] Point of reference not in the sense that the interpretation of precedents must be reduced to the interpretation of the *massime*, but - from a different perspective - in the sense that the true object of interpretation, although it cannot be separated from the examination of the full judgment, is not so much the judgment itself as "rather the relationship between it and the

[32] B. Sassani, R. Pardolesi, *Motivazione, autorevolezza interpretativa e trattato giudiziario*, in *Foro.it*, V, 299 ff. (2016).

[33] In this sense G. Gorla *Lo studio interno comparativo della giurisprudenza*…, quot. 73 ff. and F. Galgano, *L'interpretazione del precedente*…, quot., 706.

[34] F. Carnelutti, *La nuova procedura per le controversie sugli infortuni nell'agricoltura*, in Id., *Studi di diritto processuale civile*, Padova, 1930, 503 ff. (cited by L. Passanante).

[35] L. Passanante, *Il precedente impossibile*…, quot., 169.

[36] F. Galgano, *L'interpretazione del precedente*…, quot., 701 ff.

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massime that have been drawn from it (or that could have been drawn from it)." This perspective emerges as both insightful and productive, as it meticulously avoids denying the undeniable, thereby acknowledging the centrality of the *massime*. Simultaneously, it advocates for a study and interpretation of the *massime* conducted in light of the specific case from which it emerged.

Article 68 of Royal Decree 30.01.1941, No. 12 (Judicial Order) established the Maxim and Digest Office within the Supreme Court of Cassation, headed by a magistrate of the same court appointed by the First President (§1). The latter, after hearing the Attorney General of the Republic, establishes its functions (§3). Initially active in civil matters, since 1948 it has also covered criminal law. The Maxim and Digest Office was created as a distinct judicial office with autonomy from the judging panels of the Court of Cassation.[37] The main role of the Office is to carry out the official drafting of maxim of judgments and orders issued by the Supreme Court of Cassation. The justices of the Supreme Court are about 350: 1 Chief justice, 1 deputy president, 54 justices presiding over the divisions, 288 Supreme Court judges. There are also 30 judges of the courts of lower instance acting as "supporting justices" at the Supreme Court and working as members of the Maxim and Digest Office. The criteria and methods of creating maxims of judicial decisions followed by the Maxim and Digest Office are not, however, object of a public procedure.[38]

The verb "*massimare*" refers to the design and effective and faithful realization of a maxim, or rather, the condensation of the legal principle and its foundation in a few lines. According to GORLA, it is a complex task that shall be reserved for experienced jurists.[39] Drafting a legal maxim is a subsequent, additional, and new activity compared to the jurisdictional one; the maxim is not the judgment. The language of the maxim is not that of the judgment, the two expressions are ontologically and teleologically heterogeneous.[40] The one who drafts the maxim, once engaged in the search for the rationale on which "objectively rests the decision" [41] is "capable of returning it in the elliptical and syncopated form of the language of the maxim".[42] According to the 2011 decree of the First President of the Court of Cassation, the maxim "should not reproduce the decision in its argumentative path and thus translate into a mere transcription of more or less widespread passages of the judgment".[43] Moreover, the wording of the

[37] F.M. Damosso, *La massima come fonte nel sistema del precedente*, in *Cass. pen.*, 1708 ff. (2020).

[38] See V. Andrioli, *Tre aspetti della Corte di Cassazione*, quot., 189 and F. Galgano, *Dei difetti della giurisprudenza…*, quot., 504 ff.

[39] G. Gorla, *Lo studio interno e comparativo della giurisprudenza e i suoi presupposti: le raccolte e le tecniche per l'interpretazione delle sentenze*, in *Foro.it*, V, 84 (1964).

[40] E. Carbone, *Funzioni della massima giurisprudenziale e tecniche di massimazione*, in *Pol. dir.*, 139 (2005).

[41] G Gorla, *Lo studio interno e comparativo della giurisprudenza…*, quot., 81.

[42] E. Carbone, *Funzioni della massima…*, quot., 139.

[43] See Article 6, paragraph 1, letter c) of the Decree of the First President of the Court of Cassation Ernesto Lupo of 24 March 2011.

maxim must not be creative, but adhere as closely as possible to the text of the judgment.[44] The debate over who should draft legal maxims – the author of the judgment or the presiding judge[45] – appears to have subsided. The unique nature of "maximizing" work now seems to have settled the issue in favour of exclusively assigning this task to the specialized Maxim and Digest Office.

The Court of Cassation has published a summary document outlining the criteria for drafting maxims in civil and criminal matters.[46] According to the Supreme Court document, the selection of decisions and drafting maxims are recommended when dealing with an intervention of the Joint Section which "resolves a conflict in jurisprudence" or a "particularly significant legal issue". Similarly, the process is recommended for cases involving the novelty of the principle, "divergence from precedents", or the usefulness of confirming a principle due to its importance, the time elapsed since its last articulation, or its applicability in similar or recurring cases. Finally, the significance of the factual circumstances is also a factor, considering the particular social impact of the issue, the public interest it raises, or its recurring nature.[47] On the other hand, the Court also indicates those cases for which the process of selection and *massimazione* shall not take place. These include the repetition of a legal norm (pleonastic maxim), the definition or the formulation of a concept (academic maxim), an intermediate passage leading to the *ratio decidendi* (fragmentary maxim), the articulation of principles in an incidental manner (excessive maxim), and a "digression from the ratio decidendi (*obiter dictum*)". The principle that repeats a norm, defines a concept, or marks an intermediate passage can only be included in a maxim as a premise, together with the *ratio decidendi.* Pronouncements following the *ratio decidendi* cannot be included in maxims, even if they are preliminary procedural rulings.[48]

Few relevant notations are raised by scholars on the content and the correct use of the maxim. TARUFFO in particular notes "to the best of my knowledge, an office like the *Massimario* exists only in Italy". Legal systems that adhere to the doctrine of precedent do not have an equivalent to maxim/maxima. In these systems, the precedent is constituted by the entire judgment, "not by more or less synthetic excerpts extracted from the legal reasoning". Therefore, "here is a first very significant difference: as a rule, the texts that constitute Italian jurisprudence do not include the facts that have been the subject of decision", so that the application of the rule formulated in a previous decision is not based on the analogy of the facts, but on the subsumption of the subsequent factual situation under a general

[44] L. Nazzicone, *Tecniche di massimazione*, Roma, 2017, 32.

