Essays

Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court

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Abstract

The constitutional case-law of the last few years confirms the unbreakable bond between interpretation and balance, and the impossibility, for the purposes of application, of interpreting without balancing and balancing without interpreting. The paper criticizes both those who advocate for an abstract distinction between the 'legislative' balance and the 'judicial' balance, and those who confine reasonableness to equality or equal treatment, or social consensus, or praxis, or living law. The impossibility of separating a 'law with rules' and a 'law with principles', in their historical and relative significance, makes it possible to address – with better predictability and controllability – delicate issues which recent decisions of the Constitutional Court have dealt with, such as those concerning diachronic law, unfair deposit, correct remedy, cryopreservation of supernumerary embryos, automatic expulsion of a foreigner in consequence of a crime, acknowledgement of a foreigner's rights, public order.

I. The Balancing of Interests in Interpretation by the Constitutional Court

The concepts of proportionality, reasonableness and balancing, are expressly recalled in the indices of the *Relazioni annuali sulla giurisprudenza della Corte costituzionale*.[1]

Even where a rule describes a linguistically closed and predetermined case, which is the result of a balancing made *a priori* by the legislator, the judge has the duty to compare, from time-to-time, principles and involved interests because the interpretative activity always has an evaluative character.

Interpretation is achieved by balancing (interests and values) and balancing is made by interpreting[2] in an attempt to search for the 'best possible law'.[3] Only

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[1] Available at www.cortecostituzionale.it.

[2] A. Ruggeri, 'Interpretazione costituzionale e ragionevolezza', in A. Marini et al eds, *I rapporti civilistici nell'interpretazione della Corte costituzionale. La Corte costituzionale nella costruzione dell'ordinamento attuale. Princípi fondamentali* (Napoli: Edizioni Scientifiche Italiane, 2008), I, 233, who states that the *balancing* of interests and values and the *interpretation* of wording are

by acknowledging the indissolubility of the hendiadys between reasonableness and balancing, is it possible to avoid the threats both of the *blindness of the mere subsumption* (which, if not accompanied by an evaluation activity, risks neglecting the peculiarities of the specific case, thereby violating the principle of differentiation laid down in Arts 3 and 118 of the Italian Constitution) and of the tyranny of values (which, as we shall see, are hierarchically ordered and are not irreconcilable and incomparable monades).[4]

It is, therefore, necessary to combine rules and principles, in order to avoid enunciations losing their function of delimiting the range of possible meaning and in addition to ensure that legal interpretation does not limit itself to an analysis of the mere letter of the law, thereby remaining at a distance from interests and values.

Law is not a mere analysis of 'language'.[5] As underlined by the Italian Constitutional Court in 2003, the idea that the balancing has always to be made at the beginning by the legislator and only occasionally *ex post* by the Italian Constitutional Court, must be ruled out.[6]

The judge is asked not only to balance, compose and combine legal provisions, which are often the expression of different ideologies but also to 'evaluate and decide if certain links of a provision to another have to be made or not',[7] by adapting the static text of the legal provision to the peculiarities of the facts.

Fact is a 'necessary aspect of the reasoning of the lawyer'[8] and the law lives

non-separable activities; G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 142.

[3] The phrase is taken from a statement of the President of the Constitutional Court R. Chieppa, 'La giustizia costituzionale nel 2002' *Giurisprudenza costituzionale*, 3180 (2003): '…also the Constitutional and common judges are fully involved, even if within determined borders, in a sort of extended process of legislative production, as they are entitled of powers, which derive directly from the Constitution. And the same Constitutional process is configurated *in concreto*… as the place of formation and elaboration of the "best possible law" '.

[4] As we already stated elsewhere, principles never operate alone, but it is rather their balancing, even in the presence of a provision which is seemingly comprehensive, that is able to preclude each form of tyranny or abuse created by the existence and the operativity of only one principle and only one ideology. After all, even interest is never a monad and has always to be set in correlation with other interests, rights or subjective situations. For further details see G. Perlingieri, *Profili* n 2 above, 143. Along the same lines, see also recently: Corte Costituzionale 23 March 2018 no 58, available at www.cortecostituzionale.it, on the *Ilva* case, according to which 'the balancing' between principles and subjective situations, according to proportionality and reasonableness, is the sole suitable instrument in order to avoid 'tyranny' or 'the unlimited expansion of a right'.

[5] R. Guastini, *Teoria del diritto: approccio metodologico* (Modena: Mucchi Editore, 2012), 60.

[6] Cf Corte Costituzionale 18 December 2003 no 1, available at www.cortecostituzionale.it, which states that 'it is not enough to provide a mere text exegesis of the legal (constitutional and ordinary) provisions, but it is rather necessary to refer to the set of constitutional principles… . At all jurisdictional levels (and therefore not only relating to the constitutional jurisdiction) it is necessary to interpret ordinary laws according to the Constitution, and not the other way around'.

[7] B. Grasso, *Appunti sull'interpretazione giuridica* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1974), 30, even if he diminishes such an undisputable truth.

[8] B. De Giovanni, *Fatto e valutazione nella teoria del negozio giuridico* (Napoli: Edizioni

only 'in the moment of its application', so that the 'constant problem of interpretation' is 'the subtle determination of the exact meaning of a legal provision in light of the specific case'.[9]

After all, the decisions of the Italian Constitutional Court can neglect fact and the factual consequences of a certain interpretation; a judgement of the Court is not, as is often said, an abstract judgement because the judge, *a quo,* always has a duty to describe the peculiarities of a specific case, in order to avoid a determination of inadmissibility of a request for a preliminary ruling.

The consequence is that factuality is also an essential part of the judgement of constitutionality.[10]

This has been recently clarified by the Constitutional Court, where it acknowledged that the judge *a quo*, in order to avoid the evaluation of inadmissibility, must always take into account the peculiarities of the specific case.[11] Even in criminal law, which is founded on the brocard, *nullum crimen sine lege,* following the path traced by the best legal doctrine, the Constitutional Court does not hesitate to state that each punishment has to be *proportionate* and direct, to ensure that the freedom of the individual is not 'exposed or sacrificed beyond the limits of reasonableness',[12] in order to ensure effectiveness of the

Scientifiche Italiane, 2016), 31.

[9] T. Ascarelli, 'Antigone e Porzia', in T. Ascarelli ed, *Problemi giuridici* (Milano: Giuffré, 1959), I, 155, 158.

[10] It has been recently pointed out that 'also Constitutional courts and the highest Courts – even if they are formally invested of the task to assess the legitimacy of legal provisions – explicitly declare that the subject of their analysis are not legal texts, but rather contexts, not only dictates but experiences, not only words, but facts'; N. Lipari, *Il diritto civile tra legge e giudizio* (Milano: Giuffré, 2017), 5.

[11] Corte Costituzionale 20 October 2016 no 225, *Foro italiano*, I, 3329 (2016).

[12] Corte Costituzionale 10 November 2016 no 236, *Foro italiano*, I, 97 (2017), which declares as contrary to Constitution Art 567, para 2, Criminal Code, where it provides, in case of 'alteration of civil status', the imprisonment for a minimum of five years up to a maximum of fifteen years instead of the imprisonment of three years up to a maximum of ten years (para 1). The more severe penalty is considered to be unreasonable and disproportionate as regards both the re-education purpose of the punishment and the effective negative social value of the unacceptable behaviour, also considering other similar and in certain cases, more serious crimes (Arts 566, para 2, 567, para 1, and 568 Criminal Code). The sanction is not proportionate as it focuses only at intimidating-deterrent results and 'uses' the individual offender for the purpose of intimidating the community. The offender, if reduced to a 'means' of intimidating, has no choice but to reject the re-education treatment; indeed, at an individual level, respect of the proportionality between fact and sanction 'represents an essential element so that the offender can somehow consider, in the execution phase, the restriction of his personal liberty not as an injustice by the State'. The offender can never become a 'means'; he can be considered only as a 'purpose'; that is the sense which best doctrine and consistent caselaw of the Constitutional Court give to the letter of Art 27, para 3, Constitution, according to which 'punishments…shall aim at re-educating the convicted'. Further significative example can be found in legge 23 March 2016 no 41, which, in regulating road manslaughter, introduced sanctions exponentially higher than for common manslaughter. In other words, the increase of the sanctions is provided only in case of road negligence, despite the fact that such sanction tends to cumulate legal sanction and *poena naturalis*: the effects of the violation of a road traffic provision almost always impact, as a rule,

real function of the punishment. A different approach could violate Art 27, para 3, Italian Constitution, which imposes the *re-education* and the social *re-integration* of the condemned.

II. Reasonableness, Equality and Parity of Treatment

In the wording of the Civil Code, of the special laws, of the navigation code, of the Unidroit Principles, of the Principles of European Contract Law and of the draft Common European Sales Law, reasonableness assumes a range of meanings.

There is often, for example, reference to a temporal indication ('reasonable time'), to the subject of the performance ('reasonable price'), to a remedy ('reasonable measure'), to a subjective connotation ('reasonable person', 'legitimate expectation', 'reasonable expectation'), to a merging project or to an organisational or accounting project of a society.[13] Even in literature and case law, reasonableness seems to overlap with proportionality, abuse, good faith and equity.[14]

In focusing attention on the case law of the Constitutional Court, the concept of reasonableness is often based on the principle of equality or on equal treatment, so that, according to the above-mentioned Court, 'the general principle of reasonableness laid down in Art 3' consists of a 'general principle (…) which reflects itself in a prohibition on introducing an unjustified disparity of treatment'.[15]

Based on this conviction, the Constitutional Court declared, for instance, the non-conformity with the constitution of a regional law, which attributed to totally disabled persons the right to use, without charge, means of public

the subject who triggered the risk. On the basis of such determinations, in Germany, road manslaughter is not punished more strictly than common manslaughter. The German legal order rather provides the use of the *Absehen von Strafe* – according to § 60 *Strafgesetzbuch*: 'The court may order a discharge if the consequences of the offence suffered by the offender are so serious that an imposition of penalties would be clearly inappropriate. This shall not apply if the offender has incurred a sentence of imprisonment of more than one year for the offence'. Therefore, the judge will not apply the sanction where the consequences of the behaviour have damaged the author, so that it seems appropriate to refrain from sanctioning him or her. In the literature, S. Moccia, *Il diritto penale tra essere e valore. Funzione della pena e sistematica teleologica* (Napoli: Edizioni Scientifiche Italiane, 1992), 188; A. Nappi, *Razionalità complessiva del sistema: il c.d. omicidio stradale al banco di prova dei canoni di proporzione ed offensività* (Napoli: Edizioni Scientifiche Italiane, 2016), 693. See most recently, G. Palmieri, 'Ragionevolezza e scelte di incriminazione', in G. Perlingieri and A. Fachechi eds, *Ragionevolezza e proporzionalità nel diritto contemporaneo* (Napoli: Edizioni Scientifiche Italiane, 2017), II, 777.

[13] For an evaluation of the concerning norms, see G. Perlingieri, *Profili* n 2 above, 16.

[14] On this point, ibid 16 and 115.

[15] Corte Costituzionale 4 July 2013 no 170, *Foro italiano*, I, 1721 (2014); Corte Costituzionale 9 July 2015 no 146, *Diritto delle successioni e della famiglia*, 515 (2016), with comment by B. Borrillo, *Profili successori della riforma della filiazione: il regime transitorio al vaglio della Consulta*. For an analysis of such an approach by the Constitutional Court, see in the literature, most recently, A. Ruggeri, 'Eguaglianza, solidarietà e tecniche decisorie nelle più salienti esperienze della giustizia costituzionale' *Rivista AIC*, 1 (2017).

transportation, while excluding foreign disabled people from this measure.[16]

Such a decision is capable of being accepted, as it is true that the identification of the categories of beneficiaries represents the result of a choice which has 'necessarily to be delimitated considering the narrowness of the financial means' but the legislator may introduce 'differentiated regimes' only where the reason does not lead to *unreasonable* discrimination (see Arts 2, 3, 16 and 32 Constitution).[17]

Similarly, the Constitutional Court tends to identify reasonableness and equality where it assesses conformity with Constitution of Art 9, para 1, legge della Provincia Autonoma di Trento 24 July 2012 no 15, according to which

> 'care allowance is reserved for Italian or EU citizens, for stateless and for foreigners who possess the residence card according to Art 9 of decreto legislativo 25 July 1998 no 286…, provided that…they are resident in the territory of the province of Trento for at least three consecutive years'.[18]

As regards the alleged 'infringement of the principle of reasonableness', the Court observes that – even if the legislator is allowed to introduce differentiated regulation for access to care services in order to reconcile the highest usability of the benefits provided with the narrowness of the available financial resources –

> 'the legitimacy of such a choice does not preclude that the selection criteria adopted in the specific case have to comply with the principle of reasonableness because the introduction of differentiated regimes is permitted only where justified by a reason which is not irrational or arbitrary, that is justified by a reasonable correlation between the condition to which the attribution of the benefit is subordinated and other peculiar requirements

[16] Corte Costituzionale 2 December 2005 no 432, *Giurisprudenza italiana*, 2252 (2006).

[17] With similar reasoning, based on the principle of equality, see Corte Costituzionale 9 July 2015 no 146 n 15 above, which stressed the need to refer to the new rules concerning the equal treatment of children, as well as for inheritance proceedings commenced before the reform came into force. See also Corte Costituzionale 4 July 2013 no 172, *Giurisprudenza costituzionale*, 2542 (2013); Corte Costituzionale 11 December 2015 no 262, *Giurisprudenza costituzionale*, 2272 (2015) (and in *Giurisprudenza italiana*, 885 (2016), with comment by R. Rivaro, *Riflessioni sulla sospensione della prescrizione dell'azione sociale di responsabilità*), which highlighted the non-conformity with Constitution of Art 2941, no 7, Civil Code, where it does not provide that prescription between the collective partnership and its administrators, so far they have been not replaced, has to be suspended in relation to proceedings for liability – differently from what was envisaged for legal persons and limited partnerships. Furthermore, the choice by the legislator to diversify the management of the time of prescription according to an element (the legal personality), which not only suffered a reduction of its role as a decisive factor for corporate law but also does not have the role of discharging liability as concerns the different profile of the liability of the managers for the unlawful acts committed during their term of office is deemed to be arbitrary.

