Malebolge

Reform of Non-Profit Organisations in Italy: Strengths and Weaknesses

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Abstract

Non-profit organisations in Italy have been reorganised through the Third Sector Code and additional legislation. However, the reform does not seem to be able to produce any of its desired effects. Even if it is too soon to come to any definitive conclusions on the reform, since the implementation procedure has not yet been completed, it is possible to draw some conclusions about the legislator's approach. This paper aims to highlight the critical theoretical issues that, once again, have prevented a proper understanding of the matters subject to regulatory intervention. The lack of attention to the functioning of the organisational models of third sector organisations (in Italian, *Enti del Terzo Settore* – ETS) has led to a poor understanding of how the organisational rules of these institutions are directed at satisfying interests that are not always compatible with economic activity. In this way, the paper highlights the strengths and weaknesses of the Italian third sector reform.

I. Introduction

A reform of the third sector in Italy has finally been carried out after numerous attempts. Following the implementation of the delegated law no 106 of 2016, a broad regulation of the non-profit economic sector is now in force. Thanks to the introduction of new organisational models and what are hoped to be more effective tax benefits,[1] a revival of the social economy is expected.[2]

The new legislation significantly restructures the third sector, and deals with many issues. The attention given to the functioning of the organisational model is of great interest.[3] The legislator ultimately seems to have attributed a different value to the functional element underpinning the management rules of such

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[1] G. Ragucci, 'Panoramica sui regimi fiscali di favore per gli enti del terzo settore' *Bollettino tributario d'informazione*, 885-888 (2018).

[2] The aims of the reform are described by G. Ponzanelli, 'Terzo settore: la legge delega di riforma' *Nuova giurisprudenza civile commentata*, 726-728 (2017); Id and V. Montani, 'Libro I, cosa cambia. La finalità diventa centrale' *Vita*, 41 (2016).

[3] For further details, see: M. D'Ambrosio, *Partecipazione e attività. Contributo allo studio delle associazioni* (Napoli: Edizioni Scientifiche Italiane, 2012), 81; Id, 'Impresa e modelli organizzativi degli enti del libro I del codice civile: note preliminari al codice del terzo settore', in F. Cicognani and F. Quarta eds, *Regolazione, attività e finanziamento delle imprese sociali. Studi sulla riforma del Terzo settore in Italia* (Torino: Giappichelli, 2018), 63-74.

institutions.[4]

The functional profile of the organisational models shows, therefore, that the models of Book V and Book I of the Italian Civil Code present different characteristic.[5] The management of a company in a collective form requires specific rules to protect investments as well as stakeholders. The regulations on the establishment of assets, requiring its conservation, as well as the rules about managers' liability, are aimed at ensuring a strong performance of the economic activity of the company. From this point of view, in the new Third Sector Code there are signs of a change in perspective, at least in the sense that the models are no longer neutral.[6] The legislation on the organisations of Book I of the Italian Civil Code does not have any rules that protect economic investments and ensure the proper management of the organisation. In this sense, the reform seems to have strengthened the provisions on preservation of assets, as well as those on the responsibility of the managers.

This is the starting point of the reform, which is, in fact, the 'universe' of the third sector.

This paper starts with a methodological premise. This will be useful to study *non-profit organisations*. Subsequently, it focuses on the functioning of the organisational models in private law entities, and ends with some brief conclusions on the reform of the third sector.

[4] On this point: R. Di Raimo, 'Poteri della maggioranza, diritti individuali e modifiche statutarie nelle associazioni non riconosciute', in P. Perlingieri ed, *Partecipazione associativa e partito politico* (Napoli: Edizioni Scientifiche Italiane, 1993), 175. In case-law Consiglio di Stato 20 December 2000 no 288, *Consiglio di Stato*, I, 490 (2001).

[5] It is worth mentioning the work by R. Di Raimo, 'Postulati logici e soggettività degli enti che esercitano l'impresa', in P. Rescigno et al, *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 329.