[45] M. Bin, *Precedente giudiziario*, ratio decidendi *e* obiter dictum: *due sentenze in tema di diffamazione*, in *Riv. trim. dir. e proc. civ.*, 1002 (1988).

[46] F. Costantini, P. D'Ovidio, *Sintesi dei criteri della massimazione civile e penale*, available on the official website of the Supreme Court of Cassation, available at https://www.cortedicassazione.it/resources/cms/documents/SINTESI_CRITERI_DELLA_MASSIMAZIONE_CIVILE_E_PENALE.pdf.

[47] F. Costantini, P. D'ovidio, *Sintesi dei criteri della massimazione…*, quot., 2.

[48] *Ibid.*

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rule.[49] He also notes that such *modus operandi* is "so deeply rooted in our habits that we often disregard the facts even when we have the entire text of the judgment, not just the maxim/maxima".[50] Indeed, if the text is published by a law review, the facts of the case are usually covered by omissions (*omissis*). If, on the other hand, full text is available, but it is a judgment of the Supreme Court, then the facts of the case are either set out in a very concise manner in the "narrative" part of the judgment, or they do not appear at all. Moreover, Supreme Court (*Corte di Cassazione*) judgments are studied to find out where and what the legal principle is, since what is sought is the abstract *regula juris* to be applied to the subsequent case, not the identification of the specific factual case that was the object of the decision.[51]

Since interpretation entails an intellectual endeavour aimed at assigning a specific meaning to a signifier, it is crucial to avoid interpreting the *massime* as if it were a general and abstract norm, granting it an independent existence. Instead, to reconstruct that meaning, it is necessary to delve into the arguments upon which the Court reached its decision in the specific case and extract the necessary guidance for applying the legal norm whose "exact observance" is encapsulated in the *dictum* of the Supreme Court.[52] In fact, the maxim shall be examined vis-à-vis the concept of "principle of law". Despite the mandate of article 384 of the Italian Code of Civil Procedure (CPC) and art. 143 of the Implementing Provisions, the principle of law is rarely explicitly stated in the Supreme Court of Cassation's ruling. Consequently, some scholars contend that the principle of law and the *massima* converge. Others, however, maintain a distinction between the two noting that the maxim represents "something more" than the principle of law.[53] While the principle of law addresses the remitting judge, the *massima* speaks to all judges within the legal system. In this sense

[49] M. Taruffo, *Precedente e giurisprudenza*, quot., 709.

[50] *Ibid.*

[51] *Ibid.* It may be said that this also depends on the institutional function that the Supreme Court performs in our system as a "judge of legitimacy" (see *supra*) only, but it should not be forgotten that the Court is increasingly called upon to decide on the merits, i.e., also on the facts of the individual case, and therefore at least in these scenarios it deals with the facts even if it cannot ascertain them *ex novo*.

[52] L. Passanante, *Il precedente impossibile…*, quot., 156.

[53] An element of discontinuity and contrast to this interpretation of the relationship between "*massima*" and principle of law is Article 363 CPC, which provides that when the parties have not appealed within the statutory time limits or have waived their right to appeal, or when the decision is not appealable to the Court of Cassation and is not otherwise challengeable, the Procurator General at the Court of Cassation may request that the Court enunciate in the interest of the law the principle of law to which the judge of merit should have adhered. If the enunciation of the principle of law can take place independently of the decision of a case, it, like the *massime*, speaks to all judges of the legal system and the operators who will have to apply an enunciated but not applied principle. Then there are either two different "principles of law," an incredible thesis. In this regard, it is stated that for the purposes of drafting the *massime* "it is permissible to consider even the obiter dicta, if the extraneous principle is enunciated in the interest of the law pursuant to Article 363 CPC. See L. Nazzicone, *Tecniche di massimazione*, quot., 26.

it is worth mentioning the opinion provided by a judge pertaining to the Maxim and Digest Office:

The maxim should encapsulate, albeit in a concise manner, all the necessary information to convey the exact scope of the principle as applied - not merely as hypothetically stated - by the Court. The principle of law enunciated by the drafting judge pursuant to Article 384 CPC responds to needs that partly differ from those of the maxim, if only because, unlike the maxim, it is embedded within a broader context (the judgment or ordinance) from which all the information useful for placing it in its correct dimension can be inferred. On the other hand, the maxim drafter must condense into a concise and clear written form everything that serves to accurately convey the scope and implications of the applied principle.[54]

The *massima* does not coincide with the concept of precedent. Precedent is not represented by an abstract general statement of a legal rule, but rather by the manner in which a legal rule has been applied to the specific facts of an individual case. In other words, it is primarily the application of the norm in the specific case that constitutes the object of any subsequent decision that follows the precedent[55]. This implies that there is no true precedent if the prior decision did not address the facts, nor if the subsequent decision does not address a particular factual situation. In other words, a precedent cannot simply consist in the abstract statement of a legal rule, or in the interpretation - also formulated in general and abstract terms - of a legal rule, without any reference to the factual situation that was the subject of the decision[56]. This issue remains a subject of debate, but despite calls for the *massima* to include more references to the specific case, today's maxims do not differ significantly from those of the past. Despite variations in the *massimazione* technique, the maxim ultimately tends to serve as a "predominantly general and abstract statement, typically disassociated from the specific case and stripped of its distinctive characteristics."[57] The factual elements present in the maxim typically end up constituting normative elements or, at most, examples of the multiple possible applications. There is a risk that the maxim becomes a "deceptive hybrid: incapable of providing an account of the specificities of the individual case, it deludes its reader into believing that they can save themselves the trouble of studying the judgment in its entirety".[58]

In the Italian case, the *massima* extracted from a Supreme Court of Cassation ruling does not fall within the proper meaning of the word "precedent" for at least two reasons. First, the Court of Cassation, unlike the supreme courts of other legal systems, is not a "fact-finder" even when it takes into account the facts pursuant to Article 384 §2 of the Italian Code of

[54] L. Passanante, *Il precedente impossibile…*, quot., 156 refers to the publication by C. Di Iasi, *La fata ignorante (a proposito dell'Ufficio del Massimario e funzione di nomofilachia)*, at www.questionegiustizia.it.