[18] Corte Costituzionale 4 July 2006 no 254, *Rassegna di diritto civile*, 514 (2008), with comment by F. Longobucco, 'Il regime patrimoniale *dei coniugi tra "vecchie" e "nuove" norme di conflitto: ragionevolezza nell'uso del "genuine link"' Rassegna di diritto civile*, 521 (2008).

which condition its acknowledgement and which define its *ratio*'.

On this point, such reasonable correlation between the alleged requirement of admissibility to the benefit (residence for a certain period of time) and the other peculiar requisites (condition of need in addition to the economic disadvantage directly referable to a non-self-sufficient person), which represent conditions for the access to the above-mentioned benefit, is ruled out.

This determines

> 'the elimination of the reasonableness of the provision of a differentiated requisite (and in the specific case, gravely exacerbated), which, far from finding its justification in the core and purpose of the benefit, contradictorily could lead to excluding parties who are likewise (if not more) exposed to conditions of need and of inconvenience'.

Such provision

> 'creates discrimination (...), which contrasts with the function and the *ratio* of the provision itself, thereby violating the limits of reasonableness which is imposed in respect of the principle of equality'.[19]

Similarly, the provision is considered to be not in conformity with Art 3 of the Constitution, where it states that a foreigner needs to have a residence permission in order to benefit from special treatment, because there is no reasonable correlation between the condition for non-European citizens to access support services considered above and the situation of need and disadvantage, which are directly referable to the person and which represent the prerequisite for receiving the benefit.

The approach of the constitutional judges, which has been briefly set out and which can be widely assessed also in other judgements,[20] is followed by a

[19] ibid. Likewise and on the other hand, Corte Costituzionale 7 December 2017 no 258, *Diritto & giustizia* (2017) considers to be well-founded the question of conformity with Constitution of Art 10, legge 5 February 1992 no 91 (New provisions on citizenship), where it does not provide the exemption from the obligation to swear (necessary for purposes of the transcription into the civil status registers, of the Italian citizenship acquired by the foreigner) in favour of the disabled and which is, as a consequence of this condition, not able to fulfil such duty. By precluding the acquisition of the *status* of citizen to the persons who are not able to swear, due to psychologically disability and therefore, by not providing differentiated treatments, the provisions risk creating unreasonable forms of social margination and creating a further form of margination in comparison with other relatives who were able to obtain citizenship.

[20] Among others, see Corte Costituzionale 4 July 2006 no 254 n 18 above, 514 which declared Art 19, para 1, of the Introductory Provisions to the Italian Civil Code as not in conformity with Constitution, where it provides that the patrimonial property regimes between spouses shall be regulated by the national law of the husband at the time the marriage was celebrated. In the view of the Constitutional Court, such provision created unreasonable discrimination to the detriment of the wife by reason of gender, thereby violating Arts 3 and 29, para 2, Constitution.

leading author, who states that

> 'the principle of reasonableness can be already inferred by means of abstraction from the principle of equal treatment, just as the principle of equality can be inferred through specification from the principle of reasonableness'.[21]

Such a perspective is not convincing. It should be pointed out, indeed, that the checking of compatibility with reasonableness does not limit itself either to equality or to equality of treatment.

In several cases, such principles are not considered and they become an instrument of concretisation and of balancing of a plurality with not less relevant normative values.

Thus, even the mechanism of the *tertium comparationis* often proves to be simplistic and misleading because compliance with the Constitution and reasonableness, as underlined by the Constitutional Court itself in the cases no 559 of 1998 (concerning the attribution conflict)[22] and no 394 of 2005 (concerning the attribution of the family's house),[23] is always 'totalitary' and 'unitary' because it cannot be separated from fact and always concerns a range of rules and principles.[24] It follows that 'an attempting favour of a unitary theoretical conceptualisation' of the principle of reasonableness[25] is, in any case, reductive and not 'desperate'. The following cases will confirm this reasoning.

III. Reasonableness in the Diachronic Perspective

By way of example, the conflict among diachronic provisions is often acceptably resolved regardless of equality. On several occasions, case law has chosen to sacrifice individual expectations in order to pursue the objective of social and/or economic policy, which do not necessarily have regard to equality.[26]

[21] M. Barberis, 'Eguaglianza, ragionevolezza e libertà', in A. Vignudelli ed, *Lezioni Magistrali di Diritto Costituzionale* (Modena: Mucchi Editore, 2014), III, 26.

[22] Corte Costituzionale 19 May 1988 no 559, *Giurisprudenza italiana*, I, 1466 (1989).

[23] Corte Costituzionale 21 October 2005 no 394, *Foro italiano*, I, 1083 (2007).

[24] Cf also G. Tesauro, 'Il "dialogo muto" con la Corte europea dei diritti dell'uomo e la giustizia internazionale', in P. Perlingieri e S. Giova eds, *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016* (Napoli: Edizioni Scientifiche Italiane, 2018).

[25] A. Ruggeri, 'Ragionevolezza e valori attraverso il prisma della giustizia costituzionale', in M. La Torre and A. Spadaro eds, *La ragionevolezza nel diritto* (Torino: Giappichelli, 2002), 97-98.

[26] F. Maisto, 'Diritto intertemporale', in P. Perlingieri ed, *Trattato di Diritto Civile del Consiglio Nazionale del Notariato*, I, 5 (Napoli: Edizioni Scientifiche Italiane, 2007). Conversely, with regard to the problem of maintaining on a par legitimate and natural children with the necessity to introduce a new regulation concerning filiation to successions that were commenced before the reform came into force, see Corte costituzionale 9 July 2015 no 146, n 15 above in which Art 3 Constitution has relevance together with such other principles as the protection of 'family life'.

With such a perspective, further to a significant decision of 2006,[27] consider the necessary balancing between the right of a mother to anonymity – which is acknowledged by Art 28, para 7, legge 4 May 1983 no 184, as well as for the protection of the life of the conceived, because it 'diverts' the woman from irreparable decisions, as might be an abortion or the material abandonment of the new-born[28] – and the right of the child to know about his origins. Such balancing involves not just equality but rather privacy, protection of human life, personal identity and health.[29] In this matter, quiet dialogue with the European Court of Human Rights[30] persuaded the Constitutional Court to review its previous position[31] and, as with commentators, to be aware of the necessity of evaluating the 'enduring relevance' of anonymity, thereby declaring the illegitimacy of the

[27] Corte Costituzionale 7 July 2006 no 279, *Foro italiano*, I, 1066 (2007), which in evaluating the conformity with Constitution of Art 48, para 5, legge 24 November 2003 no 326 (which allows for a reduction of the producer's share on the final sales price of medicines) and of Art 1, para 3, decreto legge 24 June 2004 no 156 (which provides a discount on the final price in favour of the producer of certain medicines), provides for the balancing among the interests of containing spending on pharmaceuticals, the right to health and the freedom to private economic initiative and concludes that, in that specific case, the reduction of the freedom of private economic initiative is legitimate, because the trader receives a reduced but *adequate* share. The judgement is interesting, as it does not limit itself to balance *in abstracto* the health's protection with the adequacy of the trader's share; on the contrary, it deals at the level of the 'overall reasonableness' of the solution, by observing that it 'seems obvious that such "overall" reasonableness has to be evaluated itself in the framework of a just as reasonable balancing of the interests...which are involved in the specific case', as stated by Corte Costituzionale 22 May 2013 no 92, *Foro italiano*, I, 714 (2014).

[28] R. Pane, 'L'adozione piena dei minori tra vecchi e nuovi problemi. Spunti di riflessione in tema di omogenitorialità' *Diritto delle successioni e della famiglia*, 451 (2016); see by the same author, 'Unioni same-sex e adozione in casi particolari' *Diritto delle successioni e della famiglia*, 479 (2017). On this point, cf the interesting remarks made during the round table 'In materia di filiazione' at University 'Federico II' of Naples, on 13 April 2016, and published in *Foro napoletano*, 611 (2016).

[29] The problem has been recently solved by the legislative proposal by the Senato no 1978, approved by the Camera dei Deputati on 18 June 2015, which proposes the modification of Art 8, legge 4 May 1983 no 184 (DDL. S. 1978, 'Modifiche all'articolo 28 della legge 4 maggio 1983 n. 184, e altre disposizioni in materia di accesso alle informazioni sulle origini del figlio non riconosciuto alla nascita', available at https://tinyurl.com/y85txzfm (last visited 27 December 2018). However, the important contribution delivered in this regard by the Constitutional Court (Corte Costituzionale 22 November 2013 no 278, *Rivista di diritto internazionale*, 264 (2014)) must be cited. Following the judgment of the Constitutional Court, the above-mentioned legislative proposal provides for the possibility to ask the mother if she intends to revoke her own choice.

[30] Eur. Court H.R., *Godelli* v *Italy* App no 33783/09, Judgement of 25 September 2012, *Giustizia civile*, I, 1597 (2013), considers Italy to be in breach of Art 8 European Convention of Human Rights, highlighting the need to apportion relevance not only to the mother's interests but also to those of the child to know his own origins. See also, Eur. Court H.R. (G.C.), *Odièvre* v *France* App no 42326/1998, Judgement of 13 February 2003, in M. De Salvia and G. Zagrebelsky eds, *Diritti dell'uomo e libertà fondamentali* (Milano: Giuffré, 2007), III, 598.

[31] With Judgement no 278 of 22 November 2013 n 29 above, 264, the Constitutional Court overturned its previous direction with respect to the earlier Judgement no 425 of 25 November 2005, *Rivista del notariato*, 101 (2006).

provision which states the irreversibility of the choice made at the moment of birth.

Nevertheless, the judiciary is encouraged to analyse, *in concreto,* the interests involved in a 'diachronic' perspective, in order to verify, time after time, the prevalence of anonymity or of the right to know one's own origins.[32]

On that occasion, the Court underlined the impossibility of crystallising the right to anonymity, thereby deciding that a supervening circumstance (the mother's death or the anonymity withdrawal) or supervening events, might require a different solution.

In such a circumstance as the emergence of an hereditary disease, at that point treatable by means of genetic or biological intervention, or the subsequent death of the mother, which causes not the eradication but at least a weakening of the anonymity interest, as evidenced by the maximum time limit (one hundred years) to which the legislator subordinates the mother's right not to be named.[33] In all such cases, the child's right to know about her or his own origins cannot be overlooked.

In other words, the mother's privacy must be protected within the limits permitted by the necessity of balancing with other factors, with the *favor veritatis* and with irrepressible parental responsibility.[34]

Such an outcome can be achieved by means of interpretation, regardless of the approval of draft law no 1978 of 2015, concerning 'access to information on

[32] Consider a case in which the mother revokes (spontaneously or on the application of the child) the choice of anonimity (see, recently Corte di Cassazione-Sezioni unite 25 January 2017 no 1946, *Foro italiano*, I, 477 (2017)) or the case in which the mother's interest in anonymity and confidentiality 'decreases' (in the case of the mother's death) (Consiglio di Stato 12 June 2012 no 3459, *Foro amministrativo*, 1545 (2012)). Such a solution is confirmed by international legal sources and as underlined by Corte di Cassazione 9 November 2016 no 22838, *Diritto & giustizia*, 10 (2016), is useful in order to avoid disparity of treatment between children whose mothers can again be questioned, and children whose mothers are dead. In the same way, it does not seem possible to consider the interests of 'those subjects who from the revelation of the birth which has been kept hidden for an entire life could suffer existential, sentimental, affective (and eventually) patrimonial repercussions', because the interest of third parties, even if worthy of protection, seems likely to have to be subsumed beneath biological truth, the protection of personal identity and the right to the psychophysical health (F. Tescione, 'L'anonimato materno: un diritto al banco di prova' (comment on Corte di Cassazione 9 September 2016 no 22838) *Rassegna di diritto civile*, 673 (2017)).

[33] Art 93, para 2, decreto legislativo 30 June 2003 no 196, *Codice di protezione in materia di dati personali*, which Art 2 draft law of the Camera del Senato no 1978 aims to modify, n 29 above.

[34] Cf C. Granelli, 'Il c.d. "parto anonimo" ed il diritto del figlio alla conoscenza delle proprie origini: un caso emblematico di "dialogo" fra Corti', available at *www.juscivile.it*, 573, 589 (2016), who particularly underlines the important role of privacy protection. In particular, the above-mentioned author also stresses the importance of being cautious in case of mother's death, as the right to anonymity does not merely protect (conceived child's) health and the mother's privacy but also the social identity of the latter in relation to the family and/or relationships which she may have established after having utilised the protection of the right to anonymity, so as not to incur damages (to image, reputation and other constitutionally relevant goods) in respect of eventually interested third parties.

the origins of the child which has not been recognised at his birth', which is currently under debate in the Senate.[35]

It is the same logic which inspires the definition of what a readopters' rights. According to Art 22, para 7, of the law on adoption, they must know relevant facts concerning the minor, *inter alia,* at minimum, the necessary healthcare information for the health and harmonious psychophysical development of the minor.

The relative-historical perspective determined by the Court seeks to avoid permanent solutions and establishes balancing solutions which can be considered reasonable in a given historical period (and which could be considered unreasonable at a different time) or indeed solutions which can be considered as reasonable in respect of assessing certain information (which might likewise appear unreasonable with respect to information concerning matters having a different nature, as, for example, that relating to health).[36]

Legal scholarship which takes account of such a diachronic perspective has long debated not only, for instance, supervened unreasonableness but also supervened unlawfulness or – considering the restrictions on the use of goods according to Art 2645-*ter* of the Civil Code – of supervened unworthiness with following supervened unenforceability.[37]

[35] Camera del Senato draft law no 1978 '*Modifiche all'articolo 28 della legge 4 maggio 1983, n. 184, e altre disposizioni in materia di accesso alle informazioni sulle origini del figlio non riconosciuto alla nascita*', n 29 above.