[6] Any organisational model is functionally characterised and not every purpose can be pursued under each model. To clarify the concept of the 'neutrality' of organisational models see: G. Marasà, *Le "società" senza scopo di lucro* (Milano: Giuffrè, 1984), 174; Id, 'Scopi non lucrativi e scopi non economici nei contratti associativi del Libro V del codice civile: problemi e prospettive', in G. Ponzanelli ed, *Gli enti "non profit" in Italia* (Padova: CEDAM, 1994), 189. For a more general construction of the problem, see: P. Rescigno, 'Le società intermedie', in Id, *Persona e comunità* (Padova: CEDAM, 1966), 45 and 63; R. Costi, 'Fondazione e impresa' *Rivista di diritto civile*, I, 17 (1968); P. Ferro-Luzzi, *I contratti associativi* (Milano: Giuffrè, 1971), 371; G. Rossi, 'Impresa pubblica e riforma delle società per azioni' *Rivista delle società*, 292 (1971); G. Santini, 'Tramonto dello scopo lucrativo nelle società di capitali' *Rivista di diritto civile*, I, 151 (1973); as well as P. Spada, 'Intervento al convegno tenutosi a Bari il 27 maggio 1977 sul tema «La nuova disciplina dei consorzi»' *Giurisprudenza commerciale*, I, 335 (1978); D. Vittoria, 'Il problema della forma giuridica degli organismi di garanzia collettiva tra piccole e medie imprese: consorzi o cooperative?' *Diritto e giurisprudenza*, 1 (1981). On this theme, the following contributions are worth mentioning: C. Fois, 'Le società per azioni tra codice civile e legislazione speciale. Preliminari ad una indagine esegetica' *Rivista delle società*, 64 (1985); G. Ponzanelli, *Le "non profit organizations"* (Milano: Giuffrè, 1985), 7; A. Frignani, 'Aspetti giuridici dell'associazionismo nel commercio (profili privatistici: le strutture)' *Quadrimestre*, 605 (1986); P. Grosso, 'Le cooperative ed i consorzi: strumento di associazionismo nel commercio' *Quadrimestre*, 670 (1986); as well as those promoting neutrality: A. Cetra, 'La riforma del Terzo settore e gli enti del primo libro del c.c. titolari di impresa' *Non profit*, 42 (2014).

II. Methodological Premise

The protection of social rights implies the appropriateness and effectiveness of regulatory provisions. Private law should pay more attention to commercial studies on this subject.

It has recently been stated that

> 'the *non-profit* archipelago is out of the traditional waters of private law and that civil law participates in the discussions on the topic with interest, but with a sense of extraneousness'.

It has also been said that

> 'the instruments and debates of the past are not very useful' and that the 'poverty of judgements (on the subject) (…) has meant that the discourses are often limited to refined doctrinal dissertations'.[7]

Such a perspective seems to underline an inherent lack of attractiveness of the sector, which is placed in a subordinate status, as if there are no significant issues from a private law point of view. This seemingly raises problems of a sociological type, or questions that are related to public law.

We shall now be more analytical.

Broadly speaking, there is no agreement on the irrelevance of past instruments and debates (such as, for example, the problem of the value of profitability within so-called 'idealist organisations'), since the issue (as will be demonstrated) has yet to be at the centre of a debate. This goes beyond the argument that the question is outdated, which rests on the understanding that it has been resolved and is therefore obsolete.

It is not the case that the lack of judgments in the sector has transformed the debate, in relation to many aspects of the phenomenon, into a mere exercise in style. It would be more correct, perhaps, to try to understand the reason for the limited number of legal disputes in a sector that is so relevant in the life of private individuals.

The operating environment of the third sector has been subject to more or less incisive reform measures. Traders in the social economy have frequently asked the legislator for reform. They have called for the introduction of harmonised legislation, from a fiscal as well as a legal point of view, and a restructuring of organisational models that could encourage private investment.[8]

[7] M.V. De Giorgi, 'Terzo settore. Il tempo della riforma' *Studium iuris*, 139-145, 139 (2018).