[55] J. Mourao Lopes Filho, *Os Precedentes Judiciais no Cositucionalismo Brasileiro Contemporaneo*, Salvador-Bahia, 2016, 275, cited by M. Taruffo, *Note sparse sul precedente giudiziale*, in *Riv. trim. dir. e proc. civ.*, 111 ff. (2018).

[56] M. Taruffo, *Note sparse…*, quot., 114.

[57] L. Passanante, *Il precedente impossibile…*, quot., 158.

[58] *Ibid.*

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Civil Procedure.[59] Therefore, it can be said that the Court, based on its nomophylactic function, decides questions of law and interprets norms in a general and abstract manner, i.e., without proceeding to a specific application of a norm to the facts of a particular case. The second reason concerns in particular the maxim, which increasingly constitute the specific content of the Cassation Court's case law. According to TARUFFO, there is no need to dwell on what is obvious to everyone, namely that the maxima, even when well-formulated, consists of a few lines in which it is essentially said "norm X is interpreted in a way Y" without any reference to the facts of the case on which the relative decision was made.[60]

The interpreter of a precedent cannot therefore rely on the study of the maxim but must necessarily extend the investigation to the full judgment from which it is derived. These considerations are further corroborated by the relationship between maxim, ratio decidendi, and obiter dicta. It is indeed well-known that, contrary to the hopes expressed by many and in line with a long-standing custom,[61] the maxims continue to reproduce not only *rationes decidendi* but also *obiter dicta*, with the aggravating factor of failing to indicate whether the *dictum* – object of the maxim - belongs to the former or the latter as well as to bring to a systemic under-estimation – in the context of *massime* - of the distinction between *ratio decidendi* and *obiter dicta*.

In addition to the maxim and its circulation in the legal order, there are two elements that deserve particular attention when considering the role of judicial precedent and the systemic significance of the distinction between *ratio decidendi* and *obiter dicta*. In the first instance, the case law of the Supreme Court on procedural matters - in particular with a decision of the Joint Sections - plays a fundamental and peculiar role from a systemic perspective, especially in the case of a shift of the interpretative orientation (*revirement*) concerning the requirements for admissibility of certain acts. On the other hand, the Italian Code of Civil Procedure has introduced few "*filters for entry*" to the Supreme Court of Cassation, in the form of the possibility for the Court to declare the inadmissibility of the appeal when the contested judgement - or decree concerning personal freedom - has decided the questions of law "in a manner consistent with the case law of the Court" and the examination of the grounds of the appeal presented does not offer elements to confirm or change its orientation.

[59] Art. 584 Code of Civil Procedure reads: §1. The Court enunciates the principle of law when it decides an appeal brought pursuant to Article 360(1)(3) CPC, and in any other case where, deciding on other grounds of appeal, it resolves a legal issue of particular importance. §2. The Court, when it allows the appeal, quashes the judgment and remits the case to another judge, who must comply with the principle of law and, in any event, with the Court's ruling, or decides the case on the merits if no further factual findings are necessary.

[60] M. Taruffo, *Note sparse…*, quot., 115.

[61] There are two historical examples in Italy where the *massimazione* included obiter dicta without adequate reference to the specific facts under examination, creating no small amount of confusion: the Meroni judgment, Cass. sez. un. 26 January 1971, no. 174, on the subject of compensability of damage for injury to contractual rights, and Cass. sez. un. 9 September 2010, no. 19246.

3.2 The recent decision of the Joint Sections of the Court of Cassation concerning value of precedent and role of the *obiter dicta*

In its decision of May 12, 2022, Case No. 15236, the Italian Court of Cassation, sitting as the Joint Sections, delved into the concept of precedent with a specific focus on the role of *obiter dicta* within the Italian legal framework. Before examining such specific legal question, we would give a bit of context and delineate the facts of the case as well as the relevant legal issues in the decision of Joint Section (3.2.1) for then be able to focus on the *quaestio* on the *obiter dicta* and its implications on the Italian legal order in light of what we have discussed (3.2.2).

3.2.1 Facts of the case, arguments of the parties and decision of the Joint Sections

In Case No. 15236, decided on May 12, 2022, two companies participated in a public tender issued by the Chamber of Deputies for the award of a service contract. These companies formed a temporary joint venture, known as *Raggruppamento Temporaneo d'Imprese* (RTI), and were ranked first in the tender. However, the Chamber excluded the RTI from the process on the basis that the composition of the proposed working group did not meet the technical specifications outlined in the tender's annex. The Chamber specifically objected to the use of a self-employed worker as the technical director, arguing that such workers were only permissible for ancillary or instrumental tasks under the tender rules.

The two companies challenged this exclusion before the Regional Administrative Tribunal of Lazio (TAR) which dismissed their appeal, asserting that the dispute fell under the *autodichia* of the Chamber of Deputies. The Italian legal system recognizes *autodichia* as a principle of self-governance, allowing constitutional bodies to handle internal disputes without external interference. In this case, the Chamber's Rules of Jurisdiction designated its Council of Jurisdiction as the competent authority to adjudicate challenges concerning its administrative actions, including disputes involving external entities like contractors.

Unconvinced by the TAR's ruling, the companies escalated the matter to the Council of State. The Council overturned the TAR's decision, annulling the Chamber's exclusion of the RTI and finding that the Chamber had improperly invoked *autodichia* in a matter concerning public procurement. The Chamber of Deputies subsequently appealed to the Supreme Court of Cassation (Joint Sections), contesting the Council of State's jurisdiction. The Chamber argued that the dispute should have been resolved internally through its self-governance mechanisms, as procurement issues involving its internal administration fall under its autonomous powers.[62]

[62] The Chamber cites its own Rules of Jurisdiction (*Regolamento per la tutela giurisdizionale*) and the Italian Constitution (art. 64) to support its claim that it has the authority to resolve internal disputes arising from its administrative acts.

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The Chamber's primary argument was that the dispute fell entirely within the scope of its *autodichia*, as outlined in its Rules of Jurisdiction. These rules, according to the Chamber, constituted a primary source of law equivalent to national legislation and could not be subjected to modification or review by external courts, including the Council of State. Furthermore, the Chamber contended that its constitutional right to self-governance, particularly in matters of procurement, entitled it to regulate contractor selection autonomously, without interference from external judicial bodies. To support its claim, the Chamber referenced Constitutional Court rulings Nos. 120/2014 and 262/2017, which it interpreted as affirming its exclusive authority to manage its internal operations, including procurement procedures.