[36] It is the same argument which induced the Corte Costituzionale 18 December 2017 no 272, available at www.dejure.it, to consider as unfounded the issue of the constitutionality of Art 263 of the Civil Code for violation of Arts 2, 3, 30, 31 and 177, para 1, Constitution, where in it does not provide that the appeal against the recognition of the natural child due to lack of truthfulness can be accepted only when it responds to the child's interest. The Court acknowledges that, even if the child's interest 'to obtain the acknowledgement of a filiation status which corresponds as much as possible to his or her life needs' is particularly worthy of protection (as it has been acknowledged several times by the legislator), the acknowledgement of the individual's biological and genetic facts being deemed to have an absolute constitutional relevance must be ruled out, so that it can be exempted from any form of balancing. The judge has to evaluate, case-by-case, 'if the interests of asserting the truth prevails over the minor's interest; if such action is really appropriate to achieve it (as it is in the case of Art 264 Civil Code); if the interests of achieving truth also has a public dimension (for instance, because it concerns practices which are legally prohibited, as for example, surrogate motherhood, which unacceptably offends a woman's dignity and deeply undermines human relationships) and seeks to protect the minor's interests within the limits consented by the said truth'. The conclusion is that 'if it is therefore constitutionally not acceptable that the need to ensure the emersion of truth automatically prevails over the minor's interest, it should also be noted that balancing such needs with those interests results in the automatic cancellation of the former in favour of the latter. Conversely, such balancing results in a comparative evaluation between the interests involved in the assessment of the prevailing truth and the consequences arising from such an assessment on the minor's legal position'.

[37] G. Perlingieri, 'Il controllo di 'meritevolezza' degli atti di destinazione *ex* art. 2645-*ter* c.c.' *Foro napoletano*, 54 (2014).

IV. *Follows*. The Cryopreservation of Supernumerary Embryos

Reasonableness has a fundamental role in the interpretation of legge 19 February 2004 no 40 on medically assisted procreation.

The Constitutional Court adhered to the perspective, shared also by the Italian Supreme Court, which aims at extending the principle of *dignity* to the human species in order to ensure its future,[38] with a further consequence of considering embryos, according to the notion accepted by the Court of Justice,[39] as carrier of values and interests. These principles must be balanced with the rights of third parties.[40]

This is because the status of the person, which is constitutionally granted, extends in its relevance beyond the limitations of birth and death.

If this is the case, the cryopreservation of supernumerary embryos cannot limit itself to a practice that has indeterminate duration (differently from what was demanded by the Constitutional Court, in its attempt to avoid the suppression of residual embryos). Indeed, if it is true that an embryo, regardless of the 'broader or narrower degree of subjectivity (…), is surely not reducible to a mere genetic material'[41] and if it is true that cryopreservation, even if permanent, avoids the suppression of *abandoned* embryos, thereby protecting their 'dignity', it must be that the *sine die* practice of cryopreservation risks putting the embryo in Limbo, thereby impairing its 'dignity',[42] thus creating a sort of futile medical

[38] T. Gutmann, *Secolarizzazione del diritto e giustificazione normativa* (Napoli: Edizioni Scientifiche Italiane, 2016), 40.

[39] Regarding the notion of 'human embryo' see I. Zecchino, 'La nozione di "embrione umano" nella giurisprudenza della Corte di Giustizia' *Diritto delle successioni e della famiglia*, 503 (2016).

[40] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 680; in this matter, see also G. Ballarani, 'Nascituro (soggettività del)' *Enciclopedia di Bioetica e Scienza Giuridica* (Napoli: Edizioni Scientifiche Italiane, 2015), IX, 137, who cites Corte Costituzionale 18 February 1975 no 27, *Giurisprudenza costituzionale*, 117 (1975); F. Carimini, 'Nascituro (legge sull'interruzione volontaria della gravidanza)' *Enciclopedia di bioetica e scienza giuridica* (Napoli: Edizioni Scientifiche Italiane, 2015), IX, 128.

[41] Corte Costituzionale 11 November 2015 no 229, *Foro italiano*, I, 3749 (2015).

[42] Note that several European countries (such as France, Germany, the United Kingdom and Spain) chose to set a time limit for cryopreservation, permitting the utilisation of the supernumerary embryos additionally for purposes other than those originally intended (the usability, for purposes of scientific research or the embryo's adoption by third parties or of 'abandoned' embryos, which are affected by serious anomalies). *De iure condito*, the usability of supernumerary embryos for scientific purposes is a practice which is acknowledged in other countries (like the United Kingdom, Portugal and Spain) but which seems to be prohibited in Italy by Art 13 of legge no 40 of 2004. Such provision poses certain doubts (recently overturned by the not entirely convincing Judgement of the Corte Costituzionale 13 April 2016 no 84, *Giurisprudenza costituzionale*, 750 (2016); see the request for a preliminary ruling of the Tribunale di Firenze 7 December 2012 no 166, *Foro italiano online* and in any case it does not seem appropriate to rule out, in any case, the usability of the embryo for experimental purposes. On this topic, see recently A. Patroni Griffi, 'Inizio vita e sindacato di ragionevolezza', in G. Perlingieri and A. Fachechi eds, *Ragionevolezza* n 12 above, 827. See also A. Musio, 'Misure di

care, sacrificing the life carried by the embryo in itself.[43]

The general prohibition of the *utilisation of supernumerary embryos* (according to Art 13, legge no 40 of 2004) has to be properly balanced both with *freedom of research* and other interests and values which are worthy of protection; among them are economic interest in the reduction of expenses, considering the costs related to cryoconservation and the *right to health*, considering the non-use of the embryos for new therapies and pharmaceuticals.

Consider the utilization of the embryo for experimental purposes, especially if it is affected by chromosomal abnormalities which are incompatible with life and/or, by any measure, are very serious; consider the usefulness of embryonic stem cells where science acknowledges their utility.

In such a case, the *prohibition of the utilisation of embryos* would certainly impair both scientific research and public health.

The *prohibition of the use of supernumerary embryos* must be balanced with *solidarity* and *maternity protection*. It does not seem that, *de iure condito*, the adoption of the embryo by third parties can be ruled out if there is agreement by the couple who supply the genetic material.

Such practice would directly realise *maternity protection,* according to Art 31, para 2, Constitution,[44] and would correspond to the principles of solidarity and of protection of 'embryo dignity'.[45]

Inter alia, the adoption of a conceived child is admitted by the recent draft law 11 January 2017 no 4215. In contrast, it would be more useful if legislators would introduce provisions to avoid the *commercialisation of residual embryos*.

In any case, the Constitutional Court seems to be aware that the prohibition of cryopreservation of indefinite (or permanent) duration or supernumerary embryos is not the definitive solution.[46] There is no doubt that the embryo is worthy of protection because its preservation is functional to the protection of life and the dignity of life but it cannot be denied that only through reasonable 'balancing between conflicting principles' is it possible to assess the worthiness of that practice.

tutela dell'embrione', in P. Stanzione and G. Sciancalepore eds, *Procreazione assistita. Commento alla legge 19 febbraio 2004, n. 40* (Milano: Giuffré, 2004), 205.

[43] I. Zecchino, 'La nozione di "embrione umano" nella giurisprudenza della Corte di Giustizia' n 39 above, 511, who recalls European case law which qualifies the embyo as a 'developing human being'. On this point, see also R. Landi, 'L'incerto destino degli embrioni soprannumerari' *Rassegna di diritto civile*, 907 (2017); A. Patroni Griffi, n 42 above, 827.

[44] On the contrary, A. Patroni Griffi, n 42 above, 834 calls, in conformity with the Constitutional Court, for the intervention of the legislator.

[45] Corte Costituzionale 13 April 2016 no 84 n 42 above, 750; Corte Costituzionale 11 November 2015 no 229 n 41 above, 3749; Corte Costituzionale 5 June 2015 no 96, *Foro amministrativo*, 1641 (2015) and in *Nuova giurisprudenza civile commentata*, I, 930 (2015), with commentary by G. Ferrando, 'Come d'autunno sugli alberi le foglie. La legge n. 40 perde anche il divieto di diagnosi preimpianto' *Nuova giurisprudenza civile commentata*, II, 582 (2015).

[46] Corte Costituzionale 13 April 2016 no 94 n 42 above, 750 and Corte costituzionale 11 November 2015 no 229 n 41 above, 3749.

Freedom of scientific research, procreative needs of the couple and protection of the embryo's dignity are all instances which cannot be achieved just through a deductive approach or mere dogmatism.

V. *Follows*. The Automatic Expulsion of a Foreigner in Consequence of a Crime

Similar reasoning can be posited regarding the expulsion of a foreigner as a consequence of a crime (Arts 4 and 5 of decreto legislativo 25 July 1998 no 286).[47]

Even if the expulsion can be considered necessary to satisfy *safety*, *health* and *public order*, on several occasions the Constitutional Court has invited the 'ordinary judges', through the so-called 'interpretation in conformity', to rule out the automatic nature of the expulsion and to evaluate, with reasonableness and proportionality, the *peculiarities of the specific case*.[48]

The requirement of the Court is to take account of not only fundamental principles for the protection of the person but also of the *nature* and *gravity of the crime*, as well as the existence of any judgement of *definitive* or *non-definitive* condemnation or again of a mere *criminal prosecution,*[49] *time elapsed from the commission of the offence*, *offender's criminal background*, *family situation*, *solidity* and *seriousness of the social, cultural and familiar links* with the host country.

There is also the problem of the absolute protection of minors and the interest, which is acknowledged at national and international level,[50] of the unity of the criminal's family (particularly in the case of minors)[51]. Such interests serve family unity and legitimise setting aside the expulsion.

[47] Cf A. Alpini, 'Ragionevolezza e proporzionalità nel processo di erosione del c.d. meccanismo espulsivo dello straniero', in G. Perlingieri and A. Fachechi eds, *Ragionevolezza* n 12 above, 47.

[48] Corte Costituzionale 27 April 2007 no 143, *Giurisprudenza costituzionale*, 2 (2007); Corte costituzionale 18 July 2013 no 202, *Foro italiano*, I, 3376 (2013).

[49] Those are profoundly different situations as they relate to the assessment of the *social dangerousness* of the foreigner: Corte di Cassazione 1 February 2012 no 4377, *Cassazione penale*, 918 (2012); Corte di Cassazione 25 November 2014 no 50379, *Foro italiano*, II, 1 (2015).

[50] See Art 17 International Covenant on Civil and Political Rights; Art 10 New York Convention on the Rights of the Child; Art 8 European Convention of Human Rights; but also Arts 2 and 30 Constitution; Art 28, para 3, Consolidated Law on Immigration; Art 3 New York Convention on the Rights of the Child; Art 24 Charter of Fundamental Rights of the European Union, which require that in the case of a minor, the regulation of entry to or residence in the national territory shall be conformed with, interpreted and applied for the purpose of pursuing its over-riding interest.

[51] See Corte di Cassazione 16 October 2009 no 22080, *Famiglia e diritto*, 225 (2010); Corte di Cassazione 19 January 2010 no 823, *Rivista diritto internazionale*, 918 (2010) interpreted Art 31 Consolidated Law on Immigration to the extent that 'serious grounds' may be attributed to the minor's psychophysical development, to his health conditions and more generally, to his age with a consequent permission to the mother to remain in Italy despite the lack of a residence permit. On this topic, see N. Lipari, *Il diritto civile,* n 10 above, 126.

Conversely, it is possible that separation of the minor from the family becomes necessary in her/his pre-eminent interests, despite the general prohibition contained in Art 19, para 2, lett *a)*, decreto legislativo 25 July 1998 no 286. The Constitutional Court admits that the exercise of the right of reunion can be subordinated to requisites and limitations which are justified by the goal of ensuring 'a correct balancing with other values which have equivalent protection in the Constitution', as, for instance, when the foreigner has to provide dignified living conditions for their relatives.[52]

1. The Acknowledgement of a Foreigner's Rights

The impossibility of measuring reasonableness and equality and the necessity to use the former as a balancing criterion of a range of principles also emerges with regard to the problem of acknowledgement of certain rights of foreigners.

Such problems, according to the Constitutional Court,[53] are not exhaustive, even for the 'common judge', at the deductive level.

It is necessary to balance the State's obligation to control its territory, which is related to protection of matters which are constitutionally relevant (like public order, safety and public health), with the fundamental rights of the individual.[54]

[52] In these circumstances, Corte Costituzionale 19 January 1995 no 28, *Giustizia civile*, I, 635 (1995); Corte costituzionale 26 June 1997 no 203, *Foro italiano*, I, 2370 (1997) extend the list of parties who have the right to family reunification; respectively, to the parent who works only within the framework of the family and to the parent who asks for reunification with a minor who is cohabiting in Italy with the other parent. On the same lines, see Corte di Cassazione 7 February 2001 no 1714, *Il diritto di famiglia e delle persone*, 1429 (2001) and Corte di Cassazione-Sezioni unite 25 October 2010 no 21799, ibid 140 (2011) which open a path in the regulation of the entrance and stay of the foreigner, by admitting the temporary authorisation of the relative to enter or remain in the national territorynot only in the case of emergency situations (as Art 3, para 3, Consolidated Law on Immigration seemed to establish by way of an exception) but whenever, in a single and specific case, the minor might suffer serious harm with respect to his psychophysical equilibrium from the separation from the family member; such harm to be evaluated by the judge 'taking into account the peculiarity of the outlined situations' and of each possible variable of the situation. This means that in this case too, the principle of the superior interest of the minor forces the judge not only to put on the table the question of conformity with the establishment of a legal rule (thereby assessing the reasonableness of the balancing of conflicting values made by the legislator) but also (as stated by Corte Costituzionale 21 November 1997 no 353, *Diritto e giurispudenza*, 903 (1998)) directly to carry out by himself, during the process of interpretation and application, the balancing of the related interests, in order to carry out an 'individualised' assessment. This serves to interpret a legal rule which addresses a 'specific case' as well as the principles and interests involved. In the literature, see G. Carapezza Figlia, 'Condizione giuridica dello straniero e legalità costituzionale', in P. Perlingieri e S. Giova eds, *I rapporti* n 24 above.