[8] For an account, over time, of the need for reform, see: D. Carusi ed, *Associazioni e fondazioni. Dal codice civile alle riforme annunciate. Convegno di Studi in onore di Pietro Rescigno* (Milano: Giuffrè, 2001); A. Zoppini, 'Problemi e prospettive per una riforma delle associazioni e delle fondazioni di diritto privato', in P. Rescigno et al, n 5 above, 359; Id, 'Perché riformare il primo libro del codice civile per la parte inerente alle associazioni e alle fondazioni', in V. Zambrano ed, *Non profit. Persona. Mercato* (Milano: Giuffrè, 2005), 73; P. Rescigno,

In relation to the recent reform, it is worth pointing out, very briefly, how the intention to harmonise the regulatory framework cannot be achieved if one takes into consideration the fact that the new legislation is 'broken up' into several decrees. This makes it impossible to claim that the (re)organisation has been carried out with fully effective results.

The need to introduce regulations in different areas has led to the reform being implemented through several different decrees. The work of enacting the law has been staggered, with effects that have not always been satisfactory, both in terms of the legislative architecture and in terms of regulatory coordination.

On this specific point, some thoughts will be expressed in the concluding remarks.

Far from wishing to assume the critical attitude of those who observe the work carried out by others and are persuaded that they could have done it better themselves, it is worth trying to detect how effective the regulatory action has been with regard to the relationship between non-profitability and the idealist purpose. It should be noted, however, that a final evaluation of the reform can only be carried out once the implementation procedure has been completed.

III. Activities and Organisational Models

The legislator seems to have freed himself – this should be considered as positive – from the conviction that it is always possible to have a functional 'hybridisation' of associations, foundations and business models.

The approach taken in the past did not make it easy to analyse, strictly, the role that the assets and the individual should play in the management models of the institutions of Book I of the Italian Civil Code.

Greater attention to the functioning of the organisational rules would have made it possible to appreciate how the 'personal' participation in associations has a profound effect on the organisational rules of the organisation, and that the use of capital in foundations cannot be compared to the economic investments of a company.

These elements cannot be underestimated.

The activity of the models referred to in Book V (profit-seeking organisations) and Book I (non profit institutions) of the Civil Code is differently regulated through their organisational structures. This becomes even clearer if the attention is focused on the functional profile of the organisational model. This is an important aspect to consider when reflecting on organisations that operate in the third sector. Moreover, in this context, the analysis must take into account the constraints of for-profit firms, namely the information asymmetry and the

'Sulla riforma del diritto delle associazioni e fondazioni' *Vita notarile*, 61 (2005); as well as R. Di Raimo, 'Appunti sulle prospettive di riforma del Libro I del Codice civile' *Rassegna di diritto civile*, 653 (2011).

lower degree of trust that the organisation is able to gain in the market.[9]

Corporate discipline defines a management model aimed at protecting the capital investment as well as all the stakeholders in the economic activity.[10]

Explanations of the phenomena of the '*associazione/impresa*' or '*fondazione/impresa*'[11] have remained for too long anchored to an interpretation based on the distribution of profits.

The fact that profit is not distributed is determined by an organisational limit of the model.[12] The personal participation in associations, and the 'legal dedication' in foundations, justify the adoption of management rules that are not able to protect the transfer of assets and the interests of parties who interact with the organisation in the event of economic activity.[13]

Even if it is recognised, the control over the adequacy of a fund does not make it possible for a public authority to syndicate 'the qualitative composition'.[14] It follows that the formation of the patrimony cannot rely on resources that lend themselves to being evaluated in such a way that it is possible to approximate the productive capacity according to objective and verifiable criteria.

In truth, in the new Third Sector Code there are signs of a change of perspective, and at least this perspective is contrary to the neutrality of the models. The management structure of the institutions of Book I of the Italian Civil Code is strengthened by the provisions on the establishment of assets and the responsibility of the managers laid down in the decreto legislativo 3 July 2017 no 117.[15]

The fact that profits are not distributed is not merely the consequence of an absence of purpose. It is influenced by the functioning of the organisational model, or, in other words, it is rooted in the functional profile of the management model.

[9] H.B. Hansmann, 'The Role of Nonprofit Enterprise' 89(5) *Yale Law School Legal Scholarship Repository*, 835-901 (1980).