The Supreme Court of Cassation's Joint Sections addressed these arguments by closely examining the boundaries of *autodichia* in relation to public procurement law. While the Court recognized the Chamber's broad normative autonomy in regulating its internal affairs, it also emphasized the limits of this autonomy, particularly in cases involving external parties.[63] Drawing on the Constitutional Court's rulings, the Joint Sections reiterated that while constitutional bodies like the Chamber of Deputies possess significant self-governance powers, these powers are not absolute. The principle of *autodichia* primarily applies to internal matters, such as disputes concerning parliamentary staff or the management of the body's internal administrative functions. However, when disputes involve external legal relationships, particularly those governed by public law, they fall under ordinary judicial review.[64]

The Court rejected the Chamber's argument that its Rules of Jurisdiction could shield its procurement decisions from external scrutiny. It found that public procurement, by its very nature, involves third parties and is subject to public law principles of transparency, competition, and fairness. As such, the Council of State was justified in assuming jurisdiction over the dispute. The Court clarified that while the Chamber's Rules of Jurisdiction may hold the status of primary law, they cannot override the fundamental principles of public procurement law that require external judicial oversight to ensure fair competition and prevent abuse.

On the issue of conflict of attribution, the Joint Sections underscored that it is the responsibility of the judiciary to determine whether a case falls within a constitutional body's self-governance domain or if it involves public

[63] The Joint Sections rely on Constitutional Court judgment no. 262/2017, defining self-governance as a core element of the autonomy recognized for constitutional bodies. This autonomy is linked to their specific role within the constitutional framework and is primarily expressed at the normative level. Judgment no. 120/2014 expands this autonomy to include the internal organization of these bodies, including the creation of norms governing their administrative structures. Judgment no. 129/1981 affirms that such autonomy is not limited to norm-making but also includes the coherent application of these norms.

[64] In Constitutional Court judgment no. 262/2017, the Court clarified that normative autonomy "has a foundation that also represents its boundary," as it does not fall to constitutional organs, "in principle, to resort to their own normative power, neither to regulate legal relations with third parties, nor to reserve to self-governing bodies the decision of any disputes that involve their subjective situations".

law matters that require external judicial review. If a case concerns public procurement, which inherently involves the rights of external parties, the judge has the authority to adjudicate the matter under public law. The Court affirmed that the *autodichia* doctrine does not grant constitutional bodies blanket immunity from judicial oversight in situations where public legal obligations are at stake. Therefore, the Council of State was correct in assuming jurisdiction without raising a conflict of attribution with the Constitutional Court.[65]

The Joint Sections also addressed the Chamber's contention that the Council of State had violated its Rules of Jurisdiction by adjudicating the tender dispute. The Court concluded that public procurement disputes, particularly those involving third-party contractors, fall outside the Chamber's self-governance prerogatives. Even though the Chamber is a constitutional body, its procurement processes, which engage external parties, must adhere to the legal principles governing public law. The Court thus confirmed that ordinary jurisdiction applies to such cases, ensuring the protection of public interests and the rule of law in the administration of public contracts.

In the light of the above the Joint Sections concluded that the identification, by the Chamber of Deputies, of a private economic operator, external to the constitutional body and not included among its auxiliary structures, for the awarding of a service contract - in this case, for monitoring contracts related to IT services and their management, following a tender procedure conducted on the basis of national and EU regulations - does not fall within the sphere of normative autonomy constitutionally recognized to the Chamber of Deputies. It follows that the jurisdiction over the dispute arisen following the exclusion from the tender of the competitor whose offer was deemed anomalous during the verification of conformity, belongs not to the self-governing bodies, but to the ordinary jurisdiction, according to the "grand rule of the Rule of Law" and the consequent jurisdictional regime to which all legal rights and subjective legal situations are subject in our constitutional system.[66] The Council of State did not, in fact, rule on an inadmissible application, since it cannot be excluded that, in the face of the self-governing objection raised by the Chamber, the administrative judge had the duty, *in limine*, to stop and the burden of promoting the conflict of attribution between the powers of the State. By recognizing its own jurisdiction and deciding on the merits of the dispute, the Council of State did not fail to apply the Chamber's Regulations, but merely interpreted their scope, correctly excluding that the provisions contained therein justified the attraction, within the jurisdiction of the self-governing body, of the appeal against the measure, adopted by the Chamber

[65] In §6 of Joint Sections No. 15236, the Court clarified that when a judge is faced with a challenge to the exclusion of a competitor from a Chamber of Deputies tender, and the Chamber raises a self-governance claim, the judge must first determine if the right in question falls under the Chamber's domestic jurisdiction (linked to its autonomy or independence). If not, the judge should proceed under ordinary jurisdiction. However, if the Chamber of Deputies believes the judge's decision interferes with its prerogatives, it can initiate a conflict of attribution before the Constitutional Court.

[66] See §15 Joint Sections No. 15236.

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Administration Service, of exclusion of the offer of the consortium to be constituted from the EU procurement procedure for the awarding of the contract.[67]

3.2.2 Court of Cassation and the *obiter dicta* argument: binding effect and persuasiveness

The interpretation of the applicable provisions in light of the Constitutional Court Judgment No. 262/2017 given by the Council of State - indeed upheld by the decision under examination - was challenged by the Chamber in its appeal before the Joint Sections. In particular, they contended that the Council of State erred in its interpretation of §7.2. of the Constitutional Court Judgment No. 262/2017. The original quotation reads as follows:

"While constitutional bodies are authorized to regulate employment relationships with their own employees, they are not, in principle, permitted to resort to their own regulatory powers to govern legal relationships with third parties or to reserve the adjudication of disputes arising from such relationships to their internal self-governance bodies. This applies, for example, to disputes concerning procurement contracts and service agreements entered into by the administrations of constitutional bodies. While these disputes may involve relationships that are not entirely unrelated to the exercise of the constitutional body's functions, they do not, in principle, concern purely internal matters and therefore cannot be shielded from ordinary judicial review." [68]

The Chamber asserted that the passage from the Constitutional Court judgment - concerning procurement contracts and service agreements entered into by the administrations of constitutional bodies, as the case at stake - constitutes "a mere *obiter dictum*", a remark or observation made by a judge that is not essential to the decision of the case at hand. As an *obiter dictum*, argued the Chamber, it does not carry the same binding force as the *ratio decidendi*, the core legal principle established by the court's ruling. The Chamber argued that the Council of State's reliance on this *obiter dictum* is misplaced and cannot justify the disapplication of the Chamber's own primary sources of law, namely its Rules of Jurisdiction.