[53] Corte Costituzionale 25 July 2011 no 245, *Il diritto di famiglia e delle persone*, 59 (2012); Corte Costituzionale 8 July 2010 no 250, *Giurisprudenza costituzionale*, 3030 (2010); Corte Costituzionale 16 May 2008 no 148, available at www.dejure.it; Corte Costituzionale 26 May 2006 no 206, *Rivista italiana di diritto del lavoro*, II, 3 (2007).

[54] G. Carapezza Figlia, 'Tutela del minore migrante ed ermeneutica del controllo' *Diritto di famiglia e delle persone*, forthcoming and G. Carapezza Figlia, 'Condizione giuridica dello straniero' n 52 above.

In order to do so, it is necessary to take into account the peculiarities of the real case, because, as it has been established by the Italian Supreme Court, one priority is the granting to the foreigner, in an irregular situation, of non-fundamental rights and another is the case in which fundamental rights are subject to discussion, as the latter may be human rights, irrespective of the *status civitatis* and of the *condition of reciprocity* (see Art 16 preliminary provisions to the Civil Code).[55]

VI. Reasonableness in the Case of Clear and Timely Provisions

Reasonableness is also a useful criterion in case of clear and timely provisions. Further to Art 118, para 3, of the preliminary provisions to the Civil Procedure Code, which, in prohibiting judges from quoting legal scholars on the motives underlying a judgement, there appears to be a provision conflicting with Arts 3, 4 and, above all, 24 of the Constitution, combined with a lack of justification and susceptibility to prejudice transparent dialogue between legal scholars and judges.[56] Consider the question of *exordium prescritionis* in case of damages manifested a considerable time after their causation and of the systematic interpretation of Art 2935 of the Civil Code.[57]

Likewise, it is worth noting necessary checking for consistency and adequacy of the legal and conventional terms of forfeiture, which also, according to the Constitutional Court,[58] cannot be so short as to make excessively difficult the exercise of rights and, as a consequence, defence, according to Art 24 Costitution, to one of the parties. The reasonableness of a time limit cannot be abstractly set 'by fixing a "general minimum threshold" which can be considered valid for all proceedings but it has rather to be evaluated on a case-by-case basis'[59] also by

[55] On this point the debate between Courts, including the Corte di Cassazione and the Corte costituzionale, is particularly intense. See Corte di Cassazione 11 January 2011 no 450, *Il diritto di famiglia e delle persone*, 1630 (2011), concerning the right to compensation for damages suffered by a foreign parent; Corte Costituzionale 23 November 1967 no 120, available at www.cortecostituzionale.it, concerning giving recognition to a foreigner of the *status personae* and of fundamental rights; Corte Costituzionale 25 July 2011 no 245 n 53 above, which declares a provision which, for the purpose of combating 'marriages of convenience', introduced a general impediment to marriage to the detriment of third-country nationals without a regular residence permit, thereby impairing their fundamental right to marry (this in contrast with Arts 2 and 29 Constitution, Art 12 European Convention on Human Rights and Art 16 Universal Declaration of Human Rights) not to be in conformity with the Constitution.

[56] Such a question is widely analysed by G. Perlingieri, *Profili* n 2 above, 56.

[57] On this point, see A. Lepore, 'Prescrizione e ragionevolezza. I danni lungolatenti', in G. Perlingieri and F. Lazzarelli eds, *Secondo incontro di studi dell'Associazione dei Dottorati di Diritto Privato, 23-24 marzo 2017, Aula Magna – Campus dell'Università degli Studi di Cassino e del Lazio Meridionale* (Napoli: Edizioni Scientifiche Italiane, 2018), 605.

[58] Corte Costituzionale 31 May 2000 no 161, *Giurisprudenza costituzionale*, 1437 (2000).

[59] ibid.

the 'common judge'.[60]

Similar considerations apply to the term of prescription agreed by the parties, as was recently also decided by the Italian Supreme Court.[61]

Furthermore, faced with a new case, specific provisions must be reassessed in order to balance interests and merits involved. It does not seem possible to distinguish between subsumption and balancing, because rules and principles continuously evolve throughout their application.[62]

After all, if 'laws are declared not to be in conformity with Constitution only' where 'it is impossible to interpret them in conformity with the Constitution'[63] and, if in the balancing between patrimonial and non-patrimonial interests, the latter have, as a rule, to prevail,[64] so that the discretion of the legislator in the allocation of resources for pursuing the balanced budget (Art 81 Constitution) is not undisputable,[65] because

> 'it is the need to ensure incompressible rights which impact on the balance and not the equilibrium of the balance itself which conditions the acknowledgement of the rights',

the opinion of recent case law of the Italian Supreme Court has to be followed. Faced with a provision so clear as Art 720 Civil Code, it observes that,

[60] For instance, the lower courts' judges determined the term to be unreasonable, set in regional law (probably contrasting with the Constitution, as relating to a matter of the State's exclusive competence), which was attributed to the municipality in order to exercise the pre-emptive right on a newly established pharmacy (Tribunale amministrativo regionale Cagliari 23 October 2000 no 919, *Rassegna di diritto farmaceutico e della salute*, 660 (2001).

[61] Corte di Cassazione 27 October 2005 no 20909, *Obbligazioni e contratti*, 511 (2006): 'the clause which provides that once it is established that the term of effectiveness of the contract of guarantee corresponds to that of enforcement, an excessively limited term for enforcing the guarantee after the maturity date of the secured debthas to be considered null and void'.

[62] In this sense, it seems inappropriate to distinguish in an absolute way among 'enforcing', 'observing' and 'applying' the Constitutional legality. See on this point F. Pedrini, 'Introduzione. Scienza giuridica e legalità costituzionale: vademecum metodologico per un "ritorno al diritto". Colloquio su (Scienza del) Diritto e Legalità costituzionale. Intervista a Pietro Perlingieri (Napoli, 27 giugno 2017)' *Rassegna di diritto civile*, 1127 (2017) (and in *Stato*, 187 (2017)). Differently M. Luciani, 'Ermeneutica costituzionale e la 'massima attuazione della Costituzione", in P. Perlingieri e S. Giova eds, *I rapporti* n 24 above, who ingenuously distinguishes between 'application' and 'enforcement'; those concepts are indeed synonymous and furthermore, there are no legal provisions which justify such kinds of distinction.

[63] Corte Costituzionale 23 October 2009 no 263, *Giurisprudenza costituzionale*, 3738 (2009); see above, Corte Costituzionale 22 October 1996 no 356, *Giustizia penale*, I, 85 (1997); Corte Costituzionale, 20 April 2000 no 113, *Giurisprudenza italiana*, 1687 (2000).

[64] Corte Costituzionale 16 December 2016 no 275, *Giurisprudenza costituzionale* 2330 (2016); Corte Costituzionale 14 July 2016 no 174, *Rivista italiana di diritto del lavoro*, II, 162 (2017).

[65] In this regard, see also L. Ferrajoli, *Costituzionalismo oltre lo Stato* (Modena: Mucchi Editore, 2017), 60, who observes that the investments in social rights 'are, from an economic point of view, the most productive, as health, instruction and existence are not only important in themselves, but they are also the conditions for individual productivity and therefore for collective productivity'.

on the occasion of a hereditary division of an indivisible benefit, in the framework of the assignation between several heirs (as holder of a patrimonial reason) the holder of the interest having the greatest worthiness prevails,[66] as, for instance, in the case of a minority shareholder who nevertheless uses the bequestas a sole home or a sole place of work.

VII. Reasonableness and Correct Remedy

The determination of reasonableness is also fundamental for purposes of the choice of the most adequate remedy.[67] The Constitutional Court, as well as the legislator[68] speaks often of 'reasonableness and proportionality of the means used in respect to the pursued goal'.[69]

The choice of reasonable remedy is of central importance, for instance, in the decided cases which address the issue of a manifestly disproportionate deposit because of the contrast with the principles of solidarity and proportionality, as well as with good faith.[70] In this matter, the reasoning of the Constitutional Court is worthy of welcome where it does not state the non-conformity of the provision with the constitution due to lack of a provision which admits the reducibility *ex officio* of a disproportionate deposit (on the assumption that it is not necessary for the legislator, every time, expressly to ensure proportionality with a specific provision). Nevertheless, the latter judgement gives grounds for concern regarding the choice of the remedy.[71]

Further to analogy with penalty clauses,[72] the most adequate remedy in the

[66] Corte di Cassazione 5 November 2015 no 22663, *Corriere giuridico*, 1058 (2016), with comment by F. Venosta, 'Immobili non divisibili, art. 720 c.c. e limiti alla discrezionalità del giudice' *Corriere giuridico*, 1059 (2016). On this topic, see also A. Alpini, 'La preferenza nell'assegnazione del bene indivisibile: il criterio dell'interesse prevalente. Il nuovo orientamento della Corte di Cassazione sull'interpretazione dell'art. 720 c.c.' *Diritto delle successioni e della famiglia*, 678 (2017).

[67] See on this point, G. Perlingieri, *Profili* n 2 above, 86.

[68] *Amplius* ibid 87. See also Art 130 Consumer Code concerning consumer sales, which allows the consumer to choose between *repair*, *replacement*, *price reduction* or *termination*, unless the remedy is unreasonable; furthermore see Arts 7 and 7 *bis* decreto legislativo 9 October 2002 no 231, concerning payment delays, which does not rule out that unfair behaviour (in the form of an agreement or a praxis) may render it void, or void with compensation, or merely compensation.

[69] Among them, see Corte Costituzionale 25 July 2000 no 351, *Foro amministrativo*, 1096 (2001); Corte Costituzionale 23 November 2007 no 401, *Foro italiano*, I, 1787 (2008); Corte Costituzionale 19 February 1999 no 34, *Giustizia civile*, I, 1259 (1999).

[70] Corte costituzionale ordinanza, 24 October 2013 no 248, in *Giustizia costituzionale*, 3767 (2013); and Corte costituzionale ordinanza 2 April 2014 no 77, *Foro italiano*, I, 2035 (2014).

[71] G. Perlingieri, *Profili* n 2 above, 31, fn 65. Cf P. Grossi, 'La invenzione del diritto: a proposito della funzione dei giudici' *Rivista trimestrale di diritto pubblico*, 837 (2017), who, conversely, shares, the view of the Constitutional Court regarding the remedy in the case of a grossly unfair deposit.

[72] On this profile, see G. Perlingieri, *Profili* n 2 above; furthermore, see in particular, G. Perlingieri, 'Legge, giudizio e diritto civile' *Annali S.I.S.Di.C.*, forthcoming (2018).

case of a grossly unfair deposit, is not (even if partial) nullity but rather the *reductio ad aequitatem*, which consists of a technique of *maintenance* and is shown to be proportionate and reasonable in the specific case because it fosters the retention and stability of the contract[73] through a balancing of all involved interests in relation to the value of the assets.

In any case, the power of the judge to correct a disproportionate deposit cannot be overturned by a previous irreducibility agreement because contractual freedom cannot paralyse superior interests.[74]

After all, reduction *ex officio* is also expressly provided in the rules for consumer sales (Art 130 Consumer Code) and in insurance contracts (Art 1909 Civil Code).

With regard to reduction *ex officio*, the most eminent authorities refer to a conforming remedy, which can operate not only in cases of over-insurance but also in cases of manifestly disproportionate insurance premiums, as well as in all cases in which the agreed performance is greater than the real value of the benefit.[75]

On other occasions, the Constitutional Court itself ruled out the utility of rigid penalty rules, whose application is not calibrated on the 'relationship of adequacy with the specific case' and relating to which it is 'essential' an 'applicative gradualism' both 'in the jurisdictional' and 'in a disciplinary context'.[76]

The outlined perspective does not lead to the overlapping, as has been stated,[77] of *legislative* and *jurisdictional* competences, because violation of a mandatory provision does not necessarily lead to annulling the contract where this remedy results in it being disproportionate and unreasonable with respect to the '*ratio* of the prohibition'[78] or where the annulment represents an 'excessive result taking into account the implementation of the interests (involved in and) protected by the violated provision'.[79]

[73] Regarding the different function of the so-called 'ablative' or maintenance remedies, cf D. Di Sabato, 'Gli smart contracts: robot che gestiscono il rischio contrattuale' *Contratto e impresa*, 387, (2017).

[74] Corte di Cassazione 28 September 2006 no 21066, *Foro italiano*, I, 434 (2007).

[75] It is always important to evaluate the creditor's interest as well as, from the judge's perspective, to explain the reasons which caused the agreed amount to be considered excessive; see on that point, *ex pluribus*, G. Partesotti, *La polizza stimata* (Napoli: Edizioni Scientifiche Italiane, 2017), 87, nonché P. Corrias, 'Giulio Partesotti e il diritto delle assicurazioni' *Banca borsa e titoli di credito,* 1-20 (2018).

[76] Corte costituzionale 16 July 2015 no 170, *Foro amministrativo*, 2461 (2015).

[77] See, *ex pluribus*, M. Luciani, *Ermeneutica costituzionale e la 'massima attuazione della Costituzione'*, in P. Perlingieri e S. Giova eds, *I rapporti* n 24 above.

[78] S. Polidori, 'Cause di nullità del contratto', in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2010), IV, 1, 1021. Such reasoning is extended to textual avoidance in G. Perlingieri, *Profili* n 2 above, 67.