[10] For an explanation of an enterprise's social impact, see S. Zamagni, 'Responsabilità sociale dell'impresa e «democratic stakeholding»' *Rivista della cooperazione*, 53 (2006); as well as M. Libertini, 'Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa' *Rivista delle società*, 1 (2009); C. Angelici, 'Responsabilità sociale dell'impresa, codici etici e autodisciplina' *Giurisprudenza commerciale*, I, 159 (2011); Id, 'Divagazioni sulla "responsabilità sociale" d'impresa' *Rivista delle società*, 3-19 (2018); V. Calandra Buonaura, 'Responsabilità sociale dell'impresa e doveri degli amministratori' *Giurisprudenza commerciale*, I, 526 (2011); G. Alpa, 'Responsabilità sociale dell'impresa, enti non profit, etica degli affari' *Economia e diritto del terziario*, 199 (2011).

[11] The reference is to associations and foundations that do business. On the topic, see P. Rescigno, n 6 above; R. Costi, n 6 above, which first used these terms.

[12] See: M. D'Ambrosio, *Partecipazione* n 3 above, 191; on this theme, see also G. Racugno, 'L'impresa sociale' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 49-69 (2009).

[13] Regarding the function of the enterprise, see: G. Fanelli, *Introduzione allo studio della teoria giuridica dell'impresa* (Milano: Giuffrè, 1950), 87 and 116.

[14] A. Cetra, *L'impresa collettiva non societaria* (Torino: Giappichelli, 2003), 125 and 136.

[15] Arts 22, 26, 27 and 28.

The prohibition on the distribution of profits, even indirectly,[16] can only be imposed on the institutions of Book I of the Civil Code. In associations and foundations, a distribution of the profits would constitute a 'mutation' of the function of the model.[17]

The distribution of profits by companies is a choice made with private autonomy. A failure to distribute profits does not affect the description of the organisational model. Therefore, it is natural that the legislator has foreseen 'attenuated' methods for the division of profits[18] if the social organisation is constituted according to the forms referred to in Book V of the Civil Code.[19]

The introduction of rules guaranteeing the conservation of the assets of an institution is of greater interest.[20] Here, the intent seems to have been to protect creditors through a regime of responsibility that is attentive to the relationship between equity and total indebtedness.

The delegated law already provides for the application of the provisions of Titles V and VI of Book V of the Italian Civil Code (as compatible) to associations and foundations (which exercise business activities regularly and predominantly).

The option of regulation by reference is not, however, without pitfalls. Transplanting legal rules may not be a simple operation, since it may not produce the desired effects. It is impossible not to consider the regulatory context in which the rules operate. The technique of the legislative reference must consider the interests of the case to be regulated.

For the institutions of Book I of the Civil Code, an example is the reference to the regulations on '*patrimonio destinato a uno specifico affare*'.[21] There are strong doubts about the effectiveness of the provision as it is written. When the regulatory text was prepared, the formula 'as far as compatible' was not included. On this point, it is doubtful whether the company's rules can operate automatically for associations and foundations and, in a broader sense, for social organisations. So, the following may occur: a) the possibility of providing for the rule also to apply to companies that perform a social enterprise, in derogation from what is

[16] As, for example, is recognised in Art 4, para 1, letter *e)* of the delegated law and Art 8, para 2, of the Third Sector Code.

[17] In this sense, see: Tribunale di Palermo 24 February 1997, *Giurisprudenza commerciale*, II, 440 (1999), with commentary by A. Cetra, 'L'associazione non riconosciuta che esercita un'impresa commerciale non è una società di fatto tra gli associati'; and more recently, Corte di Cassazione 8 March 2013 no 5836, *Giurisprudenza italiana*, 349 (2014), with commentary by E. Morino, 'Società di fatto, associazione e scopo di lucro: un nodo gordiano ancora da sciogliere'.

[18] L. Becchetti, 'Impresa sociale. Largo al *low profit*' *Vita*, 48 (2016).