The Joint Sections of the Italian Supreme Court firmly rejects the Chamber of Deputies' contention that the reference to procurement and service agreements related disputes in Constitutional Court Judgment No. 262/2017 should be relegated to the realm of mere "digressive argumentation".[69] Although it recognises that the relevant statement regarding disputes related to contracts and supplies of services provided to the administrations and constitutional bodies touches upon an aspect that was not the subject of the conflict of attribution decided by the Constitutional Court in that case[70]. Nevertheless, according to the Joint

[67] *Ibid.* §16.

[68] §8 Joint Sections, No. 15236 quoting § 7.2. Constitution Court decision no. 262/2017.

[69] §§ 20-22 Joint Sections No. 15236.

[70] See §10 -21 Joint Sections, No. 15236 In fact, the judgment declares that "it was up to the Senate of the Republic and the President of the Republic to approve the

Sections, that passage must be recognized as having not only the value of an exemplification but also an "orientative" one, because it contributes, in a balancing logic, to identifying the boundary between attributions in systemic equilibrium, determining the perimeter of the guaranteed scope of constitutional bodies, beyond which the normal jurisdictional function of safeguarding rights expands.

The Joint Sections argue that when evaluating the "value as a precedent" of a judgment rendered by an ordinary court, it is crucial to examine the scope of the "statements of principle" that extend beyond the *ratio* underpinning the decision in the specific case. The Joint Sections - to some extent arguing as well in *obiter dicta*, since in this passage they refer to the value of a precedent provided by an ordinary court rather than the decisions of the Constitutional Court object of the appeal - align with the doctrine that maintains that in practice it is not always true that *obiter dicta* are considered completely devoid of effects on subsequent decisions. Even if it is excluded that they have the same effectiveness as that attributed to the *ratio decidendi*, this does not prevent them from being referred to as an argument or a factor with some persuasive significance. In fact, it seems that the Joint Sections argue a little further when noting that as *obiter dicta* do not bear a direct connection to the facts of the case, they "by default" – it may eventually do not - lack "persuasive force". However, the Supreme Court in the Enlarged Board recognise that *obiter dicta* may in any case "foreshadow future case law on other disputes where the legal issue, initially addressed and hypothetically resolved, arises in a relevant factual context".[71]

Whereas, in a departure from such approach applied to judgments of ordinary courts, the Joint Sections states that the distinction between *ratio decidendi* and *obiter dicta* "*loses its significance*" when considering rulings issued by the Constitutional Court. This is because the statements of principle embedded within the decisions – always to be considered in their entirety – aim to safeguard constitutional norms, values, and powers. The judgments of the Constitutional Court engage in a continuous dialogue between the abstract principles of the Constitution and their application in concrete cases. According to the Joint Sections of the Supreme Court of Cassation, the decision No. 262/2017 of the Constitutional Court purports that the exclusion of disputes related to procurement contracts and service agreements for the administrations of constitutional bodies from the domain of self-governance represents "a clear principle with guiding force"[72]. This principle embodies the core reasoning (*spiritus*) of the decision and constitutes the natural outcome of an evolution acknowledged and implemented by the Constitutional Court.[73]

challenged acts... insofar as they reserve to self-governing bodies the decision of labor disputes brought by their employees," while no reference is made to disputes with "third parties".

[71] §21-22 Joint Sections, No. 15236.

[72] §22 Joint Sections, No. 15236.

[73] *Ibid.*

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4. Obiter dicta in Australia: the High Court's statement in *Farah v. Say-Dee* and the binding value on lower and intermediate courts

The traditional view is that *obiter dicta* is not binding on lower courts. The first Chief Justice of the Australia High Court said that:[74]

"The questions submitted in the case are to a great extent of an abstract character. In my judgment the provisions of sec. 31 were not intended to allow the submission of hypothetical or abstract questions of law which may never arise for actual decision. Any opinions expressed by the Court on such questions can only be *obiter dicta* of more or less weight, but having no binding authority. And I regret to have to say that in my judgment most, if not all, of the questions which have been so laboriously and exhaustively discussed before us are of that character [...]

It appears necessary, however, if only to show why I feel bound to refuse to give a categorical answer to some of the questions submitted, to express my opinion on some of the points argued, even though it may be only *obiter*, and to state some propositions which appear to me to be elementary, and indeed little more than truisms, although nearly all of them have been explicitly or implicitly controverted in the arguments for the claimants. [...] I am conscious that this opinion partakes more of the character of an essay or treatise than of a judicial pronouncement, and I entertain some doubts whether I am performing a judicial duty in delivering it. I should not like it to be regarded as a precedent, but on the whole I think I should let it go forth for what it is worth".

The traditional view regarding *obiter dicta* of higher courts established a clear distinction between their persuasive influence and binding force. Lower courts were not obligated to follow *obiter dicta*, yet they accorded them significant weight. As Harding and Malkin aptly observe, "Taking High Court dicta seriously and having a duty to obey them are two different things".[75] This distinction lies at the heart of the traditional approach to the precedential effect of obiter dicta. However, the lack of a binding obligation did not render obiter dicta inconsequential. Lower courts often considered dicta from the High Court, the highest court in Australia, to be highly persuasive.[76] In some instances, lower courts felt compelled to follow dicta if it emerged from a majority of judges or if it represented a consistent view reiterated by the High Court in multiple cases.[77] Faced with such pronouncements, lower courts would naturally find them highly persuasive.

In *Farah v Say Dee*, the High Court of Australia, in a unanimous joint judgment, said that lower courts should consider themselves bound by "seriously considered dicta" of the majority of judges of the High Court.[78]

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[74] The *Federated Saw Mill Employees' Association of Australasia v James Moore and Sons Pty Ltd* (1909) 8 CLR 465, per Griffiths CJ at 485.