[79] S. Polidori, n 78 above. Cf also G. Perlingieri, *Profili* n 2 above, 86 and especially 90. In this regard, see: L. Carraro, *Il negozio in frode alla legge* (Padova: CEDAM, 1943), 149; G. De Nova, 'Il contratto contrario a norme imperative' *Rivista critica di diritto privato*, 435 (1985), 442; G. Villa, *Contratto e violazione di norme imperative* (Milano: Giuffré, 1993), 22, 78. Within the case law, see: Corte di Cassazione 12 October 1982 no 5270, *Giurisprudenza italiana*, I, 1,

Therefore,

> 'it is up to the legislator to identify the interests which are legally relevant and up to the judge to operate a comparative evaluation and the balancing of such interests, in order assess if one of them has been "unjustly" sacrificed and in such a case, to verify which one among the different remedies abstractly provided by the legal system, is most suitable to ensure effective protection of prevalent interest'[80]

according to criteria of adequacy, proportionality and reasonableness.

Nevertheless, the judgements of the Constitutional Court concerning deposits demonstrate undoubtedly that checking for conformity with the constitution has to be extended also to freedom to negotiate; this can neither be *impermeable* to the evolution of the legal system nor be considered superordinate and incomparable in value. It has rather to be protected for its conformity with and relationship to other principles and values of the legal system.[81]

Furthermore, it would be contradictory to submit the legislative power to checking for conformity with the Constitution and by contrast, to leave private individuals free to regulate their own relationships differently from fundamental principles and other superior rules.

Nor is there an 'alternative use of the right' because Constitutional principles belong to the already existing law. Interpretation is not only a means for identifying the meaning of a legal rule but it also has a function of 'verifying' and

741 (1983); Corte di Cassazione-Sezioni unite 28 March 2006 no 7033, *Foro italiano*, I, 3518 (2007). Regarding avoidance as residual remedy, which is suitable in the case of violation of a mandatory provision where there is no other sanction, see L. Lonardo, *Ordine pubblico e illiceità del contratto* (Napoli: Edizioni Scientifiche Italiane, 1993), 110; such arguments are recalled in Corte di Cassazione 7 March 2001 no 3272, *Giustizia civile*, I, 2109 (2001). The outlined perspective is reflected also in the hypothesis of fraudulent contracts breaching tax law provisions, where, even if there is a violation of a mandatory rule, the preferred sanction is not avoidance, but rather the mere unenforceability in respect of the tax authorities; in this sense see Corte di Cassazione 20 April 2007 no 9447, *Repertorio Foro italiano*, entry no 339 'contratto in genere' (2007); Corte di Cassazione 28 February 2007 no 4785, *Vita notarile*, 815 (2007).

[80] M. Nuzzo, 'Abuso del diritto e "nuovo" riparto di competenze tra legislazione e giurisdizione' *Rassegna di diritto civile*, 968, 972, 974 (2016): 'once the legislator considers a *bene della vita* worthy of protection, it is up to the judge to evaluate the suitability of the remedy provided by the legislator, to ensure efficient protection of such benefits; the consequence is that, where the remedy is inefficient, it is up to the judge to find the most efficient remedy in the system of remedies provided in general terms by the legal system' or rather, the most reasonable and proportionate one.

[81] P. Perlingieri, *Il diritto civile* n 40 above, 322; A. Mignozzi, 'Le pene private contrattuali nel diritto vivente. Funzione concreta e principio di proporzionalità', in G. Perlingieri and A. Fachechi eds, *Ragionevolezza* n 12 above, 717; see most recently, P. Perlingieri, '"Controllo" e "conformazione" degli atti di autonomia negoziale' *Rassegna di diritto civile*, 207 (2017), with further references relating to the constitutional foundations of freedom to negotiate. In this regard, see also L. Ferrajoli, *Costituzionalismo oltre lo Stato* n 65 above, 34, who proposes a private law constitutionalism for the purpose of avoiding a new absolutism of the economic market powers as well as acall for a 'freedom exempted from limits and checks'.

'conforming'[82] the (legal and contractual) acts with normative value.

VIII. Reasonableness as Parameter for the Interpretation and Concretisation of General Clauses: Public Order

Reasonableness is also essential in the interpretation and confirmation of general clauses.[83] The often over-estimated distinction between a national and international public order[84] is nothing more than the distinction between

[82] P. Perlingieri, ' "Controllo" e "conformazione" degli atti di autonomia negoziale' n 81 above, 204. The legal system is coherent; the principle of legality imposes content checking as to both the legitimacy of legal acts and the lawfulness and worthiness of acts of free negotiation. Such checks are fundamentally similar as they 'end up with having the same roots…, the same guiding normative principles' (P. Perlingieri, *Interpretazione e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2011), 9). The outcome is a judgement on conformity of the (legal or conventional) act to the principles and to the fundamental norms. There remain lawyers who superficially equalise these positions, which is without any doubt the expression of a modern legal positivism, to the different and non-assimilable theory of the 'alternative use of law'; see G. D'Amico, 'Problemi (e limiti) dell'applicazione diretta dei principi costituzionali nei rapporti di diritto privato (in particolare nei rapporti contrattuali)' *Giustizia civile*, 500, 451 (2016), who, *inter alia*, wrongly considers that the supporters of the assessment of worthiness of acts of free negotiation automatically anticipate an 'indirect' relevance of constitutional principles via the 'private law category of 'worthiness" (fn 17). The author does not consider that not only worthiness is a mere '*summary description*' but also that it never goes on the 'indirect' or 'direct' application of principles but rather on a judgement which has to be made, taking into account the historically changing normative parameters which permit the establishment of what is and what is not worthy (and worthy of protection) at a specific historical moment. Consequently, an act or clause can be declared to be non-worthy, taking into account their non-'immediate' or 'direct' conformity with a fundamental principle. Furthermore, the dichotomy between 'direct or indirect application' is the expression of a perspective which is still bound to the distinction between a 'law for the rules' and a 'law for the principles' and does not consider that each check, which is also about worthiness, always imposes balancing and involvement of norms, rules and principles. *Inter alia*, the checking of worthiness can have very specific features even in the same moment in time and in the framework of the same legal order, depending on the applicative context and the legal provision which is taken into consideration. On this point, see G. Perlingieri, *Il controllo di 'meritevolezza'* n 37 above, 54.

[83] In general terms and with particular reference to the general clause of good faith, see G. Perlingieri, *Profili* n 2 above, 114. In fact, general clauses 'are not a-historical but rather assume different meanings taking into account changing reality and therefore of the legal system itself'; 'they are nothing more than a legislative technique, a drafting technique; they acquire significance in the framework of regulation, of the concrete relationship inserted in the entire regulatory system and especially of its analytical principles' (P. Perlingieri, 'Obbligazioni e contratti' *Annuario del contratto 2016*, 213 (2017)).

[84] For a unitary concept of public order, see P. Perlingieri, 'Libertà religiosa, principio di differenziazione e ordine pubblico' *Diritto delle successioni e della famiglia*, 183 (2017); on the same topic but with partially different results, see also V. Barba, 'L'ordine pubblico internazionale', in G. Perlingieri and M. D'Ambrosio eds, *Fonti, metodo e interpretazione. Primo incontro di studi dell'Associazione dei Dottorati di Diritto Privato. 10-11 novembre 2016, Complesso di S. Andrea delle Dame, Seconda Università di Napoli* (Napoli: Edizioni Scientifiche Italiane, 2017), 409.

fundamental principles or legislative provisions, which are a means of identifying principles of the Italian Republic (and as such, they may not be derogated neither by internal provisions nor by provisions with foreign elements) and principles or provisions in conformity with the Constitution but which are not an expression of fundamental principles (and therefore which cannot be derogated by foreign legislation and which are applicable to foreigners, subject to a condition of reciprocity according to Art 16 of the introductory provisions to the Italian Civil Code).

Therefore, with regard to the question if an international custom, a foreign law or an international arbitration ruling may derogate to Italian law, or the question as to whether or not a provision has to be applied, subject to the condition of reciprocity,[85] has to be answered not just according to abstract distinctions of national and international public order[86] but rather taking into account of the hierarchy of normative values (not of the sources)[87] and of balancing, according to tests of reasonableness, between concurring norms and principles. Such balancing should be carried out having regard to the peculiarities of the specific case,[88] of the limitations of national sovereignty arising from general international law, from EU law (Arts 10 and 11 Constitution), from any international agreements (Art 117, para 1, Constitution) and considering the so-

[85] This question has been analysed by Corte Costituzionale 22 October 2014 no 238, *Rivista di diritto internazionale*, 237 (2015).

[86] Corte di Cassazione 16 May 2016 no 9978, *Giurisprudenza italiana*, 1854 (2016), with comment by A. di Majo, 'Riparazione e punizione nella responsabilità civile', where the Court states that 'the meaning of the principle of public order (…) is coherent with the historical value of the notion and finds a limit only in the potential aggression of the foreign legal product to the essential values of the internal legal order, which has to be evaluated in conformity with those of the international legal community'. Rigid positions in favour of a broad and unitary notion of public order have been progressively abandoned; on this point, see Corte di Cassazione 11 November 2014 no 24001, *Foro italiano*, 3408 (2014), with comment by G. Casaburi, 'Sangue e suolo: la Cassazione e il divieto di maternità surrogata', and *Corriere giuridico*, 471 (2015), with comment by A. Renda, 'La surrogazione di maternità tra princípi costituzionali e interesse del minore'.

[87] On the hierarchical difference between values and sources see P. Perlingieri, *Il diritto civile* n 40 above, 433, who considers personalism and solidarism as the foundations of the regulatory system applicable to the European legal system and highlights the possibility that a lower category provision derogates a higher category provision if it is more in conformity with the fundamental principle. See also P. Perlingieri and P. Femia, 'Sistema, gerarchia, bilanciamento dei princípi', in P. Perlingieri et al eds, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2018), 14.

[88] See E. Calò, 'Vite (e morti) parallele di Michel Colombier e di Maurice Jarre: la colonna sonora dell'ordine pubblico internazionale successorio nel diritto italiano e francese' *Diritto delle successioni e della famiglia*, 879 (2016), who also correctly interprets Art 35 Regulation (EU) 2012/650 on succession. The Author affirms indeed that 'the needs of public international law shall be considered in a concrete way; it is not the absence of the provision of the compulsory portion in the foreign law, which will not automatically justify the exception of public international order but rather the result of its application to the dispute'. It follows that the judge always has a duty to take into account the specific case for instance, if the beneficiary of the compulsory portion, who has been neglected or disregarded is or is not in economic hardship (904).

called 'margin of discretion' which each State maintains in way of implementation of fundamental rights laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms.[89]

With regard to the question of the exhibition of the crucifix, which is a symbol worthy of protection, as it is in conformity with (positive) normative values which are worthy of protection,[90] the focus should be on internal provisions for the protection of free revocability of a will and of finally declared wishes. Such acts may, as a rule, not be derogated by foreign provisions, as they implement fundamental principles of public policy for the protection of the human person and of people's savings.[91]

[89] See F.M. Palombino, 'Laicità dello stato ed esposizione del crocifisso nella sentenza della Corte europea dei diritti dell'uomo nel caso Lautsi' *Rivista di diritto internazionale*, 137 (2010): 'the doctrine of the margin of appreciation represents notably the instrument through which the Court acknowledges to the State a discretionary power to adopt measures to restrict certain rights protected by the Convention, provided that some conditions are met, namely such circumstances which permit the evaluation of the legality of the violation itself. The limitation has to be prescribed by law and must be, in fact, necessary (in order to maintain public order and/or ensure the rights of others) and proportional to the objective pursued; it is furthermore necessary that a consensus among the States which are part of the Convention does not exist in the subject matter or object of the restrictive measure'. After all, 'the margin of appreciation conversely permits the various States to preserve each their own ethical concepts and to move at different speeds'. See M.C. Vitucci, 'Ragionevolezza, consenso e margine di apprezzamento nella giurisprudenza della Corte europea dei dirittiumani', in G. Perlingieri and A. Fachechi eds, *Ragionevolezza* n 12 above, 1093,who, as regards the case law of the European Court of Justice, acknowledges also that the violation of the Convention depends on the normative values which are shared in the individual States: 'tell me your values and I will tell you if you have violated the Convention'; see also R. Sapienza, 'Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo' *Rivista di diritto internazionale*, 571 (1991). If the doctrine of the margin of appreciation, utilised in a technical sense (which means as outlined above) is typical only of proceedings before the European Court of Human Rights, it should be noted that the same concept of margin of appreciation has been often used also as a synonym of deference in respect of the State's sovereignty in all judgements of proportionality and/or reasonableness made by international courts and tribunals. It follows that, when assessing *in concreto* the reasonableness and legitimacy of a State measure which limits the rights of private persons, international tribunals always take into account the circumstances for which the States exercise a sovereign right directed to the protection of rights and the interests of safeguarding all citizens, so that, *in concreto,* limitation of the rights of an individual can be considered as reasonable if it is required for the protection of essential interests of general application. On this point, see G. Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v Uruguay' *Brazilian Journal of International Law*, 108 (2017).

[90] On this point see G. Perlingieri, *Profili* n 2 above, 102.

