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History and Projects

Italy in Egypt and Historical Influences on Egyptian Codification

Gian Maria Piccinelli*

Abstract

The presence of a large community of Italians in Egypt has assumed a meaningful dimension from the mid-XIX to the mid-XX century. Even if its economic and social profile was generally modest, it succeeded in creating schools, places of worship and meeting attended also by the Egyptian élites and by the members of other nationalities. Particularly appreciated in various professions, the Italians left important traces of their legal culture during the reforms of the Egyptian law after the end of the period of Capitulation system. The creation of the so called 'mixed' and 'national' systems has seen a participation of both Italian jurists and judges. The influence of the doctrine of Pasquale Stanislao Mancini was evident in the formation of the Egyptian private international law. The intensive work of Italian professors and advocates completed the circulation of Italian codification and it strengthened the Euro-Mediterranean legal *koinè*.

I. The First Egyptian Codification

The influence of the civil law model on the legal modernization period in Egypt, which began under Muhammad Ali's reign (1805-1849),¹ was quite clear from its very beginning. The presence of large communities of Europeans, especially Italian, Greek and French people, along with their participation in Egyptian administration, helped the development of that process of modernization.

It is maintained that:

'(T)he transformation from Shari'a law to civil law started with establishing specialized judicial councils in response to Egypt's gradually increasing subjection to international commerce constraints and Western imperialist influence. These judicial councils progressively limited the competence of Shari'a courts in most of the matters unrelated to personal status'.²

It was a process that Egypt, as well as other Arab countries, underwent during

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¹ See C. Chahata, 'Les survivances musulmanes dans la codification du droit civil égyptien' 17(4) *Revue internationale de droit comparé*, 839-853 (1965); F. Castro, 'La codificazione del diritto privato negli stati arabi contemporanei' *Rivista di diritto civile*, I, 387-447 (1985).

² A.A. Alshorbagy, 'On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law' 2 *Indiana International and Comparative Law Review*, 241 (2012).

the 19th century to reform their legal systems, which were mainly based on Islamic jurisprudence (*fiqh*), based on the European civil law model.³

Even though Egypt belonged to the Ottoman Empire, the Ottoman Commercial Code (1850) and the Majallah (1869-1872) were not adopted. Instead, the political leaders of Egypt opted for the drafting of legislative instruments imbued with Napoleonic tenets and principles.

Clearly, it has been highlighted that:

‘(I)n countries like Egypt, the Europeanization of law involved two separate, though overlapping, developments. First, governments restructured their legislative, administrative and judicial sectors. Second, they applied codes of statutory law, which were published in a national gazette and administered by a centralized court system’.⁴

The need to overcome the system deriving from the Capitulation treaties, entailing the existence of several foreign consular jurisdictions in matters involving foreign citizens, was the main reason to found a new Egyptian legal order.

The work carried out starting from 1869 by the then Foreign Minister of Khedive Isma’il, the Christian Armenian Nubar Pasha, resulted in an agreement which was signed by the seventeen capitular states settled in the country. The convention established the Mixed Courts, with the aim of overcoming the distortions of consular justice and involving the participation of judges belonging to each of the European powers in Egypt. The Mixed Courts would have unitary authority in disputes both between foreign citizens and between foreigners and Egyptians.

A new set codes were developed specifically for the new tribunals. The task was delegated to the French lawyer Jacques Maunoury who, in less than two years, developed six projects related to civil, commercial and maritime commercial matters, along with civil and commercial procedure, and the penal code and procedure.⁵

³ See G.H. El-Hahal, *The Judicial Administration of Ottoman Egypt in the 17th Century* (Minneapolis: Bibliotheca Islamica, 1979); H. Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994); N.J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (New York: Cambridge University Press, 1997); R. David and J.E.C. Brierley, *Major Legal Systems in the World Today* (London: Stevens, 3rd ed, 1985), 77 confirm the influence played by Italy and France legislation of the North Africa and Mediterranean Countries.

⁴ C.B. Lombardi and N.J. Brown, ‘Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law’ 21 *American University International Law Review*, 387-388 (2006).

⁵ As the 1875 Egyptian codification plan is concerned, see F. Castro, ‘Sistema sciaraitico, *siyàsa shar’iyya* e modelli normativi europei nel processo di formazione degli ordinamenti giuridici dei Paesi del Vicino Oriente’, in A. Bausani and B. Scarcia Amoretti eds, *Il mondo islamico tra integrazione e acculturazione* (Roma: Istituto di Studi Islamici, 1981), I, 165-202; Id, *Il modello islamico*, in G.M. Piccinelli ed (Torino: Giappichelli, 2007), 121-126.

The promulgation took place on 28 June 1875, together with the establishment of the Mixed Courts that were introduced on 1 January of the following year, when the mixed codification became effective.

Later, in 1883, six more codes, called the National Codes, were enacted homologous to the previous ones aiming to regulate the legal relationship among Egyptians.

It is said that:

‘(T)he dualism so established was apparently viable as long as there were distinct courts applying the two systems, which by their very nature, were opposed both in principle and method – one based on comparative law and human reason and the continually subject to change, while the other is based on premises of authority and faith and is by definition unchangeable’.⁶

The Mixed Civil Code followed the Napoleonic model, only with some reductions and the exclusion of family and inheritance legislations (*al-ahwàl al-shakhsīyya*) which continued to be entrusted to the sharia courts and their procedure, which were reformed on the same occasion.⁷

As far as the Mixed Commercial Code was concerned, it was mainly conformed to the Ottoman legislation which in turn had been modeled on the first and third books of the *Code de Commerce*, leaving maritime commerce out of the Code. For these matter, Maunoury resorted to the Ottoman Code of Maritime Commerce, for it seemed to have filled the gaps which were present in the French model.⁸

It is worth remembering briefly that, together with the mixed codification that solved, at least partially, most of the contradictions of consular justice according to the Capitulation system, the project of writing the Code of Personal Status (1875),⁹ was assigned to Muhammad Qadri Pasha (1821-1888). The work *al-Ahkàm al-shar’iyya fi-l-ahwàl al-shakhsīyya*, or the personal status code for Muslims, responded both to the informational needs of the Mixed Courts and to its application by reformed sharia tribunals. The project was completed

⁶ See R. David and J.E.C. Brierley, n 3 above, 478.

⁷ L. Abu-Odeh, ‘Modernizing Muslim Family Law: The Case of Egypt’ 37 *Vanderbilt Journal of Transnational Law*, 1075 (2004) describes this system saying that ‘(T)he Codes applied in the national courts were very similar to those of the Capitulatory courts, with the exemption that some Taqlid rules (ie traditional rules copied from Islamic legal schools) were included. As a result of the establishment of the national court system, the qadi in Taqlid courts saw themselves overseeing an even more contracted jurisdiction, namely, that of the family (marriage, divorce, inheritance, and wills) and waqf (charitable institutions)’.

⁸ See D. Palagi, *Le code de commerce maritime mixte commenté par la jurisprudence de la Cour d’Appel Mixte* (Alexandrie: W. Morris, 1929), 146.

⁹ F. Castro, ‘Muhammad Qadrî Pascià (1821-1888): giurista e statista egiziano. Primi appunti per una bibliografia’, in B. Scarcia Amoretti and L. Rostagno eds, *Yād-Nāma. In memoria di Alessandro Bausani* (Roma: Bardi Editore, 1991), I, 161-165.

very quickly and by 1875 it had already been translated into several languages, including Italian. Despite its importance for the new direction taken by the legal system in Egypt, the Code was never promulgated and maintained a semi-official nature. Its role consisted in a sort of *Restatement* of the personal status code which, however, became the precondition of the subsequent 1920 legislation, as well as of the broader one passed in 1929.¹⁰

The purpose was not to reform the law in force at the time, but merely to make it more easily available for the judges of the new Mixed Courts and the judges dealing with personal status issues.¹¹

David and Brierley claim that there was a ‘consolidation’ of the personal status legislation. They explain that there was a strong interest to start such a project since it would have organized and, somehow, synthesized the many and unclear or vague works available in Arabic, that was not easily comprehensible in all Muslim countries. The conservative part of the Muslim Egyptian society was conscious of the risk of simplification of the law and of the possibility of access to the courts; indeed,

‘it was only very recently that the authorities have been allowed to legislate on questions of *statut personnel* and public benefactions, even though they aspired to nothing more than setting down rules which had already been admitted’.

They add,

‘(a) dichotomy began to develop between Sharia courts, which continued to apply mostly non-codified Sharia, and the national and mixed courts, in which judges with civil legal training applied western-inspired codes’.¹²

¹⁰ L. Abu-Odeh, ‘Modernizing Muslim Family Law: The Case of Egypt’ 37 *Vanderbilt Journal of Transnational Law*, 1102 (2004). See J.J. Nasir, *The Islamic Law of Personal Status* (London-Boston: Graham and Trotman, 1990), 35-36 reporting that: ‘The eminent jurist Muhammad Qadri Pasha compiled in 1893 *The Sharia Provisions on Personal Status*, a book of 646 articles on marriage, divorce, gift, interdiction, wills and inheritance, all based on the Hanafi doctrine’; see also D. Sudqi El Alami and D. Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London-Boston: Kluwer Law International, 1996), 51.

¹¹ See K.A. Stilt, ‘Islamic Law and the Making and Remaking of the Iraqi Legal System’ 36 *George Washington International Law Review*, 731 (2004). These personal status cases ‘were usually the last remaining type of case to be heard in Sharia courts before their dissolution, which, in Egypt, occurred in 1955’. The civil courts increasingly took over jurisdiction from the Sharia courts, which, by 1880, had jurisdiction only over personal status, succession, religious endowments, gifts, and homicide. When law no 462 of 1955 on the dissolution of the Sharia and confessional courts transfer the complaints that would be heard before them to the national courts, and Art 1 abolished the Sharia courts in Egypt, personal status cases would be decided by an *ad hoc* division of the national courts.

¹² See R. David and J.E.C. Brierley, n 3 above, 476-477: ‘Codes on *statut personnel* prepared by Kadri Pasha in Egypt (...) are still no more than private works, although their scholarship and strict conformity to the orthodox point of view have generally been recognized’. The Authors

The Egyptian law and that of other countries with an *hanafi* tradition would explicitly refer to Qadri's work for a long time in case of gaps in the law and if there were doubts about interpretation.

Towards the end of 1880, five years after the Mixed Courts were established, the Egyptian government appointed a commission charged with drafting the reform of the judiciary for the Egyptians.

The nationalists wanted these reforms to do away with the Mixed Courts, which they considered an affront to Egyptian sovereignty, and to replace them with a single judiciary which would have absorbed the disputes between foreigners. The publication of the six new codes elaborated in 1881 was sped up since they were to become effective before the intervention of Great Britain in Egypt due to the Sudanese issue. This happened by blocking at the same time a reform inspired to the French model and by introducing common law elements, foreign to the Egyptian system. The National Civil Code became effective on 28 October 1883, while the others followed on 13 November 1883. The last day of the same year, Khedive Tawfiq inaugurated the Court of Appeals and Cairo's Court of First Instance.

In the National Codes preparatory committee, some European jurists working in Egypt were summoned, among whom, besides the French Vacher and the Englishman Low, was the Italian Giuseppe Moriondo, who was charged with working on civil codes and procedure. Among the members, there was also former Justice Minister, Muhammad Qadri Pasha, who not only collaborated with Moriondo, but also specifically dealt with commercial codes.

In addition to the French Code, the authors took inspiration from Italian and Belgian law, and, in some cases, even from Muslim law, due to some influence drawn from the codification of Sharia done by Qadri Pasha.¹³

As adopted, the reform maintained both the two judiciaries and the twelve Codes. Their unification only took place in 1949, twelve years after the 1937 Montreux Convention.

II. The Influence of the Italian Post-Unification Model

The mixed codes system, at first, and then the national codes system, continued to be strongly inspired by the correlated French texts. The presence of Italian jurists and the participation of Italy in the negotiations for the creation of the Mixed Courts, however, allowed Italians to influence some particular institutions' codification, as noticeable considering the debate and the state of progress of national legislation.

add that: 'Major reforms have taken place in Egyptian law on the subjects of *ab intestato* succession and public benefications, although not in form of codes'.

¹³ M.Z. Garrana and H.A. Boghdadi, 'Notizie storiche e sistematiche sul Diritto Civile Egiziano' *Annali di diritto comparato e di studi legislativi*, 17 (1935).

In order to understand the influence of the Italian model in Egyptian codes, it is useful to look at the two Parliamentary reports presented by the then Foreign Minister Pasquale Stanislao Mancini¹⁴ on the eve of the initiation of the first mixed codification and the subsequent national codification.

On 20 March 1875, Mancini presented to the House of Representatives the Parliamentary committee's report that was in charge of examining the draft amendment of consular jurisdiction in Egypt.¹⁵ This was a report that he himself took up again in his study concerning the Judicial Reform in Egypt (published in Rome in 1876), by not only focusing on problems of a judicial and trial nature, but also by proceeding with an accurate presentation of history, of circulation of legal models and of the regime of some legal institutions provided for by the mixed Egyptian codes.¹⁶

The new mixed legislative body was made up of six codes followed by a Judicial organisational regulation: Civil Code, Commercial Code, Maritime Commercial Code, Civil and Commercial Procedure Code, Penal Code, Criminal Instruction Code. As previously mentioned, all of these were inspired by the Napoleonic codification model with some variations due to some reforms that had already been carried out by some European states¹⁷ and deeply examined by Mancini.¹⁸

¹⁴ For his biography, see I. Birocchi et al eds, *Dizionario biografico dei giuristi italiani (XII-XX secolo)* (hereinafter DBGI) (Bologna: il Mulino, 2013), 1244.

¹⁵ Camera dei Deputati, *Atti parlamentari, Sessione del 1874-1875, doc no 88-A, Relazione della Commissione*, 53 (the Committee was made up of the following Representatives: Mancini (president and rapporteur), Sormanierbi, Miceli, Lacava e Pierantoni) about the draft law presented by the Foreign Minister in cooperation with the Minister of Justice on 13 February 1875 session; 20 March 1875 Session (hereinafter, 1875 Report). The collection of diplomatic documents is important (in one of the so-called House of Representatives' Green Books) presented, also in 1875, by the previous Foreign Minister Visconti-Venosta together with the draft law about Egyptian Reform: Camera dei Deputati, *Atti Parlamentari, Sessione del 1871-1875, doc no 63, Documenti diplomatici concernenti la riforma giudiziaria in Egitto presentati dal Ministro degli Affari Esteri (Emilio Visconti-Venosta) nella tornata del 26 gennaio 1875* (Diplomatic documents concerning judicial reform in Egypt and presented by the Foreign Minister (Emilio Visconti-Venosta) in 26 January 1875 Session), 256.

¹⁶ For the study of the circulation of national and mixed Egyptian codes, it would be extremely interesting to consult the unobtainable E. Marinetti, *Concordanze tra i codici egiziani civile, commerciale, marittimo ed i codici francesi e italiani* (Alexandria, 1876). Very useful, J. Aziz, *Concordance des Codes égyptiens mixte et indigène avec le Code Napoléon, (I. Code Civil; II. Code de commerce)* (Alexandrie: Penasson, 1886-1889). This last book shows, in particular, that some Egyptian rules, as we will see, are original compared to the French model. Still, the possible source is not mentioned, except some reported rules of French special laws in the appendix to the first volume, which have perhaps represented the model for some parts of the Egyptian codes. As concerns the spread of French model in Europe, it is useful to refer to A. De Saint-Joseph, *Concordance entre les Codes Civils étrangers et le Code français* (Paris: Cotillon, 1856), and Id, *Concordance entre les Codes de commerce étrangers et le Code de commerce français* (Paris: Cotillon, 1844) (this one has also been translated into Italian, *Concordanza fra i codici di commercio stranieri ed il Codice di commercio francese* (Venezia: Tip. di Pietro Naratovich, 1855)).

¹⁷ See 1875 Report n 15 above, 38-48.

¹⁸ The project for that code was written by the French Maunoury and then revised by the

In the original text, the regulation established three courts of first instance (Alexandria, Cairo and Zagazig) and a Court of Appeal in Alexandria. Each court was made up of seven judges, among whom four were foreigners and three were Egyptians. The Court of Appeal was made up of eleven judges, and seven of them were foreigners. A foreign Magistrate was eligible by statute to the Presidency and was nominated by the Court itself, within the majority. The Egyptian Government elected the judges, while as concerned foreigners, the respective governments' input was also required. Once appointed, judges were non-removable and could not practice any other profession. The competence of the mixed Courts included civil and commercial disputes between Egyptians and foreigners and between foreigners of different nationalities, except those matters concerning personal status and inheritance, while questions concerning state properties were excluded, as well as those concerning the interpretation and execution of an administrative action.

The new judicature had to apply codes and laws that were supported by the Egyptian Government. Its official languages were Arabic, Italian and French.

Compared to the French Civil Code, the mixed civil one,¹⁹ made up of seven hundred sixty-nine articles, lacks books concerning persons, family and legal and testamentary inheritance (which represent the personal statute, *al-ahwàl al-shakhsyya*, and continue to be under the authority of the sharia judges) and lacks articles concerning state property and religious establishments (*waqf*).

Other changes concern the classification of goods into four species: free property goods (*mulk*); dead hand goods or *waqf* collected goods; taxation goods or *kharàjì* (state goods that are granted in usufruct to private parties according to some conditions provided for in specific instructions); and free or vacant goods (*mubàh*). What was differently regulated, compared to the French Code, was the property for a discovered treasure (Arts 81-82), accession of goods (Art 92), and testimonial evidence (Arts 285 et seq). The regulatory principles concerning bonds are simplified, whereas the rules regulating trials of invalid contracts were modified. The number of credits on which it is possible to register privileges was restricted.

Changes were not always drawn from the European codes: some rules were clearly taken from Islamic law since it is evident that their 'use is entrenched in the history of Egypt', as in the case of *shufa*, a pre-emption right to land.²⁰

However, what is particularly relevant here are the rules that Mancini explicitly declared were taken from the Italian Civil Code (1865) in force at the

International committee which was established *ad hoc*.

¹⁹ *Shufa* is a 'preference made in favour of a landowner when plantations are purchased and constructions are made on that land with his permission; preference made in favour of the undivided co-owner; preference in favour of the closest owner'. See D. Santillana, *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita*, I, (Roma: Istituto per l'Oriente, 2nd ed, 1938), I, 393-400.

²⁰ See 1875 Report n 15 above, 40.

time. First of all, according to Mancini, legal easement of aqueducts (ie the right to request that water necessarily transits through intermediate lands for irrigation and industrial use) would pass onto the Egyptian project, something that the Italian Code, in turn, had taken from the Kingdom of Sardinia Code of 1837 and which was, in turn, taken from the old cities' statutes in Lombardy.²¹

However, as shown by an examination of the law, al-Sanhuri's thesis²² should be accepted, since he considers this subject completely borrowed from Islamic Law. Still, it is also possible that a formulation of our 1865 Code has been used for a functionally identical legislation that is present in the Hanafi School.

On the other hand, Mancini²³ inserted easements where there were gaps in the Egyptian code,

'The legislation of which does not make any distinction between legal easements or those deriving from the locations and the conventional ones and, among the latter, between the easements that can be purchased with long possession necessary for prescription (continuous and apparent) and those requiring a title to be purchased (discontinuous).²⁴ No regulation controls the owners' consortia for waters use, particularly for irrigation. The easement of the forced passage of water on other people's lands (art 52) seems to be restricted only to the water required, while wider is the proportionality of phrases used by arts 538 and the following ones in the Italian Code'.

Therefore, Italian influence on this subject (if there has been one) does not seem to have been very strong. Rather, the very use of the adjective 'necessary', which is identified in the Islamic legal doctrine on the legal easement of aqueduct,

²¹ A. Sanhoury, 'Le droit musulman comme élément de refonte du code civil égyptien' *Recueil E. Lambert* (Paris: Librairie générale de droit et de jurisprudence, 1938), 621-643. See also F. Castro, 'La codificazione' n 1 above, 399-400 and Id, 'Abd al-Razzàq Ahmad al-Sanhuri (1895-1971): primi appunti per una biografia', in Id et al, *Scritti in onore di F. Gabrieli nel suo LXXX compleanno* (Roma: Università di Roma 'La Sapienza', 1984), 1-38. Concerning easement in Islamic Law, see D. Santillana, n 19 above, 382-386 and 453-465.

²² As concerns international laws on inheritance in the 1865 Italian Civil Code and the role played by Mancini for their processing, see A. Migliazza, 'Successioni (Diritto internazionale privato)' *Novissimo Digesto Italiano* (Torino: UTET, 1971), XVIII, 862-893, in particular 864-867.

²³ See 1875 Report n 15 above, 42.

²⁴ See D.E. Stigall, 'The Civil Codes Of Libya And Syria: Hybridity, Durability, and Post-Revolution Viability in the After-Math of the Arab Spring' 28 *Emory International Law Review*, 297 (2014) who affirms that: 'The Egyptian Civil Codes adopted their concept of prescription from French law, treating it as a means of acquiring ownership rights. Although the concept existed in Islamic law, it was conceived of as a bar to actions against the adverse possessor and not as a means of acquiring property rights. Yet the period of possession prescribed in the codes as a prerequisite to the acquisition of such rights was taken from Islamic law, not the French Code'. See also R.A. Debs, *Islamic Law and Civil Code: The Law of Property in Egypt* (New York: Columbia University Press, 2010), 92, and F.J. Ziadeh, 'Property Rights in the Middle East: from Traditional Law to Modern Codes' 8 *Arab Law Quarterly*, 3, 4 (1993).

would support Sanhuri's argument.²⁵

What is evident, however, is the Italian origin of the legislation (of private international law) of inheritance (Arts 75-77). The criteria for inheritance found in Arts 8 and 9 of the Italian Code's preliminary regulations, which were in force at the time, had been adopted. These regulations referred exclusively to the 'national law of the person whose inheritance is discussed, whatever the nature of the goods is and in whatever country they are.' Only one exception has been introduced in the Egyptian code as concerns *waqf* and *kharaji* goods, which are instead ruled by local law. Therefore, it is clear that these rules originated from Mancini's doctrine, as they are different from those belonging to the Napoleonic Code, which included a law applicable to people and personal properties, based on the criterion of connection to the deceased's last residence, and another one applicable to real estate concerning which the law identified according to the *lex rei sitae*'s principle²⁶ was used. In any case, it is clear that the acceptance of the criterion regarding nationality taken from the Italian code permitted the same laws implemented by consular courts to continue to be implemented in the case of foreigners' inheritance. An adjournment according to the French system would lead, in most cases, to the application of personal status according to Islamic law that regulated and still regulates this matter in Egypt, but which was unacceptable to the European powers at the time.

The influence of a solution that the Italian Civil Code of 1865 had already adopted (preliminary provision, Art 8) – which can be identified only in the two private international law rules (Arts 77-78, mixed Civil Code) dealing with inheritance that are also inspired to Mancini's proposals – enables to adopt the national law on the deceased as the only connective criterion, by overcoming the traditional law adjournment of the last domicile of *de cuius* and *lex rei sitae*.

Another innovation, in relation to limitation periods, would have derived not so much from the Italian 1865 Civil Code system, but rather from Italian doctrine: an innovation that, according to our report, has been already 'claimed within the Committee in charge of the last Italian Civil Code review'.

Compared to the French and Italian codes, those limitation periods seem to be reduced from ten-year and thirty-year, as they were in Roman law, to half as much, that is to five and fifteen years respectively.²⁷

²⁵ See also J. Aziz, n 16 above, 27, which clearly shows the separation of the text of Egyptian Art 54 (that is Art 52 that Mancini refers to) from Art 640 of Code Civil, in which only water transit is discussed, '*qui en découlent naturellement sans que la main de l'homme y ait contribué*' ('flowing naturally from it without any interference by human hand').

²⁶ For propriety and law limitation, see Arts 102-116 of mixed Civil Code. For bonds, see Arts 268-277.

²⁷ A confirmation to Mancini's thesis may be found in the realization according to which Islamic judges, in general, deny the possibility that a bond can be discharged through limitation, on the basis of a *hadith* attributed to the Prophet: 'the right of a Muslim does not die out for time progress' (Al-Tasùli, comment on *Tuhfat al-hukkâm* by Ibn 'Asim, II, 12). Still, limitation

Even here, Al-Sanhuri²⁸ asserts that these limitation periods (that according to him prove to be reduced compared to the French Code) derive from the Islamic Law, in which, however, the limitation (seen as discharge of the right to take legal action) requires different times according to the different schools and depending on the institutions it is applied to, without any possibility of finding a uniform regulation that must have affected the Egyptian Code. The Ottoman *Majalla* fixed different terms, fifteen and thirty-six years respectively.²⁹

Therefore, we must agree with Mancini who points out how

‘time periods of ten- and thirty-year limitation, adopted by French and Italian codes exactly as they were in the Roman Law, when steam and electric system communications were not so easy and fast, are reduced in half, that is five years in favour of a third party owning title, and fifteen years for the owners who do not possess title (Arts 102 and 275). The five-year limitation is adopted also for taxes, rents and annual performances, and the shorter one, lasting one year for doctors, tutors and professors’ fees, due to expenditure acts for court ushers and chancellors (why not adding fees for lawyers?) and for merchants’ supplies (Arts 277 and 278)’.³⁰

It is interesting to point out that the brief aside concerning lawyers’ fees seems to have found acceptance in Art 209 of the National Egyptian Civil Code (which corresponds to Art 273 of the mixed code), perhaps due to the attention arisen by the report in the international judicial environments, so much so that it was translated into French on orders of the Egyptian Government itself.³¹

The (mixed) Commercial and Maritime Commercial Codes correspond exactly to the conforming Ottoman Codes (1850 and 1863 respectively), whose model,

established itself in the procedure, through the explanation that it concerns not so much time progress, but the owner’s quitclaim through inactivity for an extended period.

According to the Maliki doctrine, immovable limitation lasts ten years, while movable things last one or two years (though it has been raised to ten between relatives and co-owners). Different terms are applied to pre-emption right to land (ten years), deposit (ten years), action statement for injury between co-owners (one year) and for credits not represented by a written title (sixteen or twenty years). Moreover, according to this school’s influential opinion, the extinctive limitation should be ‘transmitted, case by case, to the judge’s prudent will, who will have regard for the several circumstances of time, person, nature’. See D. Santillana, n 19 above, 271-278 and 110-111.

²⁸ See F. Castro, ‘La codificazione’ n 1 above, 400.

²⁹ The *Majallat al-ahkâm al-‘adliyya*, also called ‘Ottoman Civil Code’ since it tried to gather the main *Hanafi* legal doctrine on obligations and contracts, was issued between 1869 and 1876 and adopted in all Ottoman Empire territories. An English translation of this code is available at <https://tinyurl.com/y975ec8s> (last visited 30 June 2018).

³⁰ See 1875 Report n 15 above, 42.

³¹ *Relazione della Commissione parlamentare al disegno di legge di proroga al 31 gennaio 1882 dell’introduzione della riforma giudiziaria in Egitto*, presented at the House of Representatives on 1 February 1881 session (Parliamentary Minutes, 14th Legislation, First Session, 1880, Doc no 156-A, 2).

in turn, was the 1807 *Code de Commerce*, whose second book on Maritime commerce, however, had been integrated and updated and represented a separate code.³² Moreover, the other three codes, that is the Civil Procedure Code, the Commercial Procedure Code, and the Penal and Criminal Instruction Codes (mixed), do not detach themselves from the already tested, though at times incomplete, French model, except for a few changes.³³

With regard to the 1883 Commercial Code, which remained in force with numerous amendments and integrations until 1999, the most relevant change compared to the French model is constituted by Arts 2 and 3 (corresponding to Arts 632 and 633 of the *Code de Commerce*) that list the acts of commerce without any reference to the commercial jurisdiction as in the French system. This change was inspired by the Italian Commercial Code of 1865 according to which acts of commerce were regarded as the mandatory objects of an entrepreneurial professional activity. This model was followed by all of the Arabic Commercial Codes enacted afterwards.

The National Penal Code, after a period where its enforcement was contentious, was amended in 1904, drawing inspiration not only from its French counterpart but also from the Italian, Belgian, Indian, Sudanese, German, and Dutch Criminal Codes. The system of preparatory instruction, based on principles of the separation of the power to charge the suspect and the powers of instructions,³⁴

³² As concerns the Ottoman Commercial Code, F. Castro, 'La codificazione' n 1 above, 393-394 remembers that the Committee (in charge of drawing up the code text) by showing the awareness of gaps inside the second book of French Code de commerce, which had not been recognized by the time of the first commercial coding and which reproduced, often *ad litteram*, the old 1681 navy decree, integrated the French legislation, by inserting, in the system of Code de commerce's second book, materials taken from the commercial codes of Holland (1837), Spain (1829), Portugal (1833), the Kingdom of the two Sicilies (1819) and the Kingdom of Sardinia Commercial Code (1842), as well as, on the subject of passenger transport, from *Allgemeines Landrecht für die Königlich-Preussischen Staaten* (1794), which had already been replaced in Germany by 1861 *Allgemeines Deutsches Handelsgesetzbuch*.

³³ In fact, Mancini critically points out, 1875 Report, n 15 above, 43-44, that the 'Penal code is the one in which, while a huge progress is reached for the current repressive practices in Egypt, the legislator has less dared detach from the not so admirable French model as concerns general rules, crime classification, sentence severity and capital punishment frequency'.

Compared to that model, the main variations introduced in the Civil and Commercial Procedure Code concern: decision oath, witnesses' examination and testimonial evidence admissibility, the possibility given to the court to transfer elsewhere (in serious cases) the trial location, appeal proposition limits, the introduction of the condition of reciprocity for the execution of foreigners condemned in Egypt. In the Penal Code Mancini, who is one of the main supporters of the abolition of capital punishment (see his *Abolizione della pena di morte* (Roma: Tip. dell'Opione, 1873) and *Sommi lineamenti di una storia ideale delle penalità e problemi odierni nella scienza e nella codificazione*, (Roma: Tip. dell'Opione, 1874), regretfully underlines that death penalty is kept, though with some remedies and temperaments. However, these are regulations that, because they are introduced to make its application and execution rare, would be vainly looked up even in the codes of the most civilized and human countries where people still don't have courage to give up the immoral and apparent gallows protection.

³⁴ C. Claro, 'Législation pénale de l'Égypte de 1883 à 1897' *Revue pénitentiaire*, 586-591 (1898).

did not meet Egypt's needs because the preparatory instruction on the part of the instructing judge seemed to delay the course of justice.³⁵

Another interesting (and final) moment of the report is the presentation, by Mancini, of the new Egyptian mixed codes' omissions. This analysis was extremely important, particularly for the immediate and wide circulation registered by Mancini's report (which was translated into French on orders of the Egyptian government itself) both in Italy and abroad.

Referring to the mixed Civil Code, Mancini shifted his attention to the book about property, in which he deemed the rules governing the easements, ownership and business management 'insufficient',³⁶ while the rules governing donations suspension causes, emphyteusis and aleatory contracts were completely lacking.³⁷

To be added, instead, (in imitation of Arts 6-12 of the Italian Civil Code, preliminary dispositions) would be private international laws, which would not deal with subjects like private property negotiations, or contracts among living people and bond verification tools.

It is worth mentioning, according to a very authoritative doctrine, that the Egyptian Civil Code enacted in 1949 – as the result of the unification of mixed and national justices – draws also on the French-Italian draft Code of Obligations

³⁵ See A. Badaoui, 'Les problèmes juridiques de l'Égypte contemporaine' 26 *L'Égypte contemporaine*, 373 (1935).

³⁶ In fact, as concerns this subject, the only presence of Art 207 seems to be 'dangerous', since it too much generically orders that 'anyone who intentionally procures a benefit to another person has got the right to get, from the latter, the percentage of the loss suffered until the achieved benefit'. See 1875 Report n 15 above, 42.

³⁷ Perhaps, the elimination of these was intentional in connection with the Quranic prohibition as concerns *gharar* (risk). Another rule that has been doubtless influenced by Islamic law is the one concerning legal interest (*ribà*), whose measure is left to the judge's evaluation (who has, then, the possibility of cancelling it in the disputes among Muslims) within the maximum established by the legislator. See, among the others, M. Rodinson, *Islam e capitalismo. Saggio sui rapporti tra economia e religione* (Torino: Einaudi, 1968), 168; M. Daoualibi, 'La théorie de l'usure en Droit Musulman', in Id et al, *Travaux de la Semaine Internationale de Droit Musulman* (Paris: Sirey, 1953), 139-157; N. Cagatay, 'Ribà and Interest Concept and Banking in the Ottoman Empire' *Studia Islamica*, 53-68 (1976).

Since the early 20th century, there has been a strong debate in Egypt on bank interests' legitimacy, from the Islamic point of view, after a famous *fatwà* declared in 1903 by Muhammad 'Abduh (b. 1849 – d. 1905, *mufthi* of Egypt since 1899). If we make a distinction between usury interest – typical of pre-Islamic era – and 'participation to profits of a legal deal', he considered bank interest legal, provided that it had the same value as a dividend or gain derived from savings bank general management profits. On this basis, a 1904 *khedivial* decree allowed the Post Administration to create some special windows that worked as savings bank where every depositor, at the moment of deposition, signed a proxy authorizing 'the Administration to use the deposited funds (...) in all the ways allowed by *shari'a*, except for any form of usury (...) and to pay yearly the *dividends* deriving from this commitment'. This *fatwà* was remarkably carried on also in other Arabic countries that were looking for a legitimacy of financial models accepted by European countries. For an overview of the different positions within last century's Islamic doctrine, see Y. Al-Qaradawî, *Fatàwà al-bunùk hiyya al-ribà al-haràm* (Bank Interests are the forbidden *riba*), (Al-Qàhira: Dàr al-Sahuwa, 2008). See, in general, G.M. Piccinelli, *Banche islamiche in contesto non islamico* (Roma: Istituto per l'Oriente, 1996), 12.

of 1928 and the 1942 Italian Civil Code. For instance, the doctrine of the collapse of the basis of a transaction was not accepted by the French but was adopted by the Italian Civil Code.³⁸

III. The Reasons: The Italian Community in Egypt

Since the beginning of 19th century, there was an increasing number of people moving from Italy towards the main cities of the Southern Mediterranean. This was at the beginning of the history of Italian emigration, but some important communities had already begun to establish themselves, particularly, in Tunis and Algiers or, further East, in Smirne, Constantinople and Alexandria in Egypt.³⁹

Later, a different kind of migration started to consolidate, made up of fortune-seeking farmers and craftsmen, Jewish traders keeping close relations with the respective communities in Italy, and professionals – mostly doctors, engineers, architects and lawyers – in search of new frontiers.⁴⁰

The Italian community in Egypt, which had a little less than seventeen thousand members between 1870 and 1880, grew considerably, reaching more than sixty thousand people at the threshold of the Second World War, ranking second only to the Greek community.⁴¹ Mainly concentrated in Alexandria and Cairo, Italians founded their own schools,⁴² places of worship and meeting, while keeping a general economically and socially modest profile.⁴³

³⁸ K. Zweigert and H. Kotz, *An introduction to Comparative Law* (Oxford: Clarendon Press, 3rded, 1995), 110.

³⁹ Among the many studies on Italian emigration in the Mediterranean and towards North Africa, see P. Bevilacqua, A. De Clementi and E. Franzina, *Storia dell'emigrazione italiana. Partenze* (Roma: Donzelli, 2001), and in particular the essay by P. Corti, 'L'emigrazione temporanea in Europa, in Africa e nel Levante', 213-236; R. Romano and C. Vivanti, *Storia d'Italia* (Torino: Einaudi, 1972), IV, 553-556. Also a recent documentary has gathered and presented several testimonies and documents of the contribution of Italian Community to Egyptian history: *Gli Italiani d'Egitto*, by R. Di Marco, directed by film-maker Sharif Fathy Salem, 2010. See M. Ersilio, *Esuli italiani in Egitto. 1815-1861* (Pisa: Domus Mazziniana, 1958).

⁴⁰ See F. Cresti and D. Melfa eds, *Da maestrato e da scirocco: le migrazioni attraverso il Mediterraneo (Atti del convegno, Facoltà di scienze politiche, Università di Catania, 23-25 January 2003)* (Milano: Giuffrè, 2006). See also *Annuario statistico della emigrazione italiana dal 1876 al 1925, con notizie sull'emigrazione negli anni 1869-1875*, (Roma: Commissariato Generale per l'Emigrazione, 1927); *L'emigrazione italiana dal 1910 al 1923* (Roma: Commissariato Generale per l'Emigrazione, 1926), 692.

⁴¹ See M. Petricioli, 'The Italians in Egypt (1936-1940)', in M. Petricioli and A. Varsori eds, *The Seas as Europe's External Borders and their role in Shaping a European Identity* (London: Lothian Foundation Press, 1999), 123-133; Id, *Oltre il mito L'Egitto degli Italiani (1917-1947)* (Milano: Mondadori, 2007).

⁴² M. Petricioli, 'Italian Schools in Egypt' 24 *British Journal of Middle Eastern Studies*, 179-191 (1997).

⁴³ Many documents certify the humble condition of most of the Italians, particularly in Cairo where, at least until 1890-1891, we mainly register temporary migrations from the South of Italy, linked to services in public inns: see *Emigrazione e colonie. Rapporti dei RR. Agenti diplomatici e consolari pubblicati dal R. Ministero degli Affari Esteri* (Roma: G. Bertero National

With the passing of time, the Italian community grew in status. For example, a great number of engineers and workers were in Egypt following the realization of the Suez Canal project (started in 1846 and signed by engineer Luigi Negrelli, but later realized by the French Ferdinand de Lesseps who took all the credit for it), and the building activities of the most relevant Egyptian infrastructures until the construction of the Aswan Dam.⁴⁴

The *khedivial* decree, dating 14 May 1876, appointed Senator Antonio Scialoja⁴⁵ as the first President of the Treasury Superior Board, which he was responsible for founding by himself together with the Public Debt Fund. Under his leadership, the English G. Goschen and the French E. Joubert also worked with him and they carried the tasks on after Scialoja left.⁴⁶

The increasing mobility of scholars and professors, especially in the early 1900s, extended the Italian commitment to culture and teaching. King Fouad appointed the Arabist Eugenio Griffini Bey (died 1924) as responsible for the Court Library, a role that was traditionally reserved for Arabs.

Ultimately, trade and its relative legal terminology are incontrovertible evidence of the active Italian influence in Egypt. In *L'arabo parlato in Egitto: grammatica, dialoghi e raccolta di circa 6000 vocaboli*, published in 1900,⁴⁷ we find, for example, that 'contract' (the Italian *contratto*) is *kuntratu*, the word used for 'bill of exchange' is *kambyàla* (that is *cambiale* in Italy), and *birutistu* stands for 'protest' (from *protesto*), while *bùlisa* (from *polizza*) is used per 'insurance policy'.

IV. Italians as Lawyers and Judges

As we have seen, the presence of Italian lawyers in Egypt had been certified since the early 19th century. By considering the fragmented pre-unitary judicial reality, names and origins show that the profession mainly concerned consular

Tipography, 1893), 216-245. Moreover, diplomatic documents inform the Italian Government that often 'native people are already badly impressed by Italians because of the poorly admirable example given by our migrants who are largely very miserable and not always exemplary' (*I documenti diplomatici italiani*, by the Commission for diplomatic documents release (Roma: Government General Library, 2000), 56). The Emigration General Committee itself, by editing in 1926 the report on *L'emigrazione italiana dal 1910 al 1923* n 40 above, 694, highlights that 'most of the Italian community in Egypt lives with an under-waged or domestic job'.

⁴⁴ Among the architects who were particularly active during the first half of the 20th century, we can mention Enrico Verrucci-Bey and Gennaro Scognamiglio. The first, in particular, worked for the construction and repair of many royal sites, among which the Montazah Royal Palace in Alexandria together with the realisation of a high tower modelled after the Mangia Tower in Siena. See M. Awad, *The Presence of Italian Architects in Mediterranean Countries* (Roma: Carucci, 1987).

⁴⁵ See DBGI n 14 above, 1833.

⁴⁶ M. Awad, n 44 above, 60-61.

⁴⁷ C.A. Nallino, R. De Sterlich and A. Dib Khaddag, *L'arabo parlato in Egitto: grammatica, dialoghi e raccolta di circa 6000 vocaboli* (Milano: Hoepli, 1900).

judgment trials. This activity was necessary mainly to the European merchants' community and was particularly polarized in the Alexandria harbour, most of which had Italian origins, dating back several centuries.⁴⁸ However, during the first half of the 19th century, 'insufficient business' compelled many of them to have a second job, for example that of school teacher.⁴⁹ Some succeeded more than others, such as Paolo Paternostro from Palermo – father of Alessandro, born in Cairo⁵⁰ – who was able to obtain a high number of clients as a lawyer, became the Viceroy's counselor minister,⁵¹ was appointed Bey in 1857, and, shortly thereafter, general director of the Egyptian Foreign Ministry.⁵²

For a better understanding of the role of Italian jurists during the transition stage from the consular jurisdiction to the creation of mixed and national Egyptian law, the second report about judicial reform in Egypt is extremely useful; it would be read, in 1882, on the eve of the entry into force of national codes, by Pasquale Stanislao Mancini to the Italian Parliament.⁵³ In the report, Mancini reports the Italian magistrates' appointments, the organic constitution of the mixed judiciary, the courts' judgements.⁵⁴

The introduction of the new jurisdiction raised disapprovals, especially concerning the rules on jurisdictional conflicts and civil and commercial sentence execution.⁵⁵ Mancini reacted by providing supporting data, giving a precise picture of 'reform benefits'⁵⁶ and of the 'participation of the Italian part to the reform (civil affairs)'.

To this purpose, he used a 'recent report written up (...) by the royal agent in Egypt, with the collaboration of the Italian reform magistrates'⁵⁷ which was quoted in the Report and from which we can clearly deduce how the level of trials involving was not particularly high, showing Italians more as defendants

⁴⁸ As concerns the presence of Italian merchants in Egypt and the role of Maritime Republics, particularly that of Pisa, in the origin of the Capitulation treaties, see F. Santorelli, *L'Italia in Egitto* (Cairo: Tipografia Italiana, 1894), 19.

⁴⁹ See M. Ersilio, n 39 above, 44-48.

⁵⁰ See DBGI n 14 above, 1521.

⁵¹ M. Ersilio, n 39 above, 156 and also L.A. Balboni., *Gli Italiani nella civiltà egiziana del secolo XIX* (Alexandria: Penasson, 1906), 424.

⁵² See M. Ersilio, n 39 above, 260.

⁵³ House of Representatives, Parliamentary Minutes, 15th Legislation, First session, 1882-1883, Doc. no 4, *Relazione presentata dal Ministro degli Affari Esteri, Riforma giudiziaria in Egitto*, 23 December 1882 Meeting, 82 (from now on in fn: *1882 Report*) to which diplomatic documents are attached, 86-237 (now on in fn, *1882 Dipl. Doc.*).

⁵⁴ *1882 Report* n 53 above, 44-64. For instance, Comm. Giaccone as counsellor of the Alexandria Court of Appeal, Cavalier Moriondo as judge of the Alexandria Court of first instance, who was already Constantinople's consul judge, Advocate Bernardi as assistant solicitor general at the Court and tribunals, who worked at Justice and Religious Affairs Ministries, Comm. Ara as State controversy lawyer, Comm. Haimann as the divisional head Justice Ministry. *ibid* 18-19.

⁵⁵ *ibid* 64-73.

⁵⁶ *ibid* 73-78.

⁵⁷ *ibid* 49-54.

rather than as claimants in ‘trials whose commercial nature is inferred by the mere claim’s title’ (eg promissory notes), rather than in ‘trials born from commercial or industrial acts or companies’. Conversely, Italians, as claimants, appeared in ‘summary’ civil trials (particularly for wages), something which is easily explained

‘by considering how our Community is made up mainly of workers, artists, service people, etc. A grimmer piece of data is that of how Italians appeared in front of summary court as house or warehouse rent debtors; it can and must be found only in the condition experienced by the Italian Community’.⁵⁸

These notations are integrated by Mancini with some further elements useful for the evaluation of the participation and influence of Italian jurists on the transformation of the Egyptian legal system.

First, the official languages of Egyptian mixed courts: in addition to Arabic, only Italian and French were allowed, followed by English as of 1898. Then, since the new laws were ‘mostly modelled after French and Italian codes’,⁵⁹ a great deal of work was assigned to Italian magistrates. Moreover, since most of the lawyers defending in the first instance and in the Court of Appeals were Italian, and since there were ‘among them some of the most respected in terms of doctrine and rhetoric’, it is evident that the influence of Italian legal culture on judicial decisions was important.

The second report by Mancini mentions neither the upcoming implementation of national codes, nor the relations between the new mixed jurisdiction during the first seven years of its application, and the traditional Islamic judicature which was responsible for all of the disputes between Muslim Egyptians. Only a small reference, albeit a very interesting one, can be found in one of the attachments presented to the Parliament, containing the report of Alexandria’s Italian committee of notables,⁶⁰ with regards to the revision of the 1875 Judicial organization rules (translated from Italian):

‘We have already noticed how the weaknesses, inadequacies and abstruseness of current codes, both civil and commercial, are endless. Now

⁵⁸ *ibid* 53. The report adds: ‘In the end, it has to be made known that, among the Italians appearing in the reform statistics, those protected and naturalized (often Israelites and Eastern people) are much more than people of Italian origin and, moreover, they are more often old Italian families rather than new-comers, except what concerns wages and rents’.

⁵⁹ *ibid* 54.

⁶⁰ *Rapporto della Commissione dei notabili della colonia italiana in Alessandria d’Egitto*, First attachment to *1882 Report* n 53 above, 191-206. It is worth remembering that treaties between European powers for the introduction of mixed coding and the related jurisdiction expected the obligation of following adaptations and amendments, to be suggested on the basis of practical experience, as a fundamental condition for the extension of that system. To this end, the Alexandria committee and another homologous one in Cairo were established.

we add that in the same codes any logical connection is missing and that there are some gaps which can be only vaguely filled with a general declaration written in the organic procedure, in order to call for interpretation rules and to resort to the general rules of common law *de rebus dubiis, de verborum significationibus, de regulis juris*, etc. This general declaration will make less compelling the provision for the necessary and essential changes which require a long study of the different codes in order to be realized, an attentive study that must be practiced on the sources they were drawn from, an accurate examination of the last five years of jurisprudence, *as well as a perfect knowledge, as far as possible, of Islamic legislation, whose codification in an Islamic country must be sufficiently considered (my italics)*.⁶¹

Inside the then current debate, particularly centred on the conservation of Capitulation privileges, though reorganized in the mixed jurisdiction, the Alexandria committee introduced the problem concerning the relation between the legislation in force and Islamic law, which was deeply rooted in the Egyptian legal culture. The recurring legal and judicial conflicts, given ‘the necessity of considering the Ottoman law and of reconciling its useful parts with the great work of a wise justice reform in this mysterious Orient’, could have found a solution by integrating the International Codes Review Committee (in charge of editing the national coding) with

‘two of the most erudite and less prejudiced *ulemas* (experts in the law), in order to better coordinate the Oriental forensic theories, practices and legal discipline with the Western forensic theories, practices and legal discipline’.

It is worth noting that it was the difficulties in the application of the mixed reform that had led to a fast review of the 1875 judicial organization procedure, replaced by ‘the 27 November 1881 Khedivial decree concerning Egypt’s legislative and judiciary system’ which is, in turn, a relevant premise to the implementation of the national legislation officially inaugurated at the end of 1883. As already mentioned, nationalists would have desired that the former replaced the mixed legislation, with the native jurisdiction incorporating disputes between foreigners as well.⁶²

The political climate of that period, with the British military action and the ‘Arabì Pashà uprising’,⁶³ hastened the preparation and the implementation of

⁶¹ *ibid* 203.

⁶² The events that followed 1883 and the ever-increasing English influence on Egyptian issues can explain why facts have deviated greatly from the intentions of those who, for those reasons, have hastened to enact the judicial reform and national codes. See F. Castro, ‘La codificazione’ n 1 above, 397.

⁶³ For a clear and efficient summary of the Egyptian events related to this period, see G. Calchi-Novati, ‘Le fonti del Ministero degli Esteri sulla rivolta di Arabi: il rapporto centro-periferia

the national legislation, not allowing, however, the completion of the reform project. The decision not to intervene in Egypt alongside Great Britain, grounded on the principle of nationality in Italian foreign policy supported by Mancini, gradually reduced our country's influence on many public administration sectors in Egypt that, from then on, were increasingly affected by England in issues of domestic affairs. However, the general legislative body had already been approved and, even though it was not completely well-established, it allowed Egypt to adhere to the French model and to be open to the contribution of civil law countries.

As pointed out by a prominent scholar, '(t)he process of codification was also tied closely to a phenomenon of the 'reception' of European laws'.⁶⁴

Notwithstanding the subsequent colonization, given the presence of the 1876 and 1883 French-inspired Civil Codes 'British domination did not find it convenient or beneficial to disrupt the system already in place'.⁶⁵

During this century, a complex historical period of transition, England started a codes and procedures reform, trying to introduce elements closer to the colonial experience of common law. In 1898, English became the official language in mixed courts, in addition to Arabic, Italian and French. The legal development was gradually integrated, according to what John Scott reported in the 1899 *Journal of the Society of Comparative Legislation*, together with a wide account of 'necessary' reforms for the Egyptian legal system. To this end, new judges and new lawyers were needed, rather than new laws.⁶⁶

nella prospettiva italiana' *Rivista mensile d'informazione e di studi per la diffusione della conoscenza dell'oriente sopra tutto musulmano*, 3, 21 (1989).

⁶⁴ 'In the Middle East, reception is strongly associated with the colonization process. (...) Elsewhere, British political sway was significant mostly in Egypt (...), but Egypt adopted civil codes before English influence became dominant, and the system of courts itself was more directly inspired by the French legal system, owing in part, as modern research suggests, to an accident of history that made the stronger power, Britain, surrender the projection of its own system of courts and legislation to French judicial and legal influence in Egypt in return for political control. As a consequence, the English common law tradition remained in the Middle East of residual nature'. C. Mallat, 'From Islamic to Middle Eastern Law A Restatement of the Field (Part II)' 52 *American Journal of Comparative Law*, 277-278 (2004).

⁶⁵ *ibid* 278. See, as example of westerners approaching the Egyptian legal system: J. Yeates Brinton, *The Mixed Courts of Egypt* (New Haven and London: Yale University Press, 1968); B. Cannon, *Politics of Law and the Courts in Nineteenth-Century Egypt* (Salt Lake City: University of Utah Press, 1988); F. Ziadeh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt* (Redwood City: Stanford University Press, 1968); B. Botiveau, *Loi islamique et droit dans les sociétés arabes* (Paris: Karthala, 1993).

⁶⁶ See J. Scott, 'Judicial Reform in Egypt' 1(2) *Journal of the Society of Comparative Legislation*, 240-252 (1899): 'The native tribunals had been founded on the lines of the mixed tribunals, the French codes were the basis of their law, the people had to a certain extent got used to the French system, French was the foreign language then generally in use. As a judge of the mixed courts, I had applied French law and procedure and had found they worked fairly well. With the exception of the Englishmen in the Court of Appeal, there was hardly a person in the country who would have received with any favour a complete change in favour of an English system of law. I therefore urged that better men were wanted, not new measures. As I said in one of my reports, tant valent les juges tant valent les lois'.

The Khedivé's legal consultant since 1890, Scott worked hard to reform the *Madrasat al-huquq* (Law School) by employing new French, Italian and Egyptian professors and, as concerns national judges, by relying particularly on those Egyptians who had earned a university degree in law from Italy or France, that guaranteed an eminent university tradition and a legal education which was consistent with the legal system in force.

In 1904, as a replacement for the 1883 conforming texts, the national Penal Code (Law no 3/1904) and the related Penal Procedure Code (Law no 4/1904) were issued, re-examined. In the 1906 issue of the *Journal of the Society of Comparative Legislation*, William E. Brunyate gives us a wide account of it, highlighting that the original French system had not been modified, but the experience of Anglo-Indian coding had been considered, with some difficulties, as well as some innovations in Belgian and Italian laws.⁶⁷

‘The Penal Code of 1883 was modelled on that of the Mixed Tribunals, which was itself a hastily compiled and badly drafted adaptation of the French Penal Code as it existed in the ‘seventies. It was adopted (probably rightly) in 1883 on the advice of Lord Dufferin, on the ground that such legal education as was then possessed by Egyptians had been acquired in France. It remained true until a very recent date that legal education in Egypt was essentially French. Any complete recasting of the Code at the present time would therefore have been ill-advised. The method adopted was that of amending those parts of the Code which worked unsatisfactorily in practice, drawing freely upon the Indian Penal Code and *to a less extent on those of Belgium and Italy*: large portions of the Code, admittedly defective but of infrequent application, were left practically unrevised. The general effect of the revision is to create a distinctively Egyptian Code which will require to be studied without slavish reference to precedents in foreign countries – a fact which should be distinctly beneficial to Egyptian legal education’.⁶⁸

Arts 2 to 4 of the Egyptian text related to national law applicability to crimes committed abroad were explicitly modelled after Zanardelli's Code (the 1889 Italian Penal Code).

On the other hand, the transformation of national penal trial law is much wider than the other sectors of the reform; since 1895, with the abolition of *juge d'instruction*, it gradually lost the traditional character of the French law of evidence model in order to adopt some features of the English model.⁶⁹

⁶⁷ W.E. Brunyate, ‘Egypt’ *Journal of the Society of Comparative Legislation*, 1, 55-65 (1906).

⁶⁸ *ibid* 55-56.

⁶⁹ *ibid* 57-58: ‘It is a mistake to suppose that Egyptian criminal procedure has ever borne any very close resemblance to the procedure in France. There were from the beginning fundamental differences between the Procedure Code and its French prototype. But the

The good reputation of Italian jurists is proved by their constant presence on the occasion of important forensic editorial initiatives as well.

Since 1890, the *Bulletin de législation et de jurisprudence égyptienne* had been published for more than ten years and it was developed by the English Thomas Lebsohn and three Italians A. De Rensis, Dario Palagi, A. Schiarabati.

Between 1901 and 1945 (but with annual regularity until 1926) thirty-five volumes of *Gazette des Tribunaux Mixtes d’Egypte* were published, to which the following Italians contributed: Edoardo D. Bigiavi (from 1903 to 1916) (father of Walter Bigiavi who was born in Cairo in 1904),⁷⁰ Dionisio Anzilotti (in 1907),⁷¹ Dario Palagi (from 1910 to 1932), Albert Lamanna (from 1911 to 1914), Salvatore Messina (from 1920 to 1932),⁷² and Ernesto Cucinotta (in 1938).

These collaborations highlight the eclectic and heterogeneous environment experienced by jurists in Egypt during those years, when judges of different nationalities sat in the same court, applying the same law, by naturally switching from French to Italian, by making contribution from their own legal culture to every decision. A practice of interpretation and application thus consolidates, in accordance to the events, but also acting comparatively on the general principles, the institutions, the categories and the judicial terms. It is indeed difficult to trace a given solution back to a given model even where an Italian judge does draw up the judgment, and not a French or Greek one.

Thus, we can comprehend the perception in Italy of that distant debate and of that passion animating both the Egyptian legal system (not only the mixed system), during those years. From the legal point of view, Egypt was fully counted among the systems whose general principles complied with those common to civil law nations. This is proved by the motivations given by the Italian Court of Cassation in denying, in that period, petitions for the enforcement of the mixed Courts’ decisions.

* * * * *

essence of criminal procedure is intimately connected with the traditions of the magistracy, and a corps of magistrates with fixed traditions can scarcely be said to have come into existence prior to the time at which the late Sir John Scott gave vitality to the Courts by creating single-judge tribunals with extensive civil and criminal powers. That change was very shortly followed by the practical suppression of the *juge d’instruction* in favour of enquiries by the Parquet, and since 1895 the merits or demerits of criminal procedure have no longer been fairly imputable to its French origin. All that can be said of the present procedure is that it is pretty certainly transitional, and that its future development must depend largely on the degree of capacity which it proves possible to evoke in the magistracy. In the meantime, a good deal of the formalism of French procedure in detail had been reproduced in the Egyptian Code, and the magistracy had shown a decided tendency to mistake formalism for spirit. The inconveniences resulting from such formalism it was the special object of the revision to mitigate’.

⁷⁰ See DBGI, n 14 above, 254.

⁷¹ *ibid* 52.

⁷² *ibid* 1336.