[75] Harding and Malkin, *The High Court of Australia's Obiter Dicta*..., quot., 245.

[76] King CJ in *R v Holmes* [(No 7) [2021] NSWSC 570: could "constitute a formidable obstacle" to counsel's submissions in a case.

[77] Eg. *Horan v James* [1982] 2 NSWLR 376, 381 (should treat lower court as bound); *Haylen v NSW Rugby League* [2002] NSWSC 114; Cairn J in *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, 857.

[78] [2007] HCA 22 (2007) 230 CLR 89, at [135].

They also said that State and Territory Courts of Appeal, the highest courts in each jurisdiction, should follow one another unless they thought their decisions were "plainly wrong". Both these statements run counter to the orthodoxy that lower courts must follow the *ratio decidendi* of higher courts in their own jurisdiction.

In that case, Farah Constructions (FC) entered into a contract with Say-Dee to purchase and redevelop a residential property in partnership (no 11 in a street in Burwood, Sydney) in 1998. The principals of Say-Dee were to provide the money and Mr Farah Elias of FC was to manage the project. Many pitfalls stalled the project largely because the Council thought the property needed to be enlarged for the proposed project. Mr Elias and his family (wife and two daughters) entered into a contract to purchase no 15, and another entity (L), in which they also had an interest, contracted after that to buy an adjoining property no 13. The relationship between FC and S-D deteriorated. FC sought the appointment of a trustee for sale of no 11 and S-D filed a cross-claim seeking declarations that FC, L, Mr E and his wife and daughters held their interests in the properties on constructive trust for the FC and S-D partnership.

At trial in the Supreme Court of NSW Palmer J found that S-D had declined to be involved in the purchase of nos 13 and 15 and that F's fiduciary duty to S-D did not extend to an obligation to disclose information concerning opportunities to acquire the properties. On appeal the Court of Appeal (unanimously) reversed many findings of fact holding that S-D had not been invited to participate in the purchase of nos 13 and 15, that FC was obliged to disclose the opportunity to purchase the other properties, and had failed to disclose this. They further held that FC had breached its fiduciary duties, and that Mrs E and her daughters were liable to Say-Dee because they were recipients of the benefit of the breach of duty. The Court of Appeal held under the first limb of *Barnes v Addy* that Mrs E and her daughters held the property on constructive trust because the requisite knowledge could be imputed to them.[79] Tobias JA declared unjust enrichment to be the proper basis of this limb and actual knowledge to be unnecessary. When appeals to the High Court took place the High Court overturned the Court of Appeal's findings.[80] They said there had been no breach of fiduciary duty so it was not necessary for the Court of Appeal to engage with principles of recipient liability, though it did so none the less.

We will not go into all the issues about knowing receipt. What is of interest to us is that, the Court of Appeal decided that they could decide that unjust enrichment or restitution was the basis of recipient liability and therefore actual knowledge was not required. It should be noted here that there was another basis for their decision, so this was a secondary opinion. Tobias JA listed some academic and judicial writing supporting the

[79] The rule in *Barnes v Addy* (1874) LR 9 Ch App 244 says that in equity third parties could be liable for a breach of trust in two circumstances or "limbs". The first limb is "knowing receipt" (where a person knowingly receives some part of the trust property), the second limb is "knowing assistance" (that is the person knowingly assisting the trustees with their fraudulent and dishonest scheme). *Farah v Say-Dee* concerned "knowing receipt".

[80] *Farah v Say-Dee* [2007] HCA 22.

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restitutionary position and then said, "in the absence of any High Court authority to the contrary, I see no reason why the proverbial bullet should not be bitten[81] by this Court in favour of the Birks/Hansen approach."[82] Tobias JA was referring to a dispute amongst equity lawyers about the taxonomy of the common law. Peter Birks and others following him had argued that the principle of unjust enrichment could be seen as underlying the doctrines of knowing receipt and knowing assistance in *Barnes v Addy*. Others had argued that this was unnecessary and was a revising of history since unjust enrichment was not a recognised doctrine at the time of *Barnes v Addy* which was a working out of ordinary equitable rules.

It has been said, "it is notable that Tobias JA presented no substantial or independent reasoning in support of this radical change, instead treating it as an inevitability."[83] Tobias JA's assumption that the High Court had not decided any cases on knowing receipt appears to have hit a raw nerve. In fact, the High Court[84] had discussed "knowing receipt" in *Consul Development Pty Ltd v DPC Estates Pty Ltd Development*[85] in 1975 but did not raise the restitutionary argument. The case concerned the second limb of *Barnes v Addy* and therefore any statement on the first limb in that case was strictly speaking, obiter dicta. In *Farah*, the High Court clearly thought Tobias JA's statement was an improper way to consider their "seriously considered dicta". Atkin again said, "the court is scathing of the inability of Tobias JA to perceive, let alone to address, any reason why "the restitutionary bullet ought not to be bitten". This failure is derided as a state of affairs more likely to arise when courts make pronouncements without hearing argument than when they do so after argument."[86] The court quotes from Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* [87]

"To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writings of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops: over time, general principle is derived from judicial decisions upon particular instances, not the other way around".

[81] To "bite the bullet" means to stoically accept immediate pain because avoiding it will lead to greater pain later, from the Old American West tales where a patient was given a bullet to bit while surgery was performed without anaesthetic.

[82] *Farah* [2005] NSWCA 309 at [232].

[83] H. Atkin, *Knowing Receipt' Following Farah Constructions Pty Ltd v Say-Dee Pty Ltd* 29(4), in *Sydney L. Rev.*, 713 (2007).

[84] The High Court of Australia at this time was dominated by the giants of the equity bar in NSW, in the persons of Gummow and Heydon JJ in particular. NSW was the last jurisdiction in the world to accept that equity and common law could be determined in the same court. This made the court unlikely to be willing to change equity rules easily. An example of the kinds of battles going on concerning whether equity could borrow from common law is *Harris v Digital Pulse* [2003] NSWCA 10, in which a hard-fought dispute about whether punitive damages could be imported from torts into equity took place.

[85] *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373.

[86] *Farah* [2007] HCA 22 at [149], Atkin at fn. 20.