[91] G. Perlingieri, 'La revocazione delle disposizioni testamentarie e la modernità del pensiero di Mario Allara. Natura della revoca, discipline applicabile e criterio di incompatibilità oggettiva' *Rassegna di diritto civile*, 739 (2013). Obviously, the principle of free revocability of the will has to be balanced according to tests of reasonableness, so that, for instance, such a principle can now operate additionally with regard to contracts (on this point see G. Perlingieri, 'Invalidità delle disposizioni '*mortis causa*' e unitarietà degli atti di autonomia' *Diritto delle successioni e della famiglia*, 119 (2016)). The same principle can now be disapplied in the will or in the presence of acts of final wishes, in order to protect, according to the theory of balancing, the interests which

On the contrary, one might consider the institution of *Kafàlah*, whose worthiness and conformity with public order depends not on useless and artificial subsumptions about well-known categories (as, for example, those of legitimate expectations and of adoption)[92] but rather with its conformity to fundamental principles, by verifying that it is functional, at the moment of its application, not only with regard to religious freedom but also to child protection.[93]

Similar reasoning should be followed where the question refers to the worthiness of cohabiting which is extraneous to the traditions of our country. The check, in the interests of public order, consists of a balancing and in an evaluation of conformity to fundamental principles. In this matter, it is indisputable that the Italian Constitution (Art 2) protects each social group as far as it supports the development of the human personality.

In this regard, both cohabitation in which one or both cohabitants are legally separated (which is not expressly acknowledged by legge 20 May 2016 no 76, for the 'Regulation of same sex civil partnerships and regulation of cohabitation') and polygamous marriages, which support cultural and religious freedom and do not, of themselves, impair the protection of the human being,[94] seem worthy of protection.

Furthermore, provisions for the protection of beneficiaries of the compulsory portion, despite their mandatory character, can be derogated, as they are not the result of the implementation of mandatory human rights.

Therefore, such provisions can be derogated by a foreign law under conditions of reciprocity. In fact, Art 42 of the Italian Constitution deals exclusively with intestate and testamentary succession and the reservation of a portion of the inheritance to a subject is not only necessary functional to the protection of a person but can also be harmful, as it has to be acknowledged by the legislator itself, in respect of labour, enterprise and savings. The assessment has to be made *in concreto*, taking account of the circumstances as to whether or not the beneficiary of the compulsory portion, whose rights have been excluded or harmed, finds himself in economic hardship or in a state of need.[95]

For purposes of the assessment of harm, it is necessary to take into account proportionality, with the consequence that, for instance, with respect to the

are *in concreto* most worthy of protection (as in the case of the acknowledgement of a child born out of wedlock, according to Art 256 Civil Code).

[92] On this topic, see G. Ferrando, 'L'adozione in casi particolari alla luce della più recente giurisprudenza' *Diritto delle successioni e della famiglia*, 85, fn 24 (2017).

[93] P. Perlingieri, 'Libertà' n 84 above, 182.

[94] On this topic, see M. Rizzuti, *Il problema dei rapporti familiari poligamici* (Napoli: Edizioni Scientifiche Italiane, 2017), 97. Such an issue is more deeply analysed by G. Perlingieri, 'In tema di rapporti familiari poligamici', forthcoming.

[95] On this point see G. Perlingieri, 'Il 'Discorso preliminare' di Portalis tra presente e futuro del diritto delle successioni e della famiglia' *Diritto delle successioni e della famiglia*, 672, fn 4, where for this purpose the author refers also to the rules concerning the right to alimony and maintenance, and 676, fn 13 (2015).

spouse or the surviving spouse or partner, the duration of the marriage or the civil partnership has to be considered.

This approach has long been taken by the Italian Constitutional Court, which declared unlawful Art 18, para 5, decreto legge 6 July 2011 no 98, where it defined the survivor's pension exclusively on mere 'naturalistic' elements, which were inconsistent 'with the solidaristic foundation of the survivor's pension'.[96]

The legislator and in most cases, the judge, cannot disregard (beyond the duration of the marriage, the age of the spouse and the age difference with the deceased spouse, all aspects of which are explicitly considered by the legislator), the eventual level of *need* of the specific spouse, his or her *condition*, the eventual *cumulation of incomes*, the existence of *minor or disabled children*, as well as the acknowledgement of a *minimum amount* of pension, which has to be paid in any case, even when the duration of the marriage is limited.[97] The examples confirm that, even in the presence of clear mandatory provisions, it is necessary to balance principles according to the reasonableness criterion.[98]

IX. The Relativity of the Concept of Reasonableness

In light of the above considerations, it emerges that the 'matching of conformity with reasonableness of the solution becomes a structural component of the interpretation'[99] and the distinction between *interpretation* and *argumentation* melts away like snow in the sun, as a means of interpretation to ensure, at the moment of application, a wide spread interpretative unity, which concurring principles and interests can ensure.[100]

Furthermore, it may also be deduced that it is not possible to distinguish between reasonableness in private law and reasonableness in Constitutional law. The legislation applicable to a specific case is always the result of the joint evaluation of principles and rules; reasonableness is the means for evaluating and assessing the applicability of a rule, as well as for solving systematic aporias

[96] Corte Costituzionale 14 July 2016 no 174 *Foro italiano*, 3052 (2016). The impetus came, first of all, from Corte Costituzionale 4 November 1999 no 419, *Il diritto di famiglia e delle persone*, 16 (2000), which did not hesitate to take into account the state of *need* of the individual relative with regard to the survivor's pension, thereby highlighting that it is not admissible to share the pension benefits between spouse and former spouse exclusively in proportion to the legal duration of the respective marriages. On the contrary, it is necessary, as it is for the devolution of the end-of-job indemnity and without observation of the period of notice which is due to the deceased worker according to Art 2122 Civil Code, to consider also other parameters or reasons of solidarity as the state of *need* of the single surviving spouse.

[97] On this topic, see E. Bellisario, 'Successione necessaria e famiglie plurinucleari: ancora sul conflitto tra figli e nuovo coniuge del *de cuius*' *Rassegna di diritto civile*, 323 (2017).

[98] On this point, see G. Perlingieri, *Profili* n 2 above, 66 and in particular 68.

[99] P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 318 (2010).

[100] G. Perlingieri, *Profili* n 2 above, 131 and 143.

and antinomies, which cannot otherwise be solved by means of interpretation.

In application or execution, there are no legal rules which cannot be connected to other legal rules.[101]

The concept of reasonableness, just as all elastic concepts which 'need integration through evaluation'[102] more than others, is not immutable, a-historical, insensitive to change.

While the preceding is static and as such, dangerous, the story evolves and with it, concepts, legal systems and the same *guiding normative values*, of which reasonableness is a mere synthesis in the applicative moment.[103]

Even where the hierarchy of the value is pre-defined (as it happens at a given point in history), the possible combinations between principles depend on the permanent evolution of the relational dynamics and the peculiarities of the specific case.[104] Consider furthermore certain rulings, which at a later time have assessed supervened social and economic aspects, which had not been at all evaluated in previous decisions. Or consider cases in which technology imposed new requirements of balancing between principles and the duty of the adjudicator to consider dynamics which where unimaginable only a short time before. There are new issues regarding personal identity and therapeutic self-determination. Regarding the latter, it has been necessary to choose between the right to life and human dignity or at least to find a balance between the two.[105]

X. The Risks of Confusion among Reasonableness, Social Consensus, Praxis and '*Diritto Vivente*'. Critical Remarks

Nevertheless, the matching of conformity with reasonableness, which needs the particular sensitivity of the adjudicator (especially in a legal system tending to be based on written law), cannot restrict itself as an instrument breaching the principle of constitutional legality by referring to unclear and dangerous concepts, such as those of 'living law', 'praxis', 'sharing', 'consensus or social acceptability', 'sensitivity or common sense' or 'experience'.[106]

[101] ibid 123.

[102] K. Engisch, *Introduzione al pensiero giuridico* (Milano: Giuffrè, 1970), 199.

[103] This finds unequivocal support in the evolution of the interpretation of Art 1052 Civil Code. The point is analysed in G. Perlingieri, *Profili* n 2 above, 26, fn 59.

[104] Furthermore, the normative values, even if they can remain identical in their external formulation, nevertheless evolve 'as their perception is continuously changing, namely their content and the relationship that they have with other normative values' and with the social situation at the moment of the application: L. Lonardo, 'Ordine pubblico', in G. Perlingieri and M. D'Ambrosio eds, *Fonti* n 84 above, 322; however see G. Perlingieri, *Profili* n 2 above, 16, 26.

[105] Regarding the importance of combining cultural pluralism, scientific and socio-economic progress with the person's *dignity*, in order to conceive the community as a means of protection of human beings and as a means of development and integration, see also F. Parente, 'I diritti umani all'epoca della globalizzazione' *Rassegna di diritto civile*, 158 (2017).

[106] This should not be seen as denying that 'law is essentially history' and that 'the lawyer

The meaning of reasonableness must be measured against norms, in the context of the legal system and not beyond it.[107] Reasonableness is neither a virtue of humans inspired by the naturalistic values of equilibrium or (in an Aristotelian perspective) fair means, nor can it be identified in English *common sense* or in the utilisation of the 'social conscience'.[108]

Reasonableness does not attribute either total freedom to its interpreter nor, as some suggest, does it consist of investigating 'social consensus'[109] (which seems *imprecise*, *dangerous* and *arbitrary*).

Conversely, it is a criterion which, observing the principle of legality, helps to identify, at the moment of its application, the solution, among those which are abstractly possible, which is mostly in conformity not only to the legal rule but also to the overall logic of the system and of its normative values, so that the *legal reasoning*[110] of the decision is always in conformity with the legal system, which is characterised by those principles that, in a given historical moment, identify a specific regulatory system.[111]

Otherwise, there would be a significant risk[112] of using the concept of reasonableness to offer interpretations related to statistical data and the 'natural order of the things'. That would impair fundamental principles or would necessitate the balancing of principles with comparative evaluation of interests. This would be based on the consideration of the reasonableness as a normative criterion, which refers to an *evaluation of plausibility*, to the 'sufficiently broad

has to be able to operate first of all as an historian, a reader not only of codes' and laws 'but also of experience' and legal 'culture' of a given country or place: N. Lipari, 'La codificazione nella stagione della globalizzazione' *Rivista trimestrale di diritto e procedura civile*, 883 (2015); Id, 'Il diritto quale crocevia fra le culture', in Id, *Il diritto civile* n 10 above, 300.

[107] That is because, in written law, the legal rule is nothing in absence of fact but also fact is nothing without one or more legal references (rules-principles). In the absence of a specific case, legal argument becomes a hobby but without legal rules and principles it would not strictly be possible to argue. See N. Lipari, 'Intorno ai 'principi generali del diritto" and 'Intorno alla "giustizia" del contratto', in Id, *Il diritto civile* n 10 above, respectively 96 and 267, who speaks of 'diritto vivente', 'social acceptance', 'common sense or sensitivity', 'experience'; in certain passages the author seems to invite the judge to 'evaluate the prevalent values in the social context', as well as to recover 'common sense as a condition of validity of the same rule'. Such a perspective is confirmed where the above-cited author, in acknowledging that 'the law discovers that it is not called to place values but rather to adhere to existing values' identifies, in a very questionable way, the legality with 'judicially acknowledged and socially shared matters' (Id, 'L'abuso del diritto e la creatività della giurisprudenza', in Id, *Il diritto civile* n 10 above, 234). For a criticism of this perspective, see G. Perlingieri, 'Legge' n 72 above, fn 72.

[108] S. Cognetti, *Principio di proporzionalità. Profili di teoria generale e di analisi sistematica* (Torino: Giappichelli, 2011), 168, fn 4.

[109] E. Navarretta, 'Buona fede e ragionevolezza nel diritto contrattuale europeo' *Europa e diritto privato*, 971 (2012).

[110] A.J. Arnaud, *Governanti senza frontiere. Tra mondializzazione e post-mondializzazione* (Napoli: Edizioni Scientifiche Italiane, 2011), 91.

[111] G. Perlingieri, *Profili* n 2 above, 23; G. Perlingieri, 'Sul criterio di ragionevolezza' *Annali S.I.S.Di.C.*, 11 (2017).

[112] Such is the risk of case law of the lower courts: see, among others, Corte d'Appello di Venezia 5 September 2011 no 1954, available at www.dejure.it.

sharing' and to the 'praxis'.[113]

The idea that, for purposes of interpreting and applying the law, a 'sufficiently large consensus' is needed recalls totalitarian regimes and the degeneration of 'social consensus'.[114] The Nazi party laid the Führer's will on popular spirit and on sharing. Fascism and communism built their strength on common sense.

To rely on *social conscience* means introducing evaluation elements of uncertainty and arbitrariness. This is fundamentally because of two factors. First, it is not always easy to ascertain which is, at a particular moment in time, the orientation of a given community. Second, it remains an open question to ascertain whether or not the adjudicator has to rely on prevalent interpretation or on that of a part of the community which may be considered as more observant and circumspect.

Furthermore, in a multi-cultural society, it is naïve to pretend to identify, with certainty, social conscience.[115] It is only possible to identify normative principles which distinguish a given regulatory system, ie those principles *laid down*, which, in the absence our system of laws would be substantially transformed.

After all, modern constitutionalism is already the result of a broad consensus and its purpose is to avoid abuses by the majority, to ensure the respect of *minorities* and to protect inviolable human rights in the face of any public or private power, by avoiding anti-social, totalitarian and authoritarian policies.[116]

'Social consensus', what has been 'socially shared',[117] is merely a useful complementary instrument to ascertain the importance that a given value assumes in the framework of a system. Nevertheless, concrete legal provision remains essential for the balancing of interests, even if it has to be reviewed in

[113] So F. Piraino, *Buona fede, ragionevolezza e 'efficacia immediata' dei principi* (Napoli: Edizioni Scientifiche Italiane, 2017), 42, who speaks of 'unanimous consent or, however, widely prevailing', with the intention of the critics contained in G. Perlingieri, *Profili* n 2 above, 21,where the risk of the 'arbitrariness of the interpreter' of the 'sovereign' or of the majority is highlighted.

[114] See F. Piraino, *Buona fede* n 113 above, 43; N. Lipari, 'L'abuso' n 107 above, 234, who binds reasonableness to 'social consensus'.

[115] G. Perlingieri, 'Sul criterio' n 111 above, 34, fn 24.