The final act of 1937 Montreaux Conference marked the end of the double Egyptian legal system. After a transient period that lasted twelve years, in 1949 the new Civil Code became law, due to ‘Abd al-Razzaq Ahmad al-Sanhuri⁷³ who had treasured the long experience of French and European law application in Egypt.⁷⁴

Sanhuri himself, who was an advocate of a scientific reform of Islamic law which should have come before the legislative phase, wrote in his work on the Caliphate in 1926 (translated from French):

‘Here (the statute of property and contracts), in countries like Egypt we would collide with a difficulty of another type. Some foreign systems, by the effect of a long application, already entered the legal heritage of these countries. An abrupt change would upset the stability of the legal relations there. For this reason, we could proceed to the substitution of these imported rights with a legislation of national and Islamic tint only step by step. The same policy of gradual and careful restoration would be imperative either in the branches of the private law other than the civil law, or in the public law: domains which would be renovated by the modernizing scientific movement’.

The great movement of ideas and interpretations within Egyptian law and the regular application of the law based on the European model for over seventy years are the motivations Sanhuri gives in the report attached to the new Civil Code and which justified the choice of the European model as the basis of the text. A completely different phase opened up then, a phase that would last through Nasserism and Arab Egyptian socialism, in which, nevertheless, the European scientific contribution continued to have an impact.

Italian professors in Egyptian universities, while not so many in the legal

⁷³ See especially the studies by F. Castro, in particular ‘Abd al-Razzaq’ n 21 above. See also E. Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971* (Cairo: American University of Cairo, 1987).

⁷⁴ To sum up, Egypt appears to be a civil law system, widely influenced by the French one both for substantial and procedural rules. As far as the court system is concerned, it is formed of ‘both regular courts and exceptional court systems’ (See M.M. Hamad, ‘The Politics of Judicial Selection of Egypt’, in K. Malleson and P.H. Russell eds, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University Of Toronto Press, 2006), 260-262, including administrative (See M.S.E.A. Abdel Wahab, *An Overview of the Egyptian Legal System and Legal Research*, available at <https://tinyurl.com/ybmf2scp> (last visited 30 June 2018), civil (See B. Dupret, ‘A Return to Sha-ria?’, in N. Yassari ed, *The Sharia in the Constitutions of Afghanistan, Iran and Egypt implications for Private Law* (Tübingen: Mohr Siebeck, 2005), 164 (‘Civil law is divided into summary courts (for minor issues) and plenary courts at the first instance level, Courts of Appeal, and the Court of Cassation’), and criminal courts, a Supreme Constitutional Court. E. Abdelkader, ‘To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt, And Iran)’ 37 *Fordham International Law Journal*, 350-351 (2014).

field, have left a deep mark thanks to their teachings. The Egyptian experience left clear traces of their studies. We remember, among them, Vincenzo Arangio-Ruiz,⁷⁵ who taught in Cairo for a long time between 1929 and 1940 and, then, also in Alexandria between 1947 and 1957. In 1950, upon his invitation, Gino Gorla⁷⁶ arrived to Alexandria, where he stayed, along with Rolando Quadri⁷⁷ and Tullio Delogu⁷⁸ until 1957.

The latter names, together with many others mentioned in this work, have participated and continue to participate in that Mediterranean juridical *koinè* that, over the centuries, albeit with varying intensity, has never stopped and which we hope will continue contributing to the great dialogue among civilizations.

⁷⁵ See DBGI, n 14 above, 91.

⁷⁶ *ibid* 1040.

⁷⁷ *ibid* 1641.

⁷⁸ *ibid* 755.

Italian Constitutional Court, Kelsen's Pure Theory and Solving 'Hard' Cases

Zia Akhtar*

Abstract

The legal system is a kernel of rules in which the crucial role is that of the law making body. The most important factor in the promulgation of laws is the ability to challenge any unfair or unjust law by invoking the powers of judicial review. In Italy, which practices a Civil law jurisdiction there is a constitutional court that conducts the judicial review of laws that concern the citizens. The creation of the Italian Constitutional Court is based on the theory of Hans Kelsen, that formulated the need for a higher court to judicially review legislation and invalidate legislative acts with the power to interpret a Bill of Rights. The issue that needs examination is if the Court has sufficient powers to solve the 'hard' cases that are raised by applicants relating to the decisions of administrative bodies delegated by the executive. This article deals with the question in a jurisprudential context by applying legal theory in this political-legal evaluation in the area of social welfare law where the court has been interventionist in interpreting the legislation. This will clarify its scope and powers and its political-legal role within the framework of the Italian constitution.

I. Building Blocks of the Constitution

The framework for the Italian Constitutional Court was drawn up by the Constitution of 1948 and it became operative in 1956.¹ The inception of the Constitutional Court (from now on 'the Court') was a theoretical and practical step that placed public law in a recognised civil law framework, and it was preceded by debates regarding the principles of constitutional governance.² The

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¹ The laws that implemented Art 137 of the Constitution are legge costituzionale 9 February 1948 no 1, legge costituzionale 11 March 1953 no 1 and legge 11 March 1953 no 87. Under Art 135, the Constitutional Court is composed of fifteen judges, five are appointed by the Parliament in joint session, five are appointed by the President of the Republic and five are appointed by the supreme ordinary and administrative courts (the Court of Cassation, the Council of State, and the Court of Audit).

² S. Cassese, 'The Globalization of Law' 37 *New York University Journal of International Law & Policy*, 973 (2005); G. Falcon, 'Internationalization of Administrative Law: Actors, Fields and Techniques of Internationalization: Impact of International Law on National Administrative Law' 18 *Revue Européenne De Droit Public*, 217 (2006).

conception of a Constitutional Court raises the issue whether it has the power of interpreting the Constitution and its scope in deciding the 'hard' cases which generally raise the issue of an abuse of power. This is an examination that can be accomplished by first evaluating Hans Kelsen's theory of law that led to the creation of constitutional courts in European countries, between the wars, and the principles that they apply in interpreting the law with the discussion of the Court review of Italian welfare rights legislation.

The Court has adopted the model of review that followed the example of Austria, where the creation of the Constitutional Court was influenced by Kelsen's concept of an apex court in the national jurisdiction.³ It also borrowed from the constitutional law principles of the American Supreme Court which has the reviewing powers to interpret the Constitution.⁴ The objective of the Court is set out in Art 134 of the Constitution which provides that it

'shall pass judgement on: – controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions; – conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions; – charges brought against the President of the Republic, according to the provisions of the Constitution'.

There was a debate about the 'comparative' element in the structure of the Court prior to the promulgation of the statute that created the court for the judicial review of legislation. The choice in favour of a special court, endowed with the power to decide several constitutional disputes and to invalidate legislation that was inconsistent with the Constitution was a hybrid power that did not translate into an identical Kelsenian model.⁵ In terms of comparative

³ The name of Hans Kelsen recurs in the records of the Constitutional Assembly only once, and not on the problem of judicial review: see G. D'Orazio, *La genesi della Corte costituzionale* (Milano: Comunità, 1981), 81. See also F. Basile, 'La cultura politico-istituzionale e le esperienze "tedesche"', in U. De Siervo ed, *Scelte della Costituente e cultura giuridica* (Bologna: il Mulino, 1980), I, 45; S. Volterra, 'La Costituzione italiana e i modelli anglosassoni, con particolare riguardo agli Stati Uniti', *ibid*, 117.

⁴ Indeed, when the Americans wrote their democratic constitutions (state and federal) at the end of the XVIII century, they could see only examples of republics declining in despotic or oligarchic government, and Italy is one of the sources of those examples. On the influence of the Italian republican tradition on American political thought and constitutional foundations see J.G.A. Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). More generally, on the constitutional ideas of this period see G. Wood, *The Creation of the American Republic 1776-1787* (New York: W.W. Norton, 1972).

⁵ Theory traditionally distinguishes between the American model of judicial review of legislation, which is diffuse, concrete, and binding as between the parties, and the Austrian model (*Verfassungsgerichtbarkeit*) which is centralized, abstract, and binding universally. See M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971); in this special issue see A. Gamper and F. Palermo, 'The Constitutional Court of Austria: Modern

powers the Court

‘was not endowed with many ‘accessory’ competences: for instance, the Court – unlike many other European constitutional courts – does not have any say as far as elections are concerned. As for review of legislation, both abstract and concrete forms were established’.⁶

The decision to create the Court was concurrently with the extension of devolution to the Regions which were entrusted with legislative powers, and a specific precedent was the High Court of Sicily that had been created in 1946 by the special regional Statute for Sicily (*Statuto speciale*). This regional Court was invested with the power to control the validity of laws according to the Statute and its preamble impacted on the future Italian Constitution.⁷

The Austrian Constitutional Court was developed by the 20th century’s preeminent legal philosopher Kelsen who framed its basic provisions to adjudicate cases that impacted on the Constitution.⁸ The Austrian Constitutional Court’s centralized review provided the ordinary judges with two important powers which are (a) the decision whether or not to raise a constitutional question, and (b) the constitutional review of secondary legislation. This does not formulate an absolutely centralized model of constitutional review, but rather a model with some features of diffuse review.⁹ The framework was influenced by the German positivist and organic approach to the study of law and as a consequence,

Profiles of an Archetype of Constitutional Review’ 3(2) *Journal of Comparative Law*, 64 (2008). See A. Pizzorusso, ‘Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies’ 38 *American Journal of Comparative Law*, 373 (1990); P. Pasquino, ‘Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy’ 11 *Ratio Juris*, 38 (1998).

⁶ P. Passaglia, ‘Rights-Based Constitutional Review in Italy’ available at <https://tinyurl.com/yc6oseel> (last visited 30 June 2018).

⁷ M. Olivetti, ‘Foreign Influences on the Italian Constitutional System’, paper submitted to the 6th World Congress of the International Association of Constitutional Law, on *Constitutionalism: Old Concepts, New Worlds*, Santiago do Chile, 12-16 January 2004, for the workshop *Foreign Influences on National Constitution*.

⁸ See eg the competences of the Constitutional Courts in Central and Eastern Europe countries: L. Favoreau, ‘Constitutional Review in Europe’, in L. Henkin and A.J. Rosenthal eds, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990), 52-53. For a general overview of the competences of the Constitutional Court see A. Cerri, *Corso di giustizia costituzionale* (Milano: Giuffrè, 2001); A. Ruggieri and A. Spadaro, *Lineamenti di giustizia costituzionale* (Torino: Giappichelli, 2004); E. Malfatti, S. Panizza and R. Romboli, *Giustizia costituzionale* (Torino: Giappichelli, 2003). Among the publications in English see A. Baldassarre, ‘Structure and Organization of the Constitutional Court of Italy’ 40 *Saint Louis University Law Journal*, 649 (1996); A. Pizzorusso, ‘Constitutional Review and Legislation in Italy’, in C. Landfried ed, *Constitutional Review and Legislation: An International Comparison* (Baden-Baden: Nomos Verlagsgesellschaft, 1989), 111; D.S. Dengler, ‘The Italian Constitutional Court: Safeguard of the Constitution’ 19 *Dickinson Journal of International Law*, 363 (2001).

⁹ See A. Pizzorusso, ‘Italian and American Models of the Judiciary’ n 5 above; P. Pasquino, n 5 above.

it adopted a systematic and conceptual attitude towards the legal order rather than a problem-oriented view; and focused on interpreting the law, rather than on analysing the conditions of legal change and reform.¹⁰ These transformations engendered a new framework setting out a methodological shift which implies that the legal analysis is no longer to be understood in the purely formal terms of conceptual jurisprudence. This has to be evaluated by means of a genuinely interdisciplinary approach, combining insights drawn from the fields of history, sociology, political science, economics, comparative law and the law of institutions.¹¹

The organisation and functions of legal institutions have brought into the debate the various strands of jurisprudence that critique Kelsen's *Pure Theory of Law*. They are relevant because of the process of development of the Italian administrative law and the conceptual basis of which in the Italian state has been subjected to critical examination.¹² This requires the examination of the principles of Kelsen's theory and its impact by reference to the difficult cases that come before the Court for review which are based on legislative provisions. The comparative approach deals with Kelsen's idea of an apex court and the rights thesis that is developed by jurists such as Hart and Dworkin, who are concerned with the legal exercise of power and the rights of the citizens.

The Court's framework in Italy and its procedure waives the more accepted concept of judges hearing with deference to the executive. The Court is more proactive in evaluating legislation which is about maintaining and restricting

¹⁰ The Germanic influence was predominant in Italian legal thought from the end of the 19th until the middle of the 20th centuries and the crucial role played by Massimo Severo Giannini in bringing about a fundamental shift in paradigms with the consequential decline in influence of the German 'dogmatic' approach to jurisprudence. See S. Cassese, *Culture et politique du droit administratif* (Paris: Dalloz, 2008); see also P. Grossi, *Scienza Giuridica Italiana. Un Profilo Storico. 1860-1950* (Milano: Giuffrè, 2000).

¹¹ This was the first time in its history that Italian legal scholarship devoted attention to history and to politics, making use of quantitative data and analyzing administrative practices. Legal change became an important area of study, while the traditional private law approach lost its central role. However, the study of administrative law remained one of the last enclaves of nationalism within the legal academy. Even with the new focus on comparative perspectives, the French and German legal traditions were still the most important points of reference. The work of Massimo Severo Giannini (1915-2000), a talented jurist and public law professor at the University of Rome Sapienza Law School was heavily influenced by his broader cultural interests: M.S. Giannini, *Lezioni di diritto amministrativo* (Milano: Giuffrè, 1950); Id, *Diritto amministrativo* (Milano: Giuffrè, 3rd ed, 1993). The complete works of Giannini are now collected in 10 volumes, published between 2000 and 2008; see also S. Cassese ed, *Massimo Severo Giannini* (Roma-Bari: Laterza, 2010). Some articles on the Italian administrative system by Benvenuti were published in Germany in the 1950s and 1960s: see, eg, F. Benvenuti, 'Die italienische Verwaltung und der Entwurf eines Gesetzes über das Verwaltungsverfahren' 49 *Verwaltungsarchiv*, 1 (1958). See also M. Nigro, *Giustizia amministrativa* (Bologna: il Mulino, 2002).

¹² At the end of the 20th century, a comprehensive Treatise of Administrative Law was published: S. Cassese ed, *Trattato di diritto amministrativo* (Milano: Giuffrè, 2003). A few years later a dictionary of public law was also published: S. Cassese ed, *Dizionario di diritto pubblico* (Milano: Giuffrè, 2006).

the power of Parliament under a working Constitution.¹³ In this paper there is discussion of Kelsen's theory of law that provides the platform for the creation of a Constitutional Court and there is consideration of other arguments by other jurists. The main issue is how judges solve hard cases and if the Court's review of social welfare law in Italy illustrates its scope and powers and its relationship with the executive.

II. Founding Principles of Judicial Review

The idea of a Constitutional Court emerged in the writings of the Austrian jurist, Hans Kelsen, and was a component of a vision of constitutions as the higher law operating within a refined and stratified system of private and public law.¹⁴ According to Kelsen, the court approximates to a default legislator which has not been elected into power but which does have a political function. He has also tried to explicate a legal foundation of constitutional review for the court to act as a bulwark against the executive's acts which are not in conformity with the provisions of the Constitution.¹⁵

This is because the Court has the role of protecting political rights and its independence can only be sufficiently guaranteed when judges can claim a special authority on the same level as legislators. The competence to review requires judges to be educated and trained to become scholars and judges of constitutional law.¹⁶ The Court has the function of developing the case law of judicial and administrative tribunals and the legislative norms of administrative bodies and even courts as to their judicial procedure. Kelsen's *Pure Theory of Law* regards legal norms as having two functions: to confer power on subordinate officials to create legal norms, and to indicate, at least in part, the content of those norms. These can be described as two classes of norms: power norms and

¹³ Such a choice was not made by the Constitution itself (which only included provisions for a Constitutional Court and for the powers of it) but by the legge costituzionale no 1/1948, approved by the Constitutional Assembly the month after the Constitution was already in force, but the Assembly was prolonged to the formal ending of a Parliamentary session.

¹⁴ See H. Kelsen, 'La garantie juridictionnelle de la constitution' 45 *Revue de Droit Public*, 197 (1928); Id, 'Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution' 4 *The Journal of Politics*, 183 (1942).

¹⁵ Kelsen elucidates his principles by stating 'that the new order begins to be 'efficacious' when the individuals whose behaviour it regulates actually behave, by and large, in conformity with the new order. If these two facts are associated with the new order, then the order is considered as valid and 'a law creating fact' '. This implies that the validity of the laws will be judged by the efficiency of the laws of the political power. H. Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945), 110.

¹⁶ The efficacy of the new order becomes a basic law-creating fact that justifies the legal framework which the judiciary can validate by acceptable the new Constitution even if it has been achieved by extra constitutional means. The Constitution has effectively been changed and the executive's power is legal because it has replaced the *Grundnorm* or the Basic Norm. H. Kelsen, *General Theory* n 15 above, 115.

decisional norms, and both are often combined into what a court decides and what must it decide, or what should it decide in the exercise of its discretion, as an intrinsic part of the judicial process.¹⁷

The issue arises as to how judges, not being directly elected by the electorate, can deal with issues of rights that are affected by the legislation enacted by the Parliament and which adopts laws. The rule of law implies that a state should not exempt areas of public power from legal scrutiny as a matter of principle, nor should there be absolute barriers to the courts assuming a wider role based on considerations of non-justiciability. Kelsen's concept is that of a Court best placed to review the abuse of power by the executive, in its judicial capacity and to inquire into the powers that run on the discretion of the executive.¹⁸

Kelsen's formulation of a Constitutional Court is that of an institution where the judges are academically suited as law professors who can be relied to review the legislation by the state. It allocates the power that can be reserved to Parliament, administrative agencies acting under the powers conferred by the executive and to the judges.¹⁹ However, Kelsen was trying to frame a concept of the first Constitutional Court in modern times where there was a need for an institution with powers to control or regulate legislation. In the case of post-World War I Austria, the concern was mostly for maintaining federal arrangements by regulating the relationship between the national and provincial governments. This facilitated the creation of an institution which was part of the highest level of political power, and independent of the institutions that actually exercise governmental power directly through law.²⁰

¹⁷ *ibid* 42.

¹⁸ In Germany, Italy, and Spain, negotiations for a constitutional framework produced four main outcomes. First, the contracting parties established parliamentary systems of government, using relatively familiar institutional templates. The other three outcomes ran counter to political centralisation. Constitutions provided for federalism (Germany) or strong regionalism (Italy and Spain), but only after long and contentious debate. The third outcome, the codification of an enforceable body of fundamental rights and liberties, proved to be even more difficult to achieve. Elster has argued that 'norm-free bargaining' – where 'the only thing at stake is self-interest' – is most likely to result in a settlement, whereas 'norm conflicts' frequently lead to 'bargaining impasse' since the parties interact with one another from the standpoint of radically opposed social values. J. Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989), 215, 244-247.

¹⁹ 'There was sovereignty of Parliament and no court can question its validity or question an Act in Parliament, which is the supreme law of the land. Before the constitution of 1920 the power of the courts to pass on the legality and hence of the constitutionality of a decision was not restricted'. H. Kelsen, *Judicial Review* n 14 above, 183, 185.

²⁰ 'Prior to the appearance of the Kelsenian constitutional court, it was widely assumed that constitutional review was incompatible with parliamentary governance and the unitary state. The parliamentary system privileges an ideology, that of majority rule, which is realised through legislative supremacy and its corollaries. American-style judicial review, by contrast, was thought to 'fit' only in polities where legislative sovereignty had been rejected – such as where 'separation' of powers meant 'checks and balances' among co-equal branches of government – or where a judicial 'umpire' of federalism was needed. Generally, forms of non-judicial, constitutional review, took root only in the German federations, Switzerland, and Austria'. K. von Beyme, 'The Genesis

The Constitutional Court, according to John Ferejohn, offers a necessary protection from abuses of power, internal and external, individual and institutional.²¹ It was not the designation of the institution as a juridical forum as that would be the appellate courts' function in a national jurisdiction. There is a characteristic of all civil law countries that there are at least two parallel supreme courts: one for civil and criminal cases (Court of Cassation) and the Constitutional Court was an institution that dealt with references arising from cases on laws enacted by the state.

The Kelsenian methodology of the constitutional court would be able to adjudge serious breaches of fundamental rights as recognized in international law. The rulings of the court would be based on the normative laws that are grounded in the universal principles such as the Basic Law in Germany that specifically sets forth in the Constitution the framework under which the state must function. The Court would be the mechanism and tribunal to judge serious crimes and human rights abuses and this could be contrasted with the system of constitutional review in the American 'diffuse' system of constitutional review which operates under the doctrine of Constitutional Supremacy whereby all courts are empowered to address breaches of the Bill of Rights 1791.²²

Kelsen's conception of democracy is achieved by granting autonomy reliant on popular sovereignty and democracy by ensuring the legislative power must be subject to such conditions of legality that ensure that the content of laws does not conform to the 'tyranny of the majority'²³ The existence of legislative power must be in accordance with basic political rights and liberties and democratic rights of political participation. These secure a successful transformation of natural freedom into the idea of political freedom and the notion of participation in legislation.

of Constitutional Review in Parliamentary Systems', in C. Lanfried ed, *Constitutional Review and Legislation: An International Comparison* (Baden-Baden: Nomos, 1989); A. Stone, *The Birth of Judicial Politics in France* (Oxford: Oxford University Press, 1992), chapters 2, 9.

²¹ J.E. Ferejohn, 'Constitutional Review in the Global Context' 6 *Legislation and Public Policy*, 49, 52 (2002).

²² Lars Vixen argues that the value in Kelsen's theory is that 'democracy is the participation in the process of legislation by virtue of which the people can consider themselves the authors of the statutory enactment'. This coercively regulates their behaviour and the ideal of the autonomous social order is achieved by 'creating such a legal political order, in which individuals enjoy political freedoms in which to participate in the determination of the content of legal norms'. Vixen contends that the social order is the creation in which people who participate may satisfy the subjective preferences of the majority of the people. This offers the possibility to consider them legitimate and identify them as self-governing actions. The Kelsenian approach according to this perspective allows the freedom to remain in distant autonomous entities with individual moral preferences or conceptions of justice, while allowing the people to identify 'with democratically enacted laws even if there is no agreement with the substantive merits'. L. Vixen, *Hans Kelsen's Pure Theory of Laws: Legality and Legitimacy* (Oxford: Oxford University Press, 2008), 104-119.

²³ H. Kelsen, 'Foundation of Democracy' 66 *Ethics*, 27 (1955).

Alec Sweet states that 'Kelsen's model of the juridical state can easily be translated into the language of delegation theory'. This distinguishes features of 'Principal-Agency models is that they link, as in a chain, authoritative acts of delegation from one constitutionally recognised authority to another'. These acts assume a 'highly legalistic form' and they emanate from the 'sovereign people (first-order principals) ratify a constitution, which delegates power to governmental bodies, like legislatures and courts'. It implies that there are statutory normative instruments through which

'governments and legislatures who are the agents of the electorate, but second-order principals *vis-à-vis* ordinary judges and administrators delegate certain specific responsibilities and powers to the courts and the administration'.²⁴

Thilo Telzloff argues that the issue of the supremacy of a constitution over the Parliament is dealt with in Kelsen's framework as a problem of general constitutional theory and considered in the framework of statutes. This is because of his formulation that

'no legislation is free in this formation of law, but is and should be bound by a constitution. Consequently, he takes the position that both legislator and judiciary deal with law creatively, while at the same time being subordinate to the constitution. The legislator is also applying law according to superior legal norms'.

It infers that he draws exclusively from the concept of the supremacy of a constitution over the elected body of the Parliament which may entitle judges to act *de facto* as the executive power.²⁵

The normative logic of constitutionalism that restricts legislative sovereignty by recognising the rights of individuals and the prerogatives of provinces requires the establishment of a means of enforcing these rules. Kelsen's concept of constitutional review provides a means of defending constitutional law as a higher law, while retaining the general prohibition on American model judicial review. The Constitutional Court that Kelsen has formulated was adopted by Italy, and its purpose is designed as a model for resolving the constitutional cases and not for the ordinary disputes which are for ordinary courts in the national order.

²⁴ A.S. Sweet, 'Constitutional Courts and Parliamentary Democracy' 25 *West European Politics*, 77 (2002).

²⁵ T. Telzloff, 'Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan' 1 *National Taiwan University Law Review*, 75, 79 (2006).

III. Morality and Law in Judicial Reasoning

Kelsen's approach to theory of the control based on 'efficacy' of the legal framework would need some analytical tools to test the constitutionality of legislation. This concept ascribes to the substance of the laws rather than the framework of laws that are hierarchical and must be obeyed. The rejection by Kelsen of law as an abstraction of the teleological 'ought' argument based on the effect of the religious, moral and sociological perspectives that comprise the normative system.²⁶ This is the subject of debate and relevant towards understanding the composition of the law, so that the assessment can be made that law is promulgated and should have the moral authority when it is subjected to judicial review.

Herbert Hart does not accept the 'efficacy' of the law based on the *Grundnorm* that underpins Kelsen's approach to the constitution. He disputes that this is a correct method of evaluating change on two counts which are, firstly, the idea that law necessarily requires a sanctions regime, and secondly, a normative social phenomenon that could be explained purely in terms of social facts that regulating behaviour is not a valid presumption of constitutional law. In rejecting the 'pure theory of law', he developed the notion that every legal system had a 'rule of recognition' that takes account of circumstances in which the law exists.

However, Hart answers the factual point of Kelsen's theory by stating that a constitution is legal by endorsing the tests provided by the rule of recognition, and so is validation of the legal system. The application of a legal rule can be accepted if it satisfies all the criteria provided by the rule of recognition which are

'those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and ... its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials'.²⁷

Hart argues that there are 'primary rules of obligation' which the law enforces towards individuals but there are also another tier of secondary rules that may be required to provide in order to implement all the primary rules. If these rules seem to be in effective then there is an opportunity for the legislators to improvise by means of the secondary rules. These second tier of rules become very important when the courts decide to resolve any issues arising over their interpretation by

²⁶ Kelsen rejected the doctrine of natural law because 'it obliterates the essential difference which exists between scientific laws of nature, the rules by which the science of nature describes its object, and the rules by which ethics and jurisprudence describe their objects, which are morality and law'. H. Kelsen, 'The Natural-Law Doctrine Before the Tribunal of Science' 2 *The Western Political Quarterly*, 481 (1949).

²⁷ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed, 1994), 116.

the judges. The secondary rules of a legal system may include 1) rules of recognition, 2) rules of change, and 3) rules of adjudication.

The difference in the approach of Hart from Kelsen is where he considers the rule of recognition as the common denominator of all rules and provides a test for validity that arises out of a convention among officials whereby they accept the rule's criteria as a standard governing their behaviour. These can be deduced from the social practices of officials acknowledging the legitimate rule of conduct, and capable of being obeyed as a valid law; by conferring validity to all else and in unifying the laws as part of the legal system. Kelsen stated his reasoning that 'there is only a *prima facie* duty to obey grounded in and thus limited by fairness and there is no obligation for us to obey unfair or pointless laws'.²⁸

In considering the law's validity Hart accepts the premises of conformity with the new order. For both scholars the issue under consideration is of the application of laws origination from a constitution based on a factual consideration of their application. There are no moral justifications that Hart considers applicable for a test of the validity as he is not a natural law theorist and there are no moral imperatives that he brings to his analysis for the acceptance of the legal framework.

However, Ronald Dworkin rejects the theory put forward by those jurists who pose the factual question such as an efficacy of change or a rule of recognition. He rejects the notion that there can be any general theory of law or any particular legal system that can identify law without recourse to its objectivity. This he states is because a theory of law should be based not on the appearance of norms but on 'how cases should be decided'.²⁹

He does not begin with an account of political organization, but with an abstract ideal regulating the conditions under which governments may use the organisation of force over the citizens. The laws cannot be applied retrospectively after they are promulgated. And Dworkin raises the practical issue by stating that the law is whatever the political sovereign promulgates at the time it is enforced. There are two features of courts's rulings and the making of rules which are when there are the important cases debated and where their rulings are contentious. The controversy suggests to him that the validity of the law cannot rest on official enactment and its diversity infers that there is no single individual rule that validates all relevant reasons, either moral or non-moral rules for judicial decisions.

Dworkin argues as follows:

'Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be

²⁸ H.L.A. Hart, 'Are There Any Natural Rights?' 64 *Philosophical Review*, 175 (1955).

²⁹ R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 1.

used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified'.³⁰

The exposition of this rule is based on the ground which provides the legal system with its validity. The issue is what vests the legal authority of the government to exercise power over the citizens. There has to be a basis for the state to be able to exercise its control and coercion and the efficacy is not the rational test based on law and morality, and on this argument they are related in an epistemic rather than in any ontological way.

Dworkin states:

'A conception of law must explain what it takes to be law provides a general justification for the exercise of coercive power by the state. A justification that holds except in special cases when some competing argument is especially powerful'.³¹

The judiciary's task is to utilize in the best possible manner the achievement of the two main purposes. These are firstly, to produce decisions that will present the law as the best fit for any problems that arise, and secondly, to decide in the light of precedence to establish the 'essence of law' is integrity. This is in accordance with the theory that in common law systems judges do have a discretion in decision making.

Jeremy Waldron agrees with the work of Dworkin and offers a supporting argument for the reasoning behind judicial decisions. He states:

'Are judges good at morality? Are they better at moral reasoning than other political decision makers? Is the quality of their moral reasoning a reason for assigning final decisions about rights to the judiciary rather than to legislatures?'.³²

'In short, judges seem to take moral issues seriously, in a way that does not seem to be true of the noisy, chaotic, self-interested, and majoritarian proceedings of our legislatures'.³³

The basic difference is that in Hart's thesis judges are left to adopt a decision that must be based on the paradigms of executive's policy, while in Dworkin's model the 'rights thesis' is endorsed. This defines that in hard cases 'judicial' decisions enforce existing political rights' and that there is no discretion that is

³⁰ R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 104.

³¹ *ibid* 225.

³² J. Waldron, 'Judges as Moral Reasoners' 7 *Journal of Constitutional Law*, 2 (2009).

³³ *ibid* 4.

permissible in arriving at the ratio of a judgment. Dworkin proposes the legal principles which confer rights are themselves a constituent of law and are decisive factors in hard cases. This is because the judge is obliged to weigh the competing rights claimed by plaintiff and defendant against each other whilst also checking the extent to which each relevant right fits in with an interpretation of the law.³⁴ The implication is that a judge remains objective in giving reasons for his decision and he invents a hypothetical judge, 'Hercules', who is endowed with an interpretive power which is 'superhuman skill, learning, patience and acumen precisely to equip him for the demands of his labours'.³⁵ This raises an interesting debate in which the judges may be held responsible merely because they are capable of making these difficult rulings.

An example of a case in which the judge has to attain such Herculean heights is the 'hard case' that Dworkin refers to in citing *Everson v Board of Education*.³⁶ He argues that if this case was being decided by judge 'Hercules' then he would first seek to find out what the objectives of the constitution and the principles enshrined in its framework are. In writing his ruling the judge would

'develop a theory that justifies the constitution as a whole and this will be by testing various constitutional doctrines against the reality of its existing rules and practices'.³⁷

The super human judge would take into consideration the political philosophy to decide the legal/political implications of particular rights such as religious freedom in the above case where they are expounded as the principles under the US Constitution's First Amendment rights referred to in the above case. In hard cases Hercules would enquire in this instance 'does the principle the plaintiff is appealing have any gravitational force?'. That is, where a principle has been determined in a previous case, 'are we pulled towards accepting it in this case because of the 'fairness of treating like cases alike'?'.³⁸

Kelsen's theory of hierarchical unity of norms and their singularity and

³⁴ R. Dworkin, 'Hard Cases' 88(6) *Harvard Law Review*, 1057-1109 (1975). An English judge Lord Reid states that 'the judge does not just protect the status quo and there is a general warrant for judicial law making'. L. Reid, 'The Judge is the Law Maker' 12 *Journal of the Society of Public Teachers of Law*, 22 (1972).

³⁵ *ibid* 1083.

³⁶ *Everson v Board of Education* 330 US 1 (1947). This was a landmark decision of the Supreme Court which applied the First Amendment to State law. Prior to this decision the words, 'Congress shall make no law respecting an establishment of religion' imposed limits only on the federal government, while many states continued to grant certain religious denominations legislative or effective privileges. This was the first Supreme Court case which made the Establishment Clause of the First Amendment binding upon the states through the Due Process Clause of the Fourteenth Amendment. Justice Black stated 'The expenditure of tax raised funds thus authorised was for a public purpose and did not violate the due process clause of the 14th Amendment'.

³⁷ R. Dworkin, n 34 above, 1083.

³⁸ *ibid* 1083-1084.

exclusivity has not been accepted by Joseph Raz who contends that the claim

‘that two norms are connected together in a chain of validity is insufficient to ensure that they form part of the same legal system and that it is possible, conversely, for two laws to belong to the same legal system even if there is no common basic norm authorising the creation of both’.³⁹

Raz rejects the assumption that there is an unbroken chain of validity leading to the basic norm which determines the structure of a pyramid shaped legal system. This is a rejection of Kelsen’s premises and is in accordance with natural law tradition which is that the normativity of law can only be deduced in the same evaluation as that of morality, or religion in terms of explaining the validity of actions. However, Raz contends that it does not explain if the functional ‘ought’ is an objective ‘ought’, and what is the basis of the criteria that makes a legal obligation distinct from a moral obligation. The critique that he develops arrives to the same conclusion that the theory of the efficacy of a normative order is wrong.

In another critique of Kelsen’s theory of law Zoran Jelić states:

‘The Kelsenian structuralist world view is a set of normative relations reduced to a world of normative functions or artificial constructions alienated from the man and not related to the social reality. On the contrary that would necessarily understands a certain degree of efficacy for the purpose of regulating conflicts of interests and establishment of peace in the social community, that it supposes an optimism measure of agreement between the norm and the social reality’.⁴⁰

This is interpreted as presenting a distinction between a ‘being’ and an ‘ought’. However, Jelic states that it is a misconception and is defined as a fact-based assessment upon the incorrect identification of the norm with the notion that it identifies with validity of norm by its efficacy. For example, the anti-normative approach to the social process that Kelsen has catalogued is an essential element of the Marxist legal theory in general.⁴¹

Karl Marx rejected the structure of a civil society on the basis that

³⁹ J. Raz, ‘Kelsen’s Theory of the Basic Norm’, in J. Raz ed, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 127-145.

⁴⁰ Z. Jelić, ‘An Observation of the Theory of Law of Hans Kelsen’ 1 *Law and Politics*, 551 (2001).

⁴¹ Kelsen argued that Marxist jurisprudence attempts to replace scientific jurisprudence by an abstract theory of law which he interprets as the ‘so-called historic materialism’, that corresponds to the ‘economic interpretation of social reality’ is evident ‘in the widespread tendency to reject any normative interpretation of social phenomena, even if they undoubtedly fall within the realm of morality or law’. H. Kelsen, *The Communist Theory of Law* (New York: Praeger, 1955), 7.

'legal relations as well as forms of state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life – and that the anatomy of civil society is to be sought in political economy',

ie in economic forces.⁴² However, law is a fact. Therefore, it must be studied by means of causative and by realistic methods that impact on the lives of people. In comparing the deductions of positive and analytical jurisprudence it can be deemed that whilst Hart tried to navigate a middle way between formalism and realism, and is concerned in the functionality of law, Dworkin has attempted to reach beyond that dichotomy and views the judge as an interpreter of the law.

The implication is that Dworkin believes that 'Hercules' will not allow policy to create gravitational force for it is the relevance of principle that decides such cases. If there is any principle used to settle the hard case it must also reflect 'Hercules' constitutional theory, for the law must be treated by the judge as a logical process. This means that ultimately, the judge as interpreter of the law will be drawn to single conclusion in each case.

However, the empirical studies conducted into judicial approaches reveal that judges do have policy that brings an element of subjectivity into decision making. Federico Thea relates the findings from studies carried out on the influence on judges in case decision making. This

'clearly demonstrates that traditional legalistic views, which categorically deny any influence of political or ideological attitudes in the judicial decision-making process, are fundamentally flawed'.⁴³

Furthermore, he provides

'relevant evidence of the influence of judges' beliefs and political attitudes in their decisions, but it also led the way to further research on the impact of political attitudes in judicial decision-making, as well as to consider other possible variables, such as the judges' personal background, and to develop alternative theoretical frameworks'.⁴⁴

The historical perspective is that in hard cases it is not possible for the judges to accept a pure model of formalism. However, there is space for disagreement among the jurists that while judges may accept that they will argue there is one correct answer to a hard case, they may still dissent about what is the outcome

⁴² K. Marx, *A Contribution to the Critique of Political Economy* (Chicago: Kerr, 1904), ii, cited in J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 2007), 309.

⁴³ F.G. Thea, 'The Role of Judges in Political Struggles' 2 *Queen Mary Law Journal*, 57, 60 (2012).

⁴⁴ *ibid* 61.

itself. The disagreement with Dworkin's rights thesis of adjudication is by the contention that each judge will base their reasoning on their own individual legal and constitutional theory. This will conceptualise into different concepts about what the law is, and, in specific cases, allow some judges to acknowledge a rule or principle to be established which other judges will not acknowledge.

IV. Resolving the Hard Cases

In Germany, Italy, and Spain the constitutions declared rights prior to establishing the state institutions and allocating the governmental functions.⁴⁵ As a consequence academic lawyers and some judges consider rights to possess a form of 'supraconstitutional' status which is reinforced by rules governing constitutional amendment, that tends to treat non-rights provisions as more elastic, and rights provisions as more rigid and immutable. Thus, although the constitutional law is viewed as positive law in these countries, parts of that law – rights – can be interpreted as expressing (or codifying) natural law.

The structure of these provisions constitutes implicit delegations of enormous law-making discretion to constitutional judges. Although a few rights are declared in absolutist terms, the most important being 'equality before the law' provisions, found in all countries with a Constitutional Court, the great majority of rights are expressly limited. There are only some rights that are expressly formulated as 'limited' rights.⁴⁶ The Court has had to decide hard cases in its jurisprudence of the Italian social welfare law by invoking the 'adding-principle' (*sentenza additiva di principio*), which is an important methodology through which it rules on the cases by reference to a law. It serves as a means for judicial review by which the Court has rejected the constitutional review for violation of competences principles of the most important legislation.

The *sentenza additiva di principio* instrument has led the Court to develop a method of softening the harshest effects of direct and 'expensive' intrusive rulings which it developed with the inference. The Court announces that by giving a directive or principled guidance, to the legislature on how to amend the law it regulates according to certain standards in order to make it constitutionally lawful.⁴⁷

⁴⁵ A.S. Sweet, n 24 above, 83.

⁴⁶ In Italy, Art 21 para 1 provides that 'the press shall not be subjected to any authority of censorship', while Art 21 para 6 provides that 'printed publications (...) contrary to morality are forbidden', and Art 21 Para 7 states that parliament has the responsibility to 'prevent and repress all (such) violations'.

⁴⁷ The Court has issued judgments which are based on the necessity to respond to specific practical needs rather than drawing on abstract theory. These various types of judgments arise from the necessity, recognized by the Court, to consider the impact its decisions have on the legal system and on other branches of government, in particular Parliament and the judiciary. This result was made technically possible by the theoretical distinction between '*disposizione*'

The impact of this rule of interpretation has been felt in the health sector where national legislation on disability has been reviewed upon which the Court has contributed in the definition and specification of the inherently ambiguous concept of health care minimum standards. This implies that health care is not absolute but can be declined in relation to economic and financial needs and minimum and essential levels of medical treatments have to be ensured referring to human dignity expressly provided by the Italian Constitution.⁴⁸

This determination that the Court is a deferential judge of social rights because it invokes questions of theoretical importance that has a bearing on its role as the interpreter of the law and the various methods it has adopted to construe the statutes. These relate to (1) reforms to national social welfare law that have been made as a response to the global financial crisis; (2) the extent and manner in which the courts have reviewed challenges to such reforms of social welfare law; (3) the outcomes of such legal challenges; and (4) what, if any, areas of social welfare policy have been protected from reform despite the economic crisis.⁴⁹

The evaluation has to be considered in the economic, social and political framework of the European Union welfare law and against a backdrop of general reduction of welfare entitlements which form part of the 'public law of austerity'. The Italian legal tradition is more in favour of privatization and liberalization compared to other countries in Europe and this is because of the similarities and differences between American and European modes of regulation and antitrust laws.⁵⁰ The new legal framework in Italy in 2001 by a constitutional amendment for regulating 'services of general interest'⁵¹ came in the aftermath of the global financial crisis and crucial questions relating to the role of the state both

and 'norma', or legal 'texts' and 'norms'. The 'text' represents a linguistic expression that manifests the will of the body that creates a particular legal act and a 'norm', is the result of a process of interpreting a text. T. Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?' 3 *Journal of Comparative Law* 100, 105 (2008).

⁴⁸ M. Cappelletti, 'Discrimination for Sexual Orientation in Poland: The Role of the Judiciary', in L. Pineschi ed, *General Principles of Law - The Role of the Judiciary* (Cham: Springer, 2015), 248.

⁴⁹ S. Civitarese, 'Austerity and Social Rights in Italy: A Long Standing Story' *UK Constitutional Law Blog*, 17 December 2015.

⁵⁰ G. Amato, *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart, 1997); Id and L.L. Laudati, *The Anticompetitive Impact of Regulation* (Cheltenham-Northampton: Edward Elgar, 2001); M. D'Alberti, 'Administrative Law and the Public Regulation of Markets in a Global Age', in S. Rose-Ackerman and P.L. Lindseth eds, *Comparative Administrative Law* (Cheltenham-Northampton: Edward Elgar, 2010), 63; R. Caranta, M. Andenas and D. Fairgrieve, *Independent Administrative Authorities* (London: British Institute of International and Comparative Law (BIICL), 2004).

⁵¹ G. della Cananea, 'The Regulation of Public Services in Italy' 68 *International Law Review Administrative Science*, 73 (2002) and G. Napolitano, 'Towards a European Legal Order for Services of Economic General Interest' 11 *European Public Law*, 565 (2005). See also D. Gallo, *I servizi di interesse economico generale. Stato, mercato e welfare nel diritto dell'Unione europea* (Milano: Giuffrè, 2010).

referring to the management of the troubled markets and to the danger of a sovereign debt default have been raised before the Court and are now the subject of ongoing review and analyses.⁵²

Stefano Civitarese suggests that the

‘profound asymmetry between social security (contributory) and social welfare benefits (means tested or universal) is a long standing problematic feature of the Italian system, and it has possibly increased since 2008, dramatically unveiling the historical lack of policy for family/children, housing and social exclusion in general’.⁵³

This is positioned between the departments of social security (pensions, unemployment allowances) and social welfare allocation of competences between the state and regions which is inherent in the Italian form of devolution.⁵⁴ The decentralisation in social assistance by the state allows for the payment of funds to be transferred to the regions that ‘makes it virtually impossible for them to cope with the task of implementing social right constitutional commitments’. The

‘expenditure for social policies (eg new families benefits, people in dire need of personal assistance, the homeless) was also reduced from € 1.884.346.940 in 2004 to € 262.618.000 in 2014’.⁵⁵

Civitarese argues that the Constitutional Court

‘favours a conceptual and normative framework where the legislature enjoys a significant margin of discretion for the determination of *how* to implement constitutional provisions regarding welfare rights. (...) The Parliament would not have full discretion on *whether* to implement such rights (...) and also due to the concrete and not abstract manner of review which characterises the functioning of the ICC when dealing with fundamental rights, it is extremely unlikely that the Court engages with the Parliament in scrutinising a welfare statutory framework *per se*’.

The issue that comes before the Court is

⁵² G. Napolitano, ‘The Role of the State in (and after) the Financial Crisis: New Challenges for Administrative Law’, in S. Rose-Ackerman and P.L. Lindseth eds, n 50 above, 569.

⁵³ S. Civitarese, n 49 above.

⁵⁴ By observing the *Piano Sanitario Nazionale 2006-2008* (2006-2008 National Health Plan), the Italian state perceived that the State is committed to the legal guarantee of the universal right to health (Repubblica Italiana, 2006). In 2008 legge 23 December 1974 no 724 was revoked and the basis of the institutional relationships between the State and the regions has changed considerably following the reform of Part V of the Italian Constitution (legge costituzionale 18 October 2001 no 3), which increased the powers of the regional Authorities, enlarging their competence for the organisation of health services.

⁵⁵ S. Civitarese, n 49 above.

‘what services or benefits should each social welfare policy guarantee in order to fulfil the promise of social rights and this is always a matter of seeking a possible gap or omission in the implementation of the constitution’.⁵⁶

It is possible to discern the two main interrelated strands in the evolution of the Court's case law regarding social rights since the 1980s. These are firstly, the Court acts

‘proactively to secure the protection of certain rights directly modifying the legislation or delivering precise instructions to the legislature as to how to amend the law’.⁵⁷

Secondly, the Court has acknowledged the existence of certain

‘constitutional social rights despite the lack of explicit mention in the constitution, as it is the case for social housing and about one hundred of them between 1984 and 1989 often determined sensible budgetary consequences’.⁵⁸

The

‘designated symbol of the welfare state is the right to health, which has a provision devoted to it in the Italian Constitution (Art 32) which combines an individual right with the interest of the community, establishing the absolute nature of free health care for the poor’.⁵⁹

The case law shows that the Court has interpreted this welfare provision and the extent it will modify the application of the statute based on its ‘additive’ reasoning and regard to the human dignity criterion in Art 3 of the Italian Constitution.

In Judgment 15 May 1989 no 252 the Court stated that social housing is like any other social right which

‘tends to be realised proportionally to collective resources; only the legislator (...) can sensibly decide how to relate means to goals and design concrete adjudicative rules expressive of such fundamental rights’.

The Court's judgment did not declare Art 6, para 1, of legge 27 July 1978 no 392 (Discipline of urban real estate leases), unconstitutional, but dismissed the question of legitimacy on substantive grounds. This was raised, in reference to Arts 2 and 3 of the Constitution, by the *Tribunale di Roma*.

In Judgment 5 July 2001 no 248, in dealing with healthcare requirement

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.*

under the law, the Court observed that

‘the need to secure universalism and completeness to the country’s welfare assistance clashed and was not in accordance with the amount of financial resources which it is possible to devote annually to the national health system, within the framework of a thorough programme of health and social care measures’.

The Court rejected the constitutional question for violation of the competences principles of the national legislation on disability and gave primacy to human dignity as a protected measure in the Italian Constitution and was the overriding factor in its decision.⁶⁰ Judgment 22 October 2008 no 354 provides the best example of guiding principle underlying the approach taken by the Court. This decision confirms previous case law: (§4)

‘it is necessary to reiterate the course of action previously announced by this court in Judgment 7 luglio 1999 no 309, according to which (A) on the one hand, the protection of the right to health, and particularly the right to benefits may not suffer from constraints encountered by the legislature in the allocation of the financial resources it has available; (B) on the other hand, the needs of public finances cannot affect the irreducible core of the right to health, protected by the Constitution as an expression of the inviolability of human dignity’.⁶¹

There are other judgments which reveal the Court’s acceptance of the limiting of health expenditure, including that of the Regions, despite the constitutional reform of 2001 which gave the regions the possibility of giving their citizens new or improved health care benefits, where their budgets are balanced. Judgment 22 May 2013 no 104 states that (§4.2):

‘the impugned (regional) legislation, enabling the (Abruzzo) region to bear the cost of supplementary fees, thereby guaranteeing a higher level of assistance, contrary to the objectives of the Recovery Plan, violates the principle of the limitation of public health spending, the principle of public finance co-ordination and ultimately Art 117.3 of the Constitution’.

⁶⁰ According to Art 3, ‘All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country’.

⁶¹ See decisions, amongst others: ordinanza 11 July 1990 no 455; sentenza 7 July 1998 no 267; sentenza 13 November 2000 no 509; sentenza 5 July 2001 no 252; sentenza 28 November 2005 no 432.

This decision is the direct consequence of the new Art 81 of the Constitution, modified in 2012 to comply with the Fiscal Compact, which provides that: 'The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle'.⁶²

Giovanni Guiglia asserts that

'bearing in mind the economic crisis and, implicitly, the commitments entered into by Italy at international and supranational level, that the Court is weighing up interests against the constitutional principles that are at stake, promoting the austerity policies adopted by the state through detailed 'state-centric' measures, at times, going so far as to indicate how regional resources should be used. These measures are justified through an approach holding that the principle of co-ordinating public finances is superior to that of regional autonomy'.⁶³

Accordingly, the democratic choices made at regional level, although legitimate on the basis of the constitutional principle of autonomy (Art 5 of the Constitution) as further stated in Art 119 of the Constitution recognise the financial autonomy of the Regions and are subject to new balanced-budget rules. These terms were introduced in Art 81 of the Constitution during the constitutional revision of 2012 (*legge costituzionale* no 1/2012) and they are clearly based on Italy's international commitments and relate to limitations of public spending and deficit reduction (Fiscal Compact).⁶⁴

Judgment 9 June 2015 no 188 and Judgment 10 January 2016 no 10, concerning reductions in the budgets of local authorities, assert the fundamental principle that of assignment of tasks to these authorities, particularly by the regions, should be accompanied by sufficient financial resources to carry them out. In circumstances when this does not happen the court finds that there has been a violation of Arts 117, 119 and 97 of the Constitution. Furthermore, Guiglia argues, that these two decisions acknowledge that

'the significant reduction in resources for the tasks that are carried out on an ongoing basis in sectors of particular social importance is manifestly unreasonable precisely because of the lack of proportional measures to justify the extent of those tasks in any way whatsoever'.

⁶² *Legge costituzionale* 20 April 2012 no 1 has introduced the 'balanced budget' principle into the text of the Constitution itself, modifying the central Art 81 and, additionally, other three provisions of our basic law: Arts 97, 117 and 119.

⁶³ G. Guiglia, 'Legal Disputes Regarding Social Rights Brought before the Italian Constitutional Court in Times of Economic Crisis' available at <https://tinyurl.com/yd7x5u9n> (last visited 30 June 2018).

⁶⁴ The Fiscal Compact (Treaty on Stability, Coordination and Governance in the European and Monetary Union) was signed on 2 March 2012. It is available at <https://tinyurl.com/y9tsxyc8> (last visited 30 June 2018).

In addition to this violation of Art 3 para 1 of the Constitution (the principle of formal equality), there is a violation of the principle of substantive (real) equality provided for in Art 3 para 2 of the Constitution, as a result of the ‘serious prejudice to the enjoyment of social rights, caused by the failure to finance the benefits putting those rights into effect’ (Judgment no 10/2016, §§ 6.1, 6.2, 6.3).

The 2015-2016 judgments referred are of central importance in terms of the financial autonomy of sub-regional local authorities (municipalities and provinces), as they oblige the regions to ensure that the resources allotted to local authorities are sufficient to guarantee that citizens are provided with a social service. Sentenza 10 March 2015 no 70 declared as unconstitutional the system blocking the automatic indexation of those retirement pensions which were three times more than the minimum salary recognised by the National Institute of Social Security (INPS) for the years 2012 and 2013 (decreto legge ‘Salva Italia’ 6 December 2011 no 201), which would have created a considerable deficit in the state coffers (€ 17.6 billion in 2015 and € 4.4 billion in 2016). In this case, the Court heard referral orders questioning the constitutionality of a rule which limited the annual re-evaluation increase for old-age pensions for larger pensions, allowing the full increase only to pensions up to three times the minimum pension (ie up to € 1.217,00 net per month).

The Court invalidated the legislation on the grounds that it failed to comply with the principles of reasonableness and proportionality and was

‘limited to a generic reference to the ‘contingent financial situation’, whilst the overall design of the legislation does not establish why financial requirements should necessarily prevail over the rights affected by the balancing operation, against which such highly invasive initiatives are adopted’.

Although the right to an adequate pension was not found absolute, any restriction to comply with budgetary requirements had to be justified in detail and the legislator did not satisfy that requirement.

Guiglia argues that in this way

‘the Court restricts the discretionary power of the legislature and links their choices to the adoption of solutions in keeping with constitutional parameters, without referring to social rights’.⁶⁵

However, the impact of these judgments was moderated through action taken in the legislature by means of the decreto legge so-called ‘Renzi Decree’ 21 May 2015 no 65, ratified by legge 17 July 2015 no 109, which was referred to the Constitutional Court because of an alleged violation of the principles set out in

⁶⁵ G. Guiglia, n 63 above.

Judgment no. 70/2015 and, therefore, of Art 136 of the Constitution, that enforces compliance, including by Parliament, with whatever has been ruled as being constitutional. The Court issued the judgment no. 250 of 2017 on this question of constitutionality, dismissing it on the merits.

Judgment 24 June 2015 no. 178 clarifies the provisional nature of measures adopted in times of crisis when the Court declared as unconstitutional the Law that led, against the background of the economic crisis, to a prolonged suspension of collective bargaining procedures (freedom of association – Art 39 of the Constitution). The violation of this provision was by infringing on the 'collective interest of containing public spending', was declared proportionate and reasonable by the Court, insofar as the provisional and contingent nature was concerned even in the light of the effects imposed by the new Art 81 of the Constitution, and provided that, in the interests of solidarity, it was applied to all public sectors, thereby avoiding any discriminatory effects.

The Court referred to the 'supervening unconstitutionality' in order to reduce the financial impact, and it accordingly identified a specific time, after the impugned norm came into force, which was when the failure to comply with the Constitution came about. This method was introduced by the Court in the 1980s, and was particularly relevant in this case, insofar as the violation of the Constitution coincided with the publication of the decision. The Court declared that restrictions were first legitimate when enacted, but only on the strength of their transient nature, and subsequently became unlawful when extended and put on a structural footing. Consequently, the declaration of unconstitutionality has no effect for the past, but only for the future such as in eg collective bargaining rounds are no longer prohibited. Consequently, the Court reached the same result as it had in Judgment 9 February 2015 no. 10, ruling out the concept of the retroactivity of the decision as unconstitutional.

The additive principle of interpretation by the Court has had an impact because it involves more than merely taking into account the defence of social rights, and the commitment of the Court is founded on the keystone of it being the sole authority for verifying the constitutionality of laws, maximising its influence for the benefit of individuals owing to an extensive catalogue of social and other rights contained in the Constitution, and the fundamental principles that are intrinsically linked to the latter, primarily principles of (individual and social) dignity, supported by the principles of solidarity and equality (Arts 2 and 3 of the Constitution).

The Court and those who implement executive's powers cannot deal with issues arising from the austerity policy when the legal and political background is both fragmented and confused. In such cases involving social assistance the assumption of an interventionist mode would expose the Court to the range of objections revolving around the lack of democratic legitimacy, and this would cause more harm than good in the long term. The perspective of the Court is

based on an objective and minimalist approach that insulates the ad hoc emergency measures protecting social rights of marginal groups, even at the price of sacrificing other values such as local autonomy. While in the alternative when dealing with more structured legislation (pensions and education) and facing emphatically morally hazardous situations, a serious commitment towards social rights on the part of the Court can still make a difference, alleviating some of the harshest consequences of austerity policy, and on this basis the perspective of the Court is objective and balanced.

V. Conclusions

The motivation of the jurist is to construct an integrated view of public law and there has to be a convergence of legal scholarship – both constitutional and administrative – which is increasingly dominated by the institution and practice of judicial review. The result has been the establishment of a Constitutional Court that was created when a rights-based tribunal was considered a requirement in the framework of the state. It provided a source of legitimacy that sourced the Austrian Constitutional Court that was designed to elevate the judges as scholars and jurists who could decide cases by reference to their knowledge as much as the political reality.⁶⁶ This requires the reestablishment of some form of unitary and systematic perspective on constitutional law and this can be achieved by resorting to Kelsen's framework.

The Constitutional Court's scope and powers in Italy has to be reviewed in the context of the functions of European judiciaries who have formulated the principal agency relationship with their legislatures. They are the agents in the framework that enables them to conduct such a rigorous interpretation of the various statutes that the judges have the power of application of the laws. The central tenet of the constitutional judges is to regulate the actions of the government and Parliament themselves, and they have the obligation to control the exercise of the legislative authority and all those acts pursuant to the adoption of a statute. If ministers or parliamentarians notice that a judge has formulated a statutory provision in a manner that they did not intend then they can amend the law.