[87] *Roxborough* [2001] HCA 68 at [154]; (2001) 208 CLR 516.

This is a "dig" at Birks and his followers and their attempt to "rationalise" the common law, specifically in this case based on the principle of unjust enrichment. The High Court stated at §132:

"Although the matter is not wholly clear, and although the Court of Appeal found Mrs Elias and her daughters liable on another ground, so that the restitutionary basis was not essential to the outcome, the reasoning appears to be offered not as supposedly helpful obiter dicta but as an independent ground of decision. It was unjust to the appellants to decide the respondent's appeal to the Court of Appeal on an independent ground which was never pleaded by the respondent, never argued by the respondent before the trial judge, and never argued by the respondent in the Court of Appeal. The authorities and writings relied on by the Court of Appeal were not put to the Court of Appeal for that purpose. The relevant part of the Court of Appeal's judgment would have come as a complete surprise to all parties [...]".

And at §134, the High Court commented on the Court of Appeal making such a decision when in their view this was not "*dicta*" against the Court of Appeal's view, but "seriously considered" *dicta* which was said by a majority of the court.

"The second reason why the Court of Appeal's treatment of this subject was a grave error is the confusion it is causing. Either the Court of Appeal is to be treated as abandoning the notice test for the first limb of *Barnes v Addy*, or it is to be treated rather as recognising a new avenue of recovery, which exists alongside the first limb. Although Say-Dee submitted that the law should develop by recognising a new but additional avenue of recovery, the Court of Appeal's approach was to abandon the notice test for the first limb. In doing so, it was flying in the face not only of the received view of the first limb of *Barnes v Addy*, but also of statements by members of this Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd*.[88] It is true that those statements were dicta in the sense that the case was decided on the second limb of *Barnes v Addy*. But, contrary to the Court of Appeal's perception, the statements did not bear only "indirectly" on the matter: they were seriously considered. And, also contrary to the Court of Appeal's perception, they were not uttered only by two members of the Court, that is Stephen J, with whom Barwick CJ concurred.[89] Gibbs J took the same view[90], so that it was shared by the entire majority. Gibbs J cited with approval *Soar v Ashwell*[91] which approved the extension of *Barnes v Addy* to the case "where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant". That language is also employed in

[88] [1975] HCA 8; (1975) 132 CLR 373.

[89] *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8; (1975) 132 CLR 373 at 410. Stephen J's dicta approved a statement of Jacobs P in the court below, which strengthens their weight: *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 459.

[90] *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8; (1975) 132 CLR 373 at 396.

[91] [1893] 2 QB 390 at 396-397 per Bowen LJ.

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another case Gibbs J cited, *Lee v Sankey*.[92] In a third case cited by Gibbs J, *In re Blundell; Blundell v Blundell*[93], Stirling J said a stranger who received trust property was not liable unless "to his knowledge the money is being applied in a manner which is inconsistent with the trust".[94]

The High Court emphasised that what the Court of Appeal had done amounted to abandonment of a long-standing rule of equity.

Leaving aside any technical question about whether the doctrine of stare decisis strictly applied, abandonment of the rule that the plaintiff must prove notice on the part of the defendant is not an appropriate step for an intermediate court of appeal to take in relation to so long-established an equitable rule - for other illustrations of it both before[95] and after[96] *Barnes v Addy* can be found, its existence had been acknowledged in the Court of Appeal itself the previous year[97], and its correctness has been assumed in this Court.[98]

And if the Court of Appeal is to be seen as creating a new rule that rule impacts on the first limb in *Barnes v Addy* which they reiterate "…is not a step which an intermediate court of appeal should take in the face of long-established authority and seriously considered dicta of a majority of this Court". In their view this creates an anomaly for judges in the lower courts. At §135 we may read:

"The result of the statements by the Court of Appeal about restitution-based liability has been confusion among trial judges of a type likely to continue unless now corrected. As Hamilton J remarked and Barrett J agreed, a trial judge of the Supreme Court of New South Wales now "faces the difficult situation of obiter dicta in the High Court some 30 years ago conflicting with recent dicta in the Court of Appeal, which have met with

[92] (1872) LR 15 Eq 204 at 211 per Sir James Bacon VC.

[93] (1888) 40 Ch D 370 at 381.

[94] That passage was quoted by Stephen J: [1975] HCA 8; (1975) 132 CLR 373 at 408-409.

[95] *Morgan v Stephens* (1861) 3 Giff 225 at 237 per Sir John Stuart VC [1861] EngR 655; [66 ER 392 at 397].

[96] *In re Dixon*; *Heynes v Dixon* [1900] 2 Ch 561 at 574 per Sir Richard Webster MR; *In re Eyre-Williams; Williams v Williams* [1923] 2 Ch 533 at 539-540 per Romer J; *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* [1991] FCA 344; (1991) 30 FCR 491 at 507 per Gummow J. For modern English statements to the same effect, see *Karak Rubber Co Ltd v Burden* (No 2) [1972] 1 WLR 602 at 632 per Brightman J; [1972] 1 All ER 1210 at 1234; *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405 per Buckley LJ, 410 and 412 per Goff LJ; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 306-307 per Browne-Wilkinson LJ; *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 291 per Millett J; and *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700 per Hoffmann LJ.

[97] *Robb Evans of Robb Evans & Associates v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75 at 109 [178] per Spigelman CJ, Handley and Santow JJA concurring.

[98] *Mayne v Public Trustee* [1945] HCA 38; (1945) 70 CLR 395 at 402-404 per Williams J (Latham CJ and Dixon J concurring).

substantial criticism[99]. The confusion is not likely to be limited to New South Wales judges. Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong[100]. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law. There has already been an example of a single judge feeling obliged to follow the Court of Appeal despite counsel's submission that he was obliged not to do so".[101]

The High Court is making a big claim here. Although it is true that the High Court makes the final statement on the law for states as well as the Commonwealth, it is still true that the common law in each state, of which most is at least partly affected by the legislation of the state or territory, often remains distinct for the state, and that the Court of Appeal of each state or territory may be the highest court a matter reaches, given that the High Court can refuse to hear a case. The fact remains that the High Court had not made a decision which the Court of Appeal clearly had to follow. On the traditional basis the lower courts should have followed the Court of Appeal and if a matter on this topic reached the High Court they could correct it there. However, it does seem that the Court of Appeal might have been more cautious considering the long history of *Barnes v Addy* in the common law world. In that respect some of the High Court's criticism may be just. The court's final word on the matter was this: "[158] The changes by the Court of Appeal with respect to the first limb, then, were arrived at without notice to the parties, were unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court. They must be rejected".