[116] Recently, some of the literature aknowledged that the constitutional paradigm is the only answer to technocracy, to anti-social, totalitarian and authoritarian politics, as well as to the deterioration of all aspects of the national and international crisis; on this point see L. Ferrajoli, *Costituzionalismo* n 65 above, 9, who, while wishing for a global constitutionalism, observes that 'the law expressed by constitutional principles has been therefore developed as a normative project consisting of a system of limits and constraints to all powers', with the consequence that 'in the constitutional democracy there are no longer in existence absolute sovereign powers, which are *legibus soluti* as they are not subordinated to the law'(12). In particular, 'compared with the past horrors', constitutionalism is 'equivalent to a "never again", namely to a limitation of powers which are otherwise absolute and wild. With respect to the prospect of the future, this is equivalent to a "must be", which is imposed on the exercise of each power as the source and condition of its legal and political legitimacy' (9).

[117] Concentrates, instead, much more his attention on the praxis, on 'living law' and on what is 'socially shared', N. Lipari, 'L'abuso' n 107 above, 234; see also F. Piraino, *Buona fede* n 113 above, 43, who excessively emphasises 'consensus' and 'social conscience'.

the framework of an historical and cultural dimension of society.[118]

Thus, the indissolubility of marriage retained its relevance in Italy as a principle of public policy until the introduction of a divorce law, despite the fact that it had already been possible to assume a social behaviour which favoured its amendment, as was later confirmed by the outcome of the *referendum*.[119]

Otherwise, it would be possible to affirm

> 'the non-punishability of behaviours determined in law to be criminal offences, by relying on the consideration that (...) such behaviours would not be regarded negatively by most citizens'.[120]

Sociology is not just a technique which 'confirms legal results'[121] but rather an instrument of interpretation and confirmation of one or more enunciated or interpretative materials (which includes literature, case law, praxis, administrative circulars, judgements of independent authorities, *etc*, which concur to formulate the *regola iuris* and to build a case or legal provision for a specific case.

Therefore, without any doubt, sociology represents an unfailing element in the application of the process of law but cannot transform itself into an alternative instrument to the substantial law, which is made by rules, principles and related operative instruments.

Otherwise, there is the risk of proposing solutions which are not in compliance with fundamental principles and are not necessarily in conformity in the social order or solutions which are more in conformity with the social order than with fundamental principles.

As a consequence, there is, as underlined by an author who, besides, is of an opinion which diverges from that represented in this paper, the risk of falling into a logic which is on the opposite side of 'formalism', which is bound up with

[118] It is useful to clarify that we are perfectly aware that 'law is not intelligible out of the cultural dimension of the society', in the sense that not only does it 'depend on the culture of a people, of which it is itself one of the most important historical forms' but also that the law itself has to be understood by taking into account aspects related to sociology, technology, morality, etc (N. Lipari, 'Il diritto quale crocevia' n 106 above, 297-309). Nevertheless such a perspective cannot justify the alternative use of the law or the affirmation of a law disconnected also from the principle of constitutional legality, because the senses' unitary horizon, to which people undeniably tend, is ensured by fundamental principles and in particular, by personalism and solidarism which represent the legacy of historical 'progress', which founded existing law. In reality, 'who is suspicious of values because they would represent a must be and therefore a return to natural rights, confuses the values existing in society with those characterising the legal system, which, conversely, are those who have to be interpreted and applied'; in this regard, see P. Perlingieri, 'Il bagaglio culturale del giurista', in Id, *L'ordinamento vigente e i suoi valori* (Napoli: Edizioni Scientifiche Italiane, 2006), 242.

[119] G. Badiali, 'Ordine pubblico III) Diritto internazionale privato e processuale' *Enciclopedia del diritto,* XII, (Milano: Giuffrè, 1990), 1.

[120] In this regard, N. Lipari, 'Diritto e sociologia nella crisi istituzionale del postmoderno', in Id, *Il diritto civile* n 10 above, 278.

[121] ibid.

the 'principle of a rule which has an aim in itself', ie in the 'logic, just as destructive, of the anomie, which pretends to affirm the uselessness of the rule'.[122]

Therefore, concerns have also to be expressed to anyone who identifies reasonableness with the *praxis*, the *normality of the fact*, the *living law* because legal science is continuously evolving and law is not a cause that has been won but is a cause that can be won.

The circumstances in which an opinion is largely shared is not a proof of legitimacy.

On that basis, it is dangerous to invoke precedent, especially if it is old.

XI. Reasonableness, Historical Significance and Relativity of Normative Values

Reasonableness, an historical and relative concept, does not limit itself to any widely used technique of formal interpretation and of comparative evaluation of interests.[123] On the contrary, it requires an axiologically-oriented interpretation of each rule or legally relevant fact for the purpose of pursuing a solution in conformity with the legal system and with its principles.

Principles and normative values are not beyond the system but are rather the highest manifestation of private law; they are therefore part of the 'boundary' of 'positivity'.[124]

Therefore, reasonableness and balancing of principles are physiological techniques for the purpose of legal interpretation because, if it is true that law is a building, a construction of the human will, a human matter, a command given from humans to other humans, which is an expression of physics and not of metaphysics,[125] it is also true that normative values are not a mysterious and transcending entity, which is independent from human will.

Unlike what is asserted by some scholars,[126] the identifying principles of a legal system are also a product of history, a matter for humans and are *given* by historically applicable legal rules, so that no interpreter of those rules is allowed to neglect them, unless he intends to violate the principle of legality (Arts 101,

[122] ibid 292.

[123] Regarding to the attention manifested by Domenico Rubino concerning a functional analysis of the legal rule and the comparative evaluation of the involved interests, see P. Perlingieri, 'L'interesse e la funzione nell'ermeneutica di Domenico Rubino', in Id and S. Polidori eds, *Domenico Rubino*, I, (Napoli: Edizioni Scientifiche Italiane, 2009), 3.

[124] N. Irti, 'Per un dialogo sulla calcolabilità giuridica' *Rivista di diritto processuale*, 919 (2016); Id, 'Gli eredi della positività' *Nuovo diritto civile*, 11 (2016); Id, 'Sulla 'positività ermeneutica' (per Vincenzo Scalisi)', available at www.juscivile.it, 123 (2017).

[125] G. Perlingieri, 'Sul criterio' n 111 above, 39.

[126] This is confirmed also by N. Irti, 'La filosofia di una generazione', in P. Perlingieri and A. Tartaglia Polcini eds, *Novecento giuridico: i civilisti* (Napoli: Edizioni Scientifiche Italiane, 2013), 343; Id, 'Gli eredi' n 124 above, 17; see also L. Mengoni, 'L'argomentazione nel diritto costituzionale', in Id, *Ermeneutica e dogmatica giuridica. Saggi* (Milano: Giuffrè, 1996), 118.

54, 117, 18 final transitory dispositions of the Constitution).

History also teaches that normative values are 'expression of human will, forms of earthly power, aims pursued by the world',[127] so that also 'fundamental', 'human' rights (and duties) which are not overlapped but rather 'laid down'[128] at will and which will exist because our constitutional legislators laid them down. Europe, over time, implemented them and like every other earthly event, they will live as long as the human will exist.

A pure theory of law, the idea of a law based on logic alone, on legal nihilism[129] is simply fiction[130].

A legal decision can never be neutral, as it always pre-supposes, even in the presence of a clear and pre-determined rule, a choice, a selection, a renunciation, a preference, the loss of an interest or of a value compared with another one.

Reasonableness, as well as *worthiness*, *good faith*, *abuse of rights*, represents a 'verbal summary', which does not have an intrinsic and absolute sense (and much less *sub specie aeternitatis*) because it takes a different meaning which derives both from the *ratio* of the single legislative provision in which it is *eventually* incorporated (as clarified in another context, of reasonableness by reference to: *term*, *price*, *measure person*, *merger project*, *organisational structure of a society*, *reliance*, *etc*) and from the *legal system* in which it operates, with all its peculiar principles and normative values.[131] Principles and values which are not eternal, transcendent and metaphysical[132] but which are also, each as a

[127] N. Irti, 'Gli eredi' n 124 above, 17.

[128] P. Perlingieri, 'Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti' *Rassegna di diritto civile*, 787 (1999); P. Perlingieri, 'I princípi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali S.I.S.Di.C.*, 1-7 (2017); G. Perlingieri, *Profili* n 2 above, 133-140.

[129] N. Irti, *Nichilismo giuridico* (Roma-Bari: Laterza, 2004), passim.

[130] P. Perlingieri, 'Valori' n 128 above, 787; Id, 'Le insidie del nichilismo giuridico. Le ragioni del mercato e le ragioni del diritto' *Rassegna di diritto civile*, 1 (2005) (now both contributions are contained in Id, *L'ordinamento vigente* n 118 above, 229 and 327). G. Zagrebelsky, 'L'idea di giustizia e l'esperienza dell'ingiustizia', in Id and C.M. Martini eds, *La domanda di giustizia* (Torino: Einaudi, 2003), 49 defines the sceptical relativism of the 'it's all the same' at the level of principles: 'the approach, which is celebrated as a virtue, of indifferent people who are nowadays raging, an approach which is too often disguised by excessive and over-zealous professions of faith which do not cost anything and are therefore allowed easy and unscrupulous changes of approach, which are the prelude of immoral alliances for hunger and thirst, not in the name of justice, but rather of power and success'. Regarding the incompatibility between legal nihilism and the defence of the ideologies (also proposed by N. Irti, *La tenaglia. In difesa dell'ideologia politica* (Roma-Bari: Laterza, 2008)), see G. Perlingieri, 'La povertà del pragmatismo e la difesa delle ideologie: l'insegnamento di Natalino Irti' *Rassegna di diritto civile,* 601 (2008). For a criticism of legal nihilism, which 'substantially reduces legality to a simple ratification of cadences having a mere procedural character distinguishing it from that evaluation of content which is not only the sole possible instrument in order to disconnect, in conformity with reason, law from the primordial logic of the balance of power but which is also an essential condition for any connection to the idea of culture as a condition of the spirit in history', see N. Lipari, 'Il diritto quale crocevia' n 106 above, 294.

[131] G. Perlingieri, *Profili* n 2 above, 13,22, 34 and, in particular, 36.

[132] N. Irti, 'La filosofia' n 126 above, 343; Id, 'Gli eredi' n 124 above, 17.

legal rule, a 'construction of the human will, a human business, a command given by humans to other humans, are expression of the physics' and as such, are historically conditioned.

A further aspect is the hierarchy of the norms is their historical relativity. Each legal provision, even if it is at a superior legislative level, is a product of the history 'laid down' by human will.

XII. Concluding Remarks

'No fundamental notion is separately conceivable from all the others'[133]. Reasonableness is not separately conceivable either from fundamental principles, which, as such, identify and characterise the existing legislative system, or from other well-known concepts. Reasonableness and proportionality cooperate to decide the case in hand without every overlapping.

Differently from proportionality, reasonableness disregards merely quantitative evaluation.[134] What is proportionate is not necessarily reasonable. A proportionate reaction may be considered unreasonable. A proportionate remedy may be considered as unreasonable and incongruous with respect to the interest and values involved in a specific case.[135]

For instance, the choice, shared by US literature and case law until mid-1900s[136] of *equally* separating, in the framework of a bus, the parts reserved for

[133] S. Romano, *Introduzione allo studio del procedimento giuridico nel diritto privato* (Milano: Giuffrè, 1961), 4; on this point, see also G. Perlingieri, 'Venticinque anni della Rassegna di diritto civile e la 'polemica sui concetti giuridici'. Crisi e ridefinizione delle categorie', in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea. Venticinque anni della Rassegna di diritto civile. 16-18 dicembre 2004, Grand Hotel Telese – Telese Terme (BN)* (Napoli: Edizioni Scientifiche Italiane, 2005), 546.

[134] E. Del Prato, 'Ragionevolezza e bilanciamento' *Rivista di diritto civile*, 23 (2010).

[135] G. Perlingieri, *Profili* n 2 above, 36.

[136] At the end of the 19th century, the Supreme Court of the United States declared the lawfulness of the law of the State of Louisiana, which provided for racial segregation on the means of transportation (Supreme Court of the United States 18 May 1896, *Plessy* v *Ferguson*, 163 US 537 (1896)), being not in conflict with the 14th amendment of the Constitution of the United States of America, wherein it was not possible to find a prohibition of *apartheid*. Nevertheless, regarding this decision, it is necessary to highlight the dissenting opinion of Judge John Marshall Harlan, who highlighted in his minority report, that 'Our Constitution is color-blind and neither knows nor tolerates classes among its citizens'. In the context of public transportation, for the initial ending of a discriminatory approach based exclusively on formal equality and proportionality, see Supreme Court of the United States 3 June 1946, *Morgan* v *Virginia* 328 US 373 (1946); Interstate Commerce Commission 7 November 1955, *Keys* v *Carolina Coach Company* 64 MCC 769 (1955); United States District Court for the Middle District of Alabama 4 June 1956, *Browder* v *Gayle*, 142 F Supp 707 (1956). For the definitive overruling of the 'separate but equal doctrine' see Supreme Court of the United States 17 May 1954, *Brown* v *Board of Education of Topeka* 347 US 483 (1954). On this argument, see U. Mattei, *Il modello di Common law* (Torino: Giappichelli, 2nd ed, 2004), 109; A. Gambaro, *L'esperienza giuridica degli Stati Uniti d'America*, in Id and R. Sacco eds, *Sistemi giuridici comparati* (Torino: Giappichelli, 2002), 217.

white and for black people (according to the doctrine of 'separate but equal'), is obviously *proportionate* but unreasonable in our legal system.[137]

Therefore, proportionality[138] and reasonableness always cooperate in the decision of a specific case, even if they diverge at the conceptual level.[139]

Reasonableness can justify the imbalance by virtue of the need for substantial equality.

This is not only valid for private law but also for matters which, in the common view of people, are seemingly not subject to judicial discretion.