The political parties in Parliament, depending on the relevant rules, have the capability of repealing the constitutional provisions, or restrict the Court's powers, but only if they can reconstitute themselves as the majority in the legislature to amend the Constitution. The legislators or ministers are never principals in their relationship with the constitutional judges and their decisions governing constitutional revision are more restrictive than those consisting the

⁶⁶ S. Cassese, G. Napolitano and L. Casini, 'Towards Multipolar Administrative Law: A Theoretical Perspective' 12 *International Journal of Constitutional Law*, 354 (2014).

Court's rulings on legislation. These rules are to the advantage of the continuous dominance of constitutional judges over the interpretation of the constitutional law in enacting statutes by Parliament.

The Italian Constitutional Court has judicially reviewed the rights arising from the welfare state provisions concerning health which is ingrained in the Art 32 of the Constitution, that balances an individual right with the interest of the community. The Court has carried out the application of the statute based on its flexible powers under 'additive' reasoning, taking into consideration the Art 2 respecting the human dignity requirement in the Fundamental Principles of the Constitution.

The conception of the Court should lead to a dynamic legal order rather than a merely static one and here it can discard Kelsen's role for judges in interpreting legislation, and undertake positive reasoning in arriving at its judgments. The legal system reflects the building block in the Constitution and its process is through the acts of officials who refer to norms, statutes and directions. The Court is the forum for reviewing of hard cases that can be adjudged in accordance with the Constitution and by political and legal evaluation of the state and the law.

General Remarks on Civil Liability in the European Context

Guido Alpa*

Abstract

This article considers the evolution of the civil liability system in Europe from the perspective of the establishment and application of rules deriving from regulations and directives that define special types of torts. Neither the EU rules nor the principles developed by the Court of Justice always identify all the necessary components of the tortious act. There are cases in which certain elements are prescribed, and others which are left to the national courts to establish. Furthermore, there are instances in which the case configured by the EU rules is complete but where the national legislators are accorded a certain leeway to fill in the regulatory gaps. National rules are not always uniform and, thus, are not without ambiguity. For this reason, attempts have been made to standardise the governance of civil liability, and the models proposed to break the impasse are still relevant. But time moves on, and the standardisation process is lagging behind the ever-increasing pace of change in EU law.

I. Introduction

When contemplating the evolution of the civil liability system in the European context, we should consider at least three different perspectives: i) the establishment and application of rules governing civil liability laid down directly by the Treaty on the Functioning of the European Union (TFEU) for harm caused by its institutions or by its agents in the exercise of their functions (Art 340); ii) the establishment and application of rules regarding Member States' liability for infringement of EU rules, in accordance with the general rules of the Treaty (Art 4) and the principles developed by the Court of Justice; iii) the establishment and application of rules deriving from European sources that define special types of torts.

With respect to the latter, the rules may be provided either by regulations or directives. However, rules, in these cases, are not always 'complete': in other words, neither the EU rules nor the principles developed by the Court of Justice always identify *all* the necessary components of the tortious act, namely the criterion of imputation (wilfulness, fault, risk), the interest harmed, the link of causation between the act and the harmful effect, the injury. This remark

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presupposes the so-called ‘doctrine of *Tatbestand*’, which has three layers: objective element, unlawfulness and fault.¹

There are cases in which certain elements are prescribed, and others which are left to the national courts to establish. Furthermore, there are instances in which the case configured by the EU rules is complete but where the national legislators are accorded a certain leeway to fill in the regulatory gaps.

In both situations one is faced with differing interpretations made by judges and by jurists in general who, reasoning in line with their respective cultures, do not take the same paths to solve the problems posed by the texts.

The terminology employed in the EU’s normative texts corresponds – approximately – to that of national legislators or judges, but national rules are not always uniform and, thus, are not without ambiguity. For this reason, attempts have been made to standardise the governance of civil liability, and the models proposed to break the impasse are still relevant. But time moves on, and the standardisation process is lagging behind the ever-increasing pace of change in EU law.

On the general level, we should also take into consideration two phenomena that have progressively established themselves in recent decades: the ‘Europeanisation’ of the respective national legal systems² and the constitutionalisation of EU law.³

The first is the product of various factors.

In the European context, a common framework of values is being established in which civil liability, understood as a complex of rules for the defence of legally protected interests, occupies a privileged position. This may be through the normative technique of the regulations and directives, the decisions of the Court of Justice, the attempts at standardisation or, especially, the circulation of models, ideas, languages – and thus through the shaping of a EU legal culture.⁴ The person, property, environment, savings, competition, to consider as the ‘objects of protection’, or consumers, savers, creditors, workers, family members, to consider as the ‘subjects’ of protection, delineate the operational scope of these rules, ordered in accordance with a scale of values that appears uniform in all the jurisdictions concerned. Indeed, amongst English jurists there has even been talk of a ‘Europeanisation of tort law’,⁵ and of a ‘European private law’ *system*.⁶

¹ G. Brueggemeier, *Common Principles of Tort Law. A Pre-Statement of Law* (London: BIICL, 2004), 58.

² See eg S. Grundmann, *Constitutional Values and European Contract Law* (The Netherlands: Kluwer Law International, 2008).

³ See H.W. Micklitz ed, *The Constitutionalization of European Law* (Oxford: Oxford University Press, 2014); G. Brueggemeier, n 1 above, 1; G. Alpa and M. Andenas, *Grundlagen des Europäischen Privatrechts* (Munich: Springer, 2009).

⁴ The ‘European language’ is an *artificial* one: Senato della Repubblica italiana, *Il linguaggio giuridico nell’Europa delle pluralità. Lingua italiana e percorsi di produzione e circolazione del diritto dell’Unione europea*, Roma, 2016, available at <https://tinyurl.com/yaat4pkh> (last visited 30 June 2018).

⁵ P. Giliker, *The Europeanisation of English Tort Law* (Oxford: Hart Publishing, 2014).

⁶ G. Alpa and M. Andenas, *Fondamenti del diritto privato europeo* (Milano: Giuffrè, 2001); G. Alpa, *Diritto privato europeo* (Milano: Giuffrè, 2015); C. Castronovo and S. Mazzamuto,

The constitutionalisation of EU law results from the adoption of the Treaty of Nice which, consequent to the Lisbon Treaty, became a legally binding text as of 2009. Here the values of the person are exalted as the pivot of the entire EU jurisdiction; they are utilised to govern relations between individuals on an equal footing with the *Drittwirkung* of constitutional rules having come about in the various European States (particularly in continental Europe).⁷

II. The Protection of the Person in its Physical Dimension

If we consider legally protected interests, we must first of all consider the physical person, and therefore the safeguarding of physical integrity. Particularly significant here is the liability of manufacturers of consumer goods for harm caused to consumers and bystanders by products put on the market.

Directive no 374 of 1985 is now more than thirty years old and, although reinforced by product safety directive no 95 of 2001, its effect has not been judged altogether satisfactory by consumer associations. A recent BEUC (The European Consumer Organisation) document points out the most significant gaps or discrepancies in the text.⁸ It is clear that the liability of the manufacturer is grounded in the business risk, and thus has an objective nature, but there are still too many doubts as to the exact scope of liability. The aim of the regime is restricted to products that are tangible in nature, thus it does not extend to digital goods. Moreover, the compensable loss does not always include moral injury, an aspect that seems particularly problematic in a system (such as that of the EU) wherein the moral integrity of the person and his or her sufferings are considered a fundamental right (Art 3, European Charter).

Some of the BEUC proposals may be readily accepted. Others call for discussion.

The BEUC seeks elimination of the limitation of liability for defects not known at the time when a given product was put on the market (risk of development). This is a quite complex topic, for it seems difficult to resort to insurance since the risk cannot be easily estimated. The experience of cases of harm from asbestos (asbestosis) is an example here.

The BEUC also calls for assistance at the evidentiary level. Indeed, proving a defect is not simple for the consumer, and an acceptable facilitation might consist in deeming faulty a product proving dissimilar to those of the same production series. Also, the possibility of obtaining all the documentation concerning a given product, including any studies on its harmful nature, seems a helpful suggestion, just as it seems helpful to eliminate the exemption regarding

Manuale di diritto europeo (Milano: Giuffrè, 2007).

⁷ H.W. Micklitz ed, *Constitutionalization of European Private Law* n 3 above.

⁸ BEUC, 'Review of product liability rules', Position Paper, Brussels, 2017, available at <https://tinyurl.com/ycnt3q8e> (last visited 30 June 2018).

harm amounting to less than five hundred euros. I should, on the other hand, be doubtful about doing away with the ten-year limit for claims, because today products – in a market of ever faster change and innovation – become obsolete sooner than was the case thirty years ago.

Also, in my opinion, the recommendations to extend the directive on *injunctions* to products' defects, and to establish a system for information (such as RAPEX for dangerous products) regarding the genuine and inoffensive character of products put on the market, should be accepted.

However, the directive does not specify whether the rules apply to the liability of the supplier, to whom an injured party will turn when neither the maker nor the importer is identifiable. In the various jurisdictions, the courts will apply rules taken from domestic law to the supplier. These rules may vary between countries (some inclined towards contractual, others towards extra-contractual liability).⁹

III. The Protection of the Person in its Virtual Dimension

In our society of information, telecommunications and computer science, personhood cannot be restricted to the physical person, without regard to the virtual or online presence that individual may have.

Two major new elements have appeared in this regard: the approval of a Regulation on the protection of personal data, replacing the directives on the matter, and the draft regulation on e-privacy (COM(2017) 7 final communication from the Commission to the European Parliament and the Council Exchanging and Protecting Personal Data in a Globalised World).

The Regulation, in gestation since 2012, improves the law on the subject. *Inter alia*, it inserts the so-called right to be forgotten among those rights of the data's owner that are to be protected, deals with the 'profiling' of users, seeking to prevent or limit both solicitations to purchase and unfair trade practices, and specifies in detail the remedies for breach of the provisions on the gathering, storing and use of personal data (Regulation EU 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC – General Data Protection Regulation).

From this standpoint the Regulation is in the vanguard of efforts to protect the 'digital person' and is a guarantee for the movement of data abroad. It is well known that one reason why the European Union could not sign the Transatlantic Trade and Investment Partnership (TTIP) with the United States was the

⁹ D. Fairgrave, *Products Liability in Comparative Perspective* (Cambridge: Cambridge University Press, 2005).

American negotiators' reluctance (echoing the requests of the US private sector) to accept data protection rules which were more restrictive than those applying for US residents.

In the Regulation's recitals the purposes of the new regime are explained, which are worth highlighting.¹⁰

With regard to remedies, the Regulation includes a rather morally righteous provision that imposes a presumption of fault on the data controller (but one might argue that here it is not liability of an objective kind). Evidence to the contrary is admitted, but this concerns the discharge of obligations or absence of liability for the harm done (Art 82).¹¹

¹⁰ Any processing of personal data should be lawful and fair. It should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed. The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing. In particular, the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data. The personal data should be adequate, relevant and limited to what is necessary for the purposes for which they are processed. This requires, in particular, ensuring that the period for which the personal data are stored is limited to a strict minimum. Personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means. In order to ensure that the personal data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review. Every reasonable step should be taken to ensure that personal data which are inaccurate are rectified or deleted. Personal data should be processed in a manner that ensures appropriate security and confidentiality of the personal data, including for preventing unauthorised access to or use of personal data and the equipment used for the processing.

It is appropriate to establish the controller's general responsibility for whatsoever processing of the personal data that it shall have effected directly, or that others shall have effected on its behalf. In particular, the controller should be bound to put in place adequate and effective measures and be able to demonstrate the compliance of its processing activities, including the measure's effectiveness, with the present regulation. Such measures should take into consideration the nature, scope, context and purposes of the processing as well as the risk to the rights and freedoms of natural persons.

¹¹ Art 82, 'Right to compensation and liability':

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. A controller or processor shall be exempt from liability under para 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paras 2 and 3, responsible for any

IV. The Protection of the Environment

The environmental liability directive (2004/35) has created many problems of interpretation and application due to the misunderstanding caused by the 'polluter pays' principle. Since in the economic analysis of law the principle is understood in a literal sense, an operator who is ready to repair any damage caused is deemed authorised to pollute in some States, Italy amongst them:¹² it was considered sufficient to burden the polluter with the obligation to compensate for damage in a pecuniary manner, that is, paying compensation 'equivalent' to damage caused. On the other hand, the Court of Justice, and even earlier the Commission, had specified that the primary obligation consisted in restoration of the damage caused, and not in disbursement of sums of money. This generated a quarrel that pitted the Italian government against the Commission, and several rectifications of the Italian bill implementing the directive.

The Court, ruling on 4 March 2015 in a case concerning Italy, precisely, stated that:

'Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, determined after those measures have been carried out'.

In other words, the Italian legislator (with the Environmental Code) has established that the restoration of sites is to be done by the public authorities, and that the owner of the land must reimburse the costs.

The liability should be of objective nature, although not all of those interpreting

damage caused by processing, each controller or processor shall be held jointly and severally liable for the entire damage in order to ensure effective compensation of the data subject.

5. Where a controller or processor has, in accordance with para 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in para 2.

6. Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Art 79.

¹² The literature on the topic is indeed wide-ranging. For a preliminary overview see G. Alpa et al, *Interpretazione giuridica e analisi economica* (Milano: Giuffrè, 2001); M. Benozzo et al, *Commentario al codice dell'ambiente* (Torino: Giappichelli, 2013).

the law in question are convinced by this solution.

V. The Protection of Investors' Economic Interests

Other cases of liability concern the banking, financial and accountancy sectors. Here it has been deemed at the EU level that the operator's liability is grounded in its *fault*: in my opinion, there is no true reason to distinguish the maker of goods from the producer of services (for liability purposes). Nor should there be any reason to consider that the party performing a service conducts an intellectual professional activity that implies the assumption of a business risk, but rather a fault in the execution of a personal service.

The liability regime ought to be uniform: it should not make distinctions, on the production side, between operators according to their specific jobs, insofar as the consumer and user would be exposed to risks and harm in an equal manner. It is true that in these cases the harm is not always physical (as with harm to health in the case of a defective product, or pollution of the environment), but the type of interest affected – economic interest – is no less significant than those which have stronger protections in place.

The losses sustained by savers in the past few years, due to the severe economic crisis having struck the Western world, have been caused largely by activities of a banking and financial kind. Demonstrating the fault of an alleged injuring party is difficult in many cases. Thus the reversal of the burden of proof, when relations are not contractual but rather extra-contractual, ought to be a universally acknowledged rule.

On the other hand, the same is not the case with auditors' and auditing firms' liability. Directive 2014/56 (which amended Directive 2006/43) has introduced several new elements and reinforced the professional obligations of auditors, the controls made by public authorities and the penalties imposed but, as concerns liability, it simply refers to domestic legislation.

Indeed, Art 30 of this Directive (Systems of investigations and sanctions) says:

‘1. Member States shall ensure that there are effective systems of investigations and sanctions to detect, correct and prevent inadequate execution of the statutory audit.

2. Without prejudice to Member States' civil liability regimes, Member States shall provide for effective, proportionate and dissuasive sanctions in respect of statutory auditors and audit firms, where statutory audits are not carried out in conformity with the provisions adopted in the implementation of this Directive, and, where applicable, Regulation (EU) no 537/2014’.

Nor have things changed as regards financial assets with the adoption of

Directive 2014/65 (so-called MiFID II). This Directive (which came into force on 3 January 2018) has the goal of developing a single EU market for financial services in which transparency and investor protection will be ensured.

Operators must act in their clients' best interest, guarantee that investors are properly informed, point out potential conflicts of interest between the parties and provide appropriate representations of the risks involved, distinguishing the investor's profile – a matter of assessing the appropriateness of a given product for the saver's needs.

But other proposals for reform are on the table: one for a Regulation on the prudential requirements of investment firms (COM(2017) 790 final), another for a Directive on the prudential supervision of investment firms (COM(2017) 791 final).

The question of liability has remained open; thus in Italy there is discussion as to whether the investor may demand the nullity or voiding of an investment contract or obtain compensation for loss.

VI. The Protection of Competition, and Injury Resulting from Breach of Competition Rules

The rules on competition, as originally conceived in the Treaty establishing the European Economic Community (since transmuted into the TFEU), go beyond the simple subject of study wherein legal interpretation and economic interpretation may be conducted in parallel. They are a set of rules in which economic appraisal and legal appraisal are co-essential, cross-interfering and inseparable.

One perceives this in examining the Treaty rules that prescribe proper conduct in the *internal market* (Arts 26 et seq, Arts 101 et seq) and the rules of the Charter of Fundamental Rights of the European Union – a normative text now deemed equivalent to the Treaties – which deal with economic relations, in particular Art 16 on freedom of enterprise and Art 38 on consumer protection.

Thus, when addressing the problems concerning breach of the competition rules (in terms of *antitrust violations*) and the prejudicial consequences thereof (in terms of *antitrust injury*), this junction must necessarily be taken into consideration.

But there is more: both the competition law violation and the injury are conceived in such a manner as to combine factors of EU law and those of domestic law.¹³ It would be simpler if the entire juridical construction, with its rules for interpretation, were dissolved *in toto* within the Union framework. This would permit the retention of the meanings of typical Union terms and concepts in mind in order to solve the related problems. When the harmonisation is

¹³ See, for all, C. Imbriani and A. Lopes, *Macroeconomia. Mercati, istituzioni finanziarie e politiche* (Torino: Giappichelli, 2013); P. Ciocca and A. Musu, *Economia per il diritto. Saggi introduttivi* (Torino: Giappichelli, 2006).

maximal, and the regime is nearly ‘complete’, it is easier to apply EU law and integrate it with domestic law, if the European legislator has left some leeway. If, on the other hand, that legislator regulates only one aspect of a given case, application becomes more complicated, more uncertain and, since a maximum harmonisation level has not been reached, it lends itself to divergences patterned on national models. Consequently, the safeguard of legally protected interests varies from jurisdiction to jurisdiction. Thus, inequalities may arise, both on the side of the interests of companies having infringed the rules (more or less intensely affected by damages reparation for violation of competition legislation) and on that of the interests of the competing businesses and consumers (more or less intensely favoured by the compensation for injury sustained).

Unhappily, the cases are manifold, as has been seen in the hypothesis of injury resulting from a breach of EU rules by a State, in particular by its law courts,¹⁴ and in the aforementioned case of manufacturers’ liability.

Still, the directive on unfair terms (13/1993/EC) is more detailed and precise and leaves the entire domestic legal system – and therefore the domestic courts – less room for action (eg in the assessment for preservation of a contract when a ruling has invalidated one or more of its clauses), thus ensuring a more uniform application of EU law.

And yet in its interpretation, the implementation by national legislators and the application by domestic courts have led to divergent solutions. Businesses are subject to uniform treatment as to the identification of clauses deemed abusive, but not all jurisdictions have given concurring answers in this regard.

For competition law, the EU legislator’s choice has been both less courageous and less invasive than it might have been, for it has regulated only some elements of the tort and delegated the ascertainment of the others to the national courts.

In other words, it has regulated certain aspects of the harm caused, but has not established rules on the tort in a complete manner. This perhaps stems from the assumption that it was enough to demonstrate, on the basis of economic market data, a distortion of competition in order to affirm that the offence was constituted and thus the tort caused could be determined concomitantly. Not that offence and tort are conceptually separable: they are so from the normative standpoint, and also in the EU programmes where the regulation concerned is a product of successive stratifications, recourse having been had to all kinds of sources of law (regulations, directives, decisions, opinions).¹⁵

¹⁴ See the entry ‘Responsabilità dello Stato (dir. UE)’, available at www.treccani.it, and the cases *Francovich* (Case-6/90 and 9/90 *Francovich and Bonifaci v Repubblica italiana*, Judgment of 9 November 1991), *Brasserie du Pêcheur and Factortame* (Case 46/93 and 48/93 *Brasserie du Pêcheur v Factortame*, Judgment of 5 March 1996), *Koebler* (Case173/03 *Koebler v Austria*, Judgment of 30 September 2003), *Traghetti del Mediterraneo* (Case 379/10 *Traghetti del Mediterraneo v Repubblica Italiana*, Judgment of 13 June 2006), all available at www.eur-lex.europa.eu.

¹⁵ See G. Alpa, *Illecito e danno antitrust* (Torino: Giappichelli, 2016).

Indeed, in the field of competition the EU legislator has drawn on all the sources of law: the Treaties (Arts 101 and 102), the implementing regulations, the case law of the Court of Justice and now the directive. This directive, passed by the European Parliament and the Council on 26 November 2014 (EU Directive 2014/104), deals essentially with the criteria for establishing an instance of harm. It then expands to comprise a detailed regulation of the burden of proof and of the economic criteria for quantification of harm, leaving the task of ascertaining the existence of the two other requisites, unfairness and link of causation, to the domestic judge.

One must then emphasise that the legislator's object was twofold: on one side, to clarify how to compensate the harm arising from breach of antitrust rules, on the other, to bolster *private enforcement* or recourse to private remedies, having deemed public controls insufficient.

The directive, dealing with the last segment of the hermeneutical process leading to the ascertaining of the harm and its determining, aligns itself with the legal policy that addresses the action of individuals. This means, precisely, that *private enforcement* is used to monitor the regular progress of markets on the basis of the principle of competition, placing it alongside *public enforcement*, and presupposes the acceptance of certain basic concepts for the configuration of the tort arising from violation of antitrust provisions. These provisions, along with the Treaties, regulations, Court of Justice guidelines and decisions of the Commission, already constitute a compact body of rules reflecting those of the national laws which existed before the antitrust regime and which introduced this regime after joining the EU (as occurred, after much delay, in our country).¹⁶

But, in truth, the title is at the same time concise and reductive. In fact, the regulations concern aspects of both substantive law and procedural law, and go well beyond the simple determining of harm, affecting elements of the antitrust offence that deserve careful examination.

One hardly need recall that the proposal for the Directive (on 11 June 2013 (COM(2013) 404 final) had aroused great interest and considerable volume of writings, in Italy and abroad, were devoted to it. It began with the Green Paper (COM(2005) 672 final) and the White Paper (COM(2008) 165 final), in which matters of general interest were especially discussed, namely the appropriateness of resorting to remedies sought by private individuals to enforce the competition rules, the types of remedies to be sought and the entering into collective actions,

¹⁶ For a first commentary see E. Malagoli, 'Il risarcimento del danno da pratiche anticoncorrenziali alla luce della Direttiva 2014/104/UE del 26 novembre 2014' *Contratto e impresa/Europa*, 390-399 (2015), to which the reader is referred for a detailed illustration of the contents and aims of the directive in question. On the interaction between *private and public enforcement* see M. Libertini, *Diritto antitrust dell'Unione europea* (Milano: Giuffrè, 2014); M. Maugeri, 'Premessa' and A. Zoppini, 'Introduzione', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: il Mulino, 2009), 147 et seq.

as part of Recommendation 2013/396/EU and Communication 2013/401/final of 11 June 2013. Following this, the Resolution of the Presidents of European competition authorities, entitled ‘Protection of the information contained in cases for favourable treatment in the context of civil actions for damages’ (23 May 2012), was another testimony to the close collaboration in the matter between the Central Authority and National Authorities. The discussions concluded with a focus on the circularity of initiatives and to the models of action and sanction, all measures geared towards the creation of a perfectly competitive single market.

Moreover, on the basis of Arts 101 and 102 of the TFEU and on that of Arts 103 and 104, which authorise the Union to take measures directly affecting Member States’ domestic law, the Union’s competencies cannot be questioned.

The directive’s contents are substantial, for it gives ample room for cooperation between private individuals and public authorities. It introduces a kind of ‘rewarded self-reporting’ enabling a company that has breached the rules to report the others involved in the matter in exchange for exemption from fine or reduction thereof (the so-called ‘leniency programmes’). The directive deals with the regime on evidence and its disclosure of, acquisition of, and exemption from the obligation to produce documents, and the acquisition of information. On the procedural level it seeks to resolve definitively a long-standing disagreement on the relations between investigations conducted and measures taken by national authorities, on the one hand, and the lawsuits brought by parties affected by sanctions before the competent court, on the other hand. In this respect the national authorities’ decisions, if definitive insofar as, although challenged, they have been confirmed in court, have binding effect and constitute grounds for a claim for damages. However, national decisions are not directly effective outside the confines of the State involved and may be subject to challenge in court proceedings in another Member State where new evidence is adduced.

The directive also deals with time-barring, quantification of injury, passing on of loss, and out-of-court settlement of disputes caused by breach of the competition rules.

However, not all problems opened up by compensation for loss are resolved. Therefore, when it occurs, critical views have already been expressed, especially due to disappointment at seeing problems that the directive might have definitively resolved being debated still.

Perhaps it is self-restraint, owing to application of the principle of subsidiarity, that has kept the EU bodies from laying down complete regulations concerning antitrust offences.

Since the directive also deals with passing on of loss, it is fitting to examine the so-called downstream relations having arisen as a result of infringement or otherwise affected by infringement of the rules. It is precisely here that a clarification, or a decisive specification of the remedy to be prescribed, would be desirable so as to ensure that injured parties living in different countries, but

injured by the same economic operator's antitrust act or conduct, were not subject to national rules differing one from another, thus to preclude consequently varying compensation.

The categories affected are indeed different from one another: competing businesses, harmed by an abuse of dominant position or by agreements, or suppliers, employees, consumers, all with varying interests.

Then there were other problems to be solved. In the various legal systems, the rules of jurisdiction of the competition authorities and those of the courts did not match: in the event of an appeal against the Authority's administrative ruling, a dilemma arose. Would the court have to conduct further examinations to ascertain the breach of competition rules, or was the preliminary investigation already conducted by the Authority, and evaluated in terms of sufficiency to ascertain the breach, enough? How could all these exigencies be combined unless by way of two courses of procedure coordinated between them?

The European Union has opted for a combination of *public and private enforcement* remedies.¹⁷

But the directive has addressed only certain aspects of the harm, focusing on methods of quantification (thus favouring the economic perspective) and neglecting the juridical aspects of this complex matter.

Following the analytical theory of tort liability, we ought to identify, in the configuration of the antitrust offence, certain fundamental requisites:

(i) the subjective requisite, dictated by fault or wrongful act, or the imputation by business risk;

(ii) injury to a protected interest (wrongful damage);

(iii) link of causation;

(iv) direct injury, resulting from infringement of the rules for the safeguard of competition;

(v) injury consequent to infringement in connection with business actions conducted by the injuring party with third parties claiming to have suffered injury.

Obviously, the injuring party's capacity to intend and to desire to injure is assumed. However, the classification of the competition regulations may be relevant in order to establish whether their violation implies infringement of compulsory rules, of public order, of public economic order, so as to grasp whether the 'downstream' business actions are valid or void, whether compensation

¹⁷ On the coordination of the two types of action see, for all, M. Libertini, *Diritto antitrust dell'Unione europea* (Milano: Giuffrè, 2014); but see also the studies selected by P. Barucci and C. Rabitti Bedogni, *20 anni di antitrust. L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato* (Torino: Giappichelli, 2010), I and II. For an overview of the economic and legal problems see L. Prosperetti, E. Pani and I. Tomasi, *Il danno antitrust* (Bologna: il Mulino, 2009); G. Afferni, 'La traslazione del danno nel diritto *antitrust* nazionale e comunitario' *Concorrenza e mercato*, 2008, 494 (2009), In light of the directive, one will note in particular the research of I. Lianos, 'Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe' 34(1) *Yearbook of European Law*, 170 (2015).

is due and how it may be calculated, and also taking into consideration the ‘passing on of the loss’. One must also determine, should there be more than one author of the injury, how to solve the problem of co-liability or joint liability.

As concerns the injuring party, reference should be made to the EU legal concept of a business and, more specifically, of a business as understood in the framework of competition law. In turn, the legally protected interest implies ownership of such interest and therefore the identification of the categories of the injured parties.

The identifying of the requisites brings with it a distinction of competencies and roles: in other words, must the domestic judge who has to quantify and ascertain the damages arising from breach of the antitrust rules reconstruct all the elements of the tort, or are some of them already established or determined by other domestic or EU authorities?

As may be seen, the antitrust offence presents strong analogies with another type of offence made up of the same EU and domestic components. Thus one might follow, as in the past, the same model of reasoning to delineate the contours. Indeed, State liability for breach of EU rules implies that the ascertainment of such breach has been made in the light of European law, and likewise the infringement of the injured party’s interest (which may be constituted by a right established by EU law directly with respect to the victim), whilst the injury and the link of causation between it and the breach must be proved by the victim and ascertained by the court.

The directive clarifies competencies and roles. Here the national court, that is the ‘review court’ – according to the definitions in Art 2 –

‘is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law’.

Thus, the infringement may concern either rules of EU law, or rules of domestic law corresponding to those of EU law (Art 2 (1) (3)).

The infringement may be ascertained either by an administrative authority (the Guarantor Authority) or by an administrative court (asked to review the administrative ruling), but the ordinary court has the power of revision.

The injury is established under EU law, but its quantification falls to national law.

But let us come to the problems of civil liability.

(i) The directive does not specify whether the injured party must prove the fault or wrongful act of the firm having infringed the antitrust rules. The EU legislator probably deems objective fault for an infringement of the law implicitly but has not even posed the problem of objective liability, in matters of a business, or of a wrongful imputation, insofar as the infringement is intentional (with all

the consequences that the harm resulting from a wrongful act entails in terms of foreseeability).

If conduct constituting an antitrust offence has been ascertained by an administrative measure or by a ruling of an administrative court, it will fall to the defendant firm to demonstrate the inapplicability of the antitrust rules, the existence of exemptions or any circumstance that might exclude the occurrence of infringement.

The burden of proof is – for the type of the case in point – reversed.

If the injured party goes directly to an ordinary court to obtain compensation for harm, proof of the violation is facilitated both by the rules on the disclosure of data (Arts 5 et seq) and by the courts' ability to obtain and disclose evidence pursuant to Arts 5 et seq of the directive. Thus, a demonstration of the existence of a subjective requisite is not needed because what matters for the purposes of applying the competition law, and therefore the sanctions in connection with its violation, is the *result*, the effect of the conduct concerned.

Since it is a question of a *typical* case, the general rules on unlawful act do not apply.

(ii) But proof of causation between the conduct and the injury suffered is necessary.

(iii) As concerns the injured interest, it is closely linked with the purpose of the law infringed, and therefore with the regime's purpose of protection. Recital no 11 states:

‘According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law’.

It is a question of an *acquis communautaire*, explains recital no 12, which repeats: ‘Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss’.

But what is the *injured interest*? And how is *anyone* defined?

Recital no 13 states that

‘the right to compensation is recognised for any natural or legal person – consumers, businesses and public authorities alike – irrespective of the existence of a direct contractual relationship with the infringing business, and regardless of whether or not there has been a prior finding of an infringement by a competition authority’.

And the harm is constituted by resultant injury, loss of profit (recital 12) and loss of opportunity (recital 13).

Therefore, to ascertain a claimant's entitlement to bring proceedings, the directive must be checked for a designation or sufficient indication of the type to

which such claimant belongs. The word ‘anyone’ is not in itself decisive.

Besides the generic enunciation (*consumers, businesses, public authorities*), there are many indications that the directive specifies explicitly: eg recital no 43 speaks of conditions under which goods or services are sold, of supplies in the case of a purchasers’ cartel (thus the category of *suppliers* is included), of *direct* and *indirect purchasers*.

Therefore, the following may be deemed entitled to bring suit:

(i) the competing business, which consequent to the antitrust infringement has suffered a financial loss in relation to its viability (as is the case with loss resulting from slavish imitation, dumping, denigration of products, etc);

(ii) the ‘weaker’ business having participated in the commission of the offence by reason of its relations with the stronger; the business having suffered due to another’s abuse of dominant position, or to abuse of its economic dependence; the suppliers; here too it is a matter of reduced earnings or financial loss;

(iii) the consumers and users. Here one may speak of restrictions on the freedom to contract or, as the case may be, financial loss due to having been obliged to pay a price greater than what would have been applied had the abuse, or, in general, anti-competitive conduct, not occurred;

(iv) the public authorities, with regard to the relations established with the company or companies having committed the antitrust infringement.

There also exist cases wherein the right held by the injured party is not only the generic one (although now deemed a fundamental right) consisting in the freedom to contract, but a truly different right, such as, for instance, copyright. And some authors have written of the interest of the market as a ‘common good’. However, if we are in the presence of ‘*private enforcement*’ and the remedy is one of private law, the requisites laid down by private law must be observed.

In particular, one must identify, in terms of *wrongful* damage, the type of private interest that has been injured – and this varies according to the category to which the victim belongs –, and the causal connection must be demonstrated.

But the causal connection is not addressed by the directive. Art 17, ‘Quantification of harm’, contains a provision regarding proof of the link of causation: ‘It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption’. The presumption of harm implies a presumption of liability and, in any event, a link between the harm sustained by the victim and the infringer’s conduct. Moreover, in the recitals there is mention of the loss of *chance*, another aspect of the harm that implies ascertainment of a link of causation and a calculation of the probability of loss of opportunity for profit.

The link of causation is decisive in cases wherein the injured party is of the category of consumers having purchased goods or services via ‘downstream’ contracts (with respect to the agreement, accord, practices or *de facto* conduct of the company having distorted the competitive contest), ie indirect purchasers

and consumers who, via collateral relations established with firms other than those having infringed the rules, have suffered the deleterious effects (the so-called umbrella customers mentioned above).

With this 'diminished' regime, the directive looks to the national courts' assessments for ascertainment of a link of causation which, as is well known, constitutes one of the techniques for selecting the compensable losses and, especially, for ascribing liability.

Various types of problems then arise.

First of all, one must ascertain whether the gaps can be filled by references to rulings of the Court of Justice, which, however, does not lay down precise rules in this respect.

The research conducted in order to draft the text of the directive has made it plain that, in terms of causality, the various member countries' systems are grounded in diverging models. There are systems wherein no distinction is made between causality in fact and causality in law, others wherein the judge proceeds first with ascertainment in fact and then with selection of causes. Some require proof of a direct link, others select the compensable loss on the basis of a criterion of foreseeability. Hence the attempts, still in the proposal stage, at codifying uniform criteria for the selection of compensable losses.

The situation is rendered difficult by the fact that the case law of the Court of Justice is not unequivocal, and the projects for standardisation of the rules of civil liability, and thus of legal causality, differ from one other.

In order to solve all these problems a unitary regime of civil liability within the Union would be needed.

VII. Projects for Unification of Civil Liability Rules

Scholars of comparative law maintain that the various models prevailing in national legal systems already show a tendency to converge.¹⁸ But the process is quite slow and full of pitfalls, for it requires the cooperation of case law and jurisprudence, as well as a particular sensitivity on the part of national legislators. Also, the *acquis communautaire* in this field is limited, geared as it is towards regulating rather narrow areas. And as has been seen, the rules diverge according to sector, in a wholly sporadic manner.

The research underway, results of which are published from time to time, show how far apart the various systems still are and, conversely, how useful it would be to arrive at a uniformity of terms, concepts and general rules.

Some treatises have already apprised jurists of certain particular aspects and difficulties presented by a common acknowledgement of the rules, originating

¹⁸ B. Markesinis, *The Gradual Convergence, Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (Oxford: Clarendon Press, 1994).

from both statute law and case law, of civil liability.

The current research resulting from analyses coordinated by Jaap Spier, Helmut Koziol, Ulrich Magnus and Bernhard A. Koch is commendable. It concerns the limits and the expansion of civil liability, illegality, causality, injury, objective liability. Commendable as well are the attempts at codification being made by the European Group on Tort Law based at the University of Girona, and by the Study Group for the drafting of a European civil code, coordinated by Christian von Bar.

In both cases, they are documents in progress, of interest particularly because they follow different systematising logics.

The proposals from the study centre at the University of Girona, which have been conveyed to the working group coordinated in Vienna by Professor Koziol, identify certain fundamental principles (PETL) disposed in an order quite similar to that chosen by the Italian legislator for the codification of civil liability rules (Arts 2043-2059 of the Italian Civil Code).

Liability for injury caused to third parties is ascribed on the basis of fault, or of the exercise of dangerous activities, or of the act of an auxiliary agent (Art 1.101); the compensable loss is of an economic nature and a moral nature (Art 2.101); the legally protected interests concern the person, property, breach of contractual relations, harm done voluntarily (Arts 2.101 et seq); the burden of proof lies with the injured party, but the court has the power to alleviate it when proof is too difficult or costly; the link of causation is grounded in the *condicio sine qua non*, but concurrent, alternative, potential and minimal causes are distinguished (Arts 3.101 et seq); liability is ascribed after taking into consideration the foreseeability of the injury, the nature and value of the legally protected interest, the ground for ascription, the extension of the ordinary risks of life, the purpose of the law infringed (Arts 3.201 et seq); the ground for liability is supplied by the fault, but there are cases of presumption of fault and of objective liability (Arts 4.101 et seq); in particular, there is objective liability in a case of performance of abnormally risky activities, and in cases where special domestic laws prescribe it (Arts 5.101 et seq); special rules are prescribed for liability for injury caused by minors and by the mentally incompetent, and for auxiliary agents (Arts 6.101 et seq); the framework is completed with rules regarding exemptions and items of compensable loss.

The project developed by Christian von Bar is closer to the German model of the BGB (§ 823 et seq) There is insistence on the injuring harm of a legally significant subjective situation, which consists in the injury of a series of interests listed that correspond roughly to the type of interests normally safeguarded in the realm of civil liability. The criterion of imputation is the fault or wrongdoing. However, there are also special rules for harm caused to property by employees or members of a group, for harm caused to the environment by defective products, by the circulation of vehicles or of dangerous things. The framework is completed

by a series of meticulous rules regarding imputability, solidarity or joint liability, contributory fault, remedies for loss and heads of damage.

The field of civil liability is an extraordinary laboratory for the jurist who deals with national law, comparative law or European Union law, or even European private law. The emergence of the values of the person in the area of civil liability is a guarantee of progress and stability. But a great commitment by jurists is still needed to reach a satisfactory level of protection for the interests concerned.

Unfair Contract Terms Before the Italian Competition Authority (ICA)

Marco Angelone*

Abstract

The newly-introduced Art 37-*bis* of the Consumer Code provided the Italian Competition Authority (ICA) with new powers aimed at scrutinizing – *ex ante* or *ex post* – the unfairness of the terms included in standard contracts between traders and consumers. This paper analyses the legislative provision (as supplemented by secondary regulation) in view of the decisions adopted by the ICA over the past few years in order to shed light on how that administrative body has exercised its prerogatives.

I. Overview of the Powers of Administrative Review of Unfair Terms Granted to the Italian Competition Authority (Art 37-*bis* of the Consumer Code)

So-called ‘conformation’ of contract (and more generally of freedom of contract) by authorities¹ has found new expression in the wake of the adoption of Art 37-*bis* of the Consumer Code that – embracing a widespread attitude among legal scholars opposed to the setting up of *ad hoc* bodies² – tasks the Italian Competition Authority (ICA) with providing ‘administrative protection against unfair terms’.

Art 5 of the ‘Grow Italy’ Decree (decreto legge 24 January 2012 no 1, converted into legge 24 March 2012 no 27), overturning the general decision made at the time of the transposition of Directive 93/13/EEC,³ has introduced a novel form

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¹ About the function and peculiarities of ‘conformative’ influences on contracts descending from ‘independent’ regulation of markets, see M. Imbrenda, ‘Il ruolo delle autorità indipendenti nella integrazione e conformazione del contratto’, in E. Caterini et eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), I, 922; V. Ricciuto, ‘L’integrazione dei contratti di impresa. Dilatazione o estinzione della fattispecie?’ *Rivista di diritto dell’impresa*, II, 1903 (2017). For further, M. Zarro, *Poteri indipendenti e rapporti civili. Italia, Germania e diritto europeo* (Napoli: Edizioni Scientifiche Italiane, 2015); M. Angelone, *Autorità indipendenti e eteroregolamentazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 2012), 103.

² E. Minervini, *Tutela del consumatore e clausole vessatorie* (Napoli: Edizioni Scientifiche Italiane, 1999), 196 (and further bibliographical references therein); V. Roppo and G. Napolitano, ‘Clausole abusive’ *Enciclopedia giuridica* (Roma: Treccani, 1994), Agg, VI, 12.

³ At the time it was decided to renounce a ‘mixed’ system to the sole benefit of the judicial

of administrative review, both ‘advisory before the fact’ (*ex ante*) and ‘prescriptive after the fact’ (*ex post*), aimed at establishing whether terms contained in standard form contracts entered into between traders and consumers are unfair within the meaning of Arts 1341 and 1342 of the Civil Code.

The amendments to the Code have given rise to significant effects at the systemic level, including the superseding of the ‘monopoly’ enjoyed by the judiciary in tackling unfair terms and associated corollaries. ‘Decentralised’ judicial protection and legal action before the courts (be it ‘individual’ or ‘collective’) under Arts 36 and 37 of the Consumer Code is now flanked by ‘centralised’ protection afforded by an independent body, thereby contributing to building an ‘integrated system of protection’⁴ that synergistically combines both ‘private enforcement’ and ‘public enforcement’.⁵ Access to differentiated remedies and the possibility of a ‘multitasking’⁶ approach further translates into an overall improvement in consumer protection, which is elevated to a primary objective of the ever more ‘consumer-oriented’ institutional mission of the ICA.⁷

Finally, as background to the ICS reforms just described, it is important to note that these reforms reflect two differences from the traditional judicial

protection of consumers, so much so that G. Calvi, ‘Art 1469-*sexies*’, in E. Cesaro ed, *Clausole vessatorie e contratto del consumatore* (Padova: CEDAM, 1st ed, 1996), 683, had defined as ‘maimed’ the original discipline which ‘undoubtedly represent(ed) a disappointment for the interpreter’ (E. Minervini, *Tutela del consumatore e clausole vessatorie* n 2 above, 199). Indeed, the cited directive merely required the adoption of ‘adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’ (Art 7, para 1), without opting for judicial or administrative review (Art 7, para 2) (V. Rizzo, *Le «clausole abusive» nell’esperienza tedesca, francese, italiana e nella prospettiva comunitaria* (Napoli: Edizioni Scientifiche Italiane, 1994), 626; C.M. Bianca, ‘Le tecniche di controllo delle clausole vessatorie’, in Id and G. Alpa eds, *Le clausole abusive nei contratti stipulati con i consumatori* (Padova: CEDAM, 1996), 359 and 365; A. Orestano, ‘I contratti con i consumatori e le clausole abusive nella direttiva comunitaria: prime note’ *Rivista critica di diritto privato*, 502 (1992)), thus allowing Member States to ‘adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer’ (see Art 8 and, with the same wording, the 12th *considerandum*).

⁴ E. Battelli, ‘L’intervento dell’Autorità *Antitrust* contro le clausole vessatorie e le prospettive di un sistema integrato di protezione dei consumatori’ *Europa e diritto privato*, 207 but especially 258 and 266 (2014).

⁵ V. Lopilato, ‘Tutela pubblica e privata della concorrenza’, in G. Pellegrino and A. Sterpa eds, *Giustizia amministrativa e crisi economica. Serve ancora un giudice sul potere?* (Roma: Carocci, 2014), 159; P. Cassinis, ‘*Antitrust* tra Autorità e giudici: aspetti problematici ed innovativi’, in E.A. Raffaelli ed, *Antitrust between EC Law and National Law. Antitrust fra diritto nazionale e diritto comunitario* (Bruxelles-Milano: Bruylant-Giuffrè, 2009), 263; G. Bruzzone and M. Boccaccio, ‘Il rapporto tra tutela della concorrenza e tutela dei consumatori nel contesto europeo: una prospettiva economica’, available at <https://tinyurl.com/yd4sbe7a> (last visited 30 June 2018).

⁶ M. Cerioni, *Diritti dei consumatori e degli utenti* (Napoli: Editoriale Scientifica, 2014), 367.

⁷ V. Minervini, ‘Autorità garante della concorrenza e del mercato quale autorità di tutela del consumatore: verso una nuova forma di regolazione dei mercati’ *Rivista di diritto commerciale*, I, 1149, 1152 and 1173 (2010).

authority over contracts. First, the ICS reforms reflect the so-called ‘administrativisation of contract’ implying

‘the progressive extension of the power to govern private initiative (...) from the original private parties (who had a complete say in the matter inasmuch as they enjoyed total ‘freedom of contract’) to independent authorities vested with supervisory and regulatory functions’.⁸

Second, the reforms reflect the so-called ‘dejudicialisation’ of the protection of the weaker contracting party,⁹ now a matter that falls within the realm of remedies that are removed from the sphere of the courts¹⁰ or that are in any event alternatives to strictly judicial ones.¹¹

Having regard to the above principles, this work will analyse the relevant legislative provisions taking account of the functioning of the ICA during the last five year period with a view – within the limits of *interna corporis* – to shedding light on how that body has exercised its powers in connection with unfair terms thus far.

II. Sphere of Application of *Ex Post* Review and ‘Ordinary’ Proceedings

According to official statistics,¹² since the new provisions entered into force, thirty-nine decisions were issued by the ICA following ‘ordinary’ proceedings (fourteen in 2013, fifteen in 2014, zero in 2015, three in 2016 and seven in 2017). Crucial for the implementation of the legislative provisions and the exercise of the corresponding functions was the issuance – pursuant to Art 37-*bis*, para 5, of the Consumer Code – of the (single) procedural regulation (hereinafter the Procedural Regulation), approved in September 2012 and amended most recently by Authority resolution April 2015 no 25411 (‘Regulation on Procedures for Investigating Misleading and Comparative Advertising, Unfair Commercial Practices, Violation of Consumers’ Rights in Contracts, Breaches of the Ban on Discrimination and Unfair Terms’).

⁸ E. Battelli, ‘L’intervento dell’Autorità *Antitrust* contro le clausole vessatorie’ n 4 above, 254; C. Camardi, ‘La protezione dei consumatori tra diritto civile e regolazione del mercato. A proposito dei recenti interventi sul Codice del consumo’ 6 *juscivile.it*, 310 (2013).

⁹ See, *amplius*, M. Angelone, ‘La «degiurisdizionalizzazione» della tutela del consumatore’ *Rassegna di diritto civile*, 723 (2016).

¹⁰ S. Lucattini, *Modelli di giustizia per i mercati* (Torino: Giappichelli, 2013), 6.

¹¹ Consider only the spreading of consumer ADR and ODR. Relating to the latter, see recently E. Minervini, ‘I sistemi di ODR’, in E. Minervini ed, *Le online dispute resolution (ODR)* (Napoli: Edizioni Scientifiche Italiane, 2016), 7; and A. Fachechi, *La giustizia alternativa nel commercio elettronico. Profili civilistici delle ODR* (Napoli: Edizioni Scientifiche Italiane, 2016), *passim*.

¹² Available at <https://tinyurl.com/ybsp9h6n> (last visited 30 June 2018).

In these years the Authority adopted a ‘sectoral approach’,¹³ as it mainly dealt with analysing the standard contracts used by traders in the particular markets that were considered from time to time. (Specifically, ‘attention’ was focused on short-term car hire; real estate agents; the supply of digital content on-line; private security services; the supply and sale of elevators; and fixed and mobile telephony services).

It is worth clarifying immediately that as regards its objective sphere of application, the ICA’s review may cover terms contained in ‘B2C’ contracts concluded by accepting general conditions of contract or by signing forms, models or templates within the meaning of Arts 1341 and 1342 of the Civil Code.¹⁴ Therefore, the sphere of application is narrower than that involved when an individual seeks judicial protection because in that latter case the protection extends to any contract between a trader and a consumer, including those relating to a single business deal with a single contracting party.¹⁵ The dividing line drawn by the legislation would seem to stem mainly from a desire not to ‘overburden’ the Authority with a painstaking, widespread and indiscriminate review. Rather, the review would be confined to the unfair terms appearing in ‘mass contracts’, which undoubtedly would have greater ramifications than terms intended to be used just once both because they could be repeated and disseminated more widely and because they are obviously not negotiated but drawn up unilaterally by the ‘stronger’ contracting party.¹⁶

This leads to the first point of contact¹⁷ with the injunctions under Art 37 of the Consumer Code,¹⁸ strengthening the conviction – very widespread among

¹³ In these words are expressed both the ‘Annual Report 2013’, available at www.agcm.it, 209, and the ‘Annual Report 2014’, *ibid* 235.

¹⁴ A. Barengi, ‘Art 37 bis’, in V. Cuffaro ed, *Codice del consumo* (Milano: Giuffrè, 4th ed, 2015), 326. In particular, E. Minervini, ‘La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore’ *Le nuove leggi civili commentate*, 568 (2012), cleverly notices how ‘more than a doubt raises the notion, rather mysterious, of models’ unknown to the lexicon of the recalled articles.

¹⁵ V. Roppo, ‘Il contratto’, in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2001), 912; C.M. Bianca, *Diritto civile*, III, *Il contratto* (Milano: Giuffrè, 2nd ed, 2000), 375.

¹⁶ These are clauses that become part of current-use contracts and also escape to the notary checks when the agreement is made. In relation to the guarantee function performed by the notary who is called to evaluate the unfairness and the iniquity of the agreements, see G. Perlingieri, ‘Funzione notarile e clausole vessatorie. A margine dell’Art 28 legge 16 febbraio 1913 no 89’ *Rassegna di diritto civile*, 842 (2006); and P. Perlingieri, ‘Funzione notarile ed efficienza dei mercati’ *Notariato*, 627 (2011).

¹⁷ A. Mirone, ‘Verso la despecializzazione dell’Autorità *antitrust*. Prime riflessioni sul controllo delle clausole vessatorie ai sensi dell’Art 37-bis Cod. Cons.’ *Annali italiani del diritto d’autore, della cultura e dello spettacolo*, 306 (2012).

¹⁸ That the widely consolidated opinion includes among the ‘general-preventive’ review mechanisms: F. Rizzo, ‘L’azione inibitoria’, in G. Recinto et al eds, *Diritti e tutele dei consumatori* (Napoli: Edizioni Scientifiche Italiane, 2014), 555; E. Capobianco, ‘Art 37’, in Id and G. Perlingieri eds, *Codice del consumo annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2009), 208; E. Guerinoni, *I contratti del consumatore. Principi e regole*

initial commentators¹⁹ – of the ‘supplementary’ (and not just ‘additional’) value of Art 37-*bis* of the Consumer Code and seeing the new legislative provisions as an opportunity to ‘make good’ the injunctions’ practical shortcomings, which had become apparent.²⁰

According to the primary legislation as supplemented by secondary regulation (Art 23, para 2, of the Procedural Regulation), proceedings before the ICA can commence with an application (or ‘complaint’, to be more precise) of a party or – precisely to make public enforcement more incisive²¹ – or with a decision of the ICA of its own motion.

As regards the first route, the Procedural Regulation gives a rather elastic definition of those who have standing, going no further than using the hendiadys expression that ICA action may be triggered by ‘any person or organisation having an interest’ through a paper or electronic (‘web form’ or ‘certified e-mail’) communication.

Leaving aside proceedings initiated by the ICA of its own motion, action has mainly been taken at the behest of consumer associations who have often voiced the concerns or adopted as their own the complaints made by single consumers. (On the other hand, at present, there are no actions triggered by single traders or trade associations).

By contrast, there is no record of any ‘complaint to the Authority’ having been submitted by Chambers of Commerce (or their regional or national bodies), probably because any such step should – in accordance with Art 23, para 3, of the Procedural Regulation – be taken during the exercise of functions²²

(Torino: Giappichelli, 2011), 196; E. Minervini, ‘Contratti dei consumatori e tutela collettiva nel codice del consumo’ *Contratto e impresa*, 635 (2006); S. Patti, ‘Le condizioni generali di contratto e i contratti del consumatore’, in E. Gabrielli ed, *I contratti in generale* (Torino: UTET, 2nd ed, 2006), 384; F. Tommaseo, ‘Art 1469-*sexies*’, in G. Alpa and S. Patti eds, *Le clausole vessatorie nei contratti con i consumatori*, in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2003), 1159.

¹⁹ E. Minervini, ‘La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore’ n 14 above, 564; L. Rossi Carleo, ‘La tutela amministrativa contro le clausole vessatorie’ *Obbligazioni e contratti*, 492 (2012); E. Battelli, ‘La tutela amministrativa contro le clausole vessatorie’ *Consumerism 2012. Quinto rapporto annuale*, 61, available at <https://tinyurl.com/y8qzju6c> (last visited 30 June 2018); V. Pandolfini, ‘La tutela amministrativa dei consumatori contro le clausole vessatorie’ *Corriere giuridico*, 48 (2012).

²⁰ During an arc of about twenty years, the injunctions did not produce the expected results (A. Bellelli, ‘L’azione inibitoria contro le clausole vessatorie dopo venti anni’, in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo*, I, n 1 above, 97; E. Minervini, ‘Azione inibitoria e contratti dei consumatori’ *Rassegna di diritto civile*, 618 (2014)), becoming a ‘blunt weapon’ on which many factors had a negative impact (T. Rumi, ‘Il controllo amministrativo delle clausole vessatorie’ *Contratti*, 644 (2012)). However, see Court of Justice of the European Union, Case 472/10 *Nfh v Invitel*, Judgment of 26 April 2012, available at www.eur-lex.europa.eu, with commentary by A. Fachechi, ‘Azione inibitoria collettiva ed efficacia «*ultra partes*» del giudizio di vessatorietà’ *Giusto processo civile*, 785 (2014), which claimed the ‘*ultra partes*’ efficacy of injunctions.

²¹ L. Rossi Carleo, ‘La tutela amministrativa contro le clausole vessatorie’ n 19 above, 495.

²² See on them A. Bucelli, ‘Contratti del consumatore e clausole vessatorie. Riflessioni da

relating to either ‘the drawing up of standard contracts between enterprises, trade associations and associations protecting the interests of consumers and users’ or the ‘promotion of checks for the existence of unfair terms inserted into contracts’ pursuant to the former diction and contents of Art 2, para 2, letter *h*) and letter *i*), of legge 29 December 1993 no 580,²³ which have not produced any uniform or significant volumes. This would seem to mirror the basic failure witnessed in relation to the similar power of Chambers of Commerce to seek injunctions pursuant to Art 37 of the Consumer Code²⁴ that remained unexercised.²⁵

III. The ‘Pre-Investigative’ Stage and Cases of (Early) Closure of Proceedings. The Persuasive Effects of ‘Warning Letters’ and the Chance for Traders to Have the Case Against Them Dropped by Timely Removing or Amending the Contractual Terms Suspected of Being Unfair by the Italian Competition Authority. Inapplicability of the Rules on ‘Commitments’ Under Art 14-ter of Legge 1990 no 287

Mirroring the approach adopted by the previous rules, the Procedural Regulation makes the taking of administrative action and the opening of an investigation conditional on the ICA first establishing that the factual and legal requirements for considering the reported term as potentially unfair are fulfilled.

This first step filter (‘pre-investigative’) clearly aims to limit the number of

un’esperienza sul campo’, in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo*, I, n 1 above, 179; E. Battelli, ‘Il controllo “amministrativo” delle clausole inique e la predisposizione di contratti-tipo’, in Id, *I contratti-tipo e i pareri sulle clausole inique delle Camere di Commercio*, I, *Settori commercio e turismo* (Roma: Calderini, 2010), 30 and 34; G.F. Cartei and S. Faro, ‘Consumatore e utente’, in M.P. Chiti and G. Greco eds, *Trattato di diritto amministrativo europeo. Parte speciale* (Milano: Giuffrè, 2nd ed, 2007), II, 952; D. Morana, ‘Camera di commercio, industria, artigianato e agricoltura’ *Enciclopedia del diritto* (Milano: Giuffrè, 2002), Agg, VI, 216; E. Graziuso, *La tutela dei consumatori contro le clausole abusive. Mezzi rituali ed irrituali* (Milano: Giuffrè, 2002), 112; S. Antonini, ‘Le Camere di commercio, il controllo delle clausole «vessatorie» e le clausole «inique» ex l. 580/93’, in U. Ruffolo ed, *Clausole «vessatorie» e «abusiva». Gli artt. 1469-bis ss. c.c. e i contratti col consumatore* (Milano: Giuffrè, 1997), 149; G. Alpa, ‘Il controllo amministrativo delle clausole abusive’, in Id, *Investimento finanziario e contratti dei consumatori. Il controllo delle clausole abusive* (Milano: Giuffrè, 1995), 15.

²³ The article was repealed and replaced by the decreto legge 25 November 2016 no 219, concerning the ‘Reorganization of Chambers of commerce, industry, crafts and agriculture’.

²⁴ In this regard, see E. Battelli, ‘L’inibitoria delle Camere di Commercio’ *Giurisprudenza italiana*, 2626 (2007); and F. Tommaso, ‘Art 1469-sexies’ n 18 above, 118.