[19] More precisely, the right to allocate less than 'fifty percent of the annual profits and surpluses, deducting any losses accrued in previous years' (Art 3, comma 3, decreto legislativo 3 July 2017 no 112) through a 'distribution by issuing financial instruments' or 'dividends to shareholders' (Art 3, comma 3, letter *a*, decreto legislativo no 112/2017, provides that this distribution cannot be in excess of the maximum interest rate of interest-bearing postal vouchers, increased by two and a half points, on the capital effectively paid in).

[20] Art 3 of the law of 6 June 2016 no 106 and Art 22 of the Third Sector Code.

[21] The reference is to assets of public limited companies that are destined for specific business.

generally established for this model; and b) a difficult coordination between the reimbursement of loans for specific business (as per Arts 2447-*bis* and 2447-*decies*) and the principle of the non-distribution of profits.

The choice made seems not to take into account the fact that the responsibility for the assets, linked to the investment in the organisation, must be coordinated with the liability regime of the organisational model of reference.[22] For this reason, the establishment of the '*patrimonio destinato a uno specifico affare*' had only been made available for public limited companies. It is therefore no wonder that this option was allowed only for those organisations with a legal status. This occurred, probably, due to the (wrong) conviction that, for its operation, the solution requires a simple reference to a limited liability regime.

The new Third Sector Code has, in relation to this, established a system for the acquisition of legal personality based on the establishment of a minimum capital amount and an adequacy check carried out by a notary.[23] Thus, organisational dynamics are set out, which should prevent the emergence of the typical problems of undercapitalisation.[24]

IV. Conclusions

With the aim of drawing some concluding remarks about the reformer's work, it can be noted that the new organisational structure envisaged by the Third

[22] Among many others, see: F. Di Sabato, 'Sui patrimoni dedicati nella riforma societaria' *Società*, 665 (2002); P. Ferro-Luzzi, 'I patrimoni «dedicati» e i «gruppi» nella riforma societaria' *Rivista del notariato*, 271 (2002); Id, 'La disciplina dei patrimoni separati' *Rivista delle società*, 132 (2002); A. Zoppini, 'Autonomia e separazione del patrimonio, nella prospettiva dei patrimoni separati della società per azioni' *Rivista di diritto civile*, I, 545 (2002); G. Guizzi, 'Patrimoni separati e gruppi di società (articolazione dell'impresa e segmentazione del rischio: due tecniche a confronto)' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 639-655 (2003); B. Inzitari, 'I patrimoni destinati ad uno specifico affare (art. 2447 bis, lettera a, c.c.)' *Contratto e impresa*, I, 164 (2003); P. Manes, 'Sui «patrimoni destinati ad uno specifico affare» nella riforma del diritto societario' *Contratto e impresa*, I, 181 (2003); M. Lamandini, 'I patrimoni "destinati" nell'esperienza societaria. Prime note sul d.lgs. 17 gennaio 2003, n. 6' *Rivista delle società*, 490 (2003); G. Laurini, 'I patrimoni destinati nel nuovo diritto societario', in A. Mascheroni et al, *Destinazione di beni allo scopo. Strumenti attuali e tecniche innovative* (Milano: Giuffrè, 2003), 117; R. Lenzi, 'I patrimoni destinati: costituzione e dinamica dell'affare' *Rivista del notariato*, I, 543 (2003); P. Schlesinger, 'Patrimoni destinati ad uno specifico affare e profili di distinta soggettività' *Diritto e pratica delle società*, 3, 6 (2003); R. Arlt, 'I patrimoni destinati a uno specifico affare: le protected cell companies italiane' *Contratto e impresa*, 323 (2004); F. Fimmanò, 'Patrimoni destinati e tutela dei creditori nella società per azioni' (Milano: Giuffrè, 2008); as well as P. Manes and F. Pasquariello, 'Patrimoni destinati ad uno specifico affare', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna–Roma: Zanichelli, 2013); R. Santagata De Castro, *Dei patrimoni destinati ad uno specifico affare. Art. 2447* bis-*2447* decies (Milano: Giuffrè, 2014); C. Giusti, 'Patrimoni destinati ad uno specifico affare: problemi applicativi e reale agibilità dell'istituto' *Rivista di diritto dell'impresa*, 521-537 (2017).