In this regard, case law justified a differentiated treatment in the decision of a violation of waste law, with an enhanced level of sanction in areas which are declared to be in a state of emergency.[140]

As a consequence, often the problem is not, as laid down in legal doctrine, that of the existence or otherwise of a principle (in the sense that few would now deny the existence of the principle of proportionality in the current legal system)[141] but that of composition and the reasonable balancing between rules and principles involved in a specific case.[142]

Similarly, on the assumption of the distinction between 'judicial' and 'legislative' balancing (or 'contained in the legal norms'), it seems impossible to assert that the former can prevail over the latter.[143] Indeed, at the point of application, there is no distinction between 'judicial' and 'legislative' balancing. It is true that the latter must abstractly prevail over the former but also that *in concreto* there is no distinction between these two forms of balancing, as when the decision is reached, even given a clear rule, it is always necessary to find the balance between rules and principles. As a consequence, the distinction between

[137] For further analysis and examples, see G. Perlingieri, *Profili* n 2 above, 138.

[138] Proportion is 'a pure method of measurement, which cannot deviate from a linear development in terms of mere quantitative evaluation and of logic consistency' (S. Cognetti, *Principio* n 108 above, 208). On this argument see also S. Giova, *La proporzionalità nell'ipoteca e nel pegno* (Napoli: Edizioni Scientifiche Italiane, 2012), 41.

[139] S. Cognetti, *Principio* n 108 above.

[140] Corte di Cassazione 18 February 2016 no 16065, *Repertorio Foro italiano*, 550 (2016).

[141] Note A. Cataudella, 'L'uso abusivo di princìpi' *Rivista di diritto civile*, 758 (2014); with particular regard to proportionality and reasonableness, see also L. Alexander and K. Kress, *Una critica dei principi del diritto* (Napoli: Edizioni Scientifiche Italiane, 2014), 1; see also G. D'Amico, 'Applicazione diretta dei principi costituzionali e nullità della caparra confirmatoria 'eccessiva'' *Contratti*, 926-933 (2014).

[142] For instance, the praxis of so-called 'green public procurement' poses delicate problems of balancing between the need for enviromental protection and the objectives of competition protection, with particular regard to the consequences of the parity of treatment and prohibition of discrimination; on this point see M. Pennasilico, 'Contratto e promozione dell'uso responsabile delle risorse naturali: etichettatura ambientale e appalti verdi', in *Benessere e regole dei rapport civili. Lo sviluppo oltre la crisi. Atti del 9° Convegno Nazionale S.I.S.Di.C. in ricordo di G. Gabrielli, Napoli 8-9-10 maggio 2014* (Napoli: Edizioni Scientifiche Italiane, 2015), 249; A. Addante, 'I c.d. appalti verdi nel diritto italo-europeo', in M. Pennasilico ed, *Manuale di diritto civile dell'ambiente* (Napoli: Edizioni Scientifiche Italiane, 2014), 182.

[143] Instead, G. D'Amico, 'Problemi' n 82 above, 460.

'judicial' and 'legislative' balancing, on the one hand, pre-supposes, an inadmissible separation between a 'law made from rules' and a 'law made from principles' and on the other hand, represents an abstract distinction which is without any concrete relevance because systematic interpretation and application are combined in a single process.[144]

A balancing process is also essential between provisions having different hierarchical degrees, as such provisions never have a distinct meaning that is separate from the groups to which they belong and because fact is never irrelevant or extraneous in relation to the hermeneutical process. On the other hand, systematic and axiological interpretation cannot be subsumed by formal interpretation.

The wording of a provision always has to be shaped in light not only of its *ratio* but also of the legal system of which it is part.[145] This avoids separation, at the point of enactment among exegetical, case and systematic interpretation.[146]

Reasonableness is the *argumentative criterion*, *general clause* or *principle* according to the relevant context and according to the use explicitly made of it by the legislator.

On the other hand, the question of whether or not reasonableness is an 'argumentative criterion' or a 'principle' becomes ineffective when it is clear that each interpretation and confirmation of *criteria*, *clauses* or *principles* should be conducted in respect of those (normative) positive values, which identify the existing legal order.[147]

'The crisis of the States' territorial sovereignty is not a crisis of legal

[144] For further references, see on this point, G. Perlingieri, *Profili* n 2 above, passim, but see also the further authors quoted below, at fn 146.

[145] G. Perlingieri, *Profili* n 2 above, fn 66.

[146] Indeed, if systematic interpretation and application are combined in a single process (T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi* n 9 above, 74; T. Ascarelli, 'Antigone' n 9 above, 155), the provision elaborated throughout its interpretation 'lives only in the moment in which it is applied', so that the systematic interpretation has to be reiterated for each application in order to satisfy a new and determined specific case; T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione' *Rivista di diritto processuale*, 351 (1957) and now in Id, *Problemi* n 9 above, 140; Id, 'In tema di interpretazione ed applicazione della legge' *Rivista di diritto processuale*, 14 (1958); E. Gianturco, 'Gli studi di diritto civile e la questione del metodo in Italia (1881)', in Id, *Opere giuridiche*, I (Roma: Libreria dello Stato, 1947), 8, with regard to the 'matter of preference between systematic and exegetical method', observes that there must be 'acknowledged the utility of both'; it is furthermore necessary to find 'the way to put them together, letting them follow the proposition of the doctrine, which trains the mind on researching principles by the examination of component fragments. It is just such examination which teaches how to recognise legal sources and it makes them familiar'; on that perspective, see also C.W. Canaris, *Pensiero sistematico e concetto di sistema nella giurisprudenza sviluppati sul modello del diritto privato tedesco* (Napoli: Edizioni Scientifiche Italiane, 2009), passim; P. Perlingieri, 'Applicazione' n 99 above, 317; G. Perlingieri, *Profili* n 2 above, passim; Id, *Portalis e i 'miti' della certezza del diritto e della c.d. 'crisi' della fattispecie* (Napoli: Edizioni Scientifiche Italiane, 2018), 48.

[147] G. Perlingieri, 'Sul criterio' n 111 above, 13.

sovereignty'[148] and of the principles which identify the Republic (Art 139 Constitution), which have the function of setting limits and above all, of foundation.[149]

The crisis of law becomes clear when lawyers, who are enthusiasts for the myth of legal certainty, remain prisoners of abstract concepts (which are regarded as dogma) or of mere precedent, without paying adequate attention to the reasons and consequences of solutions.

Judicial precedent cannot become, as it has been stated, 'the guarantor of legal certainty instead of the general and abstract legal rule'.[150]

Law does not accept those with doubts,[151] nor those who blindly extoll legal categories one day, the precedent the next day.

Interpretation always involves *evaluation*. Judging does not mean confining itself to an process of argument, as legal debate needs, above all, to have as a fundamental attribute, awareness that 'each technique is at the service of an ideology'[152] and that it does not exist independently from systematic and teleological implications.

Otherwise, *it is possible to assert everything*, as mere argumentative and demonstrative capacity can find a literal, functional and axiological interpretation, without offending legal science and the *demand for justice*.

Legal reasoning is a 'discursive reality' and not merely a 'deductive' or 'logic-rational' reality. Facing a choice, the adjudicator not only has to concentrate attention on 'logical grounds' of the reasoning (on the 'lack of contradiction' and the 'consistency' of the proposed solution).[153] He has also to pose a further question, which is: on which basis, according to which criterion one solution must be preferred over another?

Both in apparently easy cases (ultimately the most dangerous, as they are

[148] That is acknowledged also by N. Irti, in F. Pedrini ed, 'Colloquio su Diritto, Natura e Volontà. Intervista al Prof. Natalino Irti (Roma, 14 maggio 2015)' *Lo Stato*, 169 (2015).

[149] Therefore, the Constitution cannot be merely understood as a 'formal limit of lawfulness' or as a mere set of formal and substantial 'rules of the game' which are suitable to build a perimeter within which it should possible freely to exercise legislative discretion. It can also be seen as a set of 'substantial values and foundations, so that it would not be correct to contrast the idea of Constitution as the 'fundamental norm' (*Grundnorm*) with the idea of Constitution as a 'regulatory framework' (*Rahmenordnung*). 'The value, in addition to it being a limit which needs to be defined, is also a potential which has to be realised'; P. Perlingieri, in F. Pedrini ed, 'Colloquio su (Scienza del) Diritto e Legalità costituzionale. Intervista a Pietro Perlingieri (Napoli, 27 giugno 2017)' *Rassegna di diritto civile*, 1141 (2017). For a different point of view, see G. Pino, 'Costituzione come limite, Costituzione come fondamento, Costituzione come assiologia' *Diritto e società*, 91 (2017); see also N. Lipari, 'Diritto e sociologia' n 120 above, 286, who seems to appreciate the sociological analysis beyond the limits agreed by the principle of constitutional legality.

[150] E. Scoditti, 'Il contratto fra legalità e ragionevolezza' *Foro italiano*, 417 (2015).

[151] N. Irti, 'Dubbio e decisione' *Rivista di diritto processuale*, 64 (2001).

[152] P. Perlingieri, *Forma dei negozi e formalismo degli interpreti* (Napoli: Edizioni Scientifiche Italiane, 5th ed, 2007), 133.

[153] So instead A. Gentili, *Senso e consenso. Storia, teoria e tecnica dell'interpretazione dei contratti*, (Torino: Giappichelli, 2015), I, 109.

underestimated and permit the glorification of subsumption, praxis, precedent, 'living right', which often finds establishment in statistical repetition of a mistake) and in difficult cases, logic (also in the form of consistency and of non-contradiction) is not enough.

Only functional and axiological evaluation permit *choosing* between two solutions which are both consistent and therefore avoid the outcome of two opposite but logically consistent solutions being both considered admissible for the system.

Certainty, understood as *foreseeability*, *checking* and *verifiability* of the decisions, depends on constant compatibility assessment of the solution within the rules and fundamental principles.

The solution cannot be, as desired, *repetitive* and *perpetual*, as the overlap of principles (and rules) as well as the specifics of each single case are *a priori* unimaginable and as affirmed by Portalis,[154] the legislator cannot *foresee everything* and even if *everything is foreseen*, it is not possible to neglect the peculiarities of the facts and the plurality of the combinations between rules and principles.

After all, a perfect legal order, which finds application by means of reasoning which is merely rational, formal and logic-deductive cannot and will never exist. It lives only in the minds of those lawyers who are anxious to quell their fears and insecurities.

In my opinion there is the only one possible answer to give to Emanuele Gianturco when he, critically, asked himself the reason for so 'much obstinacy and frankly, so much affectation and carelessness' regarding the 'principles', which he considered to be not just an ornament, but rather 'the highest manifestation of science'.[155]

The fear of uncertainties and of indiscriminate arbitrariness of the judge can be overcome only through serious respect for the duty to motivate, with justification of the solution on at logical and teleological levels. Otherwise we shall witness a free law or a blind law, deprived of a sense of justice.

Emilio Betti considered Kelsenian positivism a 'disease that infected the young in the 1950s'; he would have thought that still today regarding lawyers who are still convinced that law identifies itself with the letter of the law because 'the law has to be explained' above all 'with the help of axiological criteria; without them it would result in being absolutely deprived of determination'.[156]

[154] J.E.M. Portalis, *Discorso preliminare al primo progetto di codice civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 36. About the author's thought see G. Perlingieri, *Portalis* n 146 above, passim.

[155] E. Gianturco, 'Gli studi' n 146 above, 8, who significantly concluded, 'I do not know of what the system is made of, if not of principles'.

[156] B. Troisi, *Interpretazione della legge e dialettica* (1982), now in Id, *Il contratto a danno di terzi e altri saggi* (Napoli: Edizioni Scientifiche Italiane, 2008), 13.

The concept of 'common good',[157] which is often overestimated, has no other function than that of combining and balancing the need for respect of budgetary constraint by the Member States. Such need is nowadays increasingly pressing, because of the need to guarantee everyone access to certain fundamental benefits,[158] even in cases in which such benefits become subjects of private property, as, for example, water, Internet and community utilities.[159]

Each legislative provision always leaves discretionary spaces in its interpretation and application. Nevertheless, rigour and consistency alone are insufficient.

They need to be emphasised and above all, they need to be definitively free from the 'wrong conviction that a decision' founded on mere 'subsumptive rationality offers more certainty than that rooted in (functions, interests and) normative values'.[160]

[157] Which is nothing more than a category, which is an expression of the need to protect 'fundamental benefits'; on this point, see also L. Ferrajoli, *Costituzionalismo* n 65 above, 40.

[158] ibid also spoke recently of fundamental benefits.

[159] B. Sirgiovanni, 'Dal diritto sui beni comuni al diritto ai beni comuni' *Rassegna di diritto civile*, 240 (2017). From a functional perspective, which favours overcoming the exclusive logic of belonging, it has been observed that 'the utilisation of the benefit does not follow, *sic et simpliciter,* the ownership of the right but rather the peculiar function to which such benefit is destined. Such a perspective finds confirmation and development in the theory of so-called 'common benefits', or, more correctly, benefits for common use, which are intended for collective utilisation regardless of rights of ownership. The social function of such benefits determines their regime and legitimates controls on the use made of them by the public or private power. The distinction between public and private ownership takes on new nuances, where a benefit becomes 'common', having a collective use because it is serves to support human development. After all, as it has been clarified by the Corte di Cassazione, 'speaking of a mere dichotomy among public, State-owned and private assets means, in a partial way, to limit ourselves to identification of the assets' ownership, thereby neglecting the fundamental element of classification of them by virtue of their function and the interests which are associated with those assets' (P. Perlingieri, "Funzione sociale' della proprietà e sua attualità', in S. Ciccarello, A. Gorassini and R. Tommasini eds, *Salvatore Pugliatti* (Napoli: Edizioni Scientifiche Italiane, 2016), 187).

[160] N. Lipari, *Il diritto civile* n 10 above, 4.