²⁵ Probably for this reason, this prerogative has recently been eliminated by Art 5 of the aforementioned decreto legge 25 November 2016 no 219. To fill this gap, it should be granted to the ICA the standing to bring an injunction before the ordinary Court in order to obtain a ‘*erga omnes*’ removal of the unfair term (by analogy with the power already provided by art 21-bis, legge 10 October 1990 no 287).

cases investigated so as not to swamp the Authority with applications, complaints and reports that are spurious or plainly groundless.²⁶ Indeed, should no *prima facie* unfairness be detected in the suspected term or in the absence of facts warranting a further inquiry, the proceedings must be dropped for inapplicability of Arts 33 of the Consumer Code or manifest groundlessness (Arts 5, para 1, letter *b*), and 5, para 1, letter *c*), of the Procedural Regulation). From that standpoint, Art 4, para 4 and Art 5, para 1, letter *a*), of the Procedural Regulation take on a certain importance in that they require the request to take action to be adequately detailed and to contain in particular the minimum information prescribed by the rules, specifically, the details required to identify the complainant, the offending trader and the terms alleged to be unfair. Without that information, the request cannot be acted on, although the Authority has the option to proceed on its own motion to investigate the matter further and the complainant has the option to properly resubmit the request.

The pre-investigative phase is a crucial stage of ordinary proceedings also because the combined provisions of Art 5, para 1, letter *d*), and Art 23, para 1 and para 4, of the Procedural Regulation grant the Authority – except for very serious (so-called ‘hardcore’) violations – the option of informing the trader in writing of the unfairness of a given contractual term where well founded reasons exist. The trader may well then decide, in light of the undeniable persuasive force (‘moral suasion’)²⁷ of a so-called ‘warning letter’, to have the case against him dropped without further ado by diligently removing or amending the terms ‘pointed to’ by the ICA.²⁸

In the absence of a specific provision, it would seem that once an investigation has actually commenced a trader cannot ‘voluntarily’ take corrective action and seek to (avail itself of a ‘*commodus discessus*’ and) have the case against it

²⁶ M. Libertini, ‘Il ruolo necessariamente complementare di «private» e «public enforcement» in materia *antitrust*’, in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: il Mulino, 2009), 172.

²⁷ As regards the ‘moral suasion’ carried out by independent authorities, see S. Morettini, ‘Il *soft law* nelle Autorità indipendenti: procedure oscure e assenza di garanzie?’, 5, available at <https://tinyurl.com/yc68zdvv> (last visited 30 June 2018); with particular reference to ICA, see C. Alvisi, ‘La «Moral suasion» dell’AGCM nel procedimento sulle pratiche commerciali sleali’ *Annali italiani del diritto d’autore, della cultura e dello spettacolo*, II, 837 (2011); and, with particular reference to the Italian Companies and Stock Exchange Commission (CONSOB), see N. Pecchioli, ‘Consob e poteri “commendatori” di conformazione e unificazione del mercato’ *Diritto processuale amministrativo*, 799 (2017).

²⁸ During 2013, no 3 actions of ‘moral suasion’ were successfully completed (see the ‘Annual Report 2013’ n 13 above, 209), while no 8 were those of 2014 (see the ‘Annual Report 2014’ n 13 above, 236). Some of these have been reported to consumers on the ICA official website (<https://tinyurl.com/y7xdklg6> (last visited 30 June 2018)). In a single case, the investigation was preceded by a ‘moral suasion’ activity failed because the trader (informed of the probable unfairness of the term pursuant to Art 21, para 4, of the Procedural Regulation) did not adhere spontaneously to the censures formalized in the ‘warning letter’ (decision 26 June 2013 no 24421 (CV32), available at www.agcm.it, § 8).

dropped.²⁹ This is confirmed by the fact that in a number of cases in which the trader decided to take remedial steps in relation to terms examined by the Authority, the latter still went ahead with its administrative action³⁰ and extended its scrutiny to the amended terms (again, after warning the trader),³¹ with the praiseworthy intent of providing clarity and certainty to the implicated trader regarding the establishment/continuance of contractual relations with consumers.³² In practice, the ICA has shown that it is willing, without beginning new and independent ordinary proceedings, to extend already pending proceedings, which, to the extent that the Authority assesses proposals to amend terms not yet used, end up taking the form of a sort of ‘ancillary application for an advance ruling’.³³ In that regard the ICA has clarified that the trader’s new terms are neither comparable nor equivalent to ‘commitments’ under Art 14-*ter* of legge 10 October 1990 no 287, which traders are precluded from offering. ‘Commitments’ are impermissible because the legge is silent on the matter.³⁴

The various outcomes of pre-investigative action pursuant to Art 5, para 1, letter *e*) and letter *f*), of the Procedural Regulation (dropping of the case because the breach is clearly unlikely to materially distort the economic behaviour of the average consumer, or a finding that there is no case to answer because the conduct is an isolated example or not a priority for the Authority due to a need to ensure that administrative action is streamlined, effective and economic) would not seem to strictly pass the ‘test of compatibility’ laid down in the Procedural Regulation (see Art 23, para 1) since those outcomes hinge on a ‘*de minimis* rule’ that is more suited to ‘dynamic’ contexts like unfair commercial practices and misleading advertising than to a ‘static’ context like that of unfair terms. Nonetheless, the aggregate data on action taken by the ICA over the five year period gives one reason to suppose that there has been ample recourse to

²⁹ See the decision 27 March 2013 no 24288 (CV28), available at www.agcm.it, § 30, in which the ICA declined to drop the case because ‘the removal of the profiles of unfairness of the terms in the subject matter of the proceeding was only partially completed’; and because ‘the modification of the terms was made after the notice of commencement of the investigation’.

³⁰ Similarly, as shown in decision 27 March 2013 no 24289 (CV29), available at www.agcm.it, § 26, the continuation of the proceedings is required even when the elimination of the contested contract terms follows only after the notice of commencement of the investigation.

³¹ Decision 9 August 2017 no 26729 (CV157), available at www.agcm.it; decisions 19 December 2014 nos 25244 (CV114), 25243 (CV113) and 25242 (CV89) *ibid*; decision 1 August 2014 no 25052 (CV92), *ibid*; decision 25 June 2014 no 24997 (CV61), *ibid*; decision 9 October 2013 no 24546 (CV49), *ibid*; decision 11 June 2013 no 24401 (CV34), *ibid*; decision 11 June 2013 no 24399 (CV27), *ibid*; decision 27 March 2013 no 24288 (CV28).

³² P. Cassinis, ‘The Administrative protection against unfair contract terms in Italy: first-year-enforcement activity’ *Italian Antitrust Review*, 99 (2014).

³³ In this sense, are emblematic the decisions 24 February 2016 no 25881 (CV140); of 5 June 2014 no 24958 (CV100); and 11 June 2013 no 24400 (CV33), all available at www.agcm.it, in which the ICA considered unfair the terms both in their original wording and as proposed by the trader and intended to be used after the definition of the ordinary proceedings in progress.

³⁴ Decision 19 December 2014 no 25242 (CV89), § 113. Further, Art 9 of the Procedural Regulation is not applicable because it is not cited in Art 23, para 1, of the Procedural Regulation.

these further ‘escape routes’ so as to enable the Authority to more efficiently manage the numerous complaints received and to focus on investigating solely high-impact distortions, thereby pursuing a policy designed to set priorities – even if only temporarily – based on the adverse effect on competition. Moreover, such an approach is in line with the belief that the Authority’s action to combat unfair terms must be informed not by the individual interests of (single) consumers but by the public interest in an efficient and transparent functioning of the market.³⁵

Finally, in setting out the how long each stage of the proceedings is to last, the Procedural Regulation clarifies that within one hundred and eight days after receipt of the complaint the Authority is obliged to embark on an investigation with the aim of carrying out all of the necessary checks and obtaining any and all elements of use with a view to making a final decision (Art 6, para 1, and Art 23, para 1, of the Procedural Regulation) and to notify the parties and the complainant of the commencement of proceedings (Art 6, para 2, of the Procedural Regulation). Should no steps be taken in those one hundred and eight days, the pre-investigative stage is deemed to be closed with no case to answer.³⁶ It should be noted that the entire administrative procedure must be completed within a maximum of hundred and fifty days (or two hundred and ten days if the trader is resident or based abroad) running from the date of the aforementioned notice of commencement of the investigation (Art 23, para 5, of the Procedural Regulation).³⁷

IV. ‘Mandatory’ Consultation with National Trade Associations and ‘Optional’ Consultation with Regulatory or Supervisory Authorities

Art 37-*bis*, para 1, of the Consumer Code provides that prior to making its final decision the ICA must consult with the consumer associations (enrolled in the register maintained pursuant to Art 137 of the Consumer Code), as well as

³⁵ S. Mezzacapo, ‘Illiceità delle clausole “abusive” (tra presidi di “giustizia negoziale” e tutela amministrativa del “mercato”’, in F. Capriglione ed, *I contratti dei risparmiatori* (Milano: Giuffrè, 2013), 145, 147 and 152. The opinion resumes the more general conviction that consider the public enforcement granted by the ICA ‘as an intervention aimed at protecting the general interests to the correctness of the competition and not an instrument aimed at solving the interindividual conflicts’ (G. Guizzi, ‘Il divieto delle pratiche commerciali scorrette tra tutela del consumatore, tutela del concorrente e tutela del mercato: nuove prospettive (con qualche inquietudine) nella disciplina della concorrenza sleale’ *Rivista di diritto commerciale*, I, 1132 (2010)).

³⁶ In Art 5, para 2, the Procedural Regulation adds that the ICA retains the power to renew the proceeding and to carry out an in-depth investigation based on occurring facts or on a different assessment of the priorities for intervention.

³⁷ Otherwise, it is possible to take legal action against the so-called ‘silence as refusal’, as indirectly confirms Tribunale Amministrativo Regionale-Lazio, 23 June 2015 no 8572, available at www.giustizia-amministrativa.it.

the relevant national trade associations.³⁸

The original provisions of the Decree Law introducing Art 37-*bis*, para 1, made the finding of unfairness conditional on ‘prior agreement with the trade associations’, thereby granting them not merely an advisory role but a veritable power of co-decision. When converting the Decree into a Law, the Parliament was afraid of limiting the Authority’s powers and undermining the utility of its remedies. Specifically, it was concerned that involving trade associations at the decision-making stage would lead to the undue influence of corporatist logic where ‘the very association that the trader belonged to would be called upon to give a technical assessment reproaching the term’.³⁹

As regards how mandatory consultation actually takes place, the Procedural Regulation provides that within thirty days after the commencement of the investigation, the case officer must publish a notice on a dedicated section of the Authority’s website setting out the term and stating the economic sector that the investigation concerns, as well as any information of use for the purposes of the consultation itself. Within thirty days after the said notice any persons with standing – subject to first furnishing details of their status and interest in the matter – may submit written comments to the ICA through a dedicated certified e-mail account (Art 23, para 6, of the Procedural Regulation).

In this regard one can only appreciate the constant and systematic participation of the consumer associations that (unlike the trade associations)⁴⁰ have always actively participated in online mandatory consultations through submitting written observations.⁴¹ For its part, the ICA has given due consideration and great weight, when stating the reasons for its decisions, to the input from the associations admitted to the consultation process.

By contrast, pursuant to Art 37-*bis*, para 5, of the Consumer Code, consultation with the regulatory or supervisory authorities for the sector that the trader involved belongs to (for example, the Bank of Italy, the Italian Companies and Stock Exchange Commission - CONSOB, the Institute for the Supervision of Insurance - IVASS, the Italian Regulatory Authority for Electricity Gas and Water - AEEGSI, and the Communications Authority) is merely optional

³⁸ It should be noted that in its original wording Art 37-*bis*, para 1, of the Consumer Code provided that ICA must consult also with the Chambers of Commerce (or their unions) that were ‘affected by the terms that the proceedings concern due to their specific experience gained in the sector’ (Art 23, para 6, of the Procedural Regulation) or in light of the functions that they could exercise pursuant to the former Art 2 of legge 29 Dicembre 1993 no 580. In fact, Art 5 of the aforementioned decreto legge 25 Novembre 2016 no 219 deleted all the references to Chambers of Commerce (and their unions) originally contained in Art 37-*bis* of the Consumer Code. However, the list of completed proceedings does not show any trace of comments originating from Chambers of Commerce (or their confederations).

³⁹ M. Mazzeo and S. Branda, ‘Una nuova tutela’ *Obbligazioni e contratti*, 388 (2012).

⁴⁰ Only the decision 30 November 2016 no 26255 (CV144), available at www.agcm.it, §§ 7 and 25, reveals the participation of (three) trade associations.

⁴¹ P. Cassinis, ‘The Administrative protection’ n 32 above, 99.

inasmuch as they can be invited to express an opinion (to be submitted within thirty days after the request) on the subject matter of the proceedings (Art 23, para 7, of the Procedural Regulation).

Consultations of this type have not yet occurred, but on reflection they should be made mandatory and – until such time as there is a welcome change in the law to that effect – they should be encouraged to the utmost. Such consultations could work to coordinate the new power of enforcement covering unfair terms with, firstly, analogous powers (unless one considers them to have been impliedly repealed) vested in other authorities⁴² and, secondly, (and more generally), with the so-called ‘conformative’ powers that entitle independent sectoral authorities to play a role (*ex ante*) in shaping negotiations⁴³ and, if need be, mandating the removal or substitution of any unfair contractual content.

V. The Possible Outcomes to ‘Ordinary’ Proceedings. Publication of the Final Decision and ‘Reputational’ Consequences of a Finding that a Trader’s Terms Are Unfair in the Absence of an Injunction or Declaration of Nullity

Upon completion of the investigation and receipt of the parties’ final briefs, the Authority’s Board – which makes the final decision, consistent with an organisational model that seeks to ensure an ‘internal’ separation⁴⁴ between

⁴² A. Mirone, ‘Verso la despecializzazione dell’Autorità *antitrust*. Prime riflessioni sul controllo delle clausole vessatorie ai sensi dell’Art 37-bis Cod Cons’ *AIDA*, 297 and 320 (2012). With specific regard to the Institute for the Supervision of Insurance (IVASS), the Bank of Italy and the Italian Companies and Stock Exchange Commission (CONSOB), see G. Alpa, ‘Il controllo amministrativo delle clausole abusive’ *Economia e diritto del terziario*, 16, 19 and 21 (1995). On the Italian Regulatory Authority for Electricity Gas and Water, see Id, ‘L’Autorità per i servizi pubblici e i consumatori’, in Id et al, *Attività regolatoria e autorità indipendenti. L’Autorità per l’energia elettrica ed il gas (Atti del Convegno di studi tenuto a Roma il 2-3 febbraio 1996)* (Milano: Giuffrè, 1996), 29. More generally, on the issue, F. Macario, ‘Autorità indipendenti, regolazione del mercato e controllo di vessatorietà delle condizioni contrattuali’, in G. Gitti ed, *Il contratto e le Autorità indipendenti. La metamorfosi dell’autonomia privata* (Bologna: il Mulino, 2006), 191.

⁴³ See n 1 above.

⁴⁴ Indeed, merely internal branches of the same administrative body are not sufficient to ensure the impartiality of the deciding body (according to the standard set in Art 6 of the European Convention on Human Rights), if this amounts to the consecutive exercise of investigative and judicial functions within one body, acting under the authority and supervision of a single chairman (as ruled by the Eur. Court of H.R., *Grande Stevens v Italia*, Judgment of 4 March 2014, no 18640, available at www.hudoc.echr.coe.it, with commentary by M. Zarro, ‘Il procedimento dinnanzi alla Consob può definirsi «avente carattere penale»? Il procedimento dinnanzi alla Consob è conforme all’Art 6 della Convenzione europea dei diritti dell’Uomo? Il fatto che per una medesima condotta si sia sottoposti ad un duplice procedimento sia penale sia amministrativo non è violativo del principio del *ne bis in idem*?’ *Foro napoletano*, 298 (2015); with commentary by M. Manetti, ‘Il paradosso della Corte EDU, che promuove la Consob (benché non sia imparziale) e blocca il giudice penale nel perseguimento dei reati di *market abuse*’ *Giurisprudenza costituzionale*, 2919 (2014); with commentary by V. Zagrebelsky, ‘Le sanzioni Consob, l’equo processo e il *ne bis in idem* nella Cedu’ *Giurisprudenza italiana*,

investigative and adjudicatory functions in proceedings⁴⁵ – decides whether the investigated term is unfair or fair.

Leaving aside the second hypothesis (overlooked by the *littera legis*), the law provides as the sole and necessary⁴⁶ consequence that the decision finding a term to be unfair be communicated to the parties and any intervenors and be published (including just an abstract) within twenty days after its adoption in the current official bulletin on the Authority's website and on the website of the trader that used the term, at the latter's expense. The extreme flexibility and total adaptability of the information requirements to the actual circumstances of a case,⁴⁷ enables the ICA both to calibrate the duration of the notice obligation and to publicise its decisions (should certain elements of the facts or law so dictate) by any other means deemed fit and appropriate to fully inform consumers, including through press releases, if helpful in ensuring the widest knowledge of the Authority's action (Arts 17, para 3 and 23, para 8, of the

1196 (2014); with commentary by G. Abbadessa, 'Il caso Fiat-Ifil alla Corte europea dei diritti dell'uomo. Nozione di «pena» e contenuti del principio «*ne bis in idem*»' *Giurisprudenza commerciale*, II, 543 (2014)). Less severe is the opinion expressed by Consiglio di Stato 26 March 2015 no 1596, with commentary by E. Desana, 'Illegittimità del procedimento CONSOB: cronaca di una morte annunciata?' *Giurisprudenza italiana*, 1434 (2015); with commentary by B. Raganelli, 'Sanzioni Consob e tutela del contraddittorio procedimentale' *Giornale di diritto amministrativo*, 512 (2015): 'A real subjective separation between the investigative function and the adjudicatory function (as outlined by the EDU Court) (...) is not practicable *de jure condito* in our legal system. It would require a radical reorganization of the Italian system of Independent Authorities through the creation, for example, of bodies with only investigating functions and the assignment to courts of the power to impose sanctions on the model of the Anglo-American system. However, these alternative solutions, though viable (and, in some cases, perhaps desirable) *de jure condendo*, not only do not correspond to the existing law, but are not imposed or compelled by the supranational obligations deriving from the accession to the ECHR' (my translation).

⁴⁵ It is thus necessary to ensure the neutrality of the decision-making body. See on this M. Clarich, 'Garanzia del contraddittorio nel procedimento amministrativo' *Diritto amministrativo*, 87 (2004); E. Freni, 'Le sanzioni dell'Autorità garante della concorrenza e del mercato (AGCM)', in M. Fratini ed., *Le sanzioni delle autorità amministrative indipendenti* (Padova: CEDAM, 2011), 843. However, according to most, the sectoral rules regarding the sanction proceedings carried out by the Italian Authorities (and by the ICA, in particular) still appear far from the European guarantees, which undermines the accuracy and impartiality of such bodies: see F. Tirio, *Le autorità indipendenti nel sistema misto di enforcement della regolazione* (Torino: Giappichelli, 2012), 130; F. Cintioli, 'Giusto processo, Cedu e sanzioni «*antitrust*»' *Diritto processuale amministrativo*, 519 and 523 (2015); M. Allena, *Art 6 CEDU. Procedimento e processo amministrativo* (Napoli: Jovene, 2012), 248, 259 and 324; A. Orecchio, 'Il sindacato di merito sulle sanzioni delle autorità amministrative indipendenti. Il caso dell'*antitrust*' *federalismi.it*, 2, 19 (2016).

⁴⁶ According to decision no 25052 of 1 August 2014 (CV92) n 31 above, § 41, the publication is an unavoidable outcome once the investigation has been started. On this basis, was refused the proposal of the trader aimed – in order to avoid a significant damage to its reputation – at replace the publication of the abstract of the decision by sending to all its customers the new contractual form (§ 34). Likewise decision no 24546 of 9 October 2013 (CV49), n 31 above, § 39; decision no 24542 of 9 October 2013 (CV45), available at www.agcm.it, § 38; and decision no 24399 of 11 June 2013 (CV27) n 31 above, § 48.

⁴⁷ P. Cassinis, 'The Administrative protection' n 32 above, 96.

Procedural Regulation).⁴⁸ For example, learning of the ‘unavailability’ of the trader’s website, an order was issued for publication for a day of an abstract of the decision in a provincial circulation newspaper;⁴⁹ on another occasion, publication was ordered in the local edition of a national circulation newspaper.⁵⁰

What immediately stands out is that the ICA has no power to order the removal of unfair terms.⁵¹ Since the ICA has no power to issue injunctions,⁵² it does not even have interlocutory power equivalent to those set forth in Art 27, para 3, of the Consumer Code whereby an unfair commercial practice can be provisionally suspended.⁵³ The sole sanctions that it can impose are pecuniary (ranging from five thousand to fifty thousand euros) and, furthermore, they are ‘indirect’ because fines are possible solely if the trader does not comply with the Authority’s order to publicise in the prescribed manner the unfair nature of the term.

In short, a decision that a term is unfair finds its ‘crowning glory’ in the mere fact it is made public, with the ensuing adverse consequences that that may have on the trader’s reputation.⁵⁴ Publication of the Authority’s decision is designed to warn consumers who entertain or intend to entertain commercial relations with the trader and hinges on so-called ‘moral suasion’ aimed at discouraging those who use the unfair terms from continuing to do so. Traders who continue to use unfair terms run the risk of being discredited and ruining their image⁵⁵ or

⁴⁸ The wideness of the powers allowed to the ICA to give instructions on the type and format of the publication, that must ‘fully retrace the structure and appearance of the abstract attached to the (...) decision; the writing and the diffusion mode should not be such as to frustrate the effects of the publication; in particular, on the publishing website page, as well as on the other pages, no messages should be reported that contradict the contents of the abstract or that, however, tend to diminish its scope and meaning’ (my translation) (decision no 25881 of 24 February 2016 (CV140) n 33 above; decision no 25244 of 19 December 2014 (CV114) n 31 above; decision nos 24998 (CV62) and 24996 (CV59) of 25 June 2014, both available at <https://www.agcm.it>; decision nos 24959 (CV101) and 24958 (CV100) of 5 June 2014, *ibid*). In the cases of publication in the press, the size of the page was also set (decision no 25018 of 9 July 2014 (CV1), *ibid*; decision no 24540 of 9 October 2013 (CV6), *ibid*).

⁴⁹ ‘(...) depending on the geographical area where the trader operates’ (my translation). So the decision no 24540 of 9 October 2013 (CV6) n 48 above.

⁵⁰ Decision no 25018 of 9 July 2014 (CV1) n 48 above.

⁵¹ V. Pandolfini, n 19 above, 57; T. Rumi, ‘Il controllo amministrativo delle clausole vessatorie’ n 20 above, 644.

⁵² As clearly confirmed by Tribunale Amministrativo Regionale-Lazio, 13 July 2017, no 8378, available at www.giustizia-amministrativa.it.

⁵³ See, on this aspect, A. Ciatti, ‘I mezzi di prevenzione e repressione delle pratiche commerciali sleali nella direttiva comunitaria del 2005’ *Contratto e impresa/Europa*, 87 (2007); S. Stella, ‘Art 27’, in V. Cuffaro ed, *Codice del consumo* n 14 above, 253.

⁵⁴ E. Minervini, ‘La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore’ n 14 above, 569; L. Rossi Carleo, ‘La tutela amministrativa contro le clausole vessatorie’ n 19 above, 494; S. Mezzacapo, ‘Illiceità delle clausole “abusive” (tra presidi di “giustizia negoziale” e tutela amministrativa del “mercato”)’ n 35 above, 147; T. Rumi, ‘Il controllo amministrativo delle clausole vessatorie’ n 20 above, 644.

⁵⁵ M. Mazzeo and S. Branda, ‘Una nuova tutela’ n 39 above, 388.

facing legal action seeking to set aside the terms and/or obtain damages brought by those emboldened by the Authority's finding.

This author remains of the opinion – previously expressed⁵⁶ – that such an approach is tantamount to a violation of the principle of equality (enshrined in Art 3 of the Constitution) when compared to the approach currently adopted in combating unfair commercial practices, in which the ICA enjoys a broad power to prohibit engaging in or continuing to engage in the offending behaviour.⁵⁷ That difference could well be unconstitutional on the basis that it amounts to an unreasonable disparity of treatment between consumers, who are afforded a different level of protection in the face of similar needs and expectations, without a convincing rationale for the distinction.

That said, it must be acknowledged that while the approach downplays coercive action, it does undoubtedly bolster the legislative choice (including the proportionality⁵⁸ of the 'reputational' consequences compared to the objectives pursued) to foster self-regulation, promote morals in the business world and act as an incentive for ethical business behaviour. In fact, in the 5-year period there was just one case of non-compliance with an order for publication and the ensuing imposition of a fine.⁵⁹ In all of the other cases, not only were the orders for publication complied with, but that measure was followed (in cases where steps had not already been taken during the investigation) by a willingness to accept the Authority's observation and the 'voluntary' elimination or amendment by the traders concerned of the terms found to be unfair.

VI. *Ex Ante* Review and 'Limited Effects' of the Italian Competition Authority's Assessment Given in Response to an Application for an 'Advance Ruling'

Pursuant to Art 37-*bis*, para 3, of the Consumer Code, traders – using a

⁵⁶ M. Angelone, 'La nuova frontiera del «*public antitrust enforcement*»: il controllo amministrativo dell'Agem avverso le clausole vessatorie' *Rassegna di diritto civile*, 32 and 38 (2014).

⁵⁷ On the peculiarities of this type of injunction, see A. Ciatti, 'Art. 27' n 53 above, 108; S. Stella, 'Art 27' n 53 above, 262; S. Simone, 'Le istruttorie dell'AGCM in materia di pratiche commerciali scorrette: profili procedurali' *Obbligazioni e contratti*, 680 (2011); D. Bonaccorsi di Patti, 'Le pratiche commerciali scorrette: prime note sul procedimento istruttorio innanzi all'Autorità Garante della concorrenza e del mercato' *Diritto ed economia dell'assicurazione*, 676 (2008); V. Falce, 'Emanati i regolamenti su pratiche commerciali scorrette e pubblicità ingannevole' *Diritto industriale*, 61 (2008).

⁵⁸ As regards the principle of proportionality (also in the field of legal remedies), see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 124; P. Perlingieri, 'Nuovi profili del contratto', in Id., *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 429; Id., *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 354.

⁵⁹ See the decision no 25368 of 10 March 2015 (IP213).

mandatory paper or electronic form – may seek a ruling in advance from the ICA as to the fairness or unfairness of the terms that they intend to use in future commercial relations with consumers.

This new provision has systemic implications and implies a (re)configuration of (business negotiations and in particular) standard contracts in the context of freedom of contract⁶⁰ insofar as certain conditions allow the Authority to intervene (even though not with binding force but in a spirit of collaboration and with a view to acting as an incentive)⁶¹ in the drafting of the wording of standard contracts falling within the scope of Arts 1341 and 1342 of the Civil Code. Accordingly, the trader's hitherto unquestioned sole and total power to decide the terms of future contracts has been cabined. The *ex post* conformation of contracts that is a feature of ordinary proceedings is thus flanked by an *ex ante* method of conformation achieved through applying in advance for a ruling.

The mechanism of advance rulings is more circumscribed than ordinary proceedings as regards the sphere of application, since an advance ruling can be sought solely as regards terms included in contracts not yet used. By contrast, there is no express requirement that such terms must appear in general conditions, forms, models and templates but – relying on a general reference in the law 'to the manner set forth in the (procedural) regulation' – it has been decided not to exploit that opening and instead exhibit some self restraint by limiting rulings to just serial terms (Art 24, para 1, of the Procedural Regulation).

In order to obtain an advance ruling from the Authority, the applicant⁶²

'must specify in detail the reasons and objectives underlying the inclusion of the single term, explain why it is not unfair also in relation to its interaction, if any, with other terms contained in the same contract or in one that the latter is linked to or depends and describe how and the circumstances in which contract will be negotiated and concluded' (Art 24, para 2, of the Procedural Regulation).

It is clear therefore that the mechanism is not intended to be reduced to a mere form of legal advice since it is restricted to solving concrete and personal cases (and not answering general and hypothetical questions) that entail objective uncertainty as to the lawfulness of the terms queried.

⁶⁰ C. Camardi, 'La protezione dei consumatori tra diritto civile e regolazione del mercato' n 8 above, 332 (my translation).

⁶¹ On the other hand, 'The advance ruling (...) tends to encourage the transition from regulation to self-regulation' (my translation): L. Rossi Carleo, 'La tutela amministrativa contro le clausole vessatorie' n 19 above, 496.

⁶² As believes S. Mezzacapo, 'Illiceità delle clausole "abusive"' n 35 above, 153, the reference to 'undertakings' (rather than to 'traders') is the fruit of a mere 'slip of the pen'. Moreover, in the opinion of E. Minervini, 'La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore' n 14 above, 566, the application for an advance ruling should be recognized also to trade association.

The Authority – after summoning the applicant to a hearing if necessary (Art 24, para 3, of the Procedural Regulation) – issues its advance ruling within one hundred and twenty days after the date of receipt of the application⁶³ unless the information furnished in the form proves to be materially inaccurate, incomplete or untrue. In those situations, as well as when it is necessary to expand the scope of the application for an advance ruling, the case officer promptly informs the Authority’s Board in charge of making the ruling as well as the party, and the above-mentioned deadline will start to run again from the date of receipt of the additional information or the request to expand the issue to be ruled on (Art 24, para 4, of the Procedural Regulation).

Again in this context the case officer may – in the same way described above (in Section IV) – request the regulatory or supervisory authorities for the sector that the term concerns to express an opinion within thirty days. That power has been exercised in the case of an application for an advance ruling concerning a term intended to be included in a compulsory motor insurance policy: It was decided to consult IVASS ‘in view of the complexity of insurance law and the (latter’s) experience in overseeing the insurance sector’.⁶⁴

A ruling is made once the investigation is complete. The reply to the application for an advance ruling, whatever it may be, is normally only communicated to the applicant.⁶⁵ However, the Procedural Regulation affords ample discretion to the ICA, which – unless the trader concerned adduces compelling reasons for confidentiality – may opt to publish the ruling in a specific section of its website and/or its bulletin (Art 24, para 7, of the Procedural Regulation). The ICA may wish to publish a ruling, for example,

‘in view of the novelty and importance of the term that the application for an advance ruling concerned and the large number of consumers potentially involved’.⁶⁶

From the fact that the summary information contained in the annual reports to Parliament state that the Authority replied to five applications in 2013 and four in 2014, one can deduce that online publication did not take place in the other cases.

Far more interesting and worthy of attention is the question of the effect of ICA advance rulings. The only legislative indication is that terms not disapproved

⁶³ Tribunale Amministrativo Regionale-Lazio, 23 June 2015, no 8572 n 37 above, the expiry of that period equates to a decision of unfairness of the term.

⁶⁴ See decision no 24268 of 13 March 2013 (CVI3), *Diritto e fiscalità dell’assicurazione*, I, 205 (2013); and the aligned remarks of G. Natali, ‘La tutela amministrativa in materia di clausole vessatorie nei contratti tra imprese e consumatori (Art 37-bis D. Lgs. n. 206/2005): il caso della clausola limitativa della cessione del credito risarcitorio nel contratto r.c. auto’, available at <https://tinyurl.com/y7lhvrbh> (last visited 30 June 2018).

⁶⁵ P. Cassinis, ‘The Administrative protection’ n 32 above, 97.

⁶⁶ Decision no 24268 of 13 March 2013 (CVI3) n 64 above.

of following an application for an advance ruling may not subsequently be attacked pursuant to Art 37-*bis*, para 2, of the Consumer Code, ie, may not be the subject matter of ordinary proceedings⁶⁷ given the trouble that the trader went to in proactively seeking a ruling in advance from the Authority.

In any case a favourable verdict (ie, no unfairness)⁶⁸ constitutes a precedent binding solely on the ICA, and though it entails a ‘benefit’⁶⁹ to the trader who sought the advance ruling, it is certainly not tantamount to a ‘safe harbour’;⁷⁰ it does not exempt the trader from liability towards consumers in that the trader cannot rely on the ICA’s (positive) response as proof of its good faith⁷¹ and avoid its commitments.⁷² Much less is a favourable advance ruling capable of thwarting independent legal proceedings before the civil courts because that would run contrary to the so-called ‘two-pronged approach’ that sees administrative and judicial protection as being on different (although complementary) levels.

One rather ‘unusual’ aspect⁷³ is that the law (at both primary and secondary levels) fails to specify the effects of a finding of unfairness of the terms that the application for an advance ruling concerns. That omission may be explained by the fact that the procedure in question – in keeping with the preventative nature of the remedy – is designed to assess the validity of terms incorporated into drafts of contract rules not yet used, such that in the event of an unfavourable advance ruling it is reasonable to suppose that the trader will spontaneously and prudently decide (due to ‘*moral suasion*’) not to use the term in question (and remove it from the general conditions or forms, models and templates) or to amend it so as to avoid more damaging consequences at the outcome of ICA ‘ordinary’ proceedings or a civil lawsuit.

⁶⁷ The content of Art 37-*bis*, para 3, of the Consumer Code does not mean that the ICA can not perform ordinary proceedings in relation to terms that have already been assessed at the end of an advance ruling, but only that it is not possible to expose the trader to the ‘reputational’ consequences provided by para 2 of the aforementioned article (ie, the mandatory publication of the decision) if the new assessment led to a divergent outcome.

⁶⁸ Aside from the only measure published (decision no 24268 of 13 March 2013 (CVI3) n 64 above), the ‘Annual Report 2014’ n 13 above, 240, shows that other advance rulings, in the field of long-term car rental (CVI7), of purchase of used vehicles (CVI8) and of lift maintenance contracts (CVI10), have also been concluded with a favourable decision.

⁶⁹ E. Posmon, ‘La tutela amministrativa contro le clausole vessatorie: luci e ombre di un modello di controllo’ *Le nuove leggi civili commentate*, 840 (2013).

⁷⁰ S. Mezzacapo, ‘Illiceità delle clausole “abusive”’ n 35 above, 155.

⁷¹ The clarification contained in the Art 37-*bis*, para 3, of the Consumer Code – banning insidious exemptions from liability for the trader – performs the same function that traditionally is linked to the locution ‘contrary to good faith’ placed in the Art 33, para 1, of the Consumer Code (for an overview of the different opinions, see E. Capobianco, ‘Art 33’, in Id and G. Perlingieri eds, *Codice del consumo annotato con la dottrina e la giurisprudenza* n 58 above, 147).

⁷² The ICA itself has pointed out that an advance ruling’s finding of fairness is limited: such rulings ‘relate solely to the non unfairness of the said term pursuant to Arts 33 to 37-*bis* of the Consumer Code, without affecting its validity and effectiveness on the basis of the same or other legal provisions’ (my translation): decision no 24268 of 13 March 2013 (CVI3) n 64 above.

⁷³ V. Pandolfini, n 19 above, 56.

VII. The ‘Abstract’ Nature of a Finding of Unfairness Made by the Italian Competition Authority Pursuant to Art 37-*bis* of the Consumer Code

Keeping in mind the fundamental difference in the decision-making methods and approaches of administrative and judicial bodies, it is worth attempting to clarify the parameters that the ICA adheres to when called upon to ascertain whether a term is unfair in the context of ordinary proceedings or an application for an advance ruling.

In both cases, its review develops along ‘abstract’ lines,⁷⁴ displaying many similarities with the approach adopted by ordinary courts when deciding on injunctions under Art 37 of the Consumer Code.⁷⁵ That aspect was explicitly confirmed (above all) by the ICA in its initial decisions – probably to publicise how it would handle cases – and on various occasions it has clarified that

‘in the exercise of its powers under Art 37-*bis* of the Consumer Code, the Authority conducts an abstract evaluation of terms included in contracts between traders and consumers concluded by accepting general conditions of contract or signing forms, models or templates. That evaluation is irrespective of the actual behaviour exhibited when performing the single contracts including where that behaviour differs from what is set out in the term contained in the contractual document being examined’.⁷⁶

It follows in general that not all of the interpretative canons that are normally used when assessing unfairness are compatible with the features of administrative protection. In particular, one must discard on grounds of irrelevance those canons that refer to or presuppose a concrete check, ie, that focus on a specific

⁷⁴ E. Minervini, ‘La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore’ n 14 above, 571; A. Mirone, ‘Verso la despecializzazione dell’Autorità *antitrust*’ n 42 above, 308; S. Mezzacapo, ‘Illiceità delle clausole “abusiva” ’ n 35 above, 154 and 156; V. Pandolfini, n 19 above, 52.

⁷⁵ L. Rossi Carleo, ‘La tutela amministrativa contro le clausole vessatorie’ n 19 above, 494; V. Pandolfini, n 19 above, 52; A. Mirone, ‘Verso la despecializzazione dell’Autorità *antitrust*’ n 42 above, 308.

⁷⁶ Decision no 24421 of 26 June 2013 (CV32) n 28 above, § 35 (emphasis added). In the same sense, decision no 25242 of 19 December 2014 (CV89) n 34 above, § 64, further notes that ‘the assessment of the single contract and the factual circumstances which accompanied its conclusion is (instead) entrusted to the ordinary Courts’ (my translation); decision no 25052 of 1 August 2014 (CV92) n 31 above, § 38; decision no 24999 of 25 June 2014 (CV64), available at www.agcm.it, § 29; decision no 24997 of 25 June 2014 (CV61) n 31 above, § 31; decision no 24995 of 25 June 2014 (CV57), available at www.agcm.it, §§ 29 and 41; decision no 24959 of 5 June 2014 (CV101) n 48 above, § 39; decision no 24957 of 5 June 2014 (CV99), available at www.agcm.it, § 38; decision no 24546 of 9 October 2013 (CV49) n 31 above, § 39; decision no 24544 of 9 October 2013 (CV47), available at www.agcm.it, § 39; decision no 24543 of 9 October 2013 (CV46), *ibid*, §§ 38 and 39; decision no 24542 of 9 October 2013 (CV45) n 46 above, § 35; decision no 24541 of 9 October 2013 (CV44), available at www.agcm.it, § 26; decision no 24399 of 11 June 2013 (CV27) n 31 above, §§ 55 and 65.

contract⁷⁷ because the evaluation – as aforesaid – must concentrate on examining ‘standard’ documents by definition designed to regulate an indeterminate series of relationships or indeed a ‘*spes contractus*’ not actually used yet. For the same reason the figures of consumer and trader cannot be viewed on an ‘individualised’ basis but must be treated as (indistinct) ‘categories’ having regard to the average.⁷⁸

From this standpoint there is no impediment to employing the key criterion of ‘significant imbalance’ ‘despite the good faith’⁷⁹ (Art 33, para 1, of the Consumer Code) and the presumptions in connection with the terms grouped together in the (‘grey’ and ‘black’) lists set out in Arts 33, para 2, and 36, para 2, of the Consumer Code, which are referenced in all of the ICA measures adopted.

The rules that can be relied on surely include the stipulation that terms reproducing provisions of law⁸⁰ or implementing principles contained in international conventions to which all Member States of the European Union or the European Union itself are Contracting Parties are deemed not to be unfair (Art 34, para 3, of the Consumer Code).

Moreover, the Authority has often made repeated reference to the ‘principle of transparency’,⁸¹ which mandates that contractual terms must be drafted in plain and intelligible language (Art 35, para 1, of the Consumer Code)⁸² and

⁷⁷ C. Camardi, ‘La protezione dei consumatori tra diritto civile e regolazione del mercato’ n 8 above, 328.

⁷⁸ The characteristics of the ‘consumer *eiusdem*’ are already outlined within the discipline of unfair commercial practices. See G. Bertani, *Pratiche commerciali scorrette e consumatore medio* (Milano: Giuffrè, 2016), passim; N. Zorzi Galgano, *Il contratto di consumo e la libertà del consumatore* (Padova: CEDAM, 2012), 1.

⁷⁹ The decision no 24288 of 27 March 2013 (CV28) n 29 above, § 27, confirms that ‘the expression ‘despite good faith’, excludes the relevance of the psychological attitude of the trader who utilized the term’ and deny that the trader can defend himself by arguing that he has acted ‘without any unfair intent towards the consumer’, on the contrary ‘having submitted the terms of the standard contract to the appraisal of law firms before using them’, while also aligning its conduct to the ‘market practices’ (§ 17).

⁸⁰ It was not rightly considered as sufficient to exclude the unfairness of the term its approval by a resolution of the Municipal Council (decision no 24421 of 26 June 2013 (CV32) n 28 above, § 32); or likewise ‘the duty to observe contractual commitments undertaken with consumer associations’ (my translation) (decision no 24547 of 9 October 2013 (CV50), available at www.agcm.it, § 76; and decision no 24542 of 9 October 2013 (CV45) n 46 above, § 78).

⁸¹ See, in general, M. Pennasilico, *Contratto e interpretazione. Lineamenti di ermeneutica contrattuale* (Torino: Giappichelli, 2nd ed, 2015), 59; Id, *Metodo e valori nell’interpretazione dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2011), 278; D. Achille and S. Cherti, ‘Le clausole vessatorie nei contratti tra professionista e consumatore’, in G. Recinto et al eds, *Diritti e tutele dei consumatori* n 18 above, 138.

⁸² L. Rossi Carleo, ‘Clausole vessatorie e tipologie di controllo: il controllo amministrativo’, in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), II, 2033. Regarding the burden of ‘*clare loqui*’ for the trader, see the decision no 26596 of 11 May 2017 (CV154), available at www.agcm.it, § 94; decision no 26435 of 1 March 2017 (CV148), *ibid*, § 20; decision no 26284 of 15 December 2016 (CV142), *ibid*, § 36; decision no 25244 of 19 December 2014 (CV114) n 31 above, § 61; decision no 25243 of 19 December 2014 (CV113) n 31 above, §§ 39 and 41; decision no 25242 of 19 December 2014 (CV89) n 34 above, §§ 48, 50 and 55; decision no 25020 of 9 July 2014

likewise the subject matter of the contract and the consideration for the goods and services must be clear (Art 34, para 2, of the Consumer Code).⁸³ This could be the springboard for a welcome – supported by the ICA in the exercise of its advocacy role – strengthening of consumer protection to be achieved by expanding Art 35 of the Consumer Code to include a special provision dedicated to B2C contracts concluded by accepting general conditions of contract or signing forms, models or templates. In those cases, precisely to foster fully informed purchase decisions, it should be clarified that

‘the terms relating to the subject matter of the contract, the consideration, the duration and possible renewal, the conditions and procedure for withdrawal, the possible existence and the amount of penalties, the content of and procedure for exercising statutory and contractual warranties and venue for legal proceedings must always be summarised in a clear and intelligible manner in an information sheet to be submitted to consumers for their signature and a copy of which must be given to them at that same time. The scope and meaning of the said terms indicated in the information sheet may not be limited nor contradicted by other terms in other parts of the contract or in another contractual document’.⁸⁴

By contrast, judging by Art 34, para 1, of the Consumer Code, it would seem that one cannot take into account ‘all the circumstances existing at the time of conclusion’ of the contract unless they can somehow be considered prognostically

(CV63), available at www.agcm.it, § 47; decision no 25019 of 9 July 2014 (CV58), *ibid*, § 34; decision no 25018 of 9 July 2014 (CV1) n 48 above, §§ 33 and 52; decision no 24999 of 25 June 2014 (CV64) n 76 above, § 36; decision no 24998 of 25 June 2014 (CV62) n 48 above, § 33; decision no 24996 of 25 June 2014 (CV59) n 48 above, § 34; decision no 24995 of 25 June 2014 (CV57) n 76 above, § 49; decision no 24959 of 5 June 2014 (CV101) n 48 above, §§ 66 and 67; decision no 24958 of 5 June 2014 (CV100) n 48 above, §§ 64 and 65; decision no 24957 of 5 June 2014 (CV99) n 76 above, §§ 44, 46, 65 and 66. In the decision no 25881 of 24 February 2016 (CV140) n 33 above, § 38, the ICA denounces the confusion and the obscurity of the contractual text and reminds – by echoing the advices of the Luxemburg Court (see, in particular, Court of Justice of the European Union, Case 26/13, *Arpad Kasler v Jelzalogbank*, Judgment of 30 April 2014, available at www.eur-lex.europa.eu, with commentary by S. Pagliantini, *L'equilibrio soggettivo dello scambio (e l'integrazione) tra Corte di Giustizia, Corte costituzionale ed ABF: "il mondo di ieri" o un "trompe l'oeil" concettuale?* *Contratti*, 853 (2014)) – that the requirement of transparency of contract terms laid down by Directive 93/13 cannot be reduced merely to their being formally and grammatically intelligible, but it ‘must be understood in a broad sense so that the consumer can evaluate, on the basis of precise and intelligible provisions, the economic consequences that result from the contract’ (my translation). Similarly, the decision no 25052 of 1 August 2014 (CV92) n 31 above, § 36.

⁸³ Decision no 25243 of 19 December 2014 (CV113) n 31 above, §§ 39 and 41; decision no 25052 of 1 August 2014 (CV92) n 31 above, § 37; decision no 25018 of 9 July 2014 (CV1) n 48 above, § 52; decision no 24995 of 25 June 2014 (CV57) n 76 above, § 49.

⁸⁴ See the note AS988 transmitted to Parliament and Government on 2 October 2012 concerning ‘Proposals for competitive reform in view of the Annual Market and Competition Law for 2013’ (available at www.agcm.it).

in support of the Authority's review. Likewise excluded from consideration are 'the other terms of the same contract or of another contract on which it is dependent' unless the consumer's complaint or the trader's application for an advance ruling is confined to isolated contractual provisions. However, as is often the case, should the complaint or application extend to other terms,⁸⁵ other portions of the contract⁸⁶ or other contracts expressly referred to or otherwise included on the record of the investigation,⁸⁷ the decision-making body may not – unless it gives adequate reasons for so doing – ignore or obliterate the systemic dimension when reaching its decision⁸⁸ but must verify whether the unfairness that resides in a given term is warranted and/or is balanced out by the all of the provisions taken together or the overall contractual transaction.⁸⁹

Neither is it tenable to suggest that one can *a priori* rule out reference to 'the nature of the goods or services for which the contract was concluded'⁹⁰ but those elements – and the underlying logic is the same – must be already delineated in the contractual terms submitted for assessment by the ICA and are not by contrast destined to remain vague or to be settled solely at the time of conclusion of the single agreement. Perfectly consistent with this approach and more in accord with the abstract nature of the enforcement involved is the ICA's decision not to examine the terms (for example, penalties, notice period for withdrawal, venue for legal action, etc) that are left 'blank' in the forms, without prejudice however to being able to check them from the standpoint of an unfair

⁸⁵ The decision no 25881 of 24 February 2016 (CV140) n 33 above, § 48, discusses verbatim 'of an overall interpretation of the group of terms' (my translation); in the concomitant decisions nos 24547 (CV50), 24546 (CV49), 24545 (CV48), 24544 (CV47), 24543 (CV46), 24542 (CV45), 24541 (CV44) and 24540 (CV6) of 9 October 2013, all available at <https://www.agcm.it>, it is stated that 'for the purposes of the evaluation of unfairness are significant (...) the other terms of the contract' (see, respectively, the §§ 65, 69, 72, 69, 68, 66, 35 and 21); finally, in the decisions nos 25019 (CV58) and 24997 (CV61) of 9 July 2014 n 31 above, the term is unfair also 'in the light of the entire contractual context' (see, respectively, the §§ 34 and 40).

⁸⁶ The reference to 'forms, models or templates' includes the documentation requested or to be attached, if this forms 'an integral part of the contract' (my translation): decision no 24421 of 26 June 2013 (CV32) n 28 above, § 29.

⁸⁷ A valid argument in support of this solution comes from the cited Art 24, para 2, of the the Procedural Regulation that, regarding the advance ruling, requires the trader to point out the 'reasons' and 'aims' that motivate the insertion of the term in future contracts, in relation to: a) its relevance in relation to the other terms contained in the same or other related contract or from which it depends; b) the modality and conditions relating to the negotiation and conclusion of the contract.

⁸⁸ Art 34, para 1, of the Consumer Code is nothing other than the consumerist version of the general canon of the 'systematic interpretation' enshrined in Art 1363 of the Civil Code (M. Pennasilico, *Contratto e interpretazione* n 81 above, 59).

⁸⁹ As stated in the decision no 24288 of 27 March 2013 (CV28) n 29 above, § 32. Afterward, see the decision no 26255 of 30 November 2016 (CV144) n 40 above, § 72.

⁹⁰ See the decisions nos 24547 (CV50), 24546 (CV49), 24545 (CV48), 24544 (CV47), 24543 (CV46), 24542 (CV45), 24541 (CV44) and 24540 (CV6) of 9 October 2013 n 48 above, respectively, §§ 65, 69, 72, 69, 68, 66, 35 and 21.

commercial practice.⁹¹

The only true preclusion relating to interpretation in the context of ICA ordinary proceedings or applications for advance rulings is to be found in the exemption afforded to individual negotiations under Art 34, para 4, and Art 34, para 5, of the Consumer Code, which it is impossible to examine outside the context of a specific contract, requiring the trader to prove that the consumer was actually able to influence the content and/or the drafting of the unfair term.⁹²

Finally, it is arguable that the clear similarities between the abstract review conducted by the ICA pursuant to Art 37-*bis* of the Consumer Code and that conducted by the ordinary courts in actions seeking injunctions pursuant to Art 37 of the Consumer Code means that the provision (in Art 35, para 3, of the Consumer Code) forbidding reliance on the ‘*contra proferentem*’ rule⁹³ is applicable in the case of proceedings before ICA because that rule ‘implies a canon of construction that can be (only) adopted in assessing a concrete single relationship’:⁹⁴ in other words, in case of doubt as to the meaning of a term, the Authority must not simply prefer the interpretation most favourable to the weaker contracting party but must even-handedly opt (with a view to achieving more efficient protection for the consumer understood here as a ‘category’ and not as a single person who signed a given contract) for a declaration of unfairness of the ambiguous contractual term.⁹⁵

VIII. The ‘Two-Pronged Approach’ to Protection Introduced by the Amendment to the Consumer Code and the ‘Mixed Model’ of ‘Private’ and ‘Public Enforcement’

The current legal framework reflects a ‘mixed model’ of enforcement in which administrative and judicial protections against unfair terms work in

⁹¹ Decision no 25242 of 19 December 2014 (CV89) n 34 above, § 81; decision no 24540 of 9 October 2013 (CV6) n 48 above, § 37. Thus emerges the ‘closeness’ and the ‘circularity’ between the discipline of unfair contract terms and that of unfair commercial practices. On this point, L. Rossi Carleo, ‘Il comportamento ostativo del professionista tra “ostacoli non contrattuali” e ostacoli contrattuali’, in P. Barucci and C. Rabitti Bedogni eds, *20 anni di Antitrust. L’evoluzione dell’Autorità Garante della Concorrenza e del Mercato* (Torino: Giappichelli, 2010), II, 1216.

⁹² Corte di Cassazione 10 July 2013 no 17083, available at www.dejure.it; Tribunale di Milano 25 March 2015 no 3882, *ibid*; Tribunale di Salerno 6 February 2013 no 355, *ibid*.

⁹³ The same opinion is expressed by E. Minervini, ‘La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore’ n 14 above, 572.

⁹⁴ Decision no 25052 of 1 August 2014 (CV92) n 31 above, § 40.

⁹⁵ The provision under consideration does not fit with the abstractness of the review conducted by ICA, since it requires the assessment of the concrete interests of the consumer not to declare the nullity of the non-transparent term, but rather to preserve the term with an interpretation more favourable to him (M. Pennasilico, *Contratto e interpretazione. Lineamenti di ermeneutica contrattuale* n 81 above, 60).

parallel⁹⁶ and which could well lead to some inconsistent decisions.⁹⁷ Indeed, in the absence of coordination,

‘decisions of the ordinary courts are totally independent of the ICA’s scrutiny of unfairness such that a decision by the Authority that certain contractual terms are compliant (or not compliant) does not preclude the ordinary courts from reaching a different decision not only in an individual lawsuit (...) but also in a class action’.⁹⁸

Moreover, contrasts of this type are

‘to a certain extent facilitated by the law, which on the one hand envisages an ICA evaluation that is abstract and on the other hand a judicial evaluation that is clearly anchored to the circumstances of the actual case’.⁹⁹

Bowing to the fact that recourse to the courts cannot be excluded (see Arts 24 and 113 of the Constitution and Art 47 of the EU Charter of Fundamental Rights), Art 37-*bis*, para 4, of the Consumer Code stresses that Authority decisions adopted under that same article may be challenged before the administrative courts, a provision that is consistent with the criteria for the allocation of jurisdiction laid down in the Administrative Procedure Code granting special exclusive jurisdiction to those courts (at first instance before Tribunale Amministrativo Regionale – Lazio, Roma) over any disputes arising out of decisions made by the main independent authorities including decisions (in that case with power to review the merits pursuant to Art 134, para 1, letter *c*), of the Administrative Procedure Code) concerning the imposition of pecuniary fines (Art 133, para 1, letter *l*), of the Administrative Procedure Code). At the same time that codification is without prejudice to the powers of the ordinary courts to decide the validity of the terms and any damages that may be payable. This has led one scholar to opine that

‘the two-pronged solution (jurisdiction of the administrative courts against ICA decisions and jurisdiction of the ordinary courts on matters

⁹⁶ ‘(...) public enforcement and private enforcement should not be overlapped, since nature and purpose are different. (...) These are two remedies that certainly interfere, but which operate on separate and distinct levels’ (my translation): Consiglio di Stato 22 September 2014 no 4773, with commentary by G. Ioannides, ‘Alla ricerca del giusto bilanciamento tra “public” e “private enforcement” nel diritto *antitrust*’ *Giornale di diritto amministrativo*, 252 (2015); and with commentary by R. Tremolada and F. Balestra Marini, ‘Il rapporto tra “private” e “public enforcement” del diritto “antitrust” nella giurisprudenza amministrativa’ *Foro amministrativo*, 781 (2015).

⁹⁷ Undoubtedly ‘the proliferation of forms of consumer protection entails with it the risk of fragmentation, and thus duplication, or worse, of real conflicts of *res judicata*’ (my translation): V. Pandolfini, n 19 above, 59.

⁹⁸ A. Barengi, ‘Art 37 *bis*’ n 14 above, 327.

⁹⁹ E. Posmon, ‘La tutela amministrativa contro le clausole vessatorie’ n 69 above, 845.

concerning the validity of unfair terms and awards of damages) adopted in the new legislation is problematic'

because it is not

'clear how to resolve any conflicts that might arise in cases where the ICA opens an investigation or an application for judicial review of a previous ICA decision is brought before the administrative courts while a civil lawsuit is still pending before the ordinary courts'

or again

'what happens when the ordinary courts decide that a term is unfair in cases where that same term was held to be totally valid and effective by the ICA or the administrative courts'.¹⁰⁰

That said, any such scenarios of conflict are likely to occur only rarely in practice if one considers the 'symptomatic' and not easily 'contestable' weight that ordinary courts afford to (positive or negative) ICA decisions.¹⁰¹ Indeed, although an Authority decision (and perhaps also an administrative court's judgment upholding it after a dispute) may not be binding, it still constitutes a particularly cogent indicator during a civil lawsuit of the unfairness of the disputed term and its unbalanced aspects;¹⁰² an indicator that is ever more persuasive in view of the 'privileged' probative value gained over time by ICA decisions¹⁰³ in so-called 'follow on' actions for antitrust damages and destined to take on even greater importance in light of the recent legislative developments.¹⁰⁴

Any fear of an overlap or interference between contrasting decisions is allayed in practice if one considers the negligible effect that the powers granted by Art 37-*bis* of the Consumer Code have so far played in litigation before the administrative courts: records show that public enforcement against unfair terms – due to its persuasive nature not involving sanctions but merely

¹⁰⁰ S. Mazzamuto, *Il contratto di diritto europeo* (Torino: Giappichelli, 2nd ed, 2015), 200.

¹⁰¹ V. Pandolfini, n 19 above, 58.

¹⁰² M. Mazzeo and S. Branda, 'Una nuova tutela' n 39 above, 388.

¹⁰³ Retraces the scholarly debate, F. Tirio, *Le autorità indipendenti nel sistema misto di enforcement della regolazione* n 45 above, 218.