5. Concluding Remarks

While the Australian and Italian legal systems pertain to different legal traditions and possess distinct characteristics, a unifying element emerges from our comparative analysis. Both the presented cases involve the intervention of a superior court fulfilling its role in ensuring consistent interpretation and application of the law. In the Italian civil law context, this is known as "*nomofilachia*"[102], whereas the common law employs the doctrine of *stare decisis*. Crucially, both systems uphold the fundamental principle of *iuris dicere*: issuing pronouncements – judgments or orders – that directly

[99] *Kalls Enterprises Pty Ltd (in liq) v Baloglow* [2006] NSWSC 617; (2006) 58 ACSR 63 at 78 [47] per Hamilton J, quoted in *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council; Hillig v Darkinjung Pty Ltd* [2006] NSWSC 1217 at [30] per Barrett J.

[100] *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

[101] *Multan Pty Ltd v Ippoliti* [2006] WASC 130 at [45] per Simmonds J.

[102] P. Stanzione, *Il valore del precedente nel sistema ordinamentale*, in *Comparazione dir. civ.*, 2018, 4 clarifies that "nomofilachia", in a dynamic sense, entails the ability to govern the evolution of the case-law.

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address the issues raised before the court. Within this framework, the distinction between *ratio decidendi* and *obiter dicta* plays a central role in both Australian and Italian jurisprudence.

In the Australian context, the superior judge – acting as producer of law - has developed the concept of "seriously considered dicta" to provide guidance for lower and intermediate courts. However, this tool necessitates cautious application by the High Court, respecting the prerogatives of federal and state courts and the established principles of case law e.g., in equity. Should this approach lead to deterioration and unforeseen consequences, the Australian legal system offers the mechanism of overruling, possibly by a differently composed High Court. An overruling or even the mere possibility of its manifestation allows for a "fine-tuning" of the definition of "seriously considered dicta" and adaptation of it to future developments.

Our analysis unequivocally reaffirms and underscores the enduring relevance of the distinction between *ratio decidendi* and *obiter dicta*. The delicate manner in which the Joint Sections of the Italian Supreme Court addressed this issue – akin to the approach taken by the High Court of Australia – serves as a testament to the distinction's continued importance. In this case, the Supreme Court exercised its *nomofilactic* function by taking position on the interpretation of a judgment of the Constitutional Court by the Council of State. The dispute involved the Chamber of Deputies, which maintained its right to self-adjudication under the principle of *autodichia*. This case brought together the three highest judicial institutions in Italy, along with the Chamber of the Italian Parliament, engaging in a dialogue before a court through their respective pronouncements. The fundamental principle of correspondence between the claims and the pronouncements governed all the dialogue. In more prosaic terms, one could say that "every word carries the weight of a boulder" in this context. The distinction between *ratio decidendi* and *obiter dicta* has been crucial for enabling the aforementioned institutions to fulfill their respective roles within the legal system.

The Joint Sections have provided valuable guidance on the interpretation of *obiter dicta* in the context of ordinary and administrative judicial decisions. They have emphasized that *obiter dicta*, when related to the facts of the case, should not be dismissed as mere digressions but rather considered as an argument or a factor "with some persuasive significance in the formulation of the decision of a second case." In other words, *obiter dicta* can serve as precursors to future case law on related disputes where the legal issue, initially addressed and hypothetically resolved, arises in a relevant factual context. This approach offers valuable insights that can be further explored in conjunction with the concept of "seriously considered dicta" from Australian case law. While the Italian legal system does not adhere to the doctrine of *stare decisis*, it recognizes the persuasive authority of pronouncements from the supreme courts, which can guide judicial interpretation and enhance the consistency of the legal system.

The Joint Sections' analysis presents a peculiar aspect: the notion of a weakened distinction between ratio decidendi and obiter dicta in the pronouncements of the Constitutional Court. In more prosaic terms, one could argue that this constitutes "a (reasonable) exception that proves the

rule". The unique nature of the issues adjudicated by the Constitutional Court, the stature of the institution and its members, and the limited number of questions submitted to its jurisdiction allow the Court to accord significant weight to all of its "statements of principle" embedded within its decisions. These pronouncements, which "must always be considered in their entirety", serve the crucial purpose of safeguarding constitutional norms, values, and powers, while also mediating between constitutional principles and their application in concrete cases.

Precisely to "safeguard the rule," it is crucial to uphold the parameters that distinguish obiter dicta from ratio decidendi, particularly in the Italian legal system, where judicial pronouncements and their statements of principle are often circulated in a condensed form, such as maxims or versions which do not provide a detailed account of the facts of the case. This condensed nature of judicial pronouncements highlights the importance of a clear demarcation between ratio and obiter. In this regard, it is noteworthy that the distinction between ratio and obiter, which we have extensively discussed, was not explicitly addressed in the *massima* of the Joint Sections' judgment, despite the fact that the Chamber of Deputies had raised the same legal question before the Constitutional Court due to the conflict of attribution arising from the judgment. Interestingly, however, the Constitutional Court - with its decisions 65/2024, published on April 24, 2024 - itself has subsequently concluded that the contested passage "did pertain to the ratio decidendi" of the case.

It is essential to avoid misinterpretations concerning the distinction between *ratio decidendi* and *obiter dicta*. The occasional murkiness surrounding this distinction in specific cases should not lead to the erroneous conclusion that all elements of a judgment automatically assume the status of binding legal precedent. Equally, it would be inappropriate to abandon the established definitions of these fundamental legal concepts. Instead, a rigorous and impartial approach, akin to that employed by a comparative legal analysis, is necessary when grappling with this issue. A thorough examination of the judgment's core elements, undertaken with due regard to the unique characteristics of the relevant legal system and its historical evolution, is paramount. Through such a meticulous analysis, we can then arrive at a well-founded assessment of the persuasive force the judgment may hold for legal professionals confronted with analogous cases in the future.

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