[23] See: A. Bassi, 'Personalità giuridica' *Vita*, 30 (2017).

[24] On this point: G.B. Portale, 'Capitale sociale e società per azioni sottocapitalizzata' *Rivista delle società*, 3 (1991).

Sector Code requires a thorough investigation in order to establish how much the association or foundation that intends to take on the characteristics of an ETS will retain its 'traditional' functional nature.

It is worth considering the case of the associations that assume the nature of 'philanthropic organizations', in order to provide, for example, investment services (Art 37 of Third Sector Code). In this regard, it is not clear what remains of the traditional associative organizational model. Perhaps a new form of association, based on a new organizational model, emerges.

Ultimately, the government, in the implementation phase of the reform, assumed that the reform of the third sector could not be concluded with the mere intention to make profitability compatible with idealism. The restructuring of the organisational models of Book I of the Italian Civil Code required the role of the models themselves to be checked, so as to ensure the most appropriate regulation for all the interests involved. As highlighted above, in order to guarantee the efficient development of a sector and the correct management of a company, it is not enough to explain the relationship between idealism and profitability through the classic non-distribution constraint.[25]

While we wait to verify the success of the reform in the sector, it is worth highlighting that there are limitations because the regulatory framework has not yet been completely defined. For example, there is the coexistence of two regulations: that of the Civil Code and that of the Third Sector Code. Some, authoritatively, read this fact not as a sign of weakness, but as an incentive.[26] Once again, it is easy to believe that the failure to amend the Civil Code and, therefore, the coexistence of different regulations without coordination, risks generating uncertainty rather than satisfying the 'reorganisation' and 'organic revision' requirements of the regulations in force.[27]

In many key points of the debate, the reformer has limited himself to selecting and recalling rules present in the legal system and extending them to the third sector, entrenching himself behind a judgment of 'compatibility'.[28] All this evokes a hermeneutic intervention, characterised by a careful selective capacity and a systematic approach, without which the results of the application can only be unpredictable.[29]

[25] See: M. D'Ambrosio, 'Lucratività e scopo ideale alla luce della riforma del terzo settore' *Rivista di diritto dell'impresa*, 381-398 (2017).

[26] G. Ponzanelli, n 2 above.

[27] Art 1 legge no 106/2016. On this theme, see the conclusions of E. Quadri, 'Il terzo settore tra diritto speciale e diritto generale' *Nuova giurisprudenza civile commentata*, 708-715 (2018).

[28] Regarding the referral technique as it applies to compatibility, see: A. Alpini, 'Compatibilità e analogia nell'unità del procedimento interpretativo. Il c.d. rinvio «in quanto compatibili»' *Rassegna di diritto civile*, 701 (2016); as well as, more recently, M. Ceolin, 'Il c.d. Codice del terzo settore: un'occasione mancata?' *Nuove leggi civili commentate*, 1-39, 39 (2018).

[29] See: P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 433; Id, 'L'interpretazione

If the ETSs have a new organisational model, different from that of Book I of the Italian Civil Code, and are equipped with a management model designed to manage capital in a way that protects third parties (assuming that this is so), and are structured with a view to managing a business activity (the social enterprise: the new provisions on capital formation, its conservation and responsibility are the direct consequence of the instances of doctrine and case law formulated as a solution to the critical issues raised in the exercise of economic activities), why does the legislator not allow for these entities (associations and foundations) to have an attenuated ability to distribute profits?

As for the organisational forms of associations, if the legislator has not been organic, the interpreter can be. It seems that it is possible to say that there are three types of associations:

1) the unrecognised association;

2) the recognised association (regulation 361/2000);

3) the ETS association (Third Sector Code), where personal participation is no longer recognised, but there is capitalisation (hence the 'legal dedication') in qualitative and quantitative terms predetermined according to the performance of the activity (also economic), with the function of protecting third parties.

If so, is it possible for an ETS association still to be an association in which what is relevant is personal participation?

These are some of the issues on the table; the ball is in the court of the interpreter.

della legge come sistematica ed assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985).