¹⁰⁴ The Art 7 of the decreto legislativo 19 January 2017 no 3 (as the Art 9 of the Directive no 2014/104/UE) states that the infringement of competition law found by a final decision of the ICA is deemed to be an evidence of such infringement for the purposes of an action for damages. On this aspect see, *ex multis*, G. Villa, 'L'attuazione della Direttiva sul risarcimento del danno per violazione delle norme sulla concorrenza' *Corriere giuridico*, 441 (2017); M. Zarro, 'La tutela risarcitoria da danno *antitrust*: nuovi sviluppi per il sistema misto di *enforcement*' *Rivista di diritto dell'impresa*, 669 (2017); G. Alpa, *Illecito e danno antitrust. Casi e materiali* (Torino: Giappichelli, 2016), 5; R. Chieppa, 'Il recepimento in Italia della Dir. 2014/104/UE e la prospettiva dell'AGCM' *Diritto industriale*, 317 (2016).

reputation repercussions – has not generated any full-blown applications for judicial review or unduly burdened the administrative courts. In fact, the burden has been so light that after five years only a few minor decisions have been issued by the Tribunale Amministrativo Regionale – Lazio, for the most part in interim proceedings (while the Consiglio di Stato has witnessed no appeals at all before it).¹⁰⁵

Consequently, although the legal framework does not exclude such conflicts or lay down rules for resolving them, it does seem to have managed to avoid them. The framework and actual practice would appear to embody a sort of ‘invisible hand’ capable of reducing friction and keeping episodes of potential disharmony to a minimum.¹⁰⁶

¹⁰⁵ See Tribunale Amministrativo Regionale-Lazio 6 July 2018 no 6321, available at www.giustizia-amministrativa.it, that confirmed the legitimacy of the ICA contested provision; Tribunale Amministrativo Regionale-Lazio, 13 July 2017 no 8378, available at www.giustizia-amministrativa.it, that declared the lack of interest of the applicant trader since the latter, during the proceedings, had already adopted new terms in substitution for those declared to be unfair by the ICA decision now contested before the Court; Tribunale Amministrativo Regionale-Lazio, ordinanza 22 May 2013 no 2011, *ibid*, that rejected the *interim* application for suspension of the decision by which the ICA declared the unfairness of some clauses; and Tribunale Amministrativo Regionale-Lazio, ordinanza 1 August 2013 no 3145, *ibid*, that also denied – as not meeting the conditions – the *interim* application for suspension of the opinion of the ICA expressed at the outcome of an advance ruling.

¹⁰⁶ For its part, on several occasions, the ICA decided by referring to the case law of the ordinary courts. See, lastly, the decision no 26661 of 28 June 2017 (CV158), available at www.agcm.it, § 42.

The Prohibition of Discrimination as a Limit on Contractual Autonomy

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Abstract

The essay analyzes the progressive assertion of non-discrimination as a principle within Italian and European contract law. After having examined the legislative concept of contractual discrimination, the scope of the prohibition and the extent of its impact, the Author shows that the direct applicability of the principle of equality within private law relations is inseparable from the issue of the review of contractual autonomy, where it expresses the core essence of the anti-discrimination paradigm. In order to assure full and effective protection, the paper focuses on diversification of techniques for protecting against discrimination and the choice of the 'right' civil remedy.

I. Contractual Discrimination Within a Pluralist Consumer Society. The Need for Exogenous Intervention to Regulate the Market

The need to revisit the private law rules of a social market economy poses new and difficult questions for private lawyers that call for a reimagining of the relationship between production, competition and solidarity, reconciling freedom of contract with equality in access to the market. If considered from the standpoint of general contract theory, these issues are closely intertwined with the phenomenon of contractual discrimination, ie the impact of widespread preconceptions rooted throughout society on market mechanisms and contractual dynamics.¹

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¹ On contractual discrimination see, P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 456-606; P. Morozzo della Rocca, 'Gli atti discriminatori e lo straniero nel diritto civile', in P. Morozzo della Rocca ed, *Principio di uguaglianza e divieto di compiere atti discriminatori* (Napoli: Edizioni Scientifiche Italiane, 2002), 19-69; B. Troisi, 'Profili civilistici del divieto di discriminazione', in P. Rescigno et al eds, *Il diritto civile oggi. Còmpiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 295-306; D. Maffei, *Offerta al pubblico e divieto di discriminazione* (Milano: Giuffrè, 2007); Id, 'Libertà contrattuale e divieto di discriminazione' *Rivista trimestrale di diritto e procedura civile*, 401-434 (2008); Id, 'Discriminazione (Diritto privato)' *Enciclopedia del diritto Annali* (Milano: Giuffrè, 2011), IV, 490-510; Id, 'Il diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti' *Le nuove leggi civili commentate*, 161-180 (2015); D. La Rocca, 'Le discriminazioni nei contratti di scambio di beni e servizi', in M. Barbera ed, *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale* (Milano: Giuffrè, 2007), 289-346; Id, *Eguaglianza e libertà contrattuale nel diritto europeo. Le discriminazioni nei rapporti di consumo* (Torino: Giappichelli, 2008); A. Gentili, 'Il principio

The sensitivity of contractual parties to the personal characteristics of the relevant counterparty – including in particular gender, religion and national or ethnic origin – may influence the exercise of powers of private autonomy, thereby giving rise to discriminatory effects on two levels: 1. preventing members of the disadvantaged group from acquiring the goods or services exchanged; or 2. imposing different or more onerous contractual terms on them. Under the former scenario, they are prevented from enjoying goods or services as a result of the refusal to contract or the refusal to perform. Under the latter the market transforms the prejudice into a surcharge, which is added to the price of the goods or services: the social position of the victim of discrimination translates into a further cost, which he or she is forced to pay in order to obtain the contractual benefit.²

Anti-discrimination rules apply to situations of cultural conflict, which is characterised by the capacity of risk factors to distort a transactional relationship by generating an opposition between the parties that needs to be resolved by the legal order.³ For example this may include the refusal by an estate agent to deal with non-EU clients,⁴ the articles of a housing cooperative that state that only EU nationals are eligible for membership,⁵ or the charging of different prices to different clients depending upon their ethnic origin.⁶ In these cases the discrimination, which results in a refusal to contract or the imposition of more onerous conditions, results both in a violation of the counterparty's human

di non discriminazione nei rapporti civili' *Rivista critica del diritto privato*, 207-231 (2009); A. Somma, 'Principio di non discriminazione e cittadinanza nel diritto privato europeo', in G. Alpa et al eds, *Il Draft common frame of reference del diritto privato europeo* (Padova: CEDAM, 2009), 259-280; Id, 'Razzismo economico e società dei consumi' *Materiali per una storia della cultura giuridica*, 447-477 (2009); L. Sitia, *Pari dignità e discriminazione* (Napoli: Jovene, 2011); B. Checchini, 'Eguaglianza, non discriminazione e limiti dell'autonomia privata: spunti per una riflessione' *Nuova giurisprudenza civile commentata*, 186-198 (2012); G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013); Id, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' *Rivista di diritto civile*, 1387-1418 (2015); Id, 'Contratto, dignità della persona e ambiente civile. Riflessioni sul divieto di discriminazione nei rapporti contrattuali', in G. Calabresi et al eds, *Benessere e regole dei rapporti civili. Lo sviluppo oltre la crisi* (Napoli: Edizioni Scientifiche Italiane, 2015), 423-457; E. Navarretta, 'Principio di uguaglianza, principio di non discriminazione e contratto' *Rivista di diritto civile*, 547-566 (2014); G. Donadio, *Modelli e questioni di diritto contrattuale antidiscriminatorio* (Torino: Giappichelli, 2017).

² See P. Femia, n 1 above, 530-537.

³ The internal dispute may be 'pre-transactional' where it arises during the contracting phase when the terms are being negotiated, or 'prospective' where it comes to light upon performance. In the latter eventuality, the dispute will not have been foreseen at the time the contract was concluded or, although a discriminatory element was already apparent, the dispute was temporarily left to one side and only came to a head at the time the contract was to be performed: P. Femia, n 1 above, 452-454.

⁴ Tribunale di Milano 30 March 2000, *Foro italiano*, I, 2040 (2000); Tribunale di Bologna 22 February 2001, *Diritto immigrazione e cittadinanza*, 101 (2001).

⁵ Tribunale di Monza 27 March 2003, *Foro italiano*, I, 3177 (2003).

⁶ Tribunale di Padova 19 May 2005, *Giurisprudenza italiana*, 951 (2006).

dignity and his or her freedom to access commercial exchanges as well as in market failure through a reduction in transactions and interference with the machinery of price formation, accordingly undermining collective economic wellbeing.⁷

From the perspective of some scholars of the economic analysis of law, the market is capable of abolishing irrational constraints on its own, including those resulting from discrimination. In this view, the task of removing discrimination within contractual exchanges must be left not to the law but to competition, as the victim of discrimination (who is considered as a buyer) will easily find an operator willing to sell him or her the goods or services at the market price.⁸ However, it has been shown that the market, especially where it is fragmented, is not only unable to abolish discriminatory practices on the grounds that they are anti-economic but also internalises them within a broader mechanism for calculating costs and benefits.⁹ Aligning with social prejudices turns into a strategy for maximising profits, increasing productivity, or even avoiding the collapse of the business.¹⁰

The tendency of market mechanisms – which become an ‘instrument for weakening social relations’¹¹ – to perpetrate and amplify widespread misconceptions, transforming them into contractual dynamics, demonstrates how exogenous intervention to combat discrimination is necessary. This intervention manifests itself in the legal prohibition of discrimination, which outlaws the transformation of differences (which are a matter of fact) into inequalities (as value judgments). The elaboration over the last two decades of complex anti-discrimination legislation, often imposed by EU law, results from a model for heterogeneous market regulation focused on contract law. In order to prevent markets from distortion by prejudice it is necessary to purge the full scope of contractual activity of the influence of discriminatory factors: from the pre-negotiation stage (refusal to enter into negotiations or to conclude a contract), through the determination of the terms of the agreement (application of more onerous terms), to the implementation of the bargain (refusal to perform, choice of the manner of performance or the discriminatory exercise of contractual powers).

⁷ See D. Maffei, *Offerta al pubblico* n 1 above, 41-46.

⁸ On this matter, within the German literature, K.H. Ladeur, ‘The German Proposal of an “Anti-Discrimination” Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann’ *German Law Journal*, 3 (2002); E. Picker, ‘L’antidiscriminazione come programma per il diritto privato’ *Rivista critica di diritto privato*, 701-703 (2003).

⁹ See I. Ayres, ‘Fair Driving: Gender and Race in Retail Car Negotiation’ 104 *Harvard Law Review*, 817 (1991).

¹⁰ Discrimination by economic operators may result from the need to ‘comply with an external belief as a strategy (...) for the efficient allocation of resources’: P. Femia, n 1 above, 533-534.

¹¹ On this point, P. Perlingieri, ‘Mercato, solidarietà e diritti umani’ *Rassegna di diritto civile*, 84 (1995); Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 243; M.R. Ferrarese, *Diritto e mercato. Il caso degli Stati Uniti* (Torino: Giappichelli, 1992), 42.

II. The Progressive Assertion of Non-Discrimination as a Principle Within Italian and European Contract Law

The current era has been figuratively defined as ‘a new “golden age” of anti-discrimination legislation’¹² due to the wealth of legislation that has expanded and deepened civil protection against discrimination. While the establishment of the prohibition of discrimination within private law relations in Italy has commonly been ascribed to EU law, it was in fact first formulated within a purely national provision, namely Arts 43 and 44 of Decreto legislativo 25 July 1998 no 286.¹³ A body of law with a strongly public law focus – laid down in the Consolidated Act on Immigration – surprisingly contained what has been defined as a ‘general anti-discrimination clause’,¹⁴ which is backed up by a specific civil action and complemented by a variety of instruments for protection.¹⁵ However, it is true that the *acquis communautaire* has played the key role in elevating non-discrimination to the status of a principle of contract law, which has then been propagated throughout the individual national legal systems by the normal harmonisation mechanisms. Although the prohibition on discriminating against counterparties had already been incorporated into the *Principles of the Existing EC Contract Law*, it was only recently that it was asserted within derived Community law following the introduction by the Treaty of Amsterdam in 1997 of Art 13 into the Treaty Establishing the European Communities (now Art 19 TFEU).¹⁶

Within the new Italo-European law, according to a dynamic view,¹⁷ the

¹² See M. Barbera, ‘Introduzione’, in Id, *Il nuovo diritto antidiscriminatorio* n 1 above, XIX.

¹³ On Arts 43 and 44 Testo Unico Immigrazione see P. Morozzo della Rocca, n 1 above, 31-39.

¹⁴ P. Morozzo della Rocca, n 1 above, 31; B. Troisi, n 1 above, 297-299; L. Sitzia, n 1 above, 58-67; M. Mantello, *Autonomia dei privati e principio di non discriminazione* (Napoli: Edizioni Scientifiche Italiane, 2008), 7.

¹⁵ On Art 44 decreto legislativo 25 July 1998 no 286, see G. Scarselli, ‘Appunti sulla discriminazione razziale e la sua tutela giurisdizionale’ *Rivista di diritto civile*, I, 805 (2001).

¹⁶ Within the original version of the Treaty Establishing the European Communities the prohibition of discrimination was not only not a central element but was focused exclusively on the objective of ensuring the free movement of the factors of production and the establishment of the common market (Arts 7, 40(3), 48, 52, 59 and 119 of the EC Treaty). On this point see C. Favilli, ‘Uguaglianza e non discriminazione nella Carta dei diritti dell’Unione europea’, in U. De Siervo ed, *La difficile Costituzione europea* (Bologna: il Mulino, 2001), 228. The change in the Community law approach, which is enshrined in the Treaty of Amsterdam and the Nice Charter (Arts 20 and 21) was an expression of a general reconsideration of the role of the prohibition of discrimination under European law, and involved both an expansion of the types of prohibited discrimination as well as the reinforcement of the horizontal effect of the prohibition and its direct actionability in relations between private individuals. On this matter see D. La Rocca, *Eguaglianza e libertà contrattuale* n 1 above, 50, who provides a detailed account of the evolution of the paradigm of equality within European private law.

¹⁷ According to A. Celotto, Sub ‘Art. 21’, in R. Bifulco et al eds, *L’Europa dei diritti. Commento alla Carta dei diritti fondamentali dell’Unione Europea* (Bologna: Il Mulino, 2001), 173, while Art 21 of the Nice Charter prohibits discrimination through a provision with negative effect, Art 19 TFEU imposes a positive obligation on Community bodies to develop policies and initiatives

prohibition of discrimination has been extended beyond employment relations to all market exchanges, and applies in relation to race, ethnic origin¹⁸ and gender¹⁹ and is reinforced by dedicated procedural rules applicable to discrimination disputes.²⁰ Although the view that parties have full and absolute freedom to choose counterparties is still very widespread today,²¹ the choice of contracting party is now in fact governed by copious – and fragmentary – legislation which subjects to review any inequality effects within access to goods and services that are brought about by the exercise of contractual autonomy.

Eloquent proof of the renewed legislative approach, which enhances the actionability of the prohibition of discrimination within relations between private individuals, is offered by the initiatives that have been undertaken to review the European law of contract, namely the Acquis Principles and the Draft Common Frame of Reference. While the anti-discrimination directives may not have been conceived of as directives in the area of contract law, the Acquis Group – developing the perspective opened up by the case law of the Court of Justice of the European Union (CJEU), which regards non-discrimination as a ‘general principle of Community law’²² – has included the prohibition

to counter discrimination. See, also, M. Bell, ‘The Right to Equality and Non-Discrimination’, in T. Hervey and J. Kenner eds, *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (Oxford-Portland: Hart, 2003), 98; L. Ferrajoli, ‘Uguaglianza e non discriminazione nella Costituzione europea’, in A. Galasso ed, *Il principio di uguaglianza nella Costituzione europea. Diritti fondamentali e rispetto delle diversità* (Milano: Giuffrè, 2007), 15.

¹⁸ Council Directive 2000/43/CE of 29 June 2000, transposed by Decreto legislativo 9 July 2003 no 215.

¹⁹ Council Directive 2004/113/CE of 13 December 2004, transposed by Decreto legislativo 6 November 2007 no 196, which has inserted Arts 55 *bis*-55 *decies* to Decreto legislativo 11 April 2006 no 198.

²⁰ Decreto legislativo 2 September 2011 no 150, Art 28.

²¹ See in particular within the private law literature, F. Galgano, ‘Il negozio giuridico’, in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale*, directed by Mengoni and continued by P. Schlesinger (Milano: Giuffrè, 2nd ed, 2002), 53, according to whom it is possible ‘to say no exercising one’s own contractual autonomy, without having to give reasons for the refusal’; V. Roppo, ‘Il contratto’, in *Trattato di diritto privato*, directed by G. Iudica and P. Zatti (Milano: Giuffrè, 2nd ed, 2011), 79, who, whilst identifying exceptions, asserts that: ‘insofar as it represents the *realm of freedom*, the contract may also be the *realm of inequality and discrimination based on the free choices of the contracting parties*’.

²² See the settled case law of the CJEU: Case C-810/79 *Überschär*, Judgment of 8 October 1980, ECR 2747; Case C-144/04 *Werner Mangold v Rüdiger Helm*, Judgment of 22 November 2005, *Foro italiano*, IV, 133 (2006); *Giurisprudenza italiana*, 1816 (2006), with a note by L. Ciaroni, ‘Autonomia privata e principio di non discriminazione’, who argues that the source of the principle of non-discrimination is not an act of derived EC law, but may be found ‘in various international instruments and in the constitutional traditions common to the Member States’. Since non-discrimination has been classified as a ‘general principle of Community law’, the requirement of compliance does not engage solely upon expiry of the deadline for the transposition of the relevant individual directives containing such a requirement. The national courts are therefore at all times required to ensure effective protection to individuals, striking down any provision of national law with contrary effect, in addition to ensuring the correct and timely transposition of derived Community law. See also Case C-555/07 *Seda Küçükdeveci*,

amongst the general principles of contract law,²³ thereby rooting it in a terrain different from employment law.²⁴ For its part, the Draft Common Frame of Reference dedicates chapter 2 of book II to the prohibition of discrimination and discusses, for the first time, the ‘right not to be discriminated against’.²⁵ The adoption of different terminology is important as it conceptualises non-discrimination not only in the objective terms of a prohibition, but also with reference to subjective legal interests, thereby favouring its penetration right to the heart of private law: the law of contract.

III. The Legislative Concept of Contractual Discrimination and the Scope of the Prohibition. The Extent of Indirect Discrimination and the Requirement of Justification for Inequality Effects

The definitions contained in the legislation concerning the prohibition of discrimination in relation to contracts are not perfectly overlapping. However, it is possible to identify a common conceptual core. First and foremost, discrimination does not mean the same thing as idiosyncrasy or individual aversion. Anti-discrimination rules prohibit any significance being afforded within the contracting process to particular personal characteristics, which are defined as risk factors. These are elements of an individual’s identity, which have been enumerated in law due to the widespread prejudices in relation to them.²⁶ These differences include race and ethnic origin (Art 43 of Decreto

Judgment of 19 January 2010, ECR I-356 where, albeit in relation to a more ambiguous formulation, individual anti-discrimination rules were held to have direct horizontal effect on the grounds that they were inspired by the general principle of equality. See within the literature on all points C. Favilli, ‘Il principio di non discriminazione nell’Unione europea e l’applicazione ai cittadini di paesi terzi’, in D. Tega ed, *Le discriminazioni razziali ed etniche. Profili giuridici di tutela* (Roma: Armando, 2011), 59-63, according to whom ‘direct horizontal effect is an inherent corollary of the principle of non-discrimination, classified as a keystone principle with mandatory status within EU law’.

²³ The whole of chapter 3 of the Acquis Principles is dedicated to the prohibition of discrimination, falling between those dedicated respectively to pre-contractual obligations (chapter 2) and the conclusion of contracts (chapter 4). On this matter, see D. Maffei, ‘Il divieto di discriminazione’, in G. De Cristofaro ed, *I «principi» del diritto comunitario dei contratti. Acquis communautaire e diritto privato europeo* (Torino: Giappichelli, 2009), 265.

²⁴ Art 1:101(3) of the Acquis Principles stipulates that they do not apply in the area of ‘labour law’, with the result that the directives prohibiting discrimination are considered to be a source of Community law applicable to the law of contract, aside from the traditional area of employment law.

²⁵ On this point, see V.A. Berger, ‘Privatrechtlicher Diskriminierungsschutz als Grundsatz im Gemeinsamen Referenzrahmen für Europäisches Vertragsrecht’ *European Review of Private Law*, 864, (2008); A. Somma, ‘Principio di non discriminazione’ n 1 above, 259.

²⁶ See the ‘danger of considerable exclusion’, J. Neuner, ‘Protection against Discrimination in European Contract Law’ *European Review Contract Law*, 35, 45 (2006). The legislative classification of risk factors also identifies ‘disadvantaged groups’: F. Stork, ‘Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law’ 6 *German Law Journal*, 538, (2005);

Legislativo 25 July 1998 no 286 and of Decreto Legislativo 9 July 2003 no 215, implementing Directive no 2000/43/EC); colour, ancestry or national origin (Art 43 of Decreto legislativo 25 July 1998 no 286); gender (Decreto legislativo no 196 of 2007, implementing Directive no 2004/113/EC); disability (Italian Law no 67 of 1 March 2006 and proposal for a Directive of 2 July 2008 COM (2008) 426); age (proposal for a Directive of 2 July 2008 COM (2008) 426); religion (Art 43(2) of Decreto legislativo 25 July 1998 no 286); and personal convictions and sexual orientation (proposal for a Directive of 2 July 2008 COM (2008) 426). The diffusion of the prejudice justifies the prohibition as it may potentially entail exclusion from access to contractual exchanges and the resulting social marginalisation.²⁷

The prohibition of discrimination is not subject to particular restrictions with regard to its application, either at the objective level of the contractual type²⁸ or at the subjective level in terms of the nature of the parties or the role played by them within the bargaining process.²⁹ Anti-discrimination law thus has the special feature of applying also to contracts concluded between private individuals with equal contractual power – with the express inclusion of real estate contracts through the reference to access to housing – which represent ‘a conservative area’ where limitations on freedom of contract are generally more sporadic.³⁰

On the other hand, the application of the prohibition on indirect discrimination within contract law is disputed.³¹ Indirect discrimination occurs where an ‘apparently neutral’ ‘disposition’, ‘criterion’, ‘practice’, ‘act’, ‘agreement’ or ‘course of conduct’ is liable to put people say of a particular sex, race or ethnic origin ‘in a particularly disadvantaged position’ compared to others unless that

M. Barcellona, ‘Sulla giustizia sociale nel diritto europeo dei contratti’ *Europa e diritto privato*, 645 (2005).

²⁷ The problem regarding the relevance of grounds for discrimination that are different from those expressly stipulated within ordinary legislation may be resolved in the light of a systematic interpretation drawing on those referred to within hierarchically superior sources, such as Art 3 of the Italian Constitution, Art 19 TFEU and Art 21 of the Nice Charter. See E. Navarretta, n 1 above, 563-564.

²⁸ The sources refer to ‘the access to and supply of goods and services’, which does not suggest precise types of transaction, but the receipt of the benefits exchanged under contract. It also disregards the nature of the effects (real or personal) of the transaction as well as the object.

²⁹ As regards the subjective scope of the prohibition of discrimination, see G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 81-88, where it is also asserted that the prohibition applies to legal persons and entities, in view not only of the individual characteristics of the participants, but also of the purpose and nature of the entity.

³⁰ G. De Nova, ‘Contratto: per una voce’ *Rivista di diritto privato*, 643 (2000).

³¹ Are in favour, G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 89-100; B. Troisi, n 1 above, 298; L. Sitzia, n 1 above, 259-275; A. Bettetini, ‘Divieto di discriminazioni e tutela del soggetto debole’, in P. Gianniti ed, *I diritti fondamentali nell’Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona*, in A. Scialoja, G. Branca and F. Galgano eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2013), 640, against, D. Maffei, *Offerta al pubblico* n 1 above, 76-82.

disposition, criterion, practice, act, agreement or course of conduct 'is objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary' (Art 55-*bis*(2) of Decreto legislativo 11 April 2006 no 198 and Arts 2(1)(b) and 3(4) of Decreto legislativo 9 July 2003 no 215).³²

Some commentators within the literature argue that the prohibition on indirect discrimination should be limited to employment relations, where the individual characteristics of the worker take on more central importance.³³ However, not only is such a solution not justified by any provision within the text of the law, but also this interpretation would have the effect of negating a variety of legal provisions which clearly and unequivocally apply the prohibition on indirect discrimination to the law of contract.³⁴ The notion of indirect discrimination may be regarded less as an expansion of the general concept of discrimination but rather as a 'technique' that seeks to give significance to the otherwise invisible causal link between a discriminatory factor and the inequality brought about by freedom of contract. The analysis is focused on the likelihood that the exclusion is not causal,³⁵ 'unmasking' the supposed neutrality of a criterion for access to contractual benefits, which is apparently applicable to any individual, but *de facto* acts against members of one particular group compared to society as a whole.

In this way – as has been held also within the most recent case law of the

³² Also Art 43 of Decreto legislativo 25 July 1998 no 286 uses a formulation that is capable of covering indirect discrimination in referring to 'any conduct that directly or *indirectly* results in a distinction, exclusion, restriction or preference' based on a risk factor.

³³ D. Maffei, *Offerta al pubblico* n 1 above, 76-82; Id, 'Il divieto di discriminazione' n 23 above, 267; Id, 'Il diritto contrattuale' n 1 above, 171.

³⁴ Art 2(1) of Decreto legislativo 9 July 2003 no 215 prohibits 'any direct or indirect discrimination on grounds of racial or ethnic origin' (Art 2(1) of and recital 13 to Directive 2000/43/EC are framed in identical terms); similarly, according to Art 55-*ter*(1) of Decreto legislativo 11 April 2006 no 198, 'there shall be no direct or indirect discrimination based on sex in access to goods and services and the supply thereof is prohibited' (Art 4 of and recital 12 to Directive 2004/113/EC are framed in identical terms). According to D. Maffei, 'Il diritto contrattuale' n 1 above, 173, 'EU law in the area of contract law has laid down rules and definitions that mix anti-discrimination *employment* law with anti-discrimination *contract* law; however, the task of interpreting bodies is to keep the two areas of law separate from each other, elaborating different rules for each' (original italics). However, the applicability of the prohibition on indirect discrimination to the law of contract is definitively confirmed by Art 3:102 of the Acquis Principles, which reiterates the principles on indirect discrimination contained in derived Community law, stipulating their applicability to the law of contract, aside from labour law which, as mentioned above, is excluded from the scope of the Principles (Art 1:101).

³⁵ In order to establish indirect causality it is not necessary to 'conclude that the discriminatory effect was known and intended, and therefore that the discrimination was *wilful*' (see D. Maffei, 'Il diritto contrattuale' n 1 above, 176); on the other hand, the relevance of subjective states is downplayed, with a greater emphasis being placed on objective techniques such as those based on statistics, by G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 93-95; C. Favilli, *La non discriminazione nell'Unione europea* (Bologna: il Mulino, 2009), 149, 250; A. Bettetini, n 31 above, 640.

merits courts – the discrimination is inherent in the unequal outcome, unless it is objectively justified by a legitimate aim.³⁶ The core of the problem consists precisely in the need to justify less favourable contractual treatment. In fact, it is clearly apparent from the legislation applicable to indirect discrimination that the creation of an unequal outcome is not prohibited where it is ‘objectively justified by legitimate aims pursued through appropriate and necessary means’.³⁷

Therefore, any discrimination will be prohibited where there is no reason for the difference in treatment or if the reason given is spurious, where there is a significant detriment for the person affected by the conduct.³⁸ On the other hand, there will be no discrimination where the effect of the inequality is offset by the pursuit of an aim that is worthy of protection, provided that it is achieved in a manner that is not disproportionate.³⁹ For example, a prohibition on entry into a shop open to the public by clients wearing particular clothing (such as a

³⁶ The argument proposed in this text has also been endorsed by the case law: Tribunale di Roma 8 March 2012, *Nuova giurisprudenza civile commentata*, I, 964 (2012); Tribunale di Catania 11 January 2008, *Foro italiano*, I, 1687 (2008), which, having held that the defendant had acted in such a manner as to place ‘disabled persons in a less favourable position compared to other persons’, held - disregarding the issue as to whether the action was intentional - that unlawful discrimination had occurred and awarded non-pecuniary damages.

³⁷ See also Art 3(4) of Decreto legislativo 9 July 2003 no 215 and Art 55-bis(7) of Decreto legislativo 11 April 2006 no 198. According to the settled case law of the CJEU, indirect discrimination is not prohibited where it is ‘objectively justified’: Case 127/07 *Arcelor Atlantique et Lorraine and others*, Judgment of 16 December 2008, *Raccolta della Corte di Giustizia CE*, I-9895, para 23 (2008); Case 236/09 (GC) *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt e Charles Basselier*, Judgment of 1 March 2011, *Nuova giurisprudenza civile commentata*, 493 (2011); Case 542/09 *Commissione v Paesi Bassi*, Judgment of 14 June 2012, para 55, available at www.eur-lex.europa.eu; Case 20/12 *Giersch e altri*, Judgment of 20 June 2013, para 46, available at www.eur-lex.europa.eu. In the ECHR’s case law: ‘a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised’ (Eur. Court H.R. (GC), *X and Others v Austria*, Judgment of 19 February 2013, para 98, available at www.hudoc.echr.coe.int).

³⁸ According to D. Maffei, ‘Il diritto contrattuale’ n 1 above, 172, this argument (previously endorsed in G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 95-100, 204-212 and *passim*) would lead to absurd outcomes if implemented: ‘It would not only be necessary to prohibit the sale of meat on Fridays (in order not to offend Christians) but also of pork at all times (in order not to offend Muslims) and also of dog and cat meat at all times (which is much appreciated by the Chinese but causes offence to Europeans)’ D. Maffei, ‘Il diritto contrattuale’ n 1 above, 172. Nevertheless, these examples do not have anything to do with the prohibition on indirect contractual discrimination, which concerns situations involving a *refusal to contract with or the imposition of less favourable contractual terms on a counterparty* to whom a particular risk factor applies.

³⁹ For this reason, it would appear excessive to subject contracting parties to a duty to take account of the specific cultural or religious requirements of potential counterparties, thereby ‘guaranteeing respect for ‘diversity’, as the foundation for the right to identity and to be different’ (see contra B. Troisi, n 1 above, 298). The justification for any unequal effects of a discriminatory act, conduct or criterion for imposing unequal treatment is subject to the limit of appreciable sacrifice to one’s own interest. See, *amplius*, G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 95-100.

veil or the *kippah*) may be considered to constitute indirect discrimination where it is liable to result in a difference in treatment for the members of certain groups (Muslim women or male orthodox Jews). In addition, condominium or timeshare regulations governing the use of common areas and services in such a manner as to prohibit the conduct of activities that are specific to particular cultural groups may also amount to indirect discrimination.⁴⁰ However, there will be no such discrimination where an adequate and proportionate justification can be adduced for the inequality effect, consisting for example in particular security requirements, the need to readily identify people, or health and environmental hygiene.

IV. The Contracting Procedure and Differences in the Extent of the Impact of the Prohibition of Discrimination: The Problem of Individual Exchanges

A further problematic aspect is the debate concerning the application of the prohibition of discrimination to contracting techniques in general.⁴¹ Although it is commonplace within the literature to identify as the axiological basis for the prohibition a principle of significant ‘expansive potential’,⁴² such as human dignity,⁴³ it is often argued that its scope should be limited only to declarations made to the public at large.⁴⁴ Various reasons have been proffered in support of

⁴⁰ See P. Femia, n 1 above, 541, note 845; C.M. Bianca, ‘Il problema dei limiti all’autonomia contrattuale in ragione del principio di non discriminazione’, in C.M. Bianca et al eds, *Discriminazione razziale e autonomia privata. Atti del Convegno di Napoli 22 marzo 2006* (Roma, 2006), 65.

⁴¹ European private law often uses the formulation ‘goods and services, which are available to the public’ (Art 3(3) of Directive 2004/113/EC; Art 55-ter of Decreto legislativo 11 April 2006 no 198; Art 3:201 of the Acquis Principles). The similar phrase ‘goods or services offered to the public’ is also used by Art 43(2)(b) of the Italian Consolidated Act on Immigration. The prohibition of discrimination is limited to ‘access to and (the) supply of goods and services’ under Art 3(1)(h) of Directive 2000/43/EC and Art 3(1)(i) of Decreto legislativo 9 July 2003 no 215 and, in relation to ‘access to housing’ under Art 43(2)(c) of the Consolidated Act cited above.

⁴² E. Navarretta, n 1 above, 552.

⁴³ C.M. Bianca, n 40 above, 64; D. Maffei, *Offerta al pubblico* n 1 above, 44; A. Gentili, n 1 above, 228; E. Navarretta, n 1 above, 551-556. See G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 179-187, for the critical argument that to consider the core essence of the concept of discrimination to lie in the caused offence to dignity and not in the creation of an inequality effect is to overlook the multiplicity of interests affected by the issue and to crystallise it as a tort, thereby disregarding the breadth and flexibility of the remedies available under anti-discrimination legislation.

⁴⁴ This argument is supported by detailed argument in D. Maffei, *Offerta al pubblico* n 1 above, especially 203; Id, ‘Il diritto contrattuale’ n 1 above, 166. The prohibition of discrimination is applied only to declarations directed at the public at large also by U. Breccia, Sub ‘Art. 1322 c.c.’, in E. Navarretta and A. Orestano eds, ‘Dei contratti in generale. Artt. 1321-1349’, in E. Gabrielli ed, *Commentario al Codice civile* (Torino: UTET, 2011), 105; E. Navarretta, n 1 above, 551-559. On the other hand, its extension to individually tailored declarations is supported by

this view.

Some commentators assert that only discrimination in relation to contracts open to the public at large is capable of undermining market efficiency and the dignity of those who are excluded.⁴⁵ Thus, if he or she so desires, a contracting party may avoid the application of the prohibition of discrimination, although in order to do so must bear the burden of exclusion from the offer to the public and rather make a declaration (or declarations) tailored to his or her individual circumstances as a prelude to engagement in negotiations. In such an eventuality, the contracting party may lawfully discriminate against the other party by refusing to conclude a contract or imposing different or more onerous terms owing to a particular risk factor.⁴⁶ This argument has attracted the ‘facile objection’⁴⁷ that it is inspired by a mercantile-type logic incompatible with the systemic axiology, so much so as to reduce ‘a serious humiliation to the dignity of the individual to the fact of being prohibited on the grounds that the transaction is not beneficial for the market’.⁴⁸ Moreover – as will be demonstrated in the following pages – discrimination within individually negotiated contracts may also exclude the victim from access to market exchanges and undermine collective economic wellbeing.⁴⁹

A second argument is based on the general principle that ‘contractual choices are ordinarily not open to question’,⁵⁰ which is purportedly breached by the legislator only in relation to offers to the public at large, in the light of the balance struck between individual freedom and equality of opportunity in accessing the market for a broader number of people.⁵¹ The prerequisite of ‘the exclusion of a class of people’⁵² is claimed to constitute the rationale for the prohibition of discrimination in relation to contracts, which thus justifies the restriction of that prohibition only to situations involving declarations made to the public at large, where there is ‘a sacrifice by a class of people (on the one side) as against the interest of one individual (on the other side)’.⁵³

However, it does not appear that the argument based on the ‘sacrifice by a class’ is capable of excluding the application of the prohibition of discrimination

G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 105-118; L. Sitzia, n 1 above, 97-100; B. Checchini, n 1 above, 193-195.

⁴⁵ D. Maffei, *Offerta al pubblico* n 1 above, 43-44.

⁴⁶ D. Maffei, *Offerta al pubblico* n 1 above, 215-217; Id, ‘Il diritto contrattuale’ n 1 above, 166.

⁴⁷ E. Navarretta, n 1 above, 553.

⁴⁸ A. Gentili, n 1 above, 225.

⁴⁹ See A. Gentili, n 1 above, 224-228; G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 105-108.

⁵⁰ See E. Navarretta, n 1 above, 555, according to whom ‘as long as silence as to whether to choose to contract is legitimate, then also the expression of a choice, including one based on discrimination, must be deemed to be irrelevant’.

⁵¹ E. Navarretta, n 1 above, 560-561.

⁵² *ibid* 561.

⁵³ *ibid* 560.

to individually negotiated exchanges, in particular where the contracting party (while not making any declaration to the public at large) makes systematically discriminatory choices in relation to individually tailored negotiations. Consider an estate agency which – rather than addressing a particular (indeterminate but) restricted category of persons⁵⁴ by an offer to the public at large – issues a variety of individually tailored declarations to a class of persons selected as potential clients and reserves the right to refuse to conclude a contract with counterparties who, during the course of the negotiations, prove to have a particular ethnic origin or religious conviction in order to ensure the cultural homogeneity of the condominium.

Secondly, the dissemination of social prejudice within a specific relevant market may result in a scenario whereby, when confronted with the same discriminatory conduct, notwithstanding that it occurs in relation to individually tailored negotiations, the access by the members of the disadvantaged group to particular goods or services is significantly impaired or even excluded. An example of this may be found in cases involving real estate markets with a particular geographical focus where the conduct of the owners, who do not make any offers to the public at large, entirely prevents the victims of discrimination from securing housing due to the fact that it is impossible to negotiate with third parties.⁵⁵ Thus, the fact as to whether one individual or a wider class is excluded must be assessed not in abstract terms in the light of the negotiation technique but rather specifically with reference to the individual relevant market: even where no declaration is made to the public at large, discrimination may undermine equality of opportunity in accessing the market for a class of individuals.

More generally, in order to classify individual exchanges in different terms, it must be presumed that the prohibition of discrimination does not negate the freedom of choice of the contracting party, even when a declaration is made to the public at large. EU law clearly asserts that the prohibition of discrimination ‘should not prejudice the individual’s freedom to choose a contractual partner’ on one of the risk factors (Art 3(2) of Directive 2004/113/EC; Art 55-ter(4) of Decreto legislativo 11 April 2006 no 198).⁵⁶ While the literature has traditionally

⁵⁴ The predominant solution within the literature accepts that the offer to the public must be directed at a limited class of people: P. Forchielli, ‘Offerta al pubblico’ *Novissimo digesto italiano*, XI, (Torino: UTET, 1968), 764; G. Sbisà, *La promessa al pubblico* (Milano: Giuffrè, 1974), 256; G. Oberto, ‘Offerta al pubblico’ *Digesto delle discipline privatistiche, Sezione civile*, XIII, (Torino: UTET, 1995), 10; A. Federico, Sub ‘Art 1336 c.c.’, in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2010), IV, 1, 467.

⁵⁵ On this matter, see P. Femia, n 1 above, 477-486.

⁵⁶ The prohibition of discrimination does not preclude what U. Breccia, ‘Contrarietà all’ordine pubblico’, in M. Bessone ed, *Trattato di diritto privato. Il contratto in generale* (Torino: UTET, 1999) XIII, 3, 200, defines as ‘the freedom to choose a counterparty and to contribute to the formulation of contractual terms without having to worry about treating potential contracting parties in the same way’.

considered private autonomy to be in opposition to the prohibition of discrimination,⁵⁷ it has limited itself to requiring the rejection by the law of certain factual differences, which must not condition the opportunity to access market exchanges. It must also be reasserted that the review of the discriminatory nature of a contractual choice – even outside of offers to the public at large – relates exclusively to the refusal to contract or to the imposition of more onerous contractual terms. The prohibition of discrimination therefore does not give rise to any ‘general obligation to provide reasons for contractual choices’⁵⁸ since, when applied to individually tailored negotiations, it requires that there be a pre-contractual relationship between the parties,⁵⁹ and is thereby in keeping with the tendency within the law of contract to frame the exercise of autonomy as an exercise of discretion only in particular contexts⁶⁰ involving a certain degree of relationality between the parties.

Thus, the burden of justifying the inequalities created by private autonomy will manifest itself in different ways, depending *inter alia* on the manner in which the contract was concluded. However, the solution to the tension between freedom of contract and the prohibition of discrimination cannot be inferred once and for all from the fact that a declaration is directed at the public at large, with the result that in some cases freedom of contract prevails (for tailored declarations) whilst in other cases the prohibition of discrimination is engaged (for declarations to the public at large).⁶¹ On the one hand, even where a

⁵⁷ An insuperable contradiction between the general recognition of the principle of equality, construed however as equal treatment, and freedom of contract is identified by P. Rescigno, ‘Sul cosiddetto principio d’uguaglianza nel diritto privato’ *Foro italiano*, I, 664 (1960), now in Id, *Persona e comunità. Saggi di diritto privato*, I, (Padova: CEDAM, 1987), 335; D. Carusi, *Principio di eguaglianza, diritto singolare e privilegio. Rileggendo i saggi di Pietro Rescigno* (Napoli: Jovene, 1998), 13; G. Pasetti, *Parità di trattamento e autonomia privata* (Padova: CEDAM, 1970), 43; Id, ‘Parità di trattamento’ *Enciclopedia giuridica* (Roma: Treccani, 1990), XXII, 1.

⁵⁸ See however E. Navarretta, n 1 above, 556, who fears ‘an interpretation that substantially negates freedom of contract’. According to the author in fact, the application of the prohibition of discrimination also to individual exchanges would require that the parties ‘always give reasons *ab initio* for their own contractual choices’.

⁵⁹ Unless this were to occur, it would be inconceivable either to refuse to conclude a contract or to impose less favourable contractual terms. Thus, the application of the prohibition of discrimination to individual exchanges does not – as is by contrast argued by D. Maffei, ‘Il diritto contrattuale’ n 1 above, 170 – prevent a contracting party from ‘making a contractual proposal to a person of his or her choosing, and only to that person’ as the examination as to whether individual exchanges involve discrimination does not focus on the proposal but rather – it is important to repeat once again – on the refusal to contract and the imposition of more onerous terms.

⁶⁰ On the review of contractual autonomy see P. Perlingieri, ‘Nuovi profili del contratto’ *Rassegna di diritto civile*, 545 (2000) now in Id, *Il diritto dei contratti fra persona e mercato* n 11 above, 415; Id, ‘Applicazione e controllo nell’interpretazione giuridica’ *Rivista di diritto civile*, I, 326 (2010), who sets out in stages and in substantive terms the reference principles for reviewing the legitimacy of legal provisions and reviewing contracts.

⁶¹ G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 108-118.

declaration to the public is made, the contracting party may have an appreciable interest in choosing amongst various counterparties, provided that the criterion adopted is not discriminatory.⁶² Conversely, within individual exchanges, the contracting party's interest in not being subject to any restrictions in terms of the ability to choose the counterparty cannot be considered to be protected in all cases. It has been established in fact that the (non) transferability of the proposal must be associated with the (non-)transferability of the contract with the result that, if a proposal is not directed at a specific individual, it may circulate even without the consent of the person who made it.⁶³ This negates the assumption that it is only where a declaration is made to the public at large that the contracting party does not have any interest in distinguishing between counterparties depending upon their individual characteristics.⁶⁴ There are relationships that do not feature such an interest, even if contracts are concluded on the basis of an individually tailored declaration.

A variety of legislative provisions confirm the need to diversify the manner in which the prohibition of discrimination is applied, although with reference to teleological and systematic considerations and not merely to a procedural approach focusing on contract formation. In fact, the scope of anti-discrimination legislation is limited by the reference to goods and services 'that are offered outside the ambit of private and family life and the transactions made within this area'.⁶⁵ Were the prohibition of discrimination to apply only in the event that a declaration were made to the public at large, the exclusion of exchanges made within the ambit of private and family life would lack any self-standing normative significance. In fact, anti-discrimination legislation would already have to be considered not to be applicable by virtue of the use of contracting techniques different from an offer to the public and an invitation to treat.

Once again, the question must be resolved in terms of the justification of the inequality effect brought about by the exercise of private autonomy. The more a contract impinges upon the personal sphere of the individual (the so-called *Kernbereich der persönlichen Freiheitssphäre*), the more limited the review of the freedom of choice of the other contracting party must be, and this review must be negated entirely in dealings falling under the 'area of private

⁶² See D. Maffei, *Offerta al pubblico* n 1 above, 206; G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 112.

⁶³ This argument is supported by R. Sacco, in R. Sacco and G. De Nova eds, *Trattato di diritto civile - Il contratto* (Torino: UTET, 2004), II, 337.

⁶⁴ In this way, instead, D. Maffei, *Offerta al pubblico* n 1 above, 205.

⁶⁵ See Art 3(1) of Directive 2004/113/EC and Art 55-ter(2) of Decreto legislativo 11 April 2006 no 198. Directives 2000/43/EC and 2004/113/EC add in the preamble that the principle of non-discrimination must be balanced against 'other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context'. N.M. Pinto Oliveira and B. Mac Crorie, 'Anti-discrimination Rules in European Contract Law', in S. Grundmann ed, *Constitutional Values and European Contract Law* (Austin: Wolters Kluwer, 2008), 115, distinguish between 'public and private spheres of the individual'.

and family life', which is exempt from the operation of the prohibition of discrimination, such as in cases involving the letting of a holiday home to a member of the family or of a room within a private residence.⁶⁶ Otherwise, aside from these situations, the prohibition may be applied also to individual exchanges where the inequality outcome is not justified by an appreciable interest under the legal system. Consider a scenario under which an individual negotiation is engaged in by a person during the course of business or professional activities, who then breaks off negotiations or refuses to conclude a contract for a discriminatory reason, which may even be expressly declared.⁶⁷ Consider also a scenario involving the owner of a residential complex who, without addressing the public at large, leases out identical units subject to contractual terms that are significantly more detrimental for lessors with a particular ethnic origin or religious belief.

In conclusion, the refusal to assert in absolute terms that indirect discrimination is not possible except in relation to offers to the public at large does not necessarily entail – as has been argued – the negation of freedom of contract,⁶⁸ but allows for the acknowledgement that, within different practical contexts, the effect of the prohibition of discrimination differs in terms of its extent due to the different status of the interests in play and the degree to which they are protected.⁶⁹ In some cases, such as those involving exchanges within

⁶⁶ The full freedom to choose the counterparty in the area of 'private and family life' is justified by the need to promote the broad self-determination of the individual within his or her own existential dimension (J. Neuner, 'Diskriminierungsschutz durch Privatrecht' *Juristen Zeitung*, 57 (2003); F. Stork, n 26 above, 539). It is thus inappropriate to refer to privacy as a 'protected domain within which selective and also discriminatory choices may be made', provided that the contracting party does not 'decide to make others party to that discrimination, thereby waiving his or her right to privacy' (P. Morozzo della Rocca, n 1 above, 43). Within this perspective in fact, the prohibition of discrimination could not be extended to invitations to treat followed by a refusal rooted in discrimination (see however Tribunale di Milano 30 marzo 2000, *Foro italiano*, I, 2040 (2000)), where 'the discriminatory reason is not made known to the public' (E. Navarretta, n 1 above, 553-555).

⁶⁷ For example, reference may be made to a company that refuses to provide its real estate brokerage services on the grounds of the nationality of the person requesting them or the provider or food and drink refuses to provide catering services owing to the ethnic origin of the client.

⁶⁸ See D. Maffei, 'Il diritto contrattuale' n 1 above, 168-175 according to whom 'freedom of contract is, in essence, at odds with the possible manifestation of the principle of solidarity' and E. Navarretta, n 1 above, 555, criticising the argument proposed by this author regarding the prohibition of discrimination within individual exchanges (G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 105-118).

⁶⁹ If the issue is considered in terms of the constitutional significance of private autonomy (P. Rescigno, 'I contratti in generale', in N. Lipari and P. Rescigno eds, *Diritto civile*, coordinated by A. Zoppini, III, *Obbligazioni*, 2, *Il contratto in generale* (Milano: Giuffrè, 2009), 1), without however elevating it to the status of a fundamental right (P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 321), the approach to the prohibition of discrimination within contracts must inevitably be focused on the search for a proper balance between the competing principles and interests, in the light of the specific facts of the individual case.

the ‘area of private and family life’, the legislator strikes a direct balance between the countervailing interests, providing that freedom of contract prevails; in other cases, such as in the examples referred to above involving individually tailored negotiations, the law permits the justification of the inequality outcome brought about by the counterparty’s choices to be subject to review.

V. Equality as the Axiological Foundation for the Prohibition of Discrimination and the Structure of the Judgment Concerning Discrimination

The conceptual core of the prohibition of discrimination in justifying the inequality effect has finally also been identified within the case law of the Court of Cassation. Having overcome its initial reticence to engage with the issue,⁷⁰ the Court of Cassation identified the basis for the prohibition of discrimination directly in Art 3 of the Italian Constitution, construed as a whole,⁷¹ thereby moving beyond its traditional aversion both to searching for the sources of equality in other constitutional principles as well as to invoking arguments that are more common within the literature, such as public order or morals.⁷²

The Joint Divisions accepted the calls made within the European case law – which considers non-discrimination, insofar as it is an expression of the principle of equality,⁷³ as a fundamental human right immediately actionable against other private persons⁷⁴ – and inferred from numerous international instruments (Art 14 ECHR; Art 2 of the EU Treaty; Arts 18 and 19 TFEU; Art 21 of the EU Charter of Fundamental Rights), but above all ‘from the fundamental constitutional principle of equality (Art 3 of the Italian Constitution)’ an ‘absolute individual right’ not to be discriminated against ‘established in order to protect an area of freedom and potential of the individual against any type of violation’.⁷⁵

⁷⁰ Corte di Cassazione-Sezioni Unite 29 May 1993 no 6030, *Giustizia civile*, I, 2341 (1993). On this matter, see E. Giorgini, *Ragionevolezza e autonomia negoziale*, (Napoli: Edizioni Scientifiche Italiane, 2010), 163.

⁷¹ Corte di Cassazione-Sezioni Unite 15 February 2011 no 3670, *Foro italiano*, I, 1101 (2011); Corte di Cassazione-Sezioni Unite 30 March 2011 no 7186, *Rivista italiana di diritto del lavoro*, 1095 (2011). On the Art 3 of the Italian Constitution see P. Perlingieri, ‘Eguaglianza, capacità contributiva e diritto civile’ *Rassegna di diritto civile*, 724 (1980), now in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni scientifiche italiane, 1989), 135.

⁷² A critical analysis in G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 142-146.

⁷³ Cf, *ex multis*, Case C-810/79 *Überschär* n 22 above; Case 354/95 *The Queen v National Farmers’ Union et al*, Judgment of 17 July 1997, ECR I-4559, para 61 (1995); Case 13/94 *S. v Cornwall County Council*, Judgment of 30 April 1996, para 18, ECR I-2165 (1996); Case 144/04 *Werner Mangold v Rüdiger Helm* n 22 above.

⁷⁴ The definition of fundamental right in Case 442/00 *Ángel Rodríguez Caballero*, Judgment of 12 December 2000, *Raccolta della Corte di Giustizia CE*, I, 11915, § 32 (2002); Case 144/04 *Werner Mangold v Rüdiger Helm* n 22 above; Case 555/07 (GC) *Seda Küçükdeveci*, Judgment of 19 January 2010, *Raccolta della Corte di Giustizia CE*, I-356 (2010).

⁷⁵ See Corte di Cassazione-Sezioni Unite 15 February 2011 no 3670, n 71 above; Corte di

In this way, the prohibition on contractual discrimination makes clear the twofold role which the principle of equality is able to play in recognising its horizontal effect:⁷⁶ both an individual right of the person as well as an objective limit on legislative powers *lato sensu*,⁷⁷ including transactional autonomy.⁷⁸ Therefore, the direct applicability of the principle of equality within private law relations is inseparable from the issue of the review of contractual autonomy, where it expresses the core essence of the anti-discrimination paradigm.

Within this perspective, it is possible to engage with the issue of the nature and structure of discrimination cases. According to the most broadly accepted viewpoint, cases seeking a finding of discrimination are relational in nature as they require a comparator and two terms for comparison.⁷⁹ However, any assertion that discrimination cases are tripartite in nature – whether based on actual or virtual comparators – will end up conflating discrimination with unequal treatment.⁸⁰ The comparison between two scenarios with reference to a pre-existing paradigm will in fact tend to consider whether a rule of equality has been respected, which rule operates as a pre-constituted parameter for assessing

Cassazione-Sezioni Unite 30 March 2011 no 7186, n 71 above. According to D. Maffei, 'Il diritto contrattuale' n 1 above, 178, the 'classification endorsed by the Joint Divisions in that case of the foundation for the prohibition of discrimination was not properly considered' and leads to an 'aberrant' result. However, the author does not take account of the fact that the decisions of the Supreme Court are fully aligned with the now settled position within the case law of the European Court of Human Rights, which considers the prohibition of discrimination as: 1) a general principle of law; 2) an expression of the principle of equality; 3) having direct horizontal effect in relations between private persons; and 4) as having the status of a fundamental right. The 'right not to be discriminated against' is enshrined in Art II.-2:101 of *Draft Common Frame of Reference*.

⁷⁶ Within the private law literature the significance of Art 3 of the Constitution within relations between private individuals has been proposed by G. Oppo, 'Eguaglianza e contratto nella società per azioni' *Rivista di diritto civile*, I, 633 (1974); C.M. Bianca, *Le autorità private* (Napoli: Jovene, 1977), now in Id, *Realtà sociale ed effettività della norma* (Milano: Giuffrè, 2002), I, 1, 50; P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 69 above, 459; Id, 'Eguaglianza, capacità contributiva' n 71 above, 137.

⁷⁷ On this matter see M. Barbera, *Discriminazioni ed eguaglianza nei rapporti di lavoro* (Milano: Giuffrè, 1991), 11; Id, 'Introduzione', in Id, *Il nuovo diritto antidiscriminatorio* n 1 above, XXVIII.

⁷⁸ Normative powers in a broad sense are considered to include those 'that legitimise the imposition of the rules that are applicable to the specific individual case': P. Perlingieri, 'Applicazione e controllo' n 60 above, 326. See also F. Criscuolo, 'Autonomia negoziale e autonomia contrattuale', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2008), 1-41.

⁷⁹ In this way, B. Troisi, n 1 above, 297-298; L. Sitzia, n 1 above, 249-257; D. La Rocca, *Eguaglianza e libertà contrattuale* n 1 above, 175.

⁸⁰ Within real comparison, the comparator is another specific case: Tom refuses to negotiate with Dick on the grounds that he is Jewish, but concludes contracts with Harry who has a different religious faith. However, if following the refusal to contract with Dick no other contracts are concluded there will be no relevant comparator. This therefore justifies the recourse to virtual comparison, which uses a standard as a comparator, namely the hypothetical conduct that Tom should have followed with a counterparty lacking the personal characteristic that constituted grounds for discrimination.

the act or conduct. The *tertium comparationis* reveals the inequality outcome in access to contractual benefits, although does not indicate whether it is justified.

The view that a finding of discrimination – such as in relation to incidental bad faith falling under Art 1440 of the Italian Civil Code – must be based on an examination as to whether the individual characteristic of the counterparty impinged upon the contracting process is not very distant from this model.⁸¹ In this way in fact, a virtual comparison is still necessary in order to verify whether the treatment of the counterparty is worse than how he or she would hypothetically have been treated in the absence of the prejudice.⁸²

However, it is possible to frame the assessment in different terms in a manner that is consistent with the reciprocal indifference of contractual relations involving different counterparties, which tends to be characteristic of the law of contract.⁸³ In fact, under current law not only does discrimination not presuppose the necessary operation of any ‘distinction’ or ‘preference’, but rather simply requires an ‘exclusion’ or ‘restriction’ (Art 43 of Decreto legislativo 25 July 1998 no 286), but above all any differences in treatment that are ‘objectively justified by legitimate aims pursued through appropriate and necessary means’ ‘will not in any case constitute discrimination’ (Art 3(4) of Decreto legislativo 9 July 2003 no 215; Art 55-bis(7) of Decreto legislativo 11 April 2006 no 198).⁸⁴ Prohibited discrimination also includes harassment (Art 2(3) of Decreto legislativo 9 July 2003 no 215; Art 55-bis(4) and (5) of Decreto legislativo 11 April 2006 no 198), which amounts to conduct in breach of

‘an *absolute right* not to be intimidated, degraded, humiliated or offended (and in any case not to be ‘*disadvantaged*’ and not simply ‘*more disadvantaged*’) due to a person’s own individual characteristics’.⁸⁵

The abandonment of the comparative assessment model has been further confirmed in the case law both of the European Court of Human Rights⁸⁶ as

⁸¹ D. Maffei, *Offerta al pubblico* n 1 above, 59; L. Sitzia, n 1 above, 250-252.

⁸² Although D. Maffei, *Offerta al pubblico* n 1 above, 67, explicitly denies this, he still nonetheless construes the judgment concerning discrimination in a tripartite manner as he compares the treatment of the counterparty, in the light of the reference parameter, with a *tertium comparationis* taken as an abstract standard, namely the hypothetical treatment that would have been provided in the absence of any risk factor.

⁸³ See S. Patti, ‘Alcune innovazioni del codice del 1942 nella materia dei contratti e la loro incidenza sulla autonomia privata’, in M. Giorgianni et al, *I cinquant’anni del codice civile* (Milano: Giuffrè, 1993), II, 767.

⁸⁴ Within the case law of the Court of Justice, if there are grounds for justification there can be no discrimination: C. Favilli, *La non discriminazione* n 35 above, 112.

⁸⁵ See further M. Barbera, ‘Introduzione’, in Id, *Il nuovo diritto antidiscriminatorio* n 1 above, XXXII (original italics) who argues that, in cases involving harassment, ‘the protection afforded under the new Community legislation is not dependent upon any comparison’.

⁸⁶ According to whom a difference in treatment will constitute discrimination pursuant to Art 14 of the Convention when ‘there is no objective and reasonable justification’ as ‘it does not pursue a ‘legitimate purpose’ ’ or there is no ‘reasonable relationship of proportionality between

well as the CJEU which, in discrimination disputes, now tend not to refer to a comparator and to base the judgment on the link between less favourable treatment and the presence of a risk factor.⁸⁷ It has thus been demonstrated that the violation of the prohibition on contractual discrimination does not result from the existence of a situation of inequality *vis-à-vis* a (hypothetical or actual) comparator scenario with similar characteristics; on the contrary, such a violation will result from a finding that a certain act or conduct prevents or limits access to goods or services by the other contracting party on account of a personal characteristic that represents a risk factor without any objective or reasonable justification.

In terms of application, the different conceptions of the notion of discrimination give rise to significant differences. A paradigmatic example is that of ethical banks which, in accordance with their charters, do not enter into

‘financial relations with economic operators that either directly or indirectly impede human development and contribute to the violation of fundamental human rights’.⁸⁸

The conduct of ethical banks will amount to prohibited discrimination, both if the judgment is focused on relational engagement and where the impact on consent of an individual characteristic of the counterparty is considered.⁸⁹ However, the result may be different if the review of the contracting party’s choice seeks to establish whether the creation of an inequality outcome is ‘objectively justified by legitimate aims pursued through appropriate and necessary means’. In this light, the exclusion or limitation of market exchanges put in place by the ethical bank in relation to counterparties will not amount to unlawful discrimination wherever it pursues in a proportionate manner an interest that is worthy of protection under the legal order.

It has been argued that, in this way, the ‘normative preference’ in favour of the application of the prohibition of discrimination may be identified with the

the means used and the aim pursued’: *ex multis*, Eur. Court H.R., *Karlheinz Schmidt v Germany*, Judgment of 18 July 1994, para 24; Eur. Court H.R., *Petrovic v Austria*, Judgment of 27 March 1998, para 30; Eur. Court H.R., *Niedzwiecki v Germany*, Judgment of 25 October 2005, para 32; Eur. Court H.R., *Si Amer v France*, Judgment of 29 October 2009, para 39, all available at www.echr.coe.int.

⁸⁷ The case law on sex discrimination has emblematic value. For example, it is impossible to use a male comparator in cases involving pregnancy, with the result that the Court bases its judgment on whether there is an evident link between the less favourable treatment and the risk factor: Case 177/88 *Dekker*, Judgment of 8 November 1990, ECR 3941 (1990); Case 32/93 *Webb*, Judgment of 14 July 1994, ECR I-3567 (1994). See also, Case 13/94 *S. e Cornwall County Council* n 73 above, I- 2165, para 22; Case 117/01 *K.B.*, Judgment of 7 January 2004, ECR I-541 (2004).

⁸⁸ In this way, Art 5 of the Banca Popolare Etica’s Statute. On this matter see R. Milano, *La finanza e la banca etica. Economia e solidarietà* (Milano: Paoline, 2001), 132.

⁸⁹ D. Maffei, *Offerta al pubblico* n 1 above, 193; Id, ‘Il diritto contrattuale’ n 1 above, 178.

personal preference of the interpreting body', as 'the notion that a hierarchy of interests can be created is ahistorical'.⁹⁰ By contrast, it must be reiterated that, under current law, there is in fact a hierarchy of interests, which must be inferred from constitutional axiology.⁹¹ This means that, for example, the refusal by ethical banks to conclude contracts with undertakings carrying on activities involving the production and sale of arms (Art 11 of the Italian Constitution),⁹² the use and development of energy sources and technologies that are harmful for humans and the environment (Arts 2, 9 and 32 of the Italian Constitution), the exploitation of child labour (Art 37 of the Italian Constitution) or the violation of workers' human rights (Art 36 of the Italian Constitution) may be deemed to be justified.

VI. Strict Liability for Discrimination

That this interpretation is correct is confirmed both by the rules on the criteria for establishing whether unlawful discrimination has occurred and also by the regime applicable to evidence. Some commentators within the literature consider that unlawful discrimination must be fault-based and add that this *animus* must be 'unique and exclusive'.⁹³ It is indispensable that the personal characteristic of the opposing party is a decisive factor – exclusively – for the consent by the contracting party, with the result that the latter 'acknowledges, and intends to provide' the other person with 'treatment that is harmful or otherwise less favourable'.⁹⁴ However, this argument is open to numerous objections.

First and foremost, in order to move beyond the general equivalence between wilful action and fault, laid down by the general clause on liability under tort (Art 2043 of the Italian Civil Code),⁹⁵ it must be considered that the rule is based on the assumption that the unlawful act will only be capable of causing undue harm if it is committed wilfully.⁹⁶ In fact, unlawful acts that require

⁹⁰ D. Maffei, 'Il diritto contrattuale' n 1 above, 179.

⁹¹ See P. Perlingieri, 'Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti' *Rassegna di diritto civile*, 787 (1999), now in Id, *L'ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 348.

⁹² According to D. Maffei, *Offerta al pubblico* n 1 above, 193, note 38, on the other hand, 'It is massively doubtful whether the production of and trade in arms furthers the general interest. This is not the case for anyone that *repudiates war*; this is the case for anyone that considers war to be one of the instruments for the pacification of peoples' (italics added). However, see Art 11 of the Italian Constitution: 'Italy *repudiates war* as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes'.

⁹³ D. Maffei, *Offerta al pubblico* n 1 above, 160.

⁹⁴ In this way *ibid* 161.

⁹⁵ See G. Alpa, *Trattato di diritto civile*, 4, *La responsabilità civile* (Milano: Giuffrè, 1999), 234; M. Franzoni, 'L'illecito', in M. Franzoni ed, *Trattato della responsabilità civile* (Milano: Giuffrè, 2nd ed, 2010), I, 385.

⁹⁶ In this way, P. Cendon, *Il dolo nella responsabilità extracontrattuale* (Torino: Giappichelli,

wilful action manifest a value judgment that the interests of the perpetrator prevail over those of the victim:⁹⁷ by imposing the requirement of intentional action, the legal system expands the area of freedom of action for the perpetrator.⁹⁸ However, in relation to contractual discrimination the normative preference applies in favour of the legal position of the victim, as the agent's freedom of contract (which is not classified as an inviolable human right)⁹⁹ conflicts with the 'absolute individual right not to be discriminated against', which the case law has recognised as a fundamental right 'with constitutional and supra-national status'.¹⁰⁰

Furthermore, in regulating the prohibitions on discrimination, the legislator not only does not refer to wilful action, but also even disregards the issue of fault, adopting objective criteria of strict liability. In order for discrimination to be considered to have occurred as a matter of law, it is necessary, in some cases, either that 'the purpose *or* effect' or the 'object *or* consequence' is discriminatory (Art 43 of Decreto Legislativo 25 July 1998 no 286;¹⁰¹ in relation to harassment, Art 2(3) of Decreto Legislativo 9 July 2003 no 215 and Art 55-*bis*(4) and (6) of Decreto legislativo 11 April 2006 no 198), in other cases that there be 'less favourable treatment' (Art 2(1) of Decreto Legislativo 9 July 2003 no 215; Art 55-*bis*(1) of Decreto legislativo 11 April 2006 no 198), and in other cases a 'particular disadvantage' (Art 2(1) of Decreto Legislativo 9 July 2003 no 215; Art 55-*bis*(2) of Decreto legislativo 11 April 2006 no 198) in accessing and obtaining the provision of goods or services, without any reference to whether the conduct was intentional.¹⁰² A common feature of the forms of discrimination mentioned

1974), 156; G. Visintini, *I fatti illeciti* (Padova: CEDAM, 1990), II, 247.

⁹⁷ P. Cendon, n 96 above, 465.

⁹⁸ M. Franzoni, n 95 above, 373.

⁹⁹ See further P. Rescigno, 'L'autonomia dei privati' *Justitia* (1967), now in Id, *Persona e comunità* (Padova: CEDAM, 1988), II, 422; P. Perlingieri, *Profili istituzionali del diritto civile* (Napoli: Jovene, 1975), 70; Id, *Il diritto civile nella legalità costituzionale* n 69 above, 334; G. Alpa, 'Libertà contrattuale e tutela costituzionale' *Rivista critica di diritto privato*, 44 (1995); L. Mengoni, 'Autonomia privata e Costituzione' *Banca borsa e titoli e credito*, 1 (1997); M. Pennasilico, sub 'art. 1322 c.c.', in G. Perlingieri ed, *Codice civile annotato* n 54 above, 374.

¹⁰⁰ Corte di Cassazione-Sezioni Unite 30 March 2011 no 7186, n 71 above; Corte di Cassazione-Sezioni Unite 15 February 2011 no 3670, n 71 above; Case 442/00 *Angel Rodríguez Caballero* n 74 above.

¹⁰¹ B. Troisi, n 1 above, 305.

¹⁰² Also C. Favilli, *La non discriminazione* n 35 above, 149, 255, argues that, within the Community definitions of discrimination, 'it is always irrelevant what intention the author of discriminatory treatment has'. Albeit with reference to Spanish law, there is general consensus within the literature that contractual discrimination gives rise to strict liability: F.J. Infante Ruiz, 'El desarrollo de la prohibición de no discriminar en el derecho de contratos y su consideración en la jurisprudencia' *Revista de derecho patrimonial*, 30, 191 (2013); M. García Rubio, 'Discriminación por razón de sexo y derecho contractual en la Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y ombre' *Derecho privado y Constitución*, 161 (2007); C. Mesa Marrero, 'Consecuencias jurídicas de las conductas discriminatorias: ¿un resquicio para los punitive damages?', in Á. López López ed, *El levantamiento del velo. Las mujeres en el Derecho Privado* (Valencia: Tirant lo Blanch, 2011), 1204; M.J. Reyes Lopez, 'El

above is the irrelevance of any intention on the part of the actor: what matters is the functional aspect of the act, expressed by the creation of an unjustified effect of inequality based on the presence of a risk factor.

VII. The Rules Governing Evidence and the Nature of a Legal Presumption of Discrimination

The hypothesis that the legislation establishes strict liability for discrimination is supported by the rules governing the burden of proof laid down by Art 28(4) of Decreto legislativo 1 September 2011 no 150 which provides that:

‘Where the claimant provides factual indications, inferred also from data of a statistical nature, from which the existence of discriminatory acts, agreements or conduct may be inferred, it shall be for the defendant to establish that there was no discrimination’.

An interpretation of this provision in the light of EU law is capable of establishing a legal presumption to this effect, which, in allocating the burden of proof,¹⁰³ protects the weaker party to the relationship, who encounters greater difficulty in proving factual assertions.¹⁰⁴

However, there is a question as to how the division of the burden of proof operates in practice. What is the basic fact that must be proven by the claimant? And what is the presumed fact ‘that is relevant for the decision’?¹⁰⁵ According to the provision, the basic facts are the ‘discriminatory acts, agreements or conduct’, whilst the presumed fact is the ‘discrimination’. It is necessary to give meaning to the expressions used by the legislator, starting from the legal presumption in question, which expresses preferential treatment by the legal order for the party

principio de igualdad de trato en las relaciones contractuales’ *Revista juridical del notariado*, 646 (2010).

¹⁰³ The Court of Justice has however clarified on numerous occasions that, in disputes concerning discrimination, it falls to the victim to ‘establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination’ (Case 104/10 *Kelly v National University of Ireland*, Judgment of 21 July 2011, ECR I-06813, para 30 (2011); Case 415/10 *Meister v Speech Design Carrier Systems GmbH*, Judgment of 19 April 2012, *Diritto e pratica del lavoro*, 39, § 36 (2012)). The existence of discrimination may be contested by the respondents ‘by any legally permissible means’ (Case 303/06 Grand Chamber *Coleman v Attridge Law e Steve Law*, Judgment of 17 July 2008, ECR I-5603, para 55 (2008); Case 81/12 *Accept v Consiliul Național pentru Combaterea Discriminării*, Judgment of 25 April 2013, para 56, available at www.eur-lex.europa.eu; Case 415/10 *Meister v Speech Design Carrier Systems GmbH* n 103 above, para 36), including a ‘body of consistent evidence’ capable of refuting the presumption of discrimination (Case 81/12, para 58).

¹⁰⁴ S. Patti, ‘*Probatio e praesumptio: attualità di un’antica contrapposizione*’ *Rivista di diritto civile*, I, 486 (2001).

¹⁰⁵ *ibid* 484.

that is exempt from the burden of proof.

Within this perspective, the basic fact that must be proven by the claimant is the effect of the inequality, as qualified by a risk factor: the refusal to contract or the proposal of more onerous terms. On the other hand, the fact presumed, which the claimant is not required to demonstrate, is the lack of justification for the inequality effect. Thus, once the interested party has provided evidence of the inequality effect, the legislator requires the court to presume that discrimination has occurred, unless the defendant is able to comply with the burden of demonstrating that it is not true or that there is justification for the discrimination alleged.¹⁰⁶ Therefore the perpetrator runs the risk of being unsuccessful in the proceedings if it is unable to furnish proof both of the existence and eligibility for protection of the justification for the discriminatory effect as well as the proportionality of this basis for justification. Assuming that the legislator uses objective criteria for establishing whether discrimination has occurred, the objection that the burden of proof borne by the defendant would also extend to proving a negative fact, namely the absence of any discriminatory intent, will also be inoperative. The defendant will in fact be required to furnish positive proof, namely the existence of justification for the inequality effect, and it will be in a privileged position as regards access to such proof.

VIII. Diversification of Techniques for Protecting Against Discrimination and the Choice of the ‘Right’ Civil Remedy

The legislation governing the private law protections that may be invoked against contractual discrimination offers a broad array of remedies to the courts, without any hierarchical distinction. Violations of the legal prohibition may be countered with functionally different forms of protection, which may in some cases be cumulative.¹⁰⁷ Accordingly, any reading of the prohibition of discrimination as either a prerequisite for validity or as a rule for establishing liability must be rejected.

In some cases, discrimination will result in the case being classified as unlawful, with the result that the transaction is void in its entirety. This will be

¹⁰⁶ See, Case C-303/06 (GC) *Coleman v Attridge Law and Steve Law*, Judgment of 17 July 2008, para 55, available at www.eur-lex.europa.eu, where it was held that, if the claimant demonstrates facts that enable it to be presumed that discrimination has occurred, the defendant may contest the assumption that the unequal treatment was unlawful by demonstrating ‘by any legally permissible means’ that the act or conduct was ‘justified by objective factors unrelated to any discrimination’ on the grounds of any personal characteristic that constitutes a risk factor.

¹⁰⁷ On the requirement for a confluence between remedies and interests in the light of the requirements of reasonableness and proportionality, see P. Perlingieri, ‘Il «giusto rimedio» nel diritto civile’ *Giusto processo civile*, 1 (2011), according to whom the ‘special circumstances of the specific individual case’ will determine the choice of the remedy, also ‘beyond the confines laid down by the legislator’.

the outcome for ‘discriminatory transactions or agreements’ resulting in obligations between the parties to refrain from contracting or to apply more onerous terms to members of the group that is discriminated against.¹⁰⁸ The verification as to whether the cause is lawful – the traditional instrument for the control of acts of private autonomy – is enriched by the reference to the prohibition of discrimination, which is capable of classifying as invalid a transaction requiring the parties to comply with a rule with discriminatory effect.

Where the discrimination occurs during the pre-contractual stage, consisting in a refusal to launch or pursue negotiations, the core remedy is by contrast the injunction by which the legal system seeks to obtain the ‘cessation of the detrimental discriminatory behaviour, conduct or act’ (Art 28 of Decreto legislativo 1 September 2011 no 150).¹⁰⁹ It is also possible to issue an order of specific performance,¹¹⁰ which obliges the defendant to conclude a contract, provided that the goods or services are still available and it is possible to conclude the contract. Where the perpetrator persists in the unlawful conduct and fails to comply with the obligation to act in a non-discriminatory manner, this circumstance may be assessed when liquidating the amount of damages payable.¹¹¹

In addition to a refusal to contract, discrimination may also consist in the imposition of individual clauses that result in less favourable treatment. Consider the provision within a lease prohibiting any cohabitee of the lessor who is not an EU citizen or authorising subletting, except to homosexuals. In such cases, the discrimination pertains to the substantive terms of the contract, and its negative effect is limited only to certain clauses, which may be ruled void in part,¹¹² and where appropriate supplemented or corrected.¹¹³

¹⁰⁸ There has always been an awareness within the private law literature that ‘any ‘anti-constitutional’ discrimination that penetrates into the cause or into the actual terms of the contract may without doubt result in it being void on the grounds that it is unlawful’: see, G. Oppo, n 76 above, 634, who provides the example of an agreement by which the parties undertake to refrain from contracting with blacks, Jews or Italians; P. Rescigno, ‘Sul cosiddetto principio’ n 57 above, 666; P. Femia, n 1 above, 483-485; D. Maffei, *Offerta al pubblico* n 1 above, 313; G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 247-256.

¹⁰⁹ An injunction may also be imposed in order to avoid the continued or repeated imposition of more detrimental terms within so-called ‘serial’ contracts (eg general terms and conditions, standard-form contracts, etc). In such an eventuality, the conduct will be unlawful, with the result that the order to desist will take the form of an injunction.

¹¹⁰ See further A. di Majo, *La tutela civile dei diritti* (Milano: Giuffrè, 4th ed, 2003), 144; D. Maffei, *Offerta al pubblico* n 1 above, 283.

¹¹¹ In fact, according to Art 28(6) of Decreto legislativo 1 September 2011 no 150, ‘the court shall take account of whether the discriminatory act or conduct amounts to retaliation for previous legal action or an unfair response to previous activity by the injured party seeking to secure compliance with the principle of equal treatment’.

¹¹² See also P. Femia, n 1 above, 545-546; D. La Rocca, *Eguaglianza e libertà contrattuale* n 1 above, 198; E. Navarretta, n 1 above, 557-558.

¹¹³ Partial annulment may be followed by the automatic incorporation of the clauses generally adopted by the contracting party pursuant to Art 1339 of the Italian Civil Code (G. Pasetti, n 57 above, 313), by subsequent validation pursuant to Art 1374 of the Italian Civil Code (L. Ciaroni, n 22 above, 1822), or by rectification as a form of compensation in kind

Where the discriminatory conduct results in detrimental consequences for the victim, he or she may also claim damages. Art 28(5), (6) and (7) of Decreto legislativo 1 September 2011 no 150 lay down special provisions on damages, which strongly emphasise their punitive function, as is demonstrated by: the setting of rigorous criteria for the liquidation of the quantum,¹¹⁴ the express provision that non-pecuniary harm is eligible for compensation¹¹⁵ and the possibility of ordering the publication of the order awarding damages.

In terms of remedies, the most problematic issue consists in the admissibility of real protection for the substantive interest in accessing the benefit available through contracting. In fact, when confronted with the refusal to contract, the remedies of an injunction or an award of damages may not be adequate in order to offer full and complete protection to the victim of discrimination. In the event that an injunction is not complied with, the question will therefore arise as to whether a court ruling can establish the effects of the contract that was not concluded. Art 2932 of the Italian Civil Code is commonly held not to apply, as the prohibition of discrimination cannot give rise to an obligation to contract.¹¹⁶ Nevertheless, some commentators use Art 2058 of the Italian Civil Code as a basis for establishing the effects of a contract that was not concluded, as a form of compensation in kind.¹¹⁷

However, this is not a desirable solution. In contrast to compensation in kind, the imposition of a contract does not seek to re-establish the situation that would have arisen without the unlawful effect, but rather to bring about an effect that is constitutive of a new legal relationship. Moreover, the remedy cannot be reduced to the ordinary forms of restitution in kind, which presuppose the material elimination of the detrimental consequences of the unlawful act.

Moreover, on a procedural level, compensation is based on protection through specific performance (*tutela di condanna*), whereas the imposition of a contract must strictly speaking be classified as ‘constitutive’ relief as the order of the court is liable to impinge directly on relations between private individuals. Within this perspective, Art 28 of Decreto legislativo 1 September 2011 no 150 may be considered as one of the ‘cases provided for by law’ in which, according

pursuant to Art 2058 of the Italian Civil Code (R. Sacco, in Id and G. De Nova eds, n 63 above, 100; D. Maffei, *Offerta al pubblico* n 1 above, 286). However, it would appear to be preferable to infer any amendment or supplementation of the contract from the court’s power to cancel the effects of discrimination pursuant to Art 28(5) of Decreto legislativo 1 September 2011 no 150 (G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 272-276).

¹¹⁴ The amount of compensation must be based not only on the harm suffered by the victim (compensatory-satisfactory function) but also on the seriousness of the breach, which may be heightened where the discrimination constitutes ‘retaliation’ or an ‘unfair response’ to the conduct of the injured party (Art 28(6), cited above).

¹¹⁵ See P. Virgadamo, *Danno non patrimoniale e “ingiustizia conformata”* (Torino: Giappichelli, 2014), 195.

¹¹⁶ G. Scarselli, n 15 above, 824; P. Morozzo della Rocca, n 1 above, 36; B. Troisi, n 1 above, 302; D. Maffei, *Offerta al pubblico* n 1 above, 277.

¹¹⁷ R. Sacco, in Id and G. De Nova eds, n 63 above, 313; L. Sitzia, n 1 above, 301-303.

to Art 2908 of the Italian Civil Code, the courts may issue constitutive rulings. This provision in fact grants the court the power to adopt, when accepting the claim, 'any measure capable of removing the effects' of the discrimination. The removal is achieved through the establishment of a substantive legal relationship, which gives effect to the 'right to contract' of the victim of the discrimination.¹¹⁸ It is also evident in this respect that the imposition of a contract is a very different remedy to compensation in kind, since the legal result sought by the party is only actually be provided through constitutive relief and not by compensation in kind without pursuing any enforcement proceedings.¹¹⁹

However, it must be possible to issue a constitutive judgment. In order to do so, two preconditions must be met: the goods or service must still be available and the terms of the contract must be sufficiently specific. Thus, the scope of the remedy appears to be limited to situations involving the unjustified refusal to conclude a standard form contract or the breaking off of negotiations conducted in an attempt to reach agreement concerning the essential aspects of a transaction.

In conclusion, since the principle of equality may be fulfilled in various ways in the area of contractual relations, it is also necessary that the forms of relief and the manner in which relief is provided are also different. This places the emphasis on the responsibility of interpreting bodies, which are called upon to identify the civil remedy that is capable of striking the 'right balance' between the competing rights: punishing the unjustified creation of inequality effects, while placing the narrowest possible restriction on freedom of contract.

¹¹⁸ See S. Mazzamuto, 'L'esecuzione forzata', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 2nd ed, 1998), XX, 410.

¹¹⁹ In this way, A. di Majo, n 110 above, 364; A. Chizzini, 'Sentenza nel diritto processuale civile' *Digesto delle discipline privativistiche, Sezione civile* (Torino: UTET, 1998), XVIII, 28.

Claims-Made Insurance Policies in Italy: The Domestic Story and Suggestions from the UK, Canada and Australia

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Abstract

Liability insurance contracts can be divided into two main categories: loss occurrence based and claims-made based. While the Italian Civil Code (ICC) only considers and determines insurance contracts on a loss occurrence basis, since the end of the 20th century, the claims-made model has taken control of the market. This reception has posed various issues in the domestic legal system on which the Italian Supreme Court has recently ruled several times. In dealing with these domestic issues, it may be of interest to look at the suggestions coming from common law systems, where the model was conceived and particularly from individual common law jurisdictions, notably the UK, Canada and Australia.

I. Foreword

The aim of this paper is to depict briefly the reception in Italy of an ‘alien contract’¹ of significant importance in professional practice: liability insurance.

To this end, I shall first address the main dichotomy in professional liability insurance contracts, *viz* loss occurrence and claims made; second, I shall give an account of the issues raised in Italy by claims-made policies and deal with the suggestions coming from certain common law jurisdictions (the UK, Canada and Australia).

II. Loss Occurrence Versus Claims-Made Policy Model

Art 1917, para 1, Italian Civil Code (ICC) states:

‘In liability insurance the insurer is bound to indemnify the insured for the damages which the latter must pay to a third person because of events occurring during the insurance period and resulting in the liability referred

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¹ Quoting G. De Nova, ‘The Alien Contract’ *Rivista di diritto privato*, 487 (2011): ‘A contract governed by Italian law but conceived and drafted on the basis of a common law model and in particular a U.S. and /or a U.K. model can be depicted as an “alien contract”’.

to in the insured contract. Damages deriving from fraudulent acts are excluded².

The choice of the Italian Civil Code, in shaping (professional) liability insurance, is in favour of the so called 'loss occurrence' model, in which the trigger for coverage is an accident or untoward event causing damage or loss during the currency of the policy period. That means that the timing of the claim being brought against the insured to recover damages is irrelevant; so long as the loss occurs during the policy period, coverage is guaranteed.²

Dating mainly from the 1980s, we find the introduction of a different model of liability policy – the claims-made insurance policy – created in common law systems to enable the insurance industry to cope with 'long tails' damages (ie product liability, asbestos exposure, etc). They are those which arise a long time after their cause and may even result from an uncertain series of different co-causes.³

The claims-made policy has a completely different trigger than an occurrence-based policy; the filing and initial reporting of a claim during the policy period. The professional malpractice or loss or damage need not have occurred during the currency of the policy for coverage to exist. What matters is when liability was incurred, not when it was ascertained.⁴

Benefits for the insurance industry are evident; if professional liability policies were underwritten on an occurrence basis, it would be difficult for insurers to form a view as to their potential exposure. On the contrary, once the claims-made policy expires, the insurer can expect no further claims for that policy period, whereas an occurrence-based policy can require indemnification of an insured party for multiple years after the policy has expired and the insurer has gone off-risk.⁵

² In a loss occurrence (also called event-based) policy, coverage is provided 'against liability arising out of acts of the insured occurring during the policy period, no matter when a claim is eventually lodged against the insured', M.A. Clarke, *The Law of Insurance Contracts* (London-Hong Kong: LLP Professional Publishing, 3rd ed, 1997), 419.

³ Claims made policy is still the most suitable model for pollution liability coverage: see *ibid* 429.

⁴ On a claims-made scheme, the insured is covered 'against all claims that are made during the policy period, regardless of when the activity giving rise to the claim occurred', *ibid* 419.

⁵ As pointed out by the Supreme Court of Canada in *Jesuit Fathers of Upper Canada v Guardian Insurance Co. of Canada*, 1 SCR 744 (2006): 'The development and growing use of claims made or hybrid policies was, in large part, a response to serious problems encountered by insurers in relation to occurrence-based policies. An occurrence-based policy works well where the damage resulting from a particular negligent act is immediately apparent (or becomes apparent shortly thereafter). It is less well-suited in cases of professional services such as medical, engineering or manufacturing services, where the damage from the negligent act may not be apparent for many years. First, the "long-tail" nature of the liability in the examples above makes it likely that many claims will be made well after the policy has expired. Second, the ongoing developments in law and science make it difficult for the insurer to estimate the potential liability arising from claims made many years in the future'.

In short, claims-made means, for the insurance industry, avoidance of the 'long tail'. That is why, in the Italian market, it is nowadays quite impossible to find any offer of occurrence-based professional liability policies.

More uncertain are the effective benefits for the insured of claims-made coverage.

Very often, commentators who are in favour of this second policy model remark that the claims-made policy provides insured parties with immediate coverage for all past, present and future claims-made during the policy period; insurance need not have been in place when the wrongful act or damage occurred.

Nevertheless, there may be relevant negative issues for the insured on claims-made bases in comparison with the loss occurrence model shaped by Art 1917 Italian Civil Code. Firstly, claims-made policyholders may find it impossible to change insurance company once an actual claim has brought their risk potential to the attention of insurance underwriters. Secondly, if the misconduct that creates the professional liability occurs during the policy period but the claim is not raised in the same period, they may find it difficult to obtain a new claims-made policy when they have complied with the duty of disclosing circumstances that may result in a prospective claim although not yet made. Thirdly, professionals need to maintain insurance for new claims from year-to-year and must be able to obtain cover for potential claims about which they are informed in the current year.

III. Claims-Made Policies Under Italian Law

As stated above, Art 1917 Italian Civil Code describes liability insurance as a contract on a loss occurrence basis and there is no provision in Italian Civil Code that refers to a claims-made policy. However, Art 1917, para 1 is not deemed to be mandatory as per Art 1932, para 1, Italian Civil Code.

We must add that, as provided by Art 1322 Italian Civil Code, titled 'Contractual Autonomy':⁶

'1. The parties can freely determine the contents of the contract within the limit imposed by law. 2. The parties can also make contracts that are not of the types that are particularly regulated, provided that they are directed to the realization of interest worthy of protection according to legal order'.⁷

⁶ On the topic, briefly, G. Alpa and V. Zeno Zencovich, *Italian Private Law* (Abingdon: Routledge-Cavendish, 2007), 157.

⁷ The translation of Italian Civil Code reported in this paper is from J.H. Merryman, *The Italian Civil Code* (Dobbs Ferry: Oceana Publications Inc, 1969). On Art 1322, para 2, briefly, G. Iudica and P. Zatti, *Language and Rules on Italian Private Law: An Introduction* (Padova: CEDAM, 2012), 115.

Therefore, the main questions are: can the parties modify and reverse the scope of liability insurance set out by Art 1917, para 1, Italian Civil Code?; to what extent can the insurer reshape the scope of the liability policy?; can the insurer do this if it leads to gaps in coverage that may affect not only the professional insured but even his clients, whom the coverage is intended by law to benefit?

The Italian Supreme Court (Corte di Cassazione) has addressed these issues in the quite restricted number of decisions filed on the topic.

In dealing with them, we must be aware that decisions of the Italian Supreme Court on claims-made policies have been sometimes inaccurately reported as being in favour of the feasibility and unquestionability of the model as per Italian law.

On the contrary, on a non-biased and close examination, the decisions appear more complex.

Starting with the decision made on 15 March 2005 no 5624, it does provide that claims-made policies may be valid under Art 1322, para 2, Italian Civil Code. However, the basis of the reasoning was to assert that these clauses fall under the definition of 'unfair terms' of Art 1341 of the Civil Code on standard terms and conditions of contracts and the requirement for specific approval in writing by the insured, these being void and unenforceable without it.

A subsequent decision, lodged on 17 February 2014 no 3622 was no greater a point in favour of the claims-made policy. In that case, the insurer alleged that the claims-made clause (shaped and imposed by the insurer itself) was void, in order to deny cover for claims-made during the policy period but relating to professional mistakes which occurred before the contract was entered into. Thus, we must regard the decision as a ban on the attempted unfair withdrawal from the contract more than as an assertion of indisputable validity of the claim made model.

Then came the decision of the Joint Division of the Italian Supreme Court, filed on 6 May 2016 no 9140, in which the Court stated that the so called 'mixed' claims-made policies (those providing coverage only if: i) the claim is made during the policy period and ii) also if the event – ie the professional's misconduct – occurred in a limited previous period) may be declared void because the underlying interests sought by the contract do not deserve protection under the applicable law and that such assessment must be carried out, pursuant to Art 1322, para 2, by the lower courts (tribunals and courts of appeal). The decision did not offer any guideline for such evaluation, except for the note that the suitability of the policy is not likely to be found where the claims-made clause, regardless of how it is conceived, exposes the insured party to 'coverage gaps'. Moreover, the Supreme Court decision stated that if the clause were found to be null and void, the statutory provision of Art 1917 para 1, Italian Civil Code would apply to the contract, which would therefore remain valid but would be construed

as a loss occurrence policy.⁸

More recently, the Third Division of the Supreme Court, with a decision rendered on 28 April 2017, no 10506, nominally following the previous decision of the Joint Division, stated that a claims-made clause that prevents the insured from obtaining coverage for malpractice (in that specific case, medical) which occurred in the policy period but not resulting in a proper claim made in the same period is not directed to achieve interests which are worthy of protection and therefore the policy remains enforceable, except for the claims-made clause, as a loss-occurrence insurance as per Art 1917 para 1.

To date, rulings on claims-made policies are far from being over.

On 19 January 2018, the same Third Division of the Supreme Court filed a request to the First President of the Court to obtain a new decision of the Joint Division on the lack of power of the parties to amend and modify the trigger of insurance coverage described by Art 1917 para 1 (ie loss occurrence basis).

A claims-made policy that was an alien contract, coming to Italy from a common law tradition, would be of some interest in seeking to verify if the domestic debate has taken into the due account the suggestions and indications given by the legal system of origin.

IV. Definition of Claims, Coverage Gaps, Deeming Clauses: Suggestions Coming from Common Law Jurisdictions viz the UK, Canada, Australia

As discussed above, insurance coverage is triggered, in the claims-made model, by the filing of a claim during the policy period.

Therefore, first, the definition of claim – statutory or contractual – becomes crucial. Actually, the issue concerning the trigger in a claims-made policy may be more subtle. Insurance can also be shaped as a ‘claims-made and reported’ policy: that is, the insured obtains coverage only if in the contractual period i) he received a claim and ii) he reported and notified it to the insurer.

As was noted in *Reid Crowther & Partners Ltd. v Simcoe & Erie General Insurance Co.* by the Supreme Court of Canada (21 January 1993):

‘Another type of restriction of coverage in “claims-made” and hybrid

⁸ On this decision and on the others made by Italian Supreme Court, S. Landini, ‘The Worthiness of Claims Made Clauses in Liability Insurance Contracts’ 2(2) *The Italian Law Journal*, 509 (2016). On the same topic, in the Italian literature, S. Monticelli, ‘Responsabilità dei professionisti: la clausola claims made tra abuso del diritto ed immeritevolezza’ *Danno e responsabilità*, 701 (2013); G. Volpe Putzolu, ‘La clausola claims made – Rischio e sinistro nell’assicurazione r.c.’ *Assicurazioni*, 3 (2010); P. Gaggero, ‘Validità ed efficacia dell’assicurazione della responsabilità civile claims made’ *Contratto e impresa*, 401 (2013); R. Pardolesi, ‘Le sezioni unite sulla clausola claims made: a capofitto nella tempesta perfetta’ *Foro italiano*, I, 2026 (2016); U. Carnevali ‘La clausola claims made e le sue alterne vicende nella giurisprudenza di legittimità – il Commento’ *Contratti*, 387 (2017).

policies is found in what are referred to as “claims-made and reported” policies. Coverage under such policies applies only to claims which are both made of the insured and reported to the insurer during the policy period. This type of policy creates obvious problems for insureds regarding claims discovered and/or made by third parties just before the expiry of their coverage. In his article “Professional Liability Insurance: The Claims-made and Reported Trap” (1991), 19 W. St. U. L. Rev. 165, Lee Roy Pierce, Jr. writes at p. 171:

Claims-made and reported policies are less expensive because it is statistically probable that a certain number of insureds will find it impossible or impracticable to timely report their claims. Thus, premium costs to the group are reduced because it is statistically probable that many insureds (who actually encounter the insured loss) will forfeit coverage.

In Pierce’s view, this situation is antithetical to the purpose of purchasing liability insurance, which is for the insured to trade a contingent loss (uncertainty) for a certain loss (the premium paid to the insurer).

Similarly, a standard form policy released in 1986 by the Insurance Bureau of Canada was the subject of a critical analysis by Thomas R. M. Davis in “The New IBC Standard Form Commercial General (Claims-Made) Liability Policy” (1987), 5 Can. J. Ins. L. 77. In Davis’ view, at p. 78:

The purpose of the claims-made form is to enable insurers to predict current liabilities rather than underwrite unpredictable long-term liabilities (occurrence basis). There is no doubt that the claims-made form will accomplish this, primarily by shifting a significant part of the risk of unpredictable long-term liabilities back to the insured’.

In that case, an appropriate construction of the contract, made by the Court, relieved the insured from an unreasonable denial of coverage that could be opposed by the insurer.

As was noted in *Stuart v Hutchins* by the Court of Appeal for Ontario, (1998):

‘...where circumstances beyond the control of the insured render it physically impossible for the insured to comply with the notice provision, general principles of contract interpretation would come to the insured’s aid, without need to resort to s. 129. Specifically, I think it would be open to the court to construe the notice provision as containing an implied term that non-compliance due to physical impossibility would not be fatal to coverage but that the insured be given a reasonable opportunity to comply’.

Secondly, it is worth noting that policies sold in the Italian market usually contain a definition of claim – which is necessary, given the absence of a statutory provision in Italian Civil Code describing claims-made insurance – with a very strict range that prevents the insured from reporting circumstances or mere potential claims that can likely result in a future effective claim.

This situation is well known in common law and English courts are fully aware of the same risk of coverage gaps mentioned by the Italian Supreme Court as a potential hazard for clients of the insured.

As was noted in the English leading case of *HLB Kidsons (A Firm) v Lloyds Underwriters*, before the Queen’s Bench Division - Commercial Court, of the High Court, England and Wales, decided on 9 August 2007:⁹

‘It is integral to the structure of claims-made policies being successively renewed from year to year, that provision is made for claims arising after the expiry of any one policy period out of circumstances of which the assured has first become aware during that period. Unless provision is made to treat such claims as having been made during that policy period, the concept of claims-made policies applying in successive policy years would create an unexpected and inappropriate gap in coverage. This is because of the obligation upon an assured to make disclosure to renewing insurers on the succeeding year and the possibility that, upon disclosure to renewing insurers of such circumstances of which the assured was aware at the end of the earlier policy year, renewing insurers might exclude any claims arising out of them, or only be prepared to accept liability at a premium that was commercially unacceptable to the assured. This would leave the assured with no cover in respect of such claims either under the earlier policy year during which he first became aware of the relevant circumstances or under the later year during which the claim might ultimately be made arising out of those circumstances. This analysis finds confirmation, for example, in the reasoning of Rix J in *J Rothschild Assurance Plc v Collyear* [1999] 1 Lloyd’s Rep IR 6 at paragraph 22, and of Moore-Bick J in *Friends Provident* at paragraph 13 and paragraphs 38-39’.

The contractual provision to which the Court referred was a typical *deeming clause* (General Condition 4 (‘GC4’) of the Policy), which read as follows, as quoted in the decision:

‘The Assured shall give to the Underwriters notice in writing as soon as practicable of any circumstance of which they shall become aware during the period specified in the Schedule which may give rise to a loss or claim against them. Such notice having been given any loss or claim to which that

⁹ See <https://tinyurl.com/y758jpyz> (my emphasis in the text) (last visited 30 June 2018).

circumstance has given rise which is subsequently made after the expiration of the period specified in the Schedule shall be deemed for the purpose of this Insurance to have been made during the subsistence hereof.

The reasoning continues:

‘22. The authorities concerning such clauses recognise that the purpose of a notification clause such as GC4 is twofold. First, it is intended to enable insurers to investigate potential claims at the earliest possible opportunity, before the trail of evidence goes cold, and to take, or require the assured to take, such steps as insurers think appropriate to minimise liability under the policy; see e.g. *Pioneer Concrete (U.K.) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd’s Rep 274 at 278, per Bingham J; *Rothschild Assurance* at 22, per Rix J; *Friends Provident* at paragraph 20, per Moore-Bick J; *McAlpine v BAI* [1998] 2 Lloyd’s Rep 694 at 698, per Colman J; Clarke, *The Law of Insurance Contracts*, paragraph 17-4D4.

23. Secondly, the clause enables the assured to obtain an extension of cover in respect of a claim made after expiry of the Policy (and which would otherwise fall outside the scope of the Insuring Clause), provided the claim arises out of a circumstance of which the assured became aware during the period of the Policy and in respect of which he gave notice in accordance with the clause. GC4 protects the assured from the difficulty that would otherwise arise under a claims-made policy in the event of his becoming aware during the policy period of circumstances which he recognises might give rise to a claim but which did not result in a claim being made prior to expiry of the policy. Again, the authorities recognise that, since the assured would be bound to disclose the existence of such circumstances when seeking insurance for the following year, he might find it difficult to obtain cover in respect of that potential loss at a commercially acceptable premium, if at all. GC4 enables the assured, in such a situation, to obtain an extension of the existing insurance to cover the loss, if and when a claim materialises; see e.g. *Rothschild Assurance* at 22, per Rix J; *Friends Provident* at paragraph 13, per Moore-Bick J; *Tioxide Europe Ltd v CGU International Insurance Plc* [2005] Lloyd’s Rep IR 114 at paragraph 56, per Langley J. If the assured notifies in accordance with the clause, insurers are bound to provide him with cover in respect of a claim arising from the circumstances notified, even though the claim is made after expiry of the policy period. Thus the clause acts as a “trigger for the extension of cover”; see *Friends Provident Life and Pensions v Sirius* [2006] 1 Lloyd’s Rep IR 45 at paragraph 11, per Mance LJ.’

Much of reasoning in the decision is focused on the assessment of the

compliance by the insured (Kidsons, a firm of chartered accountants which had sold to clients tax avoidance schemes which had proved ineffective and were successfully challenged and rejected by the Inland Revenue office), which had a duty to report ‘relevant circumstances’ which may result in a claim ‘as soon as practicable’. Nevertheless, the relevant point, for the domestic Italian market where this common law contractual model has landed, is that the Court finds a deeming clause provision ‘integral’ to the structure of claims-made policies being successively renewed from year to year. In other words, a deeming clause is and must be part of the *naturalia negotii* of an insurance coverage split, as is usually arranged by insurers, into short periods of one year each; much shorter in respect of the more lasting practicing activity of the professionals.

In conclusion, the UK common law system gives a clear indication in construing claims-made policies combined with the facility to obtain coverage, reporting, ‘as soon as practicable’, circumstances of which the insured may become aware during the insurance period and which may give rise to a loss or claim against them also after the completion of the same period.

Such a clear indication is not present in the Canadian common law system.

The leading case *Jesuit Fathers of Upper Canada v Guardian Insurance Company of Canada* and *ING Insurance Company of Canada* was decided by the Supreme Court of Canada on 10 January 2006 (*Jesuit v Guardian*).

The factual background is delivered as follows in the decision:

‘The Jesuits operated and administered an Indian residential school from 1913 until its closure in 1958. In 1988, they purchased a comprehensive general liability policy which provided for errors and omissions insurance with respect to professional services. The policy was for a one-year period and was renewable annually. By January 1994, the Jesuits had, through various means, become aware of both general and specific allegations of abuse of students at the school. In the case of C, his lawyer had informed the Jesuits by letter dated January 27, 1994 of the former student’s claim, detailing how he had suffered physical and sexual abuse, as well as cultural and physical deprivation. C’s lawyer also had inquired about the possibility of a negotiated settlement. Counsel for the Jesuits wrote to the insurer on March 18, 1994 to raise the possibility that the Jesuits might be facing other claims in the near future. The letter identified the offending Jesuits, the dates and locations of offending acts, the nature of the possible claims and the names of 10 victims, including C. After receiving information about the claim and possible claims, the insurer refused to renew the policy beyond September 30, 1994. Numerous additional claims alleging similar allegations were made after the expiration of the policy. With the exception of C’s claim, the insurer refused to defend any claims arising from the operation of the school because those claims were only “first made” after the expiry of the policy and were not covered by the policy. In the Ontario Superior

Court of Justice, the trial judge construed the insurance contract as a claims-made policy. He found that C's claim and the claims on behalf of the nine victims mentioned in the March 18, 1994 letter to the insurer fell within the temporal limit of the policy and that the insurer had a duty to defend against them. The Court of Appeal upheld the decision (...). Numerous additional claims, approximately 100, were made after the expiration of the policy. These claims involved allegations similar to those reported in the Zimmerman Letter including physical, sexual and cultural abuse at the Spanish School resulting from the lack of proper supervision of staff and students by the Jesuits. These are the claims that the appellant submits should be covered by the Policy even though the specific demands for compensation were not made during the policy period. After receiving information about the claims and possible claims arising out of the operation of the Spanish School in the Zimmerman Letter, Guardian refused to renew the Policy beyond September 30, 1994. The Jesuits ultimately obtained coverage from a different insurer but any claims arising from the operation of the Spanish School were explicitly excluded from coverage for sexual and physical abuse'.

The first issue which the Court addressed was the definition and scope of the term 'claim':

'Since the insurance contract was a claims-made policy, the meaning of a "claim" in that policy will determine whether a duty to defend was triggered in the circumstances of the present case. The policy does not define a claim, but the clause limiting the scope of the insurance coverage refers to claims "first made" suggesting that a claim must be actively made as opposed to merely being discovered. This interpretation of the word "claim" is consistent not only with the wording of the policy, which distinguishes between an "occurrence or circumstance" and a "claim", but also with the definition of "claim" under the common law, which requires a third party to communicate an intention to hold the insured responsible for damages'.

Then the Court dealt with the extension of coverage in claims-made policies:

'In a claims-made policy, the liability only arises if the claim is actually made during the policy period. Many claims-made policies offer even more restricted coverage. For example, the policy might exclude from coverage any negligence of which the insured is aware prior to the coverage period even if no claims have been made. This leaves the insured in the situation where, although consistently insured over a period of years, there are still certain claims that do not fall within the purview of the policy – namely, claims where the underlying damages (and related negligence) are discovered

in one policy period but the claim is not made by a third party until a subsequent period’.

The Court, being fully aware of the possible lack of coverage in claims-made policies, noted that policies with a more comprehensive protection are available on the Canadian market, among them, on one side, claims-made policies enlarged with a deeming clause and on the other, occurrence-based policies. As stated by the Court:

‘Given the potential for gaps in coverage with certain forms of claims-made and hybrid insurance policies, the insurance industry has developed additional coverage. It comes with a price (...) Another clause is the “Notice of Circumstance Clause”, which permits the insured to report during the policy period circumstances that may give rise to future claims. Any claims related to those circumstances made after the expiry of the period are deemed made during the policy period. This form of coverage was available on the market when the Guardian policies were last renewed. (...). Other commercially available insurance policies would have covered claims-made even after the end of the policy period. In particular, an occurrence based policy or a policy with an occurrence-based extension would have covered claims-made after the end of the coverage period where the circumstances giving rise to the claims were discovered during the coverage period. The Jesuits, however, never purchased such a policy and cannot now claim coverage under it’.

Therefore, it was mainly the availability on the market of these policies offering greater coverage and the failure of the Jesuit Fathers to purchase them, that impeded a construction of the Guardian policy in favour of the Jesuit Fathers.

In other words, as the policy did not include a deeming clause (also known as ‘notice of circumstance clause’) in spite of the fact that it was commercially available upon the last renewal, the Supreme Court inferred that the Jesuits did not desire this coverage to be included in the policy. Hence, in consequence, a refusal to take on additional coverage – the deeming clause – was considered an implied rejection of this coverage that would have barred the insured from claiming these terms at a future date.

The insurance policies offered in Italy being so different, where presently professionals cannot find an occurrence-based policy and can hardly find a claims-made with deeming clause policy (and if any, at a prohibitive price), the reasoning of *Jesuit v Guardian* is of little help in dealing with the issues raised in Italy by the Supreme Court Joint Division decision no 9140/2016, ie the assessment, as per Art 1322 Italian Civil Code, on the merits of the underlying interests sought by the particular contract entered into by the parties (the so

called 'Worthiness' of the contract).

Therefore, the most important guidance, for the topic in question, comes from Australia.

The most relevant Australian case is *FAI v Australian Hospital Care Pty. Limited* decided on 9 July 1999 by the Supreme Court of Queensland and subsequently, on 27 June 2001 by the High Court of Australia.

The factual background is as follows: The insured hospital had a professional indemnity policy with FAI on a claims first made and notified basis. Among the standard conditions there was one which provided that if the hospital became aware of any occurrence which may subsequently give rise to a claim and gave notice of that occurrence during the period of the policy, then any subsequent claim arising out of the occurrence would be covered (a 'deeming clause' or 'occurrence' clause). During the coverage period, the hospital received a letter from a former patient's solicitor informing them that a claim may be raised against the hospital in respect of treatment received by the patient but the hospital did not give notice of this occurrence to the insurer during the period of cover, as the patient's solicitor inquiry had apparently concluded that there was no malpractice. The central issue addressed in court was whether section 54(1) of the Insurance Contracts Act 1984 (No 80, 1984: ICA)¹⁰ precluded FAI from refusing to pay the hospital's claim on grounds that it failed to give to FAI, within the period of cover, notice of any occurrence which may have given rise to a claim.

On the Reasons for Judgment – written by Judge Derrington of the Supreme Court of Queensland in the decision filed on 9 July 1999 – it is, first of all, worthy of note that the premium was to be considered comprehensive for the coverage of a whole, composed of the simple claims-made clause *plus* the deeming clause, the combined working of both being necessary to avoid gaps of coverage. He notes:

'The similarity of the structure of the two parts [ie claims made, on one side, and "occurrences notified clause" or "deeming clause", on the other side] is obvious, and both aspects of the promised indemnity were similarly factored into the insurer's computation of the premium. The second part of the cover was introduced because of a serious hiatus in the earlier part. Under that system, if the insured became aware of a possible claim that might not be made during the period of its existing policy, it would have

¹⁰ Section 54(1) Insurance Contracts Act reads as follows: 'Subject to this section, where *the effect of a contract of insurance would*, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act'.

been in a most unhappy position, particularly, but not only, if changing insurers. Because the claim would not be made within the period of the existing policy it would not come within that cover. In addition, because the insured would be obliged to disclose the known possible claim in its proposal for the new policy, that policy would usually expressly exclude it from the cover, and/or there would be a general exclusion that would catch it. This second form of complementary cover was introduced to provide against such a contingency, which is far from uncommon, and it is important in its own right for that purpose. It is validly called an extension only because it extended the formerly inadequate cover to provide an efficient totality. Any tendency to regard it as a feature in some way outside the basic contract and coming into existence only upon the fulfilment of its conditions is not justified and is contrary to its purpose. It was a significant term of the contract providing an important area of cover which might not otherwise have been available to the insured’.

Less important, for the implication on the subject matter of this paper (ie the relevance of common law decision in dealing with the issues posed by the Italian Supreme Court decision) is the subsequent judgment made on the case by the High Court of Australia and filed on 27 June 2001.

The majority of the panel considered that if a contract has an ‘occurrences notified clause’ – ie a deeming clause – as the FAI policy had and the insured becomes aware of an occurrence that may subsequently give rise to a claim during the period of cover, the coverage is in principle due under Section 54 Insurance Contracts Act, which deals with acts or omissions occurring after the contract of insurance was entered into, and the insurer may only reduce its liability to the extent to which its interests were prejudiced as a result of that act.

In the case decided, as noted above, the policy has a deeming clause, so Section 54 (1) Insurance Contracts Act applies. Had there not been such a clause, Section 40 (3) Insurance Contracts Act¹¹ would have applied instead, providing a more favorable position for the insurer, because in that case the insured, to seek coverage against claims arisen from circumstances of which he has become aware, must have given notice of them and would not be covered if he has omitted so to do.

For that reason, Australian counsel to the insurance industry suggest that it considers removing from their policies provisions relating to the notification of

¹¹ Section 40(3) Insurance Contracts Act states: ‘(3) Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract’.

circumstances, leaving their insured parties, in that regard, to rely only on Section 40.

For purposes of this paper, any possible overlap between Section 40(3) and 54(1) Insurance Contracts Act is irrelevant and its impact is confined to the Australian domestic market.

What is crucial is that, without doubt, Section 40 Insurance Contracts Act provides that *whatever are the terms of the contract*, if the insured becomes aware of circumstances which might lead to a claim, he can notify these circumstances to the insurer and any claim later arising from those circumstances will be in any case covered by the policy.

In other words, Section 40(3) is a statutory provision that extends the scope of the contract, despite the insurer's intention. It broadens coverage in claims-made policies, including claims made after the policy period (on condition that it arises from a circumstance notified during the policy period).

V. Final Remarks

Both Italian and common law decisions emerging from several jurisdictions (primarily UK and Australia) highlight the importance (either for the insured professional or the professional's client) that a liability policy does not result in coverage gaps.

In avoiding insurance coverage gaps, the loss occurrence model is the best option; the coverage lasts until it is time-barred by the statute of limitations (called in Italian Civil Code *'prescrizione'*), with the right of the client to sue the professional insured for damages. Art 2952, paras 3 and 4 Italian Civil Code confirm that:

'(3) In liability insurance, time-limit [of insured's rights against the insurer] runs from the day on which the injured third party requested compensation from the insured or filed an action against him. (4) *Notice to the insurer* of the request of the injured third party or the action filed by him suspends the course of time-limit until the claim of the injured person has been liquidated and made collectible, or *until the right of the injured person is time-barred*'.

Thus, it is unsurprising that the Italian Civil Code (Art 1917) considered and decided upon only insurance contracts on a loss occurrence basis.

In respect of a claims-made policy, to avoid such coverage gaps, UK decisions construe the principle that permits the facility to notify, during the policy period, circumstances from which future claims may arise, as 'integral' to it; Australian decisions ground this facility, in absence of an express deeming clause, on the statutory provision of Section 40(3) Insurance Contracts Act; Canadian decisions rely upon the 'sanctity of contract' but only because they

consider it a feasible option, for the insured, to choose a policy that contains a deeming clause, there being no lack of offer in the Canadian insurance market.

Having reported (more completely and accurately than is usually done by Italian insurance counsel) the legal environment in which the claims-made model arose and from which it was imported into the Italian market, it appears clear to me that one of the main aspects Italian lower courts (tribunals and courts of appeal) have to consider – in ascertaining, as prescribed by the Italian Supreme Court, whether or not the specific claims-made policy entered into by the parties results in gaps of coverage and therefore is not valid as per Art 1322 Italian Civil Code – it is, without doubt, the facility which the insured retains to notify, during policy period, any circumstance of which he becomes aware, that might lead to future claims. In other words, the presence of a deeming clause or the construction of the insurance contract enlarging its scope in that direction is crucial for the enforceability and validity of the policy under Art 1322, para 2, Italian Civil Code.

The solution proposed here is not only grounded in law but may also result in a fair and reasonable balance of economic interests. The facility to report circumstances as per the deeming clause, on one hand will cause a scaling-up of the coverage, excluding insurance gaps, to the insured's detriment but on the other hand, will entitle the insurer, upon the renewal of the contract, to increase the premium proportionally to the increase of risk measured by the new potential liability related to the notified circumstance.¹²

¹² *Kidsons (A Firm) v Lloyds Underwriters*, [2007] EWHC 1951, n 9 above, para 20: 'On the other hand, the assured benefits under a claims made policy: i) from coverage for claims made during the policy period; ii) from coverage for claims made after the policy period arising from circumstances first known during the policy period; and iii) *from the insurer being able to estimate his liabilities more accurately and thereby to set fair premiums for the succeeding policy year*' (my emphasis).

The Italian Marriage: Crisis or Tradition?

Rossella Fadda*

Abstract

Numerous reforms of Italian family law have been enacted in recent years regarding marriage, which reinforce the freedom of the spouses and which have provoked a crisis of the institution itself. The tendency emerging from the new laws reveals an accentuation of the married couple's autonomy and of the public authority's limited role in the different phases of marriage. During the formation of the marital bond, the prospective spouses have greater freedom while the officiating public functionary has a role of mere certification and control. During the marriage itself, the spouses have greater freedom in regulating their personal relations and their property rights. In the event of dissolution, new procedures allow the spouses to separate or divorce without going to court. The 'crisis' of the marital relationship may be also caused by the introduction of laws which provide other models for couples (civil unions between persons of the same sex and cohabitation). Nevertheless, in noting the few yet significant differences in the law between marriage and civil unions, it appears that the legislative intent is to preserve certain 'traditional' aspects of marriage.

I. Introduction

The concept of 'crisis', widely used in various sectors of Italian law, presents an interesting starting point for reflection within the field of family law.

The expression marital crisis is used with reference to the institutions which offer a remedy for the failure of a marriage, which is separation or divorce. The same concept is also resorted to with regard to the nullity of a marriage.

Furthermore, the 'crisis of the traditional family' is mentioned in confronting the emerging and new formations which are recognised as families, even though they lack the typical characteristics of the family founded upon marriage.¹ In addition to persons who cohabit together as a family, the reference includes the same-sex family, the so-called step family, and the single parent family.²

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¹ L. Mengoni 'La famiglia in una società complessa' *Iustitia*, 1-14, 3 (1990), uses the term 'crisis of the family' in two senses, which are both directed toward the similarity between the legitimate family and the family of persons who cohabit together.

² Regarding the plurality of family models, see, V. Scalisi, 'Le stagioni della famiglia dall'unità d'Italia a oggi' *Rivista di diritto civile*, I, 1043-1061, 1043 (2013); V. Scalisi, *Categorie e istituti del diritto civile nella transizione al postmoderno* (Milano: Giuffrè, 2005), 211; P. Rescigno, *Matrimonio e famiglia. Cinquant'anni del diritto italiano* (Torino: Gappichelli, 2000), 334; P. Rescigno, 'I rapporti personali tra coniugi', in A. Belvedere and C. Granelli eds, *Famiglia e diritto a vent'anni dalla riforma* (Padova: CEDAM, 1996), 28; Corte Costituzionale 15 April

In this article, the term ‘marital crisis’ concerns the institutional conception of marriage in order to underline the estrangement of the institution of marriage from the field of public law and to highlight the institution as a private fact in the life of the married couple. From this point of view, the word ‘crisis’ is used in its etymological meaning (from (the Greek) Krisis = choice, change) to verify whether marriage has undergone a change with respect to its original conformation. In this way, the phenomenon is part of a wider concept dealing with the ‘privatization’ of family law which, beginning with the reform of 1975,³ was elaborated by Italian literature to show that the institutional and public law conception of marriage was surpassed and that the will of the parties increased in importance, affirming the central and increasingly autonomous role of the married couple’s consent.⁴

In the Italian legal system, the interaction between the law and society is evident especially with respect to marriage: the pressing demands arising out of social custom can influence the interpretation of the law even before the social demands are transformed into law. Often the intermediary between the social demands and the law is found in the creative activity of the judiciary, which in family law has a strong impact in supporting social custom, provided that the constitutional principles are respected. Nevertheless, in the face of the privatisation of family law brought about by the reform of 1975, the Italian legal system showed its resistance especially through its case law by continuing to affirm principles designed to maintain public control over marriage (precisely described cases of annulment by error; the relevance of the legitimate family’s interest; the objective notion of intolerability in separation; the inadmissibility of premarital agreements in the event of divorce, etc).⁵

Speaking today of the marriage crisis through the concept of privatization requires verifying whether such concept can offer new points for reflection on

2010 no 138, *Famiglia e diritto*, (2010) 42, recognised that even same-sex couples have the right ‘to live freely as a couple and benefit from its legal recognition with the connected rights and duties’; Corte di Cassazione 15 March 2012 no 4184, *Foro italiano*, 2727 (2012), recognised the relevance of same-sex unions and excluded that marriage between homosexuals is inexistent while considering it inefficacious; Corte di Cassazione 9 February 2015 no 2400, available at www.itaggiure.giustizia.it. The unions between persons of the same sex are now regulated by legge 20 May 2016 no 76, ‘Law covering civil unions between persons of the same sex and cohabitation’. Eur. Court H.R., *Shalk and Kopf v Austria*, Judgment 24 June 2010, *Nuova giurisprudenza civile commentata*, I, 1337 (2010), with commentary by M. Winkler, ‘La famiglia omosessuale nuovamente alla prova della Corte di Strasburgo’, recognised that same-sex couples have the right to enjoy ‘family life’ but that States do not have the obligation to grant same-sex couples access to marriage.

³ Legge 19 maggio 1975 no 151 amended the statutory family law contained in the Italian civil code to make it conform to the Constitution.

⁴ L. Mengoni, ‘L'impronta del modello canonico sul matrimonio civile nell'esperienza giuridica e nella prassi sociale attuale nella cultura europea’ *Jus*, 451-467, 457 (1998); M. Trimarchi, ‘Il matrimonio nel quarantennio successivo alla riforma del diritto di famiglia’ *Famiglia e diritto*, 985-990, 985 (2015).

⁵ P. Rescigno, *Matrimonio e famiglia. Cinquant'anni del diritto italiano* n 2 above, 1.

the ‘crisis’ of marriage or whether a new phase of ‘privatization’ has begun with a greater recognition for the freedom of the married couple.

In this regard, the article will seek to ascertain whether marriage has changed with respect to its original conformation to become a ‘private fact’, or whether marriage still appears to resist in its public law aspects.⁶

Having gone beyond the public law conception, according to which marriage constituted an act of state power,⁷ the majority of legal scholars in Italian literature agree as to the private character of marriage, even though its legal qualification as a private act remains an open question.

The emphasis on the private individuals’ autonomy and freedom makes it evident that the formation of the marriage bond is left to the will of the prospective spouses. However, the nature of marriage still appears controversial due to the peculiarities in Italian law which has devised various reconstructive theories of marriage. The preferred theory considers marriage as a juridical act, which expresses a free choice emanating from the private autonomy of the married couple.⁸ The public role, although necessary, is reduced to a mere formal function for purposes of certification and of control, as will be discussed below.

This function of public participation can be verified in each phase of the marital relationship: its formation, the marriage relationship itself, and its dissolution. In each phase, the public authority’s role is to ensure that the legal limits are respected in relation to the formation of the bond, the management of the relationship, and its dissolution in order to guarantee certainty regarding legal situations and *status*, as well as to protect the general and the particular interests involved in the various phases.

II. Formation of the Marriage Bond

Beginning with the marriage act, the idea of marriage understood as an act of public law which degraded the will of the spouses to a mere prerequisite in order for the civil servant to consent to the marriage on behalf of the State has now been surpassed. Today a private law concept prevails in which the prospective spouses form their marriage bond as an expression of their private autonomy. Marriage is thus qualified as a juridical act which signifies the free choice of the

⁶ Regarding the concept of resilience, see, C.S. Holling, ‘Principles of insect predation’ *Annual Review of Entomology*, 163-182, 163 (1961).

⁷ A. Cicu, *Il diritto di famiglia – Teoria generale* (Roma: Forni, 1914), 213.

⁸ Regarding the transactional theory of marriage, see, among others, C.M. Bianca, *Diritto civile*, 2, I, *La famiglia* (Milano: Giuffrè, 2014), 31; F. Santoro Passarelli, *L’autonomia privata nel diritto di famiglia. Saggi di diritto civile* (Napoli: Jovene, 1961), 383; R. Scognamiglio, *Contributo alla teoria del negozio giuridico* (Napoli: Jovene, 1969), 206, 342; F. Finocchiaro, ‘Del matrimonio, Artt. 79-83’, in A. Scialoja and G. Branca eds, *Commentario del codice civile*, (Bologna-Roma: Zanichelli, 1971), 30; R. Fadda, ‘Delle prove della celebrazione del matrimonio, Artt. 130-133’, in F.D. Busnelli ed, *Il Codice civile. Commentario* (Milano: Giuffrè, 2016), 8.

married couple and which is meant to produce its effects essentially within the legal sphere of the married couple.⁹

Of course, the presence of the State whose function is to control and protect cannot be denied because marriage, although constituting a private fact subject to the free will of the parties, involves interests of the public, third parties and the entire collectivity to ensure the certainty of *status* and the control of the act's regularity and validity. Due to these needs, interference by the public authority is justified, given the importance of the act performed by the prospective spouses. The interference by the public authority ensures that the legal limits providing for the formation of marriage are respected.

In this manner, the law intends to avoid the celebration of invalid marriages and to reduce the number of legal controversies as to whether marriages were celebrated in accordance with the law.

As pointed out above, the debate concerning the nature of marriage is still open and, especially, the role of the officiating state functionary who, according to the majority of legal scholars in the literature, is supposed to control and certify in order to provide public certainty as to the existence of the marriage bond created by the parties.

In this sense, the declaration by the state official of the matrimonial union can be considered an act by which the official declares, but does not establish, the *status* of spouse which depends on the will of the prospective spouses. The official's declaration constitutes an administrative act by which the public official does not express the will of the State but is limited to ascertaining the existence of the necessary elements in order to recognise a person's married state.

In the formation of the marital relationship the parties' consent is the only volitional element upon which the creation of the marriage bond depends, whereas the public official may neither express their intention nor refuse to officiate the marriage. The public official is limited to carrying out a formal procedure designed to guarantee the regularity of the act and to certify, for evidentiary purposes, the formation of the bond.

If both elements – the consent of the spouses and the participation of the state official – are essential and preordained for the production of certain legal effects, their functions and roles are different. The public official's act is formal and has the purpose of certifying the marriage. The private individuals' act is substantive and has the purpose of forming the marital bond.¹⁰

⁹ Regarding marriage, see, A. Renda, *Il matrimonio civile. Una teoria neoistituzionale* (Milano: Giuffrè, 2013), passim; F. Finocchiaro, 'Matrimonio', I, II, in F. Galgano ed, *Commentario del codice civile Scialoja-Branca* (Bologna-Roma: Zanichelli, 1971, 1993), passim; G. Ferrando, 'Il matrimonio', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2015), passim; A.C. Jemolo, 'Il matrimonio', in G. Vassalli ed, *Trattato di diritto civile italiano* (Torino: UTET, 1961), passim; E. Giacobbe, 'Il matrimonio. L'atto e il rapporto', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2011), passim.

¹⁰ Regarding participation of the state official, see, R. Fadda, 'Delle prove della celebrazione

In fact, only the private individuals affect the act's contents. This means that even if the legal effects are preordained by the law, complete assent by the prospective spouses to the act's contents and their free decision to want these effects are necessary.

The State's role, which is marginal and merely one of control and certification for the purpose of providing a guarantee, is found throughout the course of the relationship and in the dissolution of the bond.

III. The Marriage Relationship

In concomitance with the reform of family law of 1975, the presence of the State is reduced with respect to the marriage relationship, which justifies an individualistic conception of the family.¹¹

There is a less legislation concerning spousal duties, which in turn accentuates the freedom of the spouses and reduces the ever more marginal role of the State. This process has induced some authors to express doubts regarding the legality of spousal duties by affirming that such duties are merely moral in character. This opinion is not shared by most authors in the Italian literature but is coherent with the emphasis of the role of private autonomy and the changing attitude of the legal system toward the family. The fulfilment of spousal duties is not left to the law's coercive force but to the spontaneous observance and to the intimate conscience of those who choose the matrimonial family model. The sanction for the violation of spousal duties consists in determining who is responsible for the separation, assuming there is the required causation of intolerability of the cohabitation (Art 151 of the Italian *Codice Civile*). The payment of damages is admitted when there is a particularly grievous violation, which harms a relevant constitutional right, while the mere inobservance of spousal duties is insufficient.¹² It follows that 'non-grievous' violations of spousal duties must be tolerated, and at the same time the spouses are free to terminate the marriage relationship with a decision which can even be unilateral and not necessarily based on objective reasons.

Nevertheless, as authoritative scholars have pointed out in the literature, family autonomy which is protected by private law is not without limits in as much as such limits are recognizable in the principle of solidarity expressed by Art 2 of the Italian Constitution.¹³

The issue is still current, since even today limits upon the private autonomy of the spouses have their foundation and find their justification in the principle

del matrimonio' n 8 above, 16; A. Renda, 'Il matrimonio civile' n 9 above, 361.

¹¹ L. Mengoni, 'La famiglia in una società complessa' n 1 above, 11.

¹² Corte di Cassazione 10 May 2005 no 9801, *Giurisprudenza italiana*, 949 (2006); Corte di Cassazione 15 September 2011 no 18853, *Foro italiano*, 2038 (2012).

¹³ L. Mengoni, 'La famiglia in una società complessa' n 1 above, 11.

of solidarity in addition to the protection of the inalienable rights of the person. In this regard, the limits in the absolute binding nature of spousal rights and duties (Art 160) and in certain provisions in statutory community property law (Art 210) are relevant.

It is necessary to evaluate whether the same phenomenon of ‘privatization’ can also be found in the marriage relationship itself where, as indicated above, privatization is understood as an accentuation of the spouses’ autonomy and a reduction of the public presence in marriage.

Private autonomy is manifested in the agreements with which the spouses regulate their personal and property relations by expressing their choices relating to the direction of their family life or to their property rights (Arts 144 and 162). In this area, the freedom of the parties certainly encounters limits given that the spouses cannot deviate from legal rights and duties that arise from the marriage, nor can they avoid certain principles provided in the statutory community property regime.

However, public control does not interfere in the marriage relationship if the marital duties are incoercible and in some cases devoid of sanctions.

The limits and the absolute obligatory character of certain statutory provisions of community property law have been explained through the affirmation of the nature of public law within the statutory community property regime which is intended to satisfy the family’s needs.¹⁴ However, as the Italian literature has been correctly replied, the absolute obligatory character of the community property regime (frequently substituted by the separate property regime) refutes the theory of the presumed function of public law. The legal limits and the restrictive interpretations in the case law regarding the regulation of the property rights can be explained, as in the personal relationship, by reason of the principle of solidarity and the inviolable nature of personal rights protected by the Constitution.¹⁵

However, the affirmation of freedom and autonomy of the spouses in marriage, combined with the reduction of interference via public law visible in case law, has existed for some time. Despite this, these results do not appear to have marked the beginning of a new phase of privatization.¹⁶ Some obstacles exist, preventing this new phase of privatisation. For example, the refusal by a spouse regarding the joint purchase of property within the statutory community property regime is still inadmissible, a concept which has been upheld by the courts. Denying a spouse who intends to refuse the joint ownership of community property, where the other spouse makes a separate purchase in absence of the requirements for a purchase of separate property, certainly limits the transactional

¹⁴ Corte di Cassazione 27 February 2003 no 2954, *Famiglia e diritto*, 599 (2003); Corte di Cassazione 24 February 2004 no 3647, *Notariato*, 233 (2004).

¹⁵ T. Auletta, ‘Comunione legale: oggetto’, in Id ed, *I rapporti patrimoniali fra coniugi*, III, *Trattato di diritto privato diretto da Mario Bessone* (Torino: Giappichelli, 2011), 465.

¹⁶ F. Ruscello, ‘Il rapporto coniugale. I diritti e i doveri nascenti dal matrimonio’, in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2002), 781.

freedom of the spouses. In this case, there are also social demands and trends in the scholarly literature which favour recognising greater autonomy of the parties in the regulation of statutory community property law, and there are occasionally some openings in the case law, but there have not been any significant turning points.¹⁷

Further, the law provides for the possibility of judicial intervention in the event the spouses disagree, but the judge can intervene only where the disagreement concerns the exercise of parental responsibility and the judge must take into account the paramount interest of the children (Arts 145 and 316) in determining which spouse can decide. In other cases, the judge can only rule if there is a joint request by both spouses and if the question is of essential importance. The possibility of judicial intervention has been defined as ‘symbolic’, in that it shows that the family is not impervious to institutional intervention when such intervention is necessary for the protection of paramount interests.¹⁸

Moreover, it should be pointed out that the interests of children will always justify a judicial intervention. In the event the interests concern essential matters of the spouses or of the family, the judicial intervention must be requested by both spouses, which confirms their autonomy and freedom.

IV. Separation and Divorce

The private autonomy of the spouses is also expressed in regulating the consequences of separation, divorce, and annulment.

In this regard, the agreements made by the spouses are important, such as the agreements made during separation or divorce to regulate their personal and economic relations. This also includes any agreements regarding the children which the judge takes into consideration, if these are not contrary to the interests of the children in accordance with Art 337 *ter* of the *Codice Civile*.

With respect to divorce, the reform of 1987 (legge 6 March 1987 no 874) increased the importance of spousal autonomy with the provision for joint divorce, allowing both parties to request the judge to decree the dissolution of the marriage bond. The spousal agreement is then relevant to determine their post-divorce relations. The same law made it possible for the spouses to determine the amount of any spousal liability, which can be liquidated in a single payment, precluding any additional economic demands.¹⁹

Further, case law has acknowledged the validity of spousal agreements

¹⁷ Corte di Cassazione-Sezioni Unite 28 October 2009 no 22755, *Nuova giurisprudenza civile commentata*, 249 (2010, I); Corte di Cassazione 2 February 2012 no 1523, *Famiglia persone e successioni*, 493 (2012).

¹⁸ G. Ferrando, *Diritto di famiglia* (Bologna: Zanichelli, 2015), 86.

¹⁹ Corte di Cassazione 17 June 2004 no 11342, *Giustizia civile*, I, 415 (2005); Corte di Cassazione 8 November 2006 no 23801, *Foro italiano*, I, 1189 (2007); Corte di Cassazione 14 March 2006 no 5473, *Nuova giurisprudenza civile commentata*, 371 (2007).

which are usually made during separation, and which are intended to regulate the effects of a future and possible annulment.²⁰

The array of judicial interventions which recognise the spouses' autonomy and freedom during a marital crisis has been increased by the legge no 162 of 2014. This law introduced new forms of separation and the so-called 'rapid' or consensual divorce. This includes instances in which the parties come to an agreement to separate or divorce following negotiations in which they are counselled by attorneys

'for the consensual solutions of personal separation, cessation of the civil effects or dissolution of marriage, or modification of the conditions of separation' (Art 6),

or through an agreement to separate or divorce reached by the parties 'before a state official' (Art 12). In this way, spousal autonomy is broadly recognised in the decision to separate or to divorce as well as in the regulation of the ensuing relations, as will be discussed below.

However, signs of resistance from the public law perspective can still be found regarding agreements which have been made during the marital relationship in view of separation or divorce, to regulate a future marriage crisis.

Italian case law is consistent in holding that agreements made by the spouses intending to regulate their relations in the event of a future and possible divorce are null because the cause of such agreements is considered illegal. According to the Court of Cassation, such agreements would be in conflict with the fundamental principles of the inalienability of *status* and the right to economic maintenance given the beneficial nature of the maintenance payment.²¹ However, with respect to such decisions, there are dissenting voices in the literature. Recently, the case law has shown more flexibility, even if the Court of Cassation has not yet ruled on the admissibility of the agreements described above.

The Supreme Court has affirmed the validity of a contract stipulated by the prospective spouses prior to the marriage which provides that, in the event of failure of the marriage, one of the spouses will transfer to the other spouse his or her real property. This is to be used as an indemnity for the expenses paid by the other spouse for the restructuring of the real property used as the conjugal home. In this case, the Court of Cassation recognised the validity of the agreement, rejecting the idea that it was an agreement in view of divorce. Instead, the court qualified it as a transaction intended to transfer real property in satisfaction of a

²⁰ Corte di Cassazione 13 January 1993 no 348, *Nuova giurisprudenza civile commentata*, 950 (1993); Corte di Cassazione 20 March 1998 no 2955, *I Contratti*, 472 (1998); G. Ferrando, 'Il matrimonio' n 9 above, 127.

²¹ Corte di Cassazione 11 June 1981 no 3777, *Foro italiano*, I, 184 (1982); Corte di Cassazione 28 January 2008 no 1758, *Famiglia e diritto*, 297 (2008); Corte di Cassazione 10 March 2006 no 5302, *Giurisprudenza italiana*, 1826 (2006, 10); Corte di Cassazione 14 June 2000 no 8109, *Foro italiano*, I, 1318 (2001).

pre-existing debt according to the scheme of the *datio in solutum* (Art 1197 of the *Codice Civile*).²²

Finally, with respect to the agreements made by the spouses during divorce, the case law has confirmed the line of cases which give greater recognition of spousal autonomy in the regulation of personal relations and property rights. These cases acknowledge such agreements (eg, decree of ratification or joint divorce) as a mere external control to protect the inalienable rights of the weaker spouse or the children. The source for regulating the relation arises from a juristic act of the spouses, with the consequence that such act would have legal effect according to Art 1372 *Codice Civile* that does not allow an appeal of the court decision which acknowledges the agreement.²³ In the event that the agreement is invalid, the spouses may contest its defects in a separate legal action, which confirms that the decision regulating the relation is left to the private will of the spouses and the judicial intervention is given the role of control.

Further, the inalienability of the ex-spouse's right to maintenance has been questioned on the grounds that the current law contains certain unreasonable provisions in the area of maintenance. The criteria to determine the standard of matrimonial life, elaborated by the case law in applying Art 5 para 6, has raised doubts of constitutionality due to the 'anachronism' of a standard which refers 'to a hierarchy of values which are no longer adapted to contemporary constitutional law'.²⁴ Notwithstanding the judgement of the Constitutional Court which denied relief, the reasoning in the Order of the Tribunal of Florence which mandated the case to the Constitutional Court bolsters the position which favours the admissibility of agreements in the event of divorce, in pursuance of a privatization of the couple's relation even in the area of maintenance. Noteworthy, in particular, is the increased importance of the principle of self-sufficiency, particularly in cases of short-lived relations. This goes beyond the old criteria which were established to ensure that the ex-spouse the same standard of matrimonial life. From this perspective, there is a tendency in several European countries to put a time limit on the right to maintenance in cases of marriages having a brief duration. There are also cases in which it is the intention to define the economic consequences of divorce by means of a single payment in order to allow the spouses to definitively close their previous relation and to begin a new family life. Even the Italian case law has recognised in the area of consensual separation the admissibility of agreements to put a time limit on the right of maintenance²⁵ and has recently abandoned the 'standard of matrimonial life'

²² Corte di Cassazione 21 December 2012 no 23713, *Foro italiano*, I, 864 (2013); Corte di Cassazione 21 August 2013 no 19304, *Nuova giurisprudenza civile commentata*, 94 (2014).

²³ Corte di Cassazione 20 August 2014 no 18066, *Corriere giuridico*, 777 (2015).

²⁴ Corte Costituzionale 9 February 2015 no 11, *Famiglia e diritto*, 537 (2015).

²⁵ Corte di Cassazione 6 June 2014 no 12781, *Famiglia e diritto*, 685 (2015); but see E. Al Mureden, 'La solidarietà post-coniugale a quarant'anni dalla riforma del diritto di famiglia' *Famiglia e diritto*, 991-1007, 1000 (2015).

criteria admitting instead the principle of self-sufficiency for the purposes of determining post matrimonial maintenance.²⁶

Additional arguments in favour of the admissibility of agreements in view of divorce are found in the law which provides new forms of separation and 'extrajudicial' divorce introduced by legge no 162 of 2014. If the referenced law allows the spouses to agree to a separation or to divorce without going to court, thus giving maximum space to spousal autonomy in the decision to separate or to divorce and in the regulation of the related effects, there should no longer be any reason to deny the admissibility of agreements in view of a future separation of divorce.²⁷

V. Dissolution of the Marriage Bond

During the phase of separation and dissolution of marriage, it seems that Italian legislators has recently granted more space to the freedom of the spouses and that the institution of marriage has shown itself to be more vulnerable (and less resistant) to the pressing social demands for change.

In the past, the decision to separate or to dissolve the marital relationship was conditioned by a high degree of state interference, primarily because it was insufficient to petition for separation or divorce if only the spouses agreed.

With respect to separation, the recognition of no-fault separation and the introduction of consensual separation with the reform of the *Codice Civile* of 1975 attributes greater weight to the will of the spouses. Judicial control is exercised through the judge's ratification which is necessary to produce the effects of the separation agreement. The judicial ratification is reduced to a mere verification of the regularity of the decision – final and absolute – of the spouses to separate, but it can affect the merits of the decision concerning the children to ensure that the decision is in their interest. The judicial ratification is an instrument whose purpose is to protect a person's civil and constitutional rights and which, according to case law, performs a mere controlling function and renders the private agreement effective as an external judicial force.²⁸

²⁶ Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017); Corte di Cassazione-Sezioni Unite 11 July 2018 no 18287, available at www.cortedicassazione.it.

²⁷ Regarding agreements in view of divorce, see, G. Oberto, *I contratti nella crisi matrimoniale* (Milano: Giuffrè, 1999), passim; E. Al Mureden, *Nuove prospettive di tutela del coniuge debole* (Milano: Giuffrè, 2007), passim; L. Balestra, 'Autonomia negoziale e crisi coniugale: gli accordi in vista della separazione' *Rivista di diritto civile*, II, 277-296, 287 (2005); G. Ceccherini, *Contratti tra coniugi in vista della cessazione del ménage* (Padova: CEDAM, 1999), passim; F. Angeloni, *Autonomia privata e potere di disposizione nei rapporti familiari* (Padova: CEDAM, 1997), 417; G. Doria, *Autonomia privata e 'causa' familiare: gli accordi traslativi tra coniugi in occasione della separazione e del divorzio* (Milano: Giuffrè, 1996), passim.

²⁸ Regarding homologation, see, F. Danovi, 'Il processo di separazione e divorzio', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2015), 771; C. Lumia, 'La separazione consensuale', in P. Zatti ed, *Trattato di diritto di famiglia*, I, *Famiglia*

Moreover, a steady line of cases excluded the idea that a spouse could freely decide to separate from the other spouse because the judge was required, except in cases of consensual separation, to determine that the cohabitation was objectively intolerable. It is true that no decisions have been reported which have denied petitions for separation in application of this principle, but in this line of cases the judges expressed their opinions on the relation between spousal autonomy and state interventions in the family relationship and claimed control over the marriage crisis.²⁹

The recognition of social demands favouring a greater freedom in marriage is due to the case law that granted to a single spouse the right to separation where the judge was no longer required to find that the cohabitation was objectively intolerable.³⁰

The control of the private autonomy of the spouses is especially evident in divorce. Even the joint form of divorce introduced by the legge of 1987 was admissible only if the judge ascertained the failure of the material and spiritual union between the spouses and if the facts fell into one of the cases precisely described by the law. This reduced divorce by mutual consent to a more expedited procedure, but one which was not left entirely to the will of the spouses.

Finally, a greater recognition of the freedom of the spouses and of the centrality of their will in the institution of marriage can be found in the new law concerning the marriage crisis, which was introduced by the legge no 162 of 2014. It provides two new forms of separation and of the so-called consensual divorce. The first form consists of a separation or divorce agreement reached by the spouses as a result of negotiations in which they are assisted by one or more attorneys. The second form consists of a separation or divorce agreement reached by the spouses before a state official.

The law has had a mixed reception in the Italian literature. Some define the reform as 'legislation without courage', while others speak of a 'further step on the road to privatization' of marriage. Others say that the rules have an 'epochal relevance' rendering marriage a 'private affair'.³¹

e matrimonio, t. II, *Separazione – Divorzio* (Milano: Giuffrè, 2002), 990; M. Mantovani, 'Separazione personale dei coniugi, II) Separazione consensuale' *Enciclopedia giuridica* (Roma: Treccani, 2007), XXVIII, 3; Corte di Cassazione 8 March 1995 no 2700, *Diritto e famiglia*, 1390 (1995); Corte di Cassazione 18 September 1997 no 9287, *Vita notarile*, 217 (1998); Corte di Cassazione 8 March 2001 no 3390, *Nuova giurisprudenza civile commentata*, I, 422 (2002); Corte di Cassazione 20 November 2003 no 17607, *Corriere giuridico*, 307 (2004).

²⁹ G. Ferrando, *Diritto di famiglia* n 18 above, 178.

³⁰ Corte di Cassazione 16 February 2012 no 2274, *Famiglia e diritto*, I, 50 (2013); Corte di Cassazione 9 October 2007 no 21099, *Famiglia persone e successioni*, 10 (2008); Corte di Cassazione 21 January 2014 no 1164, *Famiglia e diritto*, 38 (2015).

³¹ F. Danovi, 'Il processo di separazione e divorzio' n 26 above, 867; Id, 'I nuovi modelli di separazione e divorzio: una intricata pluralità di protagonisti' *Famiglia e diritto*, 1141-1149, 1144 (2014); G. Ferrando, *Diritto di famiglia* n 18 above, 173; M. Sesta, 'Negoziazione assistita e obblighi di mantenimento nella crisi della coppia' *Famiglia e diritto*, 295-305, 296 (2015); F.

In our opinion, the law has taken a new step in the process of privatization of marriage and has attenuated public control over the marriage crisis by giving greater importance to the agreement of the spouses. The affirmation must be verified, and the subject matter must be distinguished as to whether separation or divorce is being considered and whether there are minor children or whether the children are not self-sufficient.

With respect to separation, it is evident that the decision is left entirely to the spouses, which was already true with consensual separation, but now it is no longer necessary even to take legal action. The spouses can stipulate a separation agreement before a lawyer or a mayor (in the event there are no children) without taking any legal action in court, circumventing even the least invasive participation by a judge who ratifies the agreement.

Nevertheless, even in these cases, a form of public control remains, albeit a reduced one. In the case of negotiations where the spouses are assisted by attorneys to find a 'consensual solution of separation', public control is exercised through the intervention of the public prosecutor to whom the parties must forward the agreement. The public prosecutor then may grant an authorisation (in cases where there are children) or a permit (in cases where there are no children). Only in the first case would the public control address the merits of the agreement in order to verify that the interests of the children are respected. In the second case, where there are no children, the public prosecutor is limited to exercising a control to verify the formal regularity of the agreement.³²

If the public prosecutor's control is one of mere formal regularity (Art 6), it shows that there is the same kind of relation between public law and private law in cases where the attorney has assisted in the negotiated separation agreement, in a similar way to the officials who take part in the formation of the marriage bond. The decision is left to the spouses, and the public intervention does not affect the centrality and the constituent character of consent but performs a function of control and protection.

Further confirmation of the above affirmations can be found in the second form of separation, that which is reserved to couples who mutually consent, who are without children, and whose procedure unfolds before the mayor. The public presence is reduced to the participation by a state official who, as in the moment of the formation of the marriage bond, intervenes to play a role which is neither substantive nor has the purpose of forming the marital bond. Instead, it merely controls the formal regularity of the agreement for purposes of providing a guarantee. In this case, the centrality of consent is evident. The agreement is free from judicial control and from any consideration concerning

Danovi, 'Crisi della famiglia e giurisdizione: un progressivo distacco' *Famiglia e diritto*, 1043-1052, 1045 (2015).

³² Regarding the role of the public prosecutor, see, F. Danovi, 'I nuovi modelli di separazione e divorzio: una intricata pluralità di protagonisti' n 29 above, 1143.

the merits of the decision. The mayor exercises the same function which he carried out during the formation of the marriage bond: ensuring the regularity of the act, the certainty of the relationship and the publication of notice of the changed relationship in order to protect third parties and the public interest.

With respect to divorce, the agreement to dissolve the matrimonial bond is admitted only if the spouses are already separated. In this regard, certain authors in the literature have pointed out that the legge no 162 of 2014 is limited to simplifying the procedure without introducing a form of ‘consensual’ divorce.

However, the situation is not so different because a divorce decree is not always necessary in order to divorce; separated spouses, whatever the type of separation, even judicial separations, can stipulate a divorce agreement with the assistance of attorneys or before a mayor. In such cases, the formal control of regularity is performed by the public prosecutor or by the mayor. In particular, the mayor plays a role analogous to the one assigned to him during the celebration of marriage: controlling the regularity of the act and guaranteeing the certainty of *status*.

It is true that the parallel is not perfect because in the formation of the marriage bond the choice of the parties is free, whereas in the dissolution of the marital bond the spouses cannot decide to dissolve the marriage relationship in the absence of a previous separation.

However, at least in the case where both spouses have already decided to dissolve the marital bond, the necessity of a preceding separation, which may also be consensual, can be interpreted in the sense of requiring that the will of the spouses be sufficiently verified, thus revealing that the true meaning of the law seems to be one which increase the importance of the spouses’ consent.

It could be said that the source of the effects of the divorce is the consent of the spouses. In the case of a preceding consensual separation, the consent of the spouses has already been expressed during the separation process and is confirmed with the divorce agreement. Thus, the consent is deferred in time because the law allows for the dissolution of the marriage following a requisite period of reflection, beginning with the separation. At most, it can be pointed out the uselessness of dividing into two phases a procedure intended to obtain the dissolution of the marriage bond. There appears to be little purpose to a previous separation which is meant to guarantee that the spouses reflect upon their decision for a certain period of time given that the timing of it has been shortened and that it is often superfluous where the marital relation has been irreparably damaged.

The referenced law has certainly taken a new step in the direction of the privatization of marriage. The new law confirms the parallelism between the phase of the formation of the marital bond and the phase of its dissolution, recalling the Roman maxim *consensus facit nuptias*. In both cases, the decision can be left to the spouses, without taking legal action in court, with a control of

mere formal regularity conducted by the public prosecutor or by the mayor.

VI. Civil Unions

Another kind of marriage crisis can be observed in the law covering civil unions introduced by the legge 20 May 2016 no 76. In reality, the crisis affects not so much marriage as much as the concept of family, which no longer finds its exclusive foundation in marriage. Moreover, the plurality of family models has been evident for some time, even in the absence of legal recognition of unions between homosexuals.

With the legge no 76 of 2016, the Italian legislator followed the supranational trend which has gone beyond the idea of 'family' being founded solely on marriage and has recognised that all individuals have the fundamental right to form a family on the basis of unions different from marriage.

The Italian State, following in the footsteps of other European countries, and in particular the German model of *eingetragene Lebenspartnerschaft*, has differentiated the same-sex couple from the heterosexual couple. Both have chosen an intermediate solution, inspired by the so-called double track principle. The law on civil unions is modelled on the law covering marriage without, however, assimilating the two institutions.³³ At the same time, the civil union is distinguished from cohabitation, which is separately regulated by a law which also applies to heterosexual couples.

The two models – marriage and civil unions – present a handful of significant differences. The principal differences regard the absence of the duty of fidelity and the duty of cooperation in the civil unions and the absence of any extension of the law covering adoptions.

These differences are significant in that they reveal a different model based on the couple's relation which excludes children as the basis for the relationship. In fact, the duties of fidelity and of cooperation in marriage are tied to the procreative purpose of marriage, and they have their foundation in the necessity to ensure the stability of the relation (fidelity) and to act in the interests of and satisfy the needs of the children (cooperation). In the same sense, it is noted that there is no provision regarding the invalidity of the civil union based on the

³³ S. Patti, 'Le unioni civili in Germania' *Famiglia e diritto*, 958-960, 958 (2015); P. Passaglia, 'Matrimonio e unioni omosessuali in europa: una panoramica' *Foro italiano*, IV, 275 (2010); J. Wasmuth, 'La convivenza registrata tra persone dello stesso sesso in Germania e l'orientamento giurisprudenziale della Corte costituzionale tedesca' *Famiglia*, 503-519, 503 (2003); F. Saitto, *La giurisprudenza tedesca in materia di eingetragene Lebenspartnerschaft tra garanzie d'istituto e Abstandsgebot. Spunti di comparazione con la sent. n. 138 del 2010 della Corte costituzionale italiana*, available at www.forumcostituzionale.it; P. Passaglia, 'Matrimonio e unioni omosessuali in Europa: una panoramica' *Foro italiano*, IV, 273 (2010). Other countries have extended marriage to persons of the same sex: Holland, Belgium, Denmark, Finland, Spain, Norway, England, Portugal, France, Iceland and Luxemburg.

error that one party believes that the other party is pregnant and there is no reference to the law on affinity (the legal bond between one party of the union and the relatives of the other party). The irrelevance of the bond of affinity confirms that the law intends to regulate a relationship whose effects are limited to the parties of the same relationship, unlike marriage where the law can affect persons other than the married couple.³⁴ It is possible that the new law may influence the interpretation of the law concerning marriage or may stimulate a reform of certain aspects of the law covering marriage.³⁵

In any case, a similarity between the two models can be recognised at least in the case of marriage without children. Such similarity can be observed in the law regarding separation and dissolution of marriage, which was simplified in the case of spouses without children (legge no 162 of 2014), as was shown above. The procedural simplification of the dissolution of the bond is particularly emphasised in civil unions where no separation is required and the decision to end the relationship may be made by only one party.

The similarity between the two models also derives from numerous court decisions written by Italian judges who, even in the absence of a specific law covering the adoption in civil unions, have allowed the adoption of a child of the partner in a civil union by applying the law of the so-called adoption in particular cases as provided in Art 44 letter d) of the legge no 184 of 1983.³⁶

Moreover, even if the two institutions appear especially close, their differences are not irrelevant but show the Italian legislator's intention to introduce a new model which is different from marriage. The failure to provide for the duty of fidelity and the duty of cooperation in civil unions proves the variation between the two institutions. Only marriage is finalised to form a family which includes children. Even if procreation is not an essential element of marriage, it characterises its nature and its law.

The exclusion of children as a fundamental reason for the partnership in civil unions prevents the assimilation between the two models and, in this way, reinforces marriage as being the only model in which children are raised. From this point of view, it can be stated that marriage is not in crisis but conserves its essential purpose of being a stable bond to which is assigned the formation of a family with children.

³⁴ M. Sesta, *Manuale di diritto di famiglia* (Padova: CEDAM, 2016), 29.

³⁵ Progetto di legge 24 February 2016 no 2253: changes of Art 143 Civil Code, concerning the suppression of the mutual obligation of fidelity between spouses.

³⁶ Corte di Cassazione 22 June 2016 no 12962, *Famiglia e diritto*, 1025 (2016); see also Tribunale di Roma 30 July 2014 no 299, *Famiglia e diritto*, 574 (2015); Corte d'Appello di Roma 23 December 2015 no 7127, available at www.articolo29.it; Tribunale di Roma 30 December 2015, *Famiglia e diritto*, 584 (2016); Tribunale di Palermo, decreto 6 April 2015, available at www.altalex.com; Corte d'Appello di Palermo 30 August 2015, *Famiglia e diritto*, 40 (2016); Corte d'Appello di Milano 1 December 2015, *Famiglia e diritto*, 271 (2016).

The Recoverability of the Loss of the Right to Life per se: A Brief European Overview

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Abstract

Traditionally, with a few exceptions, in Europe, decisions of the courts have denied the recoverability of the loss of the right to life per se (and the subsequent transfer of the claim from the primary victim to his/her heirs). In a comparative perspective, the author, as a starting point, analyzing the Italian legal system, briefly retraces the topic, contrasting with the other most important European legal systems.

I. The Recoverability of the Loss of the Right to Life per se in the Italian Legal System

Historically, in the Italian legal system, there was no specific statute, so compensation for the non-pecuniary loss (*danno non patrimoniale*) suffered by a person killed through the negligence or misconduct of another was essentially judged by the courts on the basis of the thin and uncertain temporal thread that separates life from death.

Until recently, the majority of courts dealing with such cases have awarded damages exclusively when death occurred within a significant period of time after the moment of the injury, based on the assumption that only in this situation could an injury to health, generally called 'biological terminal damage' (*danno biologico terminale*), materialize. This damage would be recoverable, as a loss *iure proprio*, since it was an impairment of the victim's psycho-physical integrity and was suffered during the said time-period; the right to claim damages was transferable to the heirs, who were, per se, entitled to claim compensation (a so-called claim *iure successionis*) against the tortfeasor.¹

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¹ Biological damage (*danno biologico*) is an injury to health, legally described as an injury to the physical and mental integrity of a person, that can be subject to medico-legal investigation, regardless of whether or not this injury impairs the person's ability to earn an income. For the recognition of the right to compensation for biological damage *iure successionis* (then awarded *sub specie* temporary total disability depending on the time of survival), arising only in the case 'when there is a significant lapse of time from the moment of the wrongful injuries until death' (*in cui intercorra un apprezzabile lasso di tempo tra le lesioni colpose e la morte causata dalle stesse*), see Corte di Cassazione 20 February 2015 no 3374, available at www.dejure.it.

In this way, this line of cases was intended to align with the *dicta* of *Corte Costituzionale* 27 October 1994 no 372,² which denied the autonomous recoverability of the loss of life per se under Art 2043³ and Art 2059⁴ of the Italian Civil Code. It followed the doctrine established by *Suprema Corte di Cassazione* in the early 1900s,⁵ hence the judgment of *Corte Costituzionale* was based on the ontological difference between health, protected under Art 32 of the Italian Constitution,⁶ and life.

It was only in the case of injury to health, once the exclusively compensatory purpose of tort law had been established, that the victim could benefit from compensation as a substitute source of satisfaction or solace. Otherwise, in the event of instantaneous or almost immediate death caused by an injury, there would be no presumption of compensation for the victim; in other words, because of the death of the person who should have been compensated, the compensation would have merely had a punitive purpose rather than being reparative and per se, it would have been unacceptable, since punishment is a characteristic function of the criminal law.

This is the reason why the recoverability of the loss of life has been affirmed solely in the event of injuries to health that caused the victim's death after a reasonable lapse of time, being treated as a normal personal injury; in these exclusive circumstances, damages could usefully serve their (exclusively) compensatory purpose.

The above-mentioned ruling of *Corte Costituzionale* (27 October 1994 no 372) was not overruled, even by the updated interpretation of the system for non-pecuniary damage of 2003 by the *Corte di Cassazione-Sezioni Unite*⁷ and

² See *Corte Costituzionale* 27 October 1994 no 372, *Responsabilità civile e previdenza*, 996 (1994), with note by E. Navarretta: 'in the case at hand, the trial judge doubted the constitutional legality of Articles 2043 and 2059 of the Italian Civil Code in the case of an immediate death deriving from wrongful injuries'.

³ Art 2043 Italian Code Civil, 'Compensation for unlawful acts', provides that: 'Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages'.

⁴ Art 2059 Italian Civil Code, 'Non-patrimonial damages', provides that: 'Non-patrimonial damages shall be awarded only in cases provided by law'.

⁵ See *Corte di Cassazione-Sezioni Unite* 22 December 1925 no 3475, *Foro Italiano*, I, 828 (1926), according to which the victim was entitled to compensation only for damages occurring from the moment of the personal injury until his or her death but no compensation in the case of immediate death, because an instantaneous demise prevents the injury from becoming a loss recoverable by the tort victim.

⁶ Art 32 of the Italian Constitution provides that: 'The Republic safeguards health as a fundamental right of the individual and as a collective interest and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person'.

⁷ See, in particular, respectively *Corte di Cassazione-Sezioni Unite* 31 May 2003 nos 8827 and 8828, *Foro Italiano*, I, 2272 (2003), with note by E. Navarretta; *Danno e responsabilità*, 826 (2003), with note by F.D. Busnelli; *Responsabilità civile e previdenza*, 675 (2003), with notes by P. Cendon, E. Bargelli and P. Ziviz.

by the *Corte Costituzionale* itself,⁸ when the compensation for general non-pecuniary losses was separated from non-pecuniary damage arising from a criminal offence (so-called moral-subjective damage) and thus from Art 2059 Italian Civil Code, so that it was exclusively to be considered in conjunction with Art 185 of the Italian Penal Code.⁹ Therefore, non-pecuniary damages were also deemed to be recoverable in other cases in which, although there had been no criminal offence, the violation was serious enough to affect the core of one of the inviolable human rights protected under Art 2 of the Italian Constitution.¹⁰

The recent interpretation of Art 2059 Italian Civil Code has also altered the definition of biological damage as pecuniary damage, according to Art 2043 Italian Civil Code, meaning that it qualifies as a non-pecuniary loss, recoverable within the scope of Art 2059 Italian Civil Code. Within the more accurate development of the system of non-pecuniary loss, and specifically with judgments nos 26973 and 26974 of 2008,¹¹ the *Corte di Cassazione-Sezioni Unite* answered the question of law as to

‘whether the so-called thanatological damage, ie damage resulting in instantaneous death, constitutes a particular category of non-pecuniary loss’ (*‘se costituisca peculiare categoria di danno non patrimoniale il c.d. danno tanatologico o da morte immediata’*);

the Court still denied compensation for the loss of life *per se*, but recognized and gave compensation only for the moral damage (*‘danno morale’*), in the light of the aforementioned broadening of the category, with the compensation intended as a means by which

‘to give solace for the pain and suffering, shortly followed by death, undergone by the victim of personal injuries, who remained lucid during agony, consciously awaiting impending death’ (*‘ristoro della sofferenza psichica provata dalla vittima di lesioni fisiche, alle quali sia seguita dopo*

⁸ See Corte Costituzionale 11 July 2003 no 233, *Foro Italiano*, I, 2201 (2003), with comment by E. Navarretta; *Danno e responsabilità*, 939 (2003), with notes by M. Bona, G. Cricenti, G. Ponzanelli, A. Procida Mirabelli di Lauro and O. Troiano.

⁹ Art 185 of the Italian Penal Code, ‘Restitution and compensation for damages’, provides that: ‘Every criminal offence requires restitution according to the civil rules of law. Any criminal offence which causes pecuniary or non-pecuniary damage obliges the wrongdoer, as well as any person who is responsible for the conduct of the wrongdoer according to civil law, to compensate that damage’. Historically, compensation for non-pecuniary damage, as defined by Art 2059 Italian Civil Code, was strictly linked to the moral-subjective damage caused by actions that constituted a crime under Art 185 of the Italian Penal Code.

¹⁰ Art 2 of Italian Constitution provides that: ‘The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled’.

¹¹ See Corte di Cassazione-Sezioni Unite 11 November 2008 nos 26972 and 26974, *Responsabilità civile e previdenza*, 38 (2009), with note by D. Poletti.

breve tempo la morte, che sia rimasta lucida durante l'agonia in consapevole attesa della fine).¹²

This explains why, in the past five years, a line of cases has considered as recoverable the moral damage from injury followed by death (so-called catastrophic damage) even when an extremely short time elapses from the moment of the injury until the time of death, provided that the victim remains conscious and has lucid awareness of his/her inevitable death. Compensation is therefore denied in the event of instantaneous or almost instantaneous death resulting from injuries when it is preceded by unconsciousness because in this case it would not be possible to suffer and thus undergo moral damage.¹³ Consequently, *rebus sic stantibus*, although compensation is awarded for the damage *iure proprio* suffered by subjects linked to the deceased by marriage or blood or having a relationship with the deceased through marriage (and also *more uxorio* cohabitation), it is not the case that the primary victim who dies instantly or a short period after the moment of the injury but is in a state of unconsciousness from the time of the injury until the time of death, has a *iure proprio* right to compensation for the non-pecuniary damage deriving from the loss of his/her right to life (and therefore, a right to compensation that could be transmitted to the heirs *mortis causa*).

The doctrine accepted by the majority of the courts raises various issues both in practical terms and most importantly on the effectiveness of the protection of the right to life. Firstly, the criterion of a reasonable time having elapsed (or of a state of consciousness when the period of time is too short) as a *discrimen* between compensation and no compensation, besides not having a defined quantitative chronological dimension, makes the burden of proof extremely difficult. Secondly and above all, it weakens the protection of the right to life, which, although it is not expressly protected under the Italian Constitution of 1948 (unlike the more recent Constitutions of several other member states of the EU),¹⁴ nonetheless implicitly emerges as a fundamental and inviolable right,

¹² See, in particular, Corte di Cassazione-Sezioni Unite 11 November 2008 nos 26973 and 26974, *Responsabilità civile e previdenza*, 38 (2009).

¹³ See Corte di Cassazione 20 February 2015 no 3374 n 1 above.

¹⁴ See Art 38 of the Polish Constitution of 1997 (*Rzeczpospolita Polska zapewnia każdemu człowiekowi prawną ochronę życia*) (*The Republic of Poland shall ensure the legal protection of the life of every human being*); Art 15, para 1, of the Spanish Constitution of 1978 (*Todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes. Queda abolida la pena de muerte, salvo lo que puedan disponer las leyes penales militares para tiempos de Guerra*) (*Everyone has the right to life and to physical and moral integrity, and under no circumstances may be subjected to torture or to inhuman or degrading punishment or treatment. Death penalty is hereby abolished, except as provided for by military criminal law in times of war*); Art 17 of the Slovenian Constitution of 1997 (*Človekovo življenje je nedotakljivo. V Sloveniji ni smrtne kazni*) (*Human life is inviolable. There is no capital punishment in Slovenia*); Art 21, para 1, of the Croatian Constitution, in the text from 2010 (*Svako ljudsko biće ima pravo na*

almost as the natural prerequisite for recognizing all other constitutionally inviolable rights. Even at the level of supranational law sources, the right to life is expressly set forth in many rules; to name a few: Art 3 of the Universal Declaration of Human Rights,¹⁵ Art 2 of the EU Charter of Fundamental Rights¹⁶ and Art 2 of the European Convention on Human Rights (ECHR).¹⁷ Specifically, in the latter, the right to life is not regarded as, so to speak, a ‘simple right’ but it is instead deemed to be the primary and most important of all rights, because ‘if one could be arbitrarily deprived of one’s right to life, all other rights would become illusory’.¹⁸

These problematic issues have been highlighted by some Italian scholars, who have always had contrasting opinions¹⁹ in this field. Among academic commentators in favour of the recoverability of the loss of right to life per se, there are some who propose listing the right to life under the heading of ‘individual rights’ and protecting it in the same way, although only for as long as it pertains to its holder and considering it as a right to be protected in the social interest when it is destroyed.²⁰

Diverting from this position, in 2014 a judgment (no 1361) by the third civil section of the Italian High Court²¹ additionally recognized the general and express

život) (*Every human being has the right to life*); Art 15, para 1, of the Slovakian Constitution from 1992 (*Každý má právo na život. Ľudský život je hodný ochrany už pred narodením*) (*Everyone has the right to life. Human life is worth protection even before birth*); Art 6, para 1, of the *Charter of Fundamental Rights and Freedoms*, part of the Czech Constitution of 1993 (*Každý má právo na život. Lidský život je hoden ochrany již před narozením*) (*Everyone has the right to life. Human life is worthy of protection even before birth*). Obviously, these are all relatively or extremely recent constitutions that were guided by the supranational European laws in expressly stating the protection of the human right to life.

¹⁵ See Art 3 of the New York Convention, 10 December 1948, where it is explicitly stated that ‘everyone has the right to life, liberty and security of person’.

¹⁶ Art 2 of the Charter of Fundamental Rights as proclaimed in Nice in December 2000 (and later modified in 2007), entitled ‘Right to life’, provides that ‘1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed’.

¹⁷ Ratified in Italy by legge 4 August 1995 no 848, the ECHR, in conjunction with Art 13, provides that the contracting States must guarantee in their domestic legislation the effective protection of the rights in the Convention, among which the right to life is stated in Art 2. The rule literally provides that ‘Everyone’s right to life shall be protected by law’. According to R.C.A. White and C. Ovey, *The European Convention on Human Rights* (Oxford: Oxford University Press, 5th ed, 2010), 143 ‘the obligation of states under the right to life consists of three main aspects, namely (1) the duty to refrain from unlawful killing, (2) the duty to investigate suspicious deaths, and (3) under certain circumstances the positive obligations to take steps to prevent the loss of life’.

¹⁸ See D. Korff, *The Right to Life. A Guide to the Implementation of Article Two of the European Convention on Human Rights*, *Human Rights Handbooks*, no 8 (Strasbourg: Council of Europe Publishing, 2006), 6, available at <https://tinyurl.com/yd5aey75> (last visited 30 June 2018).

¹⁹ For discussion, see E. Navarretta, ‘Danni da morte e danno alla salute’, in F.D. Busnelli and M. Bargagna eds, *La valutazione del danno alla salute* (Padova: CEDAM, 4th ed, 2001), 261.

²⁰ See N. Lipari, ‘Danno tanatologico e categorie giuridiche’ *Rivista critica di diritto privato*, 528 (2012).

²¹ See Corte di Cassazione 19 November 2013 no 1361, *Danno e responsabilità*, 388

compensation for thanatological damage in the event of instantaneous death, that is, regardless of the intensity of the suffering of the victim and his/her awareness of his/her impending death. In doing so, for the first time, the Court strongly questioned the consolidated line of decisions of the Italian High Court itself (although there have been several timid signs of dissent through the years²² and more frequent dissent in the lower courts).²³ Such a *revirement* is based on two major assumptions. First, the social conscience does not want to leave a victim who has lost his/her life as a result of an unlawful act without any compensation and thus make killing cheaper than maiming. Second, human life has an exceptional and unique value²⁴ and its legal protection must be of

(2014), with note by G. Ponzanelli and R. Foffa; *Nuova giurisprudenza civile commentata*, I, 396 (2014), with note by A. Gorgoni. For a first overview, *Responsabilità civile e previdenza*, 492 (2014), with note by C.M. Bianca; *Foro Italiano*, I, 719 (2014), with note by A. Palmieri, R. Pardolesi, R. Simone, R. Caso and C. Medici. The High Court's ruling (although it is not immune from criticism) seems to have persuaded the majority of scholars, among them, see C.M. Bianca, 'La tutela risarcitoria del diritto alla vita: una parola nuova della Cassazione attesa da tempo' *Responsabilità civile e previdenza*, 492 (2014), (which is really one of the cultural references of the decision); G. Villanacci, 'Rilevanza e bilanciamento degli interessi nella qualificazione e quantificazione del danno' *Ius Civile*, 266 (2015); R. Simone, 'Il danno da perdita della vita: logica, retorica e sentire sociale' *Danno e responsabilità*, 795 (2014); P. Ziviz, 'Grandi speranze per il danno non patrimoniale' *Responsabilità civile e previdenza*, 89 (2014). For an explicitly critical view, see E. Bargelli, 'Danno non patrimoniale *iure hereditario*. Spunti per una riflessione critica' *Responsabilità civile e previdenza*, 728 (2014). See also Corte di Cassazione 16 October 2014 no 21917, available at www.dejure.it; Corte di Cassazione 5 December 2014 no 25731, available at www.dejure.it. In the latter case, based on the ontological diversity between biological damage and damage from loss of life, and having to judge on the admissibility of the appeal against the denial of the *iure hereditatis* to claim for thanatological damage, the court ruled that the plaintiff, in order to avoid the *no new-claim* rule, should have claimed under this head of damage from the beginning (which was not the case in that particular trial).

²² See, for example, Corte di Cassazione 25 January 2002 no 887, available at www.dejure.it, which is at least partially in favour of granting compensation for the loss of life as such, in order to overcome the existing discrepancy between the non-recoverability of damages arising from instantaneous or almost immediate death caused by an injury and the recoverability of biological damage resulting in a later demise but only through legislation and in accordance with policy criteria that are respectful of domestic and international laws. See also Corte di Cassazione 12 July 2006 no 15760, available at www.dejure.it, where, *obiter*, the damage arising from loss of life is regarded as wrongful and *mortis causa* transferable as a claim of the deceased against the tortfeasor.

²³ See the most recent trial judge decisions: Tribunale di Brindisi 1 December 2014, *Questione Giustizia*, 14 January 2015; Tribunale di Vallo della Lucania 30 April 2014 no 158, unpublished; Corte Appello di Cagliari no 438 of 2014, unpublished; Tribunale di Brindisi 12 December 2013, available at <https://tinyurl.com/y7vnwc77> (last visited 30 June 2018). For less recent cases, see Tribunale di Venezia 15 June 2009, *Danno e responsabilità*, 1013 (2010); Tribunale di Terni 4 March 2008, *Corriere del merito*, 803 (2008); Tribunale di Venezia 15 March 2004, *Foro Italiano*, I, 2256 (2004); Tribunale di Terni 20 April 2005, *Giurisprudenza italiana*, 2281 (2005); Tribunale di Santa Maria Capua Vetere 14 May 2003, *Giurisprudenza italiana*, 495 (2004); Tribunale di Foggia 28 June 2002, *Foro Italiano*, I, 3494 (2002); Tribunale di Tropea 28 May 2001, *Danno e responsabilità*, 1097 (2001). However, it is recognised that the Tribunale di Massa has been a pioneer regarding biological damage from death *iure hereditario* (for an in-depth discussion see E. Navarretta, *La valutazione* n 19 above, 282, fn 101).

²⁴ See Corte di Cassazione 23 January 2014 no 1361, *Foro Italiano*, I, 3, 719 (2014).

primary importance, as well as being distinct and autonomous from the legal protection of health;²⁵ therefore, its loss cannot be ignored by private law and must be compensated. At the same time, the third civil section of *Corte di Cassazione* has ruled that the loss of the right to life per se is an

‘ontological and essential exception to the principle of non-recoverability of the damage resulting from the mere occurrence of a harmful event and the recoverability only of damage actually caused by a harmful event’ (*ontologica ed imprescindibile eccezione al principio della irrisarcibilità del danno-evento e della risarcibilità dei soli danni-conseguenza*’).

Thus,

‘the victim acquires the related right to claim compensation at the exact moment of the fatal injury, prior to the demise’ (*il relativo diritto al risarcimento sorge in capo alla vittima, istantaneamente, al momento della lesione mortale, anteriormente all’exitus*’).

This ruling by the third section, for the first time openly challenging the traditional doctrine, has inevitably raised a judicial dispute that has been brought before the Joint Chambers of the Italian High Court,²⁶ in terms of the possibility of the recoverability *iure hereditatis* of the loss of the right to life per se in the case of instantaneous death caused by a wrongful act.

Nevertheless, the Joint Chambers of *Corte di Cassazione* (22 July 2015 no 15530)²⁷ upheld the traditional doctrine (as stated by the Constitutional Court in 1994 and by the Joint Chambers themselves in 2008), disappointing many scholars and receiving contrasting comments. The Joint Chambers reiterated that, in the event of an instantaneous or almost instantaneous death caused by injuries, a compensation *iure hereditatis* for the loss of life per se cannot be claimed but

‘death causes both pecuniary and non-pecuniary losses to the relatives of the primary victim, who are compensated for such losses’ (*(...) la morte provoca una perdita, di natura patrimoniale e non patrimoniale ai congiunti che di tale perdita sono risarciti (...)*’).

²⁵ *ibid.*

²⁶ *Corte di Cassazione* 4 May 2014 no 5056, *Responsabilità civile e previdenza*, 490 (2014).

²⁷ *Corte di Cassazione-Sezioni Unite* 22 July 2015 no 15530, available at <https://tinyurl.com/ydf2r47j> (last visited 30 June 2018); for the first strongly favourable comment on the decision, see E. Navarretta, ‘Con il risarcimento del danno “È forse il sonno della morte men duro?” Riflessioni in margine alla Sezioni Unite della Cassazione no. 1530 del 2015’ *giustiziacivile.com*, 14 September 2015, 2, and Id, ‘La “vera” giustizia ed il “giusto” responso delle S.U. sul danno tanatologico iure hereditario’ *Responsabilità civile e previdenza*, 1416 (2015); for a more in-depth and sometimes critical position, see F.D. Busnelli, ‘Tanto tuonò, che...non piovve. Le Sezioni Unite sigillano il “sistema”’ *Corriere Giuridico*, 1206 (2015).

Therefore, on the one hand the Joint Chambers of the Italian High Court did not deem the novelty elements introduced by the third section of *Corte di Cassazione*, in case no 1341/2014 to be convincing, when supporting its own decision (the social conscience argument and the supposedly exceptional nature of the compensation for the loss of right to life per se). The first of these arguments was turned down, both because it is not a 'technically' adequate criterion to guide the interpretation of statute law (but is, at most, useful as an assumption to inspire reforms *de jure condendo*) and because it has the sole purpose of enriching the victim's heirs. The latter was, instead, considered to be an exception incompatible with tort law, based on the necessary subsistence of a loss relatable to a specific subject who in this case no longer exists and wide enough to frustrate the converse principle that tort law only compensates damage as a 'consequence' of a harmful event.

Conversely, the denial of the Joint Chambers of the High Court was grounded on the more usual 'negating' arguments according to the following: the damage for instantaneous death (or death occurring after a very short time) affects not health but life; the loss of the right to life, being, by its nature, a right enjoyed exclusively by its holder, is not recoverable after the instantaneous death of the claimant; tort law has only a compensatory purpose, while punishment is a characteristic function of the criminal law; the opinion that the denial of compensation for the loss of life per se makes the death of a victim 'cheaper' than his or her injury is groundless, since it is

'not demonstrated that the mere exclusion of the claim transferable to heirs necessarily entails a smaller compensation for the relatives' ('è *indimostrato che la sola esclusione del credito risarcitorio trasmissibile agli eredi, comporta necessariamente una liquidazione dei danni spettanti ai congiunti di entità inferiore*');

and finally, the principle of the full recoverability of all damages is not constitutionally recognized and the Constitution does not require criminal punishment to be accompanied by monetary compensation, especially since there is no subject to which such loss is traceable.

II. The Recoverability of the Loss of the Right to Life per se in the Main European Countries

The long-standing Italian doctrine of the non-recoverability of the loss of life per se is by no means unusual. In Europe, with the sole exception of Portugal,²⁸ the recoverability of the non-pecuniary loss of the right to life per se and its transferability *iure successionis* are generally denied by the courts, especially in

²⁸ See *infra*.

the event of the instantaneous death of the victim,²⁹ with arguments similar to those characterizing the Italian debate. At the root of this negative view, several recurring considerations can be found. First, the victim of an instantaneous death could not suffer any recoverable damage, so that the compensation would acquire an exclusively punitive purpose and per se would be unacceptable. Second, the instantaneous loss of life causes the contextual extinction of the victim's capacity to have rights and thus makes the *iure proprio* acquisition of the claim and its subsequent transferability *iure hereditario* impossible.³⁰

On this basis, the almost unanimous opinion of academic commentators in Spain³¹ and of the Spanish courts in the few cases in which the issue has been raised is that, in the event of instantaneous death, the loss of life is not per se a recoverable damage for the deceased and per se is not transferable *iure successionis*. In particular, so far as the courts are concerned, the Spanish High Court (*Tribunal Supremo*) has ruled on more than one occasion since the beginning of the twentieth century that the loss of life per se is not a recoverable loss.³² More recently, the *Tribunal Supremo* ruled out the recoverability of that loss, at first in its judgment of 20 October 1986³³ and later, more explicitly, in its judgment of 19 June 2003, which reads as follows:

‘están legitimadas para reclamar indemnización por causa de muerte “iure proprio”, las personas, herederos o no de la víctima, que han resultado personalmente perjudicadas por su muerte, en cuanto dependen económicamente del fallecido o mantienen lazos afectivos con él; negándose mayoritariamente la pérdida del bien “vida” sea un daño sufrido por la víctima que haga nacer en su cabeza una pretensión resarcitoria transmisible

²⁹ See C. Van Dam, *European Tort Law* (Oxford: Oxford University Press, 2nd ed, 2013), 170; also E. Bargelli, ‘Danno non patrimoniale “iure hereditario”: spunti per una riflessione critica’ *Responsabilità civile e previdenza*, 723-732 (2014), highlights how in the European legal systems the denial of the recoverability by the heirs of the non-pecuniary damage for immediate loss of life is almost unanimous. For a brief review of the French, German, English and Spanish systems see C.M. Bianca, ‘La tutela risarcitoria del diritto alla vita’ n 21 above, 504.

³⁰ This is the so-called Epicurean argument: ‘Death, therefore, the most awful of evils, is nothing to us, seeing that, when we are, death is not come, and, when death is come, we are not. It is nothing, then, either to the living or to the dead, for with the living it is not and the dead exist no longer’.

³¹ For a view of the Spanish scholars' positions, see T. Cano Campos, ‘La transmisión “mortis causa” del derecho a ser indemnizado por los daños no patrimoniales causados por la Administración’ *Revista de Administración pública*, 122 (2013); see also A.M. Rodríguez Guitián, ‘Indemnización por causa de muerte: Análisis de los ordenamientos jurídicos inglés y español’ *InDret (Revista para el análisis del derecho)*, 2-8 (2015). In this area, a point of reference is still the contribution by A.F. Pantaleón Prieto, ‘Diálogo sobre la indemnización por causa de muerte’ *Anuario de Derecho Civil*, 1567 (1983), which is structured as a dialogue between two fictional characters, *Primus*, who rejects the category of the damage for the loss of life as such, and *Secundus*, who is favourable to the argument.

³² Among the first decisions in this regard, see Tribunal Supremo 19 February 1902, *Colección Legislativa*, volume 93, no 47 (1902).

³³ See Tribunal Supremo, 2^a, 20 October 1986, *Repertorio de Jurisprudencia*, 5702 (1986).

“*mortis causa*” a sus herederos y ejercitable por éstos en su condición de tales “*iure hereditatis*” (in the case of fatal injury are entitled to damages awards in their own right or “*iure proprio*” the persons, heirs or not heirs of the victim, who have been personally damaged, as soon as they economically depend on the deceased or are in a particularly close personal relationship to the victim; the majority of courts dealing with such cases denying the recoverability of the non-pecuniary loss of the right to life per se and, therefore, the heirs of the deceased person are not entitled to inherit any direct compensation for the death (*iure hereditatis*)).³⁴

As an indirect proof of the non-recoverability of damages for loss of life per se, the table ‘*I del Baremo para la valoración de daños personales producidos por accidentes de circulación*’ (Table I for the assessment of non-economic damage arising out of motor vehicle accidents), implementing the Legislative Decree 8/2004 ‘*sobre Responsabilidad Civil y Seguro Circulación Vehículos*’ (On Liability and Insurance for Motor Vehicle Traffic), does not include, at least under the regulated area, the victim himself or herself among those who have a right to claim compensation for damages arising from his or her death.

In France, the outcomes are similar. In the absence of a specific statute, the courts³⁵ do not award any compensation for damages for ‘*perte de chance de survie*’, even though they have created the category of the so-called damage *par ricochet*³⁶ and have acknowledged the transferability *iure successionis* of the claim for the non-pecuniary losses suffered by the victim.³⁷ Moreover, according to the French judges, the claim cannot be attributed to the deceased victim nor, consequently, can it be transferred by way of inheritance.³⁸ Furthermore, an acquired right to live for a statistically-determined time cannot be argued.

The German legal system does not allow the non-pecuniary loss arising from the instantaneous death of the victim of an unlawful act (with the subsequent transfer of the claim) to be recovered,³⁹ since § 253, subpara 2 of the *Bürgerliches*

³⁴ See Tribunal Supremo, 1^a, 19 June 2003, *Repertorio de Jurisprudencia*, 4244 (2003); Tribunal Supremo, 1^a, 4 October 2006, *Repertorio de Jurisprudencia*, 6427 (2006).

³⁵ E. Bargelli, n 29 above, 725.

³⁶ I.e. damages resulting from a fatal unlawful act that violates the juridical sphere of persons holding protected interests and linked to the victim by a ‘*lien de droit*’.

³⁷ See Cour de cassation, chambre mixte, 30 April 1976 no 74-90.280 and no 73-93.014, available at <https://tinyurl.com/y6ws3cbr> (last visited 30 June 2018) which recognized the transferability of the claim to the victim’s heirs, without any kind of restriction and regardless of the type of loss.

³⁸ See, most recently, Cour de cassation, chambre criminelle, 26 March 2013 no 12-82600, *Bulletin criminel*, no 69 (2013), and also *Responsabilité civile et assurances*, no 6 (2013), with note by L. Bloch.

³⁹ See H. Kötz and G. Wagner, *Deliktsrecht* (Munich: Beck, 10th ed, 2006), § 731, 284. In Germany, § 7 of the *Produkthaftungsgesetz* of 15 December 1989 exclusively regulates pecuniary losses suffered directly by the victim who afterwards dies because of an unlawful act and provides that persons lacking any means of subsistence must be compensated but from the different perspective of the infringement of the right to receive support.

Gesetzbuch (Immaterieller Schaden) does not include life among the protected interests.⁴⁰ In contrast, in Germany, the non-pecuniary loss in the event of non-instantaneous death is considered recoverable when death occurs within a significant period after the moment of the injury; this period of time can last from a few minutes to several weeks (the elapsed time and the state of consciousness of the victim are relevant exclusively for the quantum of compensation).⁴¹

The English system deserves a special mention because of its peculiarities. For decades, two obstacles have prevented both the victim and his/her relatives from being compensated for the loss of life. The first obstacle depended on the principle, *action personalis moritur cum persona* and the second on the doctrine stated by Lord Ellenborough in *Baker v Bolton* (1808), according to which the death of a human being could not be complained of as an injury in a civil court.⁴² Crucial elements to overcome these obstacles were the *Fatal Accident Act 1846* (better known as *Lord Campbell's Act*) and the *Law Reform (Miscellaneous Provisions) Act of 25 July 1934*.⁴³ The first created a new cause of action for the benefit of any dependant of the victim for any economic loss resulting from his/her death; the second stated that the right to compensation against the tortfeasor's estate, in the event of the tortfeasor's death and the right to claim compensation, when the victim dies because of the injuries, both survive and are to be defended or pursued by the executors or administrators.

So, in *Flint v Lovell* (1935), the House of Lords⁴⁴ had to decide for the first time if the shortening of life of a still-living person resulting from the serious injuries caused by an unlawful act constituted a specific recoverable non-pecuniary loss (and was not just a claim for pain and suffering); the decision was in the affirmative.⁴⁵ Besides the positive solution accepted by the House of Lords, the

⁴⁰ The rule provides that '*Ist wegen einer Verletzung des Körpers, der Gesundheit, der Freiheit oder der sexuellen Selbstbestimmung Schadensersatz zu leisten, kann auch wegen des Schadens, der nicht Vermögensschaden ist, eine billige Entschädigung in Geld gefordert werden*' ('If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss').

⁴¹ See U. Magnus and J. Fedtke, 'Non-Pecuniary Loss under German Law', in W.V. Horton Rogers ed, *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Wien, New York: Springer, 2001), 114.

⁴² 170 ER 1033 (King's Bench 1808).

⁴³ The *Fatal Accidents Act 1846* was repealed and replaced by the *Fatal Accidents Act 1976* and the latter was amended by the *Administration of Justice Act 1982*; see W. Van Gerven et al, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford and Portland: Hart Publishing, 2000), 107; S. Deakin et al, *Markesinis and Deakin's Tort Law* (Oxford: Oxford University Press, 7th ed, 2012), 854; A.M. Rodríguez Guitián, 'Indemnización por causa de muerte: Análisis de los ordenamientos jurídicos inglés y español' *InDret (Revista para el análisis del derecho)*, 5 (2015).

⁴⁴ (1935) 1 KB 354.

⁴⁵ The case concerned a claim by a sixty-nine year-old man who had suffered severe injuries as the result of the defendant's negligence. For an in-depth analysis see F.X. Conway,

judgment of the trial judge had to be reconsidered; in fact, although favourable, the judgment had considered the loss of life expectancy more from a 'qualitative' perspective than a 'quantitative' one, that is, as a shortening of life per se. The latter seemed to be the object of the recoverable damage, according to the House of Lords. However, there were many uncertainties, since the judgment of the Court lent itself to an interpretation as compensation for the pain and suffering undergone by the victim of the personal injury, who had remained lucid and in agony, consciously awaiting his impending death.⁴⁶ The latter solution was, however, clearly rejected by the House of Lords in *Rose v Ford*,⁴⁷ when it upheld a claim to compensation filed by the personal representative of the estate of a thirty-four year-old woman who had died from her injuries (the infection of an amputated limb) four days after a road accident caused by the defendant's negligence. The claim was upheld regardless of the victim's state of consciousness or of the timing of death. The right to bring an action, which arose at the moment of the death from negligence, was deemed eligible to be brought by the personal representative, in accordance with the *Law Reform (Miscellaneous Provisions) Act 1934*, as the damage was recoverable because it stemmed from the tortfeasor's unlawful act. Despite the many uncertainties on the assessment of damages, the doctrine stated in *Flint v Lovell* survived until 1982, when the *Administration of Justice Act (Part I, section 1)* came into force. The new statute repealed the right to damages for loss of expectation of life⁴⁸ and the damages for loss of expectation of life became ancillary to the damages for pain and suffering.

At present, English law recognizes the recoverability of damages for loss of expectation of life for the benefit of the victim by virtue of the *Administration of Justice Act 1982 (Part I, s 1)* but exclusively when there is a valid claim for pain and suffering, since the fear of having one's own life expectancy reduced cannot be, by itself, the basis for a valid claim for damages. In the event of the victim's instantaneous death, the only compensation allowed for her/his benefit is the

'Damages for shortened life' *Fordham Law Review*, 219-220 (1910); see also G. Belgrad, 'Compensation for negligently shortened life expectancy' *Maryland Law Review*, 24-25 (1969).

⁴⁶ G. Belgrad, n 45 above, 26.

⁴⁷ *Law Reports Appeal Cases*, 826 (1937). In this case, the trial judge, by interpreting the doctrine originating with the case of *Flint v Lovell*, ruled that the victim could not have suffered from the shortening of his life because he was in a state of unconsciousness (see also *Slater v Spreag*). The appeal court reversed the judgment of the court below, ruling that the principle in *Flint v Lovell* was applicable only to the case where a victim was living at the time of the action. This was maybe due to a fear, especially from the insurance business, of excessively extending the scope of the principle.

⁴⁸ The rule is clearly located in the section dedicated to the 'Abolition of certain claims for damages etc' and it provides that: 'In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries: (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; (b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced'.

reimbursement of reasonable funeral expenses, while compensation for any non-pecuniary loss is not allowed, even to the victim's family;⁴⁹ the sole exception is the so-called damages for bereavement.⁵⁰ In the case of a victim who loses consciousness instantaneously or shortly after the damaging event and dies within a week, the compensation in England and Wales for the non-pecuniary loss is, according to the *Judicial College Guidelines for General Damages*, a rather low amount (between one thousand one hundred pounds and two thousand two hundred and fifty-five pounds).

III. The Recoverability of the Loss of the Right to Life per se in Some European Projects for the Harmonization of European Tort Law

The *Principles of European Tort Law* (PETL) clearly reflect the *status quo* emerging from the above analysis of the legal systems of the main European countries. On the one hand, the *Principles* clearly include life among the interests that need to be protected most extensively⁵¹ but, on the other hand, this assertion is not followed by the clear recognition of any right to compensation for the loss of the right to life per se.⁵² This argument is grounded in the assumption that the PETL ascribe only a compensatory purpose to liability for tort,⁵³ in line with

⁴⁹ According to the doctrine of Lord Ellenborough in *Baker v Bolton* (1808) in a civil court, the death of a human being could not be complained of as an injury. In other words, not even the next of kin could have a claim for compensation in case of the death of a householder that was the result of another's negligence: this, as already noted, was the position until the coming into force of the *Fatal Accident Act* 1846.

⁵⁰ Damages for bereavement were first introduced by the *Administration of Justice Act* 1982 with the introduction of section 1A of the *Fatal Accidents Act* 1976. Damages for bereavement are exclusively for the benefit of certain categories of persons indicated in the statute and are currently set at no more than twelve thousand nine hundred and eighty pounds (the original amount was three thousand five hundred pounds). K.M. Stanton, *The Modern Law of Tort* (London: Sweet & Maxwell, 1994), 282, fn 87, observes that, in substance, damages for bereavement 'replaced the old award of damages for loss of expectation of life which, when it survived for the benefit of the victim's estate, achieved much the same purpose indirectly' (see *infra*).

⁵¹ The PETL, presented in Vienna on 19 and 20 May 2005, is the result of an academic project for the standardization of civil liability carried out by the *European Group on Tort Law*. The PETL, Art 2:102, 'Protected interests', provides that '(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection. (2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection'.

⁵² See the PETL, Art 10:301, 'Non-pecuniary damages'.

⁵³ In the hypothesis considered, the compensatory purpose is deemed to be lacking and this is the only purpose that PETL seems to assign to tort law, as F.D. Busnelli critically highlights in 'Deterrenza, responsabilità civile, fatto illecito, danni punitive' *Europa e diritto privato*, 911-913 (2009). The author covers similar considerations when referring to the *Principles of European Law: Non-contractual Liability Arising out of Damage Caused to Another*. For recent general considerations on the PEL and the PETL, see M. Serio, 'La responsabilità civile

the current developments in European tort law.⁵⁴

Even clearer is the refusal that emerges from Art VI – 2:202 of the *Draft Common Frame of Reference* (DCFR) of 2012.⁵⁵ The rule attributes a legal nature to the non-pecuniary loss suffered by a person as a result of the death or the damage to the physical integrity of another who is linked to that person by either affective relations or a blood relationship (see § 1). Subsequently, the article also provides – for the scenario where the victim dies because of someone's tortious act – for the recoverability of: the damage of a legal nature suffered by the deceased but only from the moment of the injury until death and its *iure successionis* transferability to the entitled persons (see § 2(a)); the reasonable funeral expenses for whomever incurs them (see § 2(b)); and the loss of maintenance or alimony suffered by a natural person who was maintained by the deceased or, had the death not occurred, who would have been maintained under statutory provisions or to whom the deceased provided care and financial support (see § 2(c)). The comment clarifies that the rule is grounded on the principle that death per se is not damage under tort law, so that the deceased could not make any claim on the basis of death per se, nor could the private law legal system assign to the heirs or to other entitled persons any quantifiable economic value, since human life is priceless.

IV. Some Cracks in the Wall

As is demonstrated in this brief overview, the denial of the recoverability of the damage for the loss of life per se is one of the few standard principles in the field of non-pecuniary loss at a European level, which is otherwise a more inconsistent and diverse field than that of pecuniary damage, especially regarding the criteria and the conditions for assessment. This is mainly for policy reasons but also because of the historical and social *milieu* of each judicial system⁵⁶ and numerous other factors, such as the kind of socio-economic system and the average income levels, living standards, and healthcare standards.

The wall of non-recoverability, although still quite solid from a panoramic perspective, seems weaker when inspected more closely. In relation to this, it is important to note the recurring criticisms of the traditional opinions that are

in Europa: prospettive di armonizzazione' *Europa e diritto privato*, 339-353 (2014).

⁵⁴ For a general view, see F.D. Busnelli, n 53 above.

⁵⁵ See the English version of this Article, *sub* Book VI, DCFR, 'Non-contractual liability arising out of damage caused to another' available at <https://tinyurl.com/yactwqxa> (last visited 30 June 2018). The DCFR was written by the Study Group on a European Civil Code and by the Research Group on EC Private Law (Acquis Group) coordinated by Christian von Bar, Eric Clive and Hans Schulte-Nolke.

⁵⁶ See C. Salvi, 'Il risarcimento integrale del danno non patrimoniale, una missione impossibile' *Europa e diritto privato*, 523 (2014).

brought by many European legal theorists.⁵⁷ These criticisms are based, among other considerations, on the inherent inconsistency between deeming the right to life to be the most important of all rights and denying any compensation for its unlawful loss;⁵⁸ moreover, damages in respect of other, less ‘important’ rights are recoverable, often with compensation in the millions (eg for breaches of the right to privacy).⁵⁹

Further, it is a widely-held belief that the traditional position makes it cheaper for the tortfeasor to kill than to maim;⁶⁰ at the same time, there would be no reason to worry about double compensation to the heirs (for the non-pecuniary damage suffered *iure proprio* and for the *iure hereditario* claim for the loss of the life of the immediate victim of the wrongful act), since the compensation would in any case be for different losses.⁶¹

Even the courts tend to use various strategies to erode the traditional doctrine somewhat, maybe in recognition of its subtle injustice, although they appear to adhere to it, at least in principle. In Italy, before the judgment of the third section of the High Court in 2014 theatrically changed the *status quo*, this happened rather cryptically, with the doctrine being softened up,⁶² by, for example, taking aim at the criterion of the ‘significant lapse of time from the moment of the wrongful injuries until death’, the length of which has been reduced further and further in order to award compensation for the non-pecuniary

⁵⁷ See, among others, G. Brüggemeier, *Civil Liability Law in Europe, China, Brazil and Russia. Texts and Commentaries* (Oxford: Oxford University Press, 2011), 153; F.D. Busnelli, ‘Tanto tuonò, che...non piove. Le Sezioni Unite sigillano il “sistema” ’ n 27 above, 1206; T. Cano Campos, n 31 above, 127; N. Lipari, n 20 above, 528; E. Vincente Domingo, ‘El daño’, in L.F. Reglero and J.M. Busto Lago eds, *Tratado de Responsabilidad Civil* (Cizur Menor: Thomson Reuters Aranzadi, 5th ed, 2014), vol I, 318. For an overview of the opinions of German scholars, see H. Kötz and G. Wagner, n 39 above.

⁵⁸ See G. Brüggemeier, n 57 above.

⁵⁹ This is most evident in the English legal system, where, as has already been said, any right to compensation for loss of life is denied and the law awards only twelve thousand nine hundred and eighty pounds as bereavement damages to those who are entitled. In contrast, the violation of a famous singer’s privacy by a tabloid newspaper, which published a defamatory statement concerning an alleged diet, was worth three hundred and fifty thousand pounds to the victim. The disparity is so evident that it has also been highlighted by the media: see T. Heyden, ‘How is a life worth £12,980?’ available at <https://tinyurl.com/nvpsoeg> (last visited 30 June 2018). Similarly, in Italy, instead of the next-of-kin of the victim being adequately compensated for the death of their relative, compensation of a million euros was awarded at first instance to a famous soccer player for a breach of his right to privacy. This created a scandal but on appeal the amount of the compensation was drastically reduced, to eighty thousand euros.

⁶⁰ See, for example, Tribunale di Venezia 15 March 2004, *Foro Italiano*, I, 2256 (2004) and, among scholars, see, for example, A. Palmieri and R. Pardolesi, ‘Di bianco o di nero: la querelle sul danno da morte’ *Foro Italiano*, I, 763 (2014). The authors note with bitter irony that is better not to take prisoners on zebra crossings; see also C. Van Dam, *European Tort Law* n 29 above, 170.

⁶¹ Most recently, see T. Cano Campos, n 31 above, 129.

⁶² See P. Ziviz, ‘Perdita della vita come danno conseguenza’, available at <https://tinyurl.com/yb9qkwd8> (last visited 30 June 2018).

loss suffered by the victim, even when death occurred within a few hours of the injury.⁶³ Another strategy was to emphasize the state of lucid agony of the victim⁶⁴ (and in some cases even to disregard the victim's state of consciousness)⁶⁵ or to widen the chances of the victim's relatives recovering the loss of life per se as a loss *iure proprio*.

In 2007, for the first time, the French High Court, civil section (*Cour de cassation, chambre civile*)⁶⁶ awarded damages *iure successionis* to the parents of a girl who had died in consequence of medical negligence, for the '*perte de chance de n'avoir pas vécu plus longtemps*' (loss of the chance of living longer). Subsequently, the same French *Cour de cassation (chambre criminelle)*⁶⁷, in its decision of 23 October 2012, upheld the judgment of 26 April 2011 of the Nouméa Appeal Court, which had granted to the parents of a boy who had died three hours and thirty minutes after a road accident, compensation *iure successionis* for the pain and suffering of the victim and different (and much more conspicuous) compensation for '*la perte de chance de survie*' (loss of chance of survival) or '*préjudice de vie abrégée*' (damage for shortened life). Then again, also granting compensation for the '*préjudice de vie abrégée*', is a solution that could overcome the objection according to which the loss of life per se, since it is the mere occurrence of an event, is not recoverable. From this latter perspective, the right to life is an intangible asset and therefore the injury causes damage that has to be evaluated on the basis of logical-legal considerations and not on the basis of time, in the same way as an injury to a protected interest. Therefore, the damage is not death per se but rather the fact that the victim is deprived of his right to survive – or his attitude to survival – which is linked to the enjoyment of life.⁶⁸

This is not a new conclusion and appears to echo, *mutatis mutandis* and given the differences in the common law legal system, the decision of the English House of Lords in the *Flint v Lovell* case,⁶⁹ which seems also to have inspired the most recent French case law recognizing the '*préjudice de vie abrégée*'. However, the English case law currently seems to show that there is

⁶³ Only sixteen hours were needed by Corte di Cassazione 20 February 2015 no 3374, available at www.dejure.it, to grant compensation for biological damage; only thirty minutes were deemed sufficient for the recognition of moral damage by Corte di Cassazione 8 April 2010 no 8360, available at www.dejure.it.

⁶⁴ See Corte di Cassazione 10 January 2011 no 1072, available at www.dejure.it; most recently, Corte di Cassazione 5 December 2014 no 25731, available at www.dejure.it.

⁶⁵ For example, Corte di Cassazione 6 October 1994 no 8177, *Foro Italiano*, I, 1852 (1995), with note by R. Caso, awarded moral-subjective damages for a comatose victim.

⁶⁶ See Cour de cassation, première chambre civile, 13 March 2007, *Responsabilité civile et assurances*, no 7, comm. 207 (2007), with note by S. Hocquet-Berg.

⁶⁷ See Cour de cassation, chambre criminelle, 23 October 2012 no 5478, available at <https://tinyurl.com/y84wdzhr> (last visited 30 June 2018).

⁶⁸ See P. Ziviz, 'Riflessioni sulla perdita di chances di sopravvivenza' *Responsabilità civile e previdenza*, 393 (2014).

⁶⁹ See n 44 above.

some discontent with the resolution of the *Administration of Justice Act* 1982, which seriously diminishes the compensation relating to loss of life and overturns the doctrine in *Flint v Lovell*. An example of this comes from an important decision from 2014 of the English Court of Appeal (Civil Division) (*Kadir v Mistry and others*)⁷⁰. The Court of Appeal, having to decide the case of a woman who had died prematurely of a tumour that, through negligence, had been diagnosed late and consequently for which the treatment had been delayed, awarded compensation (in an amount that was not indicated) for the loss of expectation of life but denied compensation for pain and suffering, on the grounds that the victim would have suffered even in the event of a timely diagnosis and treatment. At the same time, the Court ruled that the prerequisite of the ‘awareness that his expectation of life has been so reduced’, provided for by the *Administration of Justice Act*, did not need to be proved on the basis of direct evidence but could be proved on the basis of circumstantial evidence.

Finally, there are many decisions at an international and European level that are openly favourable to the recoverability of damages for the loss of life per se.

Firstly, this happens, as has already been noted, in the Portuguese legal system. After a contrary ruling in 1969, where the judges simply granted compensation for pain and suffering from the moment of the injury until death,⁷¹ the *Supremo Tribunal de Justiça* made an award of damages and recognized the transferability of the claim *iure successionis* for the first time in its judgment of 17 March 1971,⁷² under Art 496 of the Portuguese Civil Code (1966).⁷³ In the past, the question raised many doubts among scholars but today the great majority of academic commentators agree with the doctrine held by the majority of the courts⁷⁴ and note that it is commendable because of its double social purpose both of the prevention and suppression of the spread of crime and of responding to a loss that deserves compensation at the private law level.⁷⁵ This is the right choice, given the fact that, when the injury causes the instantaneous death of the victim, it would be treated as more severe and therefore to result in compensation;⁷⁶ it is also the correct choice in the protection

⁷⁰ See Court of Appeal (Civil Division) *Kadir (Personal Representative of the Estate of Saleha Begum, Deceased) v Mistry & Ors*, 26 March 2014, All England Report (D) 247 (2014).

⁷¹ See Supremo Tribunal de Justiça, 12 February 1969, *Boletim do Ministério da Justiça* 184^o, 161.

⁷² See *Boletim do Ministério da Justiça* no 205, 150.

⁷³ The Article, ‘Danos não patrimoniais’, in the 1966 text, was amended by law 30 August 2010 no 23.

⁷⁴ More recently, see Supremo Tribunal de Justiça, 14 December 2016 7.^a Secção, available at <https://tinyurl.com/y85ok4k6> (last visited 30 June 2018).

⁷⁵ See D. Leite De Campos, ‘A Indemnização do Dano da Morte’ *Boletim da Faculdade de Direito de Coimbra*, 24 (1974).

⁷⁶ F.M. Pereira Coelho, *Direito das Sucessões* (Coimbra: 1992), 70, who adds that without this rule it would be better for the tortfeasor that the victim died instantly.

of rights by hierarchy. Loss of the right to life per se must be recoverable, since all legal sources consider the right to life as the most important of all rights.⁷⁷ More recently, in Portugal, compensation for the loss of life was expressly recognized under Art 2 of Decree no 377 of 26 May 2008, concerning the extrajudicial assessment of losses resulting from traffic accidents.⁷⁸

Secondly, at supranational level it is important to note the decisions of the European Court of human rights, which has many times awarded compensation for non-pecuniary damage deriving from the loss of the right to life per se, under Art 2 ECHR. However, this was not a general principle but was only applied to cases of violation perpetrated by the acceding State towards its citizens (ie so-called vertical relations, as in *Keenan v The UK*)⁷⁹ and excluded relationships between private parties (so-called horizontal relationships) because the Convention does not impose an obligation on the Contracting States to award compensation to victims for non-pecuniary losses.⁸⁰

Undoubtedly, these timid signs from some court decisions and the more vigorous ones from some legal scholars are only small cracks that, at present, are not enough to demolish the foundations of the wall that prevents damages being given for the loss of life per se. It is also premature to say if those cracks, without specific statutory measures, will widen and bring down the wall (at least partially, in some European areas). Certainly, the arguments regarding the exclusively compensatory purpose of tort law or the extinction of the capacity to have rights, even though they are far from trivial, should not be an obstacle, since, as a matter of method, the protection of life requires the traditional legal

⁷⁷ See A.G. Dias Pereira, 'Portuguese Tort Law: A Comparison with the Principles of European Tort Law', in H. Koziol and B.C. Steininger eds, *Tort and Insurance Law Yearbook* (Wien: Springer, 2004) 644.

⁷⁸ See H. Koziol and B.C. Steininger, *European Tort Law 2009* (Berlin: De Gruyter, 2010), 504. The provision was issued by the implementation of the 3rd Chapter of the 2nd *Decreto-Lei* 21 August 2007 no 291. The rule is entitled '*Danos indemnizáveis em caso de morte*' (Recoverable damages in case of death) and at (a) provides that, in the event of death, there has to be compensation for '*a violação do direito à vida e os danos morais dela decorrentes, nos termos do artigo 496.º do Código Civil*' (a violation of the Right to Life and of the resulting moral damages under art. 496 of the Civil Code).

⁷⁹ See Eur. Court H.R., *Keenan v The United Kingdom*, Judgment of 3 April 2001, available at <https://tinyurl.com/ya52y7ka> (last visited 30 June 2018). C. Van Dam, *European Tort Law* n 29 above, 170, notes that 'although the consequences for the States remain quite modest, this positive obligation to protect life is of increasing importance in the European Court's case law'.

⁸⁰ See Eur. Court H.R., *Zavoloka v Latvia*, Judgment of 7 July 2009, available at <https://tinyurl.com/yanwnk47> (last visited 30 June 2018). In the case, regarding the death of a twelve year-old girl from a road accident, the tortfeasor was ordered solely to provide reimbursement for the funeral costs of two thousand six hundred Euros. Hence, the court noted the lack of effectiveness of the right to the protection of life but was prevented from doing more by the impossibility of extending the rule in the *Keenan* case, since the Court stated that the Eur. Court H.R. does not impose on the States an obligation to grant compensation in favour of victims for non-pecuniary damage.

categories to be updated, and not the reverse.⁸¹ Finally, in the absence of any clear indication from the lawgiver on the matter of *quantum*, neither can the customary observation, stemming from Roman law,⁸² that 'human life is priceless', be an obstacle to recoverability. In fact, as per Lord Wright's words in the *Flint v Lovell* case,

it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all, because none would be adequate. The judge or jury must do the best they can, in the circumstances, in this case as in other cases'.

⁸¹ See G. Villanacci, n 21 above.

⁸² *Cum liberum corpus aestimationem non recipiat* (D. 9.1.3).

Will Formalities in the Digital Age: Some Comparative Remarks

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Abstract

The work proposes to examine current testamentary will formalities in light of the digital revolution that has swept through modern society these past decades. The analysis will concentrate on the extent to which each of the three forms of ordinary testamentary will governed by Italian law is compatible with new electronic and digital technologies. The topic is addressed from a comparative standpoint, commencing from reforms in some North American jurisdictions and the solutions adopted there to make the methods by which a testator forms his or her will more consistent with the prevailing socio-economic context.

I. Introduction: Will Formalities in the Digital Age

Italian succession law – governed by Book II of the Civil Code – is still, even today, one of the most markedly rigid and solemn areas of law, characteristics that make it incapable of adapting to continuous and sudden social, economic and cultural changes.¹ Succession upon death and in particular the law of testate succession² does not appear to date to have taken into account modern needs, requiring as it does rigid formalities for drafting a valid testamentary will.

The prescribed formalities for drafting a valid testamentary will³ in Italy

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¹ Cf S. Rodotà, 'Ipotesi sul diritto privato', in S. Rodotà ed, *Il diritto privato nella società moderna* (Bologna: il Mulino, 1971), 13; V. Ferrari, *Successione per testamento e trasformazioni sociali* (Milano: Comunità, 1972); and the partially different opinion of G. Zanchi, 'Percorsi del diritto ereditario attuale e prospettive di riforma del divieto dei patti successori' *Jus civile*, 700 (2013); S. Patti, 'Il testamento olografo nell'era digitale' *Rivista di diritto civile*, 992 (2014). See also V. Barba, 'I nuovi confini del diritto delle successioni, Editoriale' *Diritto delle successioni e della famiglia*, 341 (2015).

² The law on intestate and forced succession has undergone some significant changes, initially with the reform of family law through legge 19 May 1975 no 151 and more recently with the reform of filiation through legge 10 December 2012 no 219. Also of importance are the changes to rules governing actions for the restitution of gifts made by legge 14 May 2005 no 80 as well as the rules on family pacts introduced by 14 February 2006 no 55. See F. Padovini, 'Incapacità di disporre per testamento tra disciplina positiva e prospettive di riforma', in F. Volpe ed, *Testamento: fisiologia e patologie* (Napoli: Edizioni Scientifiche Italiane, 2015), 54.

³ On the subject, see A. Liserre, *Formalismo negoziale e testamento* (Milano: Giuffrè, 1966); M. Allara, *Il testamento* (Padova: CEDAM, 1936), 233; F. Santoro-Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 1997), 222; P. Rescigno, 'Ultime volontà e volontà della forma'

originate from Roman law. Specifically, the sources contain a definition of testamentary will implying solemnity and expressly envisaging the need for witnesses to the legal deed.⁴ In that era formalities were a means to strengthen protection because a testamentary will could transfer not only the decedent's entire estate but also power from the *pater familia*.⁵

Currently the rationale for rigorous formalities lies⁶ in the need to guarantee a clear and correct formation of the testator's will, which must be adequately thought through⁷ – achieving its effects only after the testator's death – and be free from outside interference and coercion. The formalities are also a means of ensuring that the testamentary will was actually made by the testator.

However, the testamentary will formalities – as set out in Arts 601-605 of the Civil Code – also act as a brake on adapting the rules to meet contemporary needs and consequently one of the essential requirements for achieving a modern succession law. In a context where technology now permeates every aspect of human life, the time has come to question whether the traditional techniques of drafting a testamentary will are compatible with the rapid spread and developments of information technology, including in the legal field.⁸

The study proposed in this work is therefore aimed at establishing whether

Vita notarile, 10 (1987); C. Cicala, 'Il formalismo testamentario. Il documento', in G. Bonilini ed, *Trattato di diritto delle successioni e delle donazioni*, II, *La successione testamentaria* (Milano: Giuffrè, 2009), 1253; P. Boero, 'Il testamento', in R. Calvo and G. Perlingieri eds, *Diritto delle successioni* (Napoli: Edizioni Scientifiche Italiane, 2014), II, 703.

⁴ See M. Amelotti, 'Testamento a), Diritto Romano' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLIV, 459. The solemnity of testate succession in Roman times mainly revolved around the essential requirements that there be witnesses, who in the *testamentum per aes et libram* – a form that was a feature of the entire classical age – were tasked with remembering and preserving the testamentary provisions since the testator's will was expressed in oral form and contained in a so-called *nuncupatio*, ie solemn declaration (ibid, 461). See also T. Rűfner, 'Testamentary Formalities in Roman Law', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, *Comparative Succession Law. Testamentary Formalities* (Oxford: Oxford University Press, 2011), 2-25.

⁵ Cf G. Accolla, 'Principi della successione a causa di morte', in G. Cassano and R. Zagami eds, *Manuale della successione testamentaria* (Santarcangelo di Romagna: Maggioli, 2010), 217.

⁶ For a more complete examination, see C. Cicala, n 3 above, 1255.

For an earlier reconstruction of the rationale of the formalities to safeguard the rights of intestate heirs as against outsiders that the testator may have sought to benefit, see G. Stolfi, *Teoria del negozio giuridico* (Padova: CEDAM, 1947), 172. See also P. Rescigno, *Interpretazione del testamento* (Napoli: Jovene, 1952), 202; Id, *Ultime volontà* n 3 above, 10. Since that view is based on the supremacy of intestate succession over testate succession, it is criticised by those who maintain that the rights of intestate heirs (or more precisely some of them) are rather protected by the rules on forced succession (see on this point A. Liserre, n 3 above, 112).

⁷ C. Gangi, *La successione testamentaria nel vigente diritto italiano* (Milano: Giuffrè, 1964), I, 101; F. Santoro Passarelli, *Dottrine generali del diritto civile* n 3 above, 222.

⁸ Cf F. Cristiani, 'Nuove tecnologie e testamento: presente e futuro' *Diritto dell'informazione e dell'informatica*, 559 (2013); Id, *Testamento e nuove tecnologie* (Torino: Giappichelli, 2012); P.M. Putti, 'Diritto e nuove tecnologie: il caso del formalismo negoziale' *Contratto e impresa*, 1229 (2014). For a more complete examination, see I. Sasso, 'Il formalismo testamentario nell'era digitale tra Stati Uniti e Italia' *Rassegna di diritto civile*, 186-228 (2018).

or not the statutory provisions governing the form that a testamentary will must take can be adapted to take into account modern techniques for drafting and electronically storing documents. The analysis will be conducted from a comparative standpoint and will start by examining developments in other legal systems, chief among which is North America (especially the State of Nevada, the only state that has enacted comprehensive legislation on this point). The second part of this work will focus on analysing the various forms of ordinary will permitted in the Italian legal system (public, secret and holographic). The objective is to propose a new interpretation in light of new social and technological developments.

Before tackling the substantive issues, it is worth making a clarification of a terminological nature so as to circumscribe the field of inquiry.⁹ The expression 'digital will' is often used by legal scholars to refer to indistinctly: *a*) problems in connection with transferring title upon death to so-called 'digital assets',¹⁰ covering all the information and interests that an individual generates as a result of his or her contact with digital devices (both online and offline); *b*) a testamentary will drawn up using technological and digital tools. This work concerns 'digital will' as per its second meaning, specifically, a document expressing an individual's last will and testament drawn up with the aid of computerised and electronic means, with the aim of assessing whether that would be compatible with the existing law on testamentary will formalities.

⁹ See also F. Cristiani, 'Nuove tecnologie e testamento: presente e futuro' n 8 above, 559.

¹⁰ On this particular subject, see U. Bechini, 'Password, credenziali e successione mortis causa' *Studio n. 6-2007/IG Consiglio Nazionale del Notariato*; M. Cinque, 'La successione nel patrimonio digitale; prime considerazioni' *Nuova giurisprudenza civile commentata*, 645 (2012); D. Corapi, 'Successione. La trasmissione ereditaria delle "nuove proprietà"' *Famiglia, persone, successioni*, 379 (2011); S. Deplano, 'La successione a causa di morte nel patrimonio digitale', in C. Perlingieri and L. Ruggeri eds, *Internet e diritto civile, Atti del Convegno di Camerino "Internet e diritto civile" 2014* (Napoli: Edizioni Scientifiche Italiane, 2015), 427; L. Di Lorenzo, 'Il legato di password' *Notariato*, 147 (2014); A. Magnani, 'L'eredità digitale' *Notariato*, 519 (2014); G. Resta, 'La "morte digitale"' *Diritto dell'informazione e dell'informatica*, 891 (2014); A. Zoppini, 'Le "nuove proprietà" nella trasmissione ereditaria della ricchezza (note a margine della teoria dei beni)' *Rivista di diritto civile*, 185 (2000); F. Gerbo, 'Dell'eredità informatica' *Diritto delle successioni e della famiglia*, 303 (2017). In the common law scenario, see M.D. Rasch, 'A Corporal's Death Starts a Dispute on E-Mail Ownership. Should e-mail accounts perish along with their owners? A military death generates a dispute over electronic rights and IP' *IP Law & Business*, 23 March 2005; S.D. Haworth, 'Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act' *Miami Law Review*, 535 (2014); G.W. Beyer and N. Cahn, 'When You Pass on, Don't Leave The Passwords Behind' 26 *Probate & Property*, 40 (2012); G.W. Beyer and N. Cahn, 'Digital Planning: the Future of Elder Law' 9 *Naela Journal*, 135 (2013); J.P. Hopkins, 'Afterlife in the Cloud: Managing a Digital Estate' *Hastings Science and Technology Law Journal*, 209 (2013); J.D. Lamm, C.L. Kunz, D.A. Riehl and P.J. Rademacher, 'The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing digital property' 68 *University of Miami Law Review*, 388 (2013-2014); N.M. Banta, 'Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death' 83 *Fordham Law Review*, 826 (2014). See also the solutions proposed by Facebook (see <https://tinyurl.com/y9fv7jbn> (last visited 30 June 2018), on the so-called Legacy contact) or by Google (see <https://tinyurl.com/16mqpkz> (last visited 30 June 2018), on the *Inactive Account Manager* system).

II. A Comparative Approach: Different Rules, Common Principles?

The Italian legal system does not have any comprehensive legislation on how to draw up a digital will. The sole legislative provisions in the matter, at least as regards the drawing up of a public will, are the Digital Administration Code (decreto legislativo 5 March 2005 no 82) and decreto legislativo 2 July 2010 no 110, limited to stating that a public deed can be drawn up in digital form with a qualified electronic signature or a digital signature.¹¹

An analysis of the laws of other legal systems reveals that to date only a small number of jurisdictions have actually tackled the issue.

Even in the common law tradition – by its nature more receptive to endorsing the freedom of expression of individuals – there is significant resistance to adopting more flexible means of drawing up testamentary wills.¹²

Indeed, like in Italy, the legislative picture in North America – bearing in mind that there are slight differences from state to state – is one that requires compliance with rigid formalities in testate succession in order for a testator's will to be valid. Such formalities are warranted by the need to avoid fraudulent interference by third parties in the drawing up of a testamentary will to preserve and verify the testator's intent and ensure that adequate thought has been given in choosing who gets what. The written form is moreover a means that lends itself to proof of the authenticity and authorship of the testamentary will in legal proceedings.¹³

¹¹ Cf G. Navone, *Instrumentum digitale. Teoria e disciplina del documento digitale* (Milano: Giuffrè, 2012), 185; G. Arcella et al, *L'atto notarile informatico: riflessioni sul d.lgs. 110/2010 profili sostanziali e aspetti operativi* (Milano: Gruppo24Ore, 2011); G. Petrelli, 'Atto notarile informatico' *Notariato*, 363 (2011); G. La Marca, 'La sicurezza dell'atto notarile informatico', in P. Sirena ed, *L'atto pubblico notarile come strumento di tutela nella società dell'informazione* (Milano: Gruppo24Ore, 2013), 103; M. Ceolin and F. Crivellari, 'L'atto pubblico informatico: note a margine del d. lgs. 2 luglio 2010, n. 110' *Studium iuris*, 903 (2011); M. Mirrione, 'L'atto notarile informatico' *Contratti*, 731 (2011); Id, 'Profili conservativi dell'atto notarile informatico', in P. Sirena ed, n 11 above, 147; M. Nastri, 'Le opportunità dell'atto pubblico informatico' *Notariato*, 566 (2010); M. Miccoli, 'L'informatizzazione del notariato: un valore per la pubblica funzione' *Notariato*, 492 (2015).

¹² M. Grondona, 'Il testamento filmato negli Stati Uniti', in P. Sirena et al, *Tradizione e modernità del diritto ereditario nella prassi notarile, Atti dei Convegni Roma, 18 marzo 2016 - Genova, 27 maggio 2016 Vicenza, 1 luglio 2016* (Milano: Gruppo24Ore, 2016), 228. See, *infra*, paras 1 and 2.

¹³ B.H. Mann, 'Formalities and Formalism in the Uniform Probate Code' 142 *University of Pennsylvania Law Review*, 1033 (1994); G.W. Beyer and C.G. Hargrove, 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?' 33 *Ohio Northern University Law Review*, 875 (2007); S.S. Bodderly, 'Electronic Wills. Drawing a Line in the Sand against their Validity' 47 *Real Property Trust & Estate Law Journal*, 208 (2013); J.K. Grant, 'Shattering and Moving beyond the Gutenberg Paradigm: The Dawn of Electronic Will' 42 *University of Michigan Journal of Law Reform*, 120 (2008-2009); J. Banks, 'Turning a Won't into a Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas' 8 *Estate Planning and Community Property Law Journal*, 295 (2015); in particular see also G. Gulliver and C.J. Tilson, 'Classification of Gratuitous Transfer' 51 *Yale Law Journal*, 1 (1941):

A rapid analysis of the American rules on testamentary formalities – conducted without any pretence as to completeness and well aware of the different legal traditions – shows that the written form constitutes the minimum requirement for the validity of a testamentary will.¹⁴ Also necessary is signature by the testator and attestation of the will by at least two witnesses. Those formalities are hierarchical in the sense that the highest ranking indispensable one is the requirement as to written form.¹⁵

Even this cursory analysis is sufficient to reveal a uniform intent and purpose that informs the rationale of the law in this field. That suggests that we cast an eye over the relevant legislation to investigate the reactions that it has generated as regards its application and interpretation.

1. The Nevada Electronic Wills Statute: Rules and Applicative Implications

In 2001, the State of Nevada introduced the first comprehensive regulation of electronic wills in § 133.085 of the Nevada Revised Statutes.¹⁶

The Nevada Electronic Wills Statute provides that an electronic will must be written, created or stored on an electronic record (but does not provide any further indications as to the type of record thereby leaving ample room for the choice in that regard).¹⁷ An electronic will must be dated, signed by the testator and contain at least one authentication characteristic unique to the testator¹⁸ (a characteristic that is capable of measurement and recognition in an electronic record like a digitized signature, voice recognition, fingerprint or even a retinal scan).¹⁹ Moreover, the document must be generated in a way so that only one

they identify four functions of will formalities: a) Ritual Function; b) Evidentiary Function; c) Protective Function; d) Channelling Function.

¹⁴ Except in rare cases where a so-called *nuncupative will* is allowed, ie a will delivered orally in a speech by the testator in the presence of two or three witnesses. That form is valid solely where resorted to by the terminally ill, soldiers or sailors (the latter even if their life is not in imminent danger). See G.W. Beyer and C.G. Hargrove, n 13 above, 873.

¹⁵ B.H. Mann, n 13 above, 1040: ‘There has always been a hierarchy of formalities, which courts refuse to admit. Writing, for example, is indispensable. The testator’s signature is also essential, but courts sometimes fudge what they will accept as a signature and where on the document it may appear’; see also J.H. Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ 87 *Columbia Law Review*, 1 (1987).

¹⁶ *Nevada Electronic Wills Statute, Nevada Revised Statutes*, § 133.085, available at <https://tinyurl.com/ycqlw6oq> (last visited 30 June 2018).

¹⁷ Cf G.W. Beyer and C.G. Hargrove, n 13 above, 887: ‘The Nevada electronic wills statute requires that a testator’s electronic will must be ‘written, created and stored in an electronic record’. (...) Under the Nevada statute, the electronic will must contain the date and the testator’s electronic signature’.

¹⁸ *Nevada Revised Statutes*, § 133.085(1)(b): ‘An electronic will is a will of a testator that (...) contains (...) at least one authentication characteristic of the testator’.

¹⁹ Cf *Nevada Revised Statute*, § 133.085(6)(a): ‘“Authentication characteristic” means a characteristic of a certain person that is unique to that person and that is capable of measurement

authoritative copy can exist, which is maintained and controlled by the testator or a custodian designated by the testator.²⁰

This legislative development occurred in a legal system that like the Italian one is characterised by very rigid regulation from the standpoint of formalities for testamentary wills. Therefore, it is worth examining the reaction of legal scholars and courts in the US to the changes, and more generally the relationship between will formalities and the advent of new information technologies.²¹ The analysis, in fact, could be useful to identify common solutions to similar problems.

Despite the fact that the North American legal tradition is more susceptible to embracing legislative changes that are an expression of the individual's freedom of self-determination, legal scholars have exhibited great reluctance and fear in considering an e-will as a new form of testamentary will.

The technical limits to the electronic will is the first important obstacle to its legal recognition. Indeed, an e-will requires the testator to procure the appropriate technical tools needed to ensure compliance with the conditions for validity of the document (as prescribed by the Nevada Revised Statute), like the procedure for identification of the testator, which entails having to foot the bill for the purchase of the electronic record and its ensuing maintenance and storage. Moreover, the solution adopted by Nevada law is a useful substitute for the paper document on the basis of the current state of development of technology, but it could well become obsolete in a short span of time due to rapid and ongoing advances in IT.²² Those considerations have led to a positive reassessment of paper, which despite its limits would appear to be more enduring than the digital surrogate where the electronic document is stored.

Moreover, although the Nevada Electronic Wills Statute is very detailed in describing how to write the testamentary will, it is not equally scrupulous in specifying what software is reliable and suited to complying with the legislative provisions.²³ The greatest obstacle is the difficulty in creating a device apt to guarantee the existence of only one authoritative copy of the electronic will that can be differentiated from any further copies that might be produced, as required by NRS 133.085(1)(c). That result would appear to be far from achievable since a computer is capable of generating identical copies.²⁴

and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person'.

²⁰ *Nevada Revised Statutes*, § 133.085(1)(c): 'An electronic will is a will of a testator that: (...) (c) Is created and stored in such a manner that: (1) Only one authoritative copy exists; (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will'.

²¹ See M. Grondona, n 12 above, 228.

²² G.W. Beyer and C.G. Hargrove, n 13 above, 893; J. Banks, n 13 above, 301.

²³ G.W. Beyer and C.G. Hargrove, n 13 above, 890; J. Banks, n 13 above, 301.

²⁴ G.W. Beyer and C.G. Hargrove, n 13 above, 891: 'The remaining barrier to full

Digital technology also exhibits many risks from the standpoint of the security and secrecy of the testamentary will: '(n)o online system is completely immune from third-party intrusion'.²⁵ It follows that the storage of the will on digital media, although protected, is susceptible to alteration and tampering due to unlawful intrusion by third parties. And that risk cannot be totally ruled out despite the increasing availability of secure devices.

2. Proposed Alternative Solutions

Although North American legal scholars acknowledge the need to update succession law in light of incessant technological developments,²⁶ they still express serious misgivings about e-wills and raise numerous doubts concerning their application.²⁷

Therefore, alternative solutions have been proposed consistent with principles already enshrined in the legal system and with a view to protecting and safeguarding the will of the decedent. In that way the issue of introducing comprehensive legislation on digital wills has been subsumed into the wider trend of reinterpreting the rules of succession law in accordance with the principle of giving maximum effect to testamentary intent when it is unequivocally that of its author. That trend,²⁸ which started to develop in the 1960s in order to

implementation of Nevada's electronic wills statute is development of software that will ensure that there is only one authoritative copy of the will and that any copies and/or changes to the original are readily identifiable'. The risk is also detected by M. Natri, 'La conservazione del documento informatico', in M. Orlandi et al, *L'atto notarile informatico: riflessioni sul D.lgs. 110/2010 profili sostanziali e aspetti operativi* (Milano: Gruppo24Ore, 2011), available at <https://tinyurl.com/yc2e7zyt> (last visited 30 June 2018), 9.

²⁵ S.S. Boddery, n 13 above, 207.

²⁶ Awareness that lawmakers in the US have, but have not acted upon – except in the case of Nevada – in enacting comprehensive rules. Emblematic of that reluctance is the recent attempt by Florida to adopt its own Electronic Wills Act, legislation that was unanimously approved by the Senate but vetoed by the Governor R. Scott arguing that although the bill was surely innovative it failed to strike a proper balance between competing concerns: for example, remote notarisation does not adequately ensure the authentication of the identity of the parties to the transaction. The Governor also expressed misgivings about remote witnessing of the will.

²⁷ G.W. Beyer and C.G. Hargrove, n 13 above, 900: 'The current fragility of the electronic storage medium, and the rapid development and lack of standardization of computer systems makes the concept of an electronic will a risky enterprise. Based on the current technological environment, a paper will is still *the best option available*. Nonetheless, we must be ready to make the transition when the time is right' (italics added); S.S. Boddery, n 13 above, 211: 'The cost-benefit analysis of amending existing probate codes to adopt purely electronic wills demonstrates that the conveniences of the medium are not worth the gamble of exposing a testator's estate disposition to the unforeseen fraudulent activity accompanying the digital age'.

²⁸ On this point, see J.H. Langbein, 'Substantial Compliance with the Wills Act' 88 *Harvard Law Review*, 489 (1975); Id, n 15 above, 1. In his first work the author suggested that reliance on the criterion of 'substantial compliance' of the testamentary will with the testator's intent can overcome formal shortcomings. This criterion was subsequently superseded by the concept of so-called 'harmless error', ie error of such minor importance as to not invalidate the entire document. This concept then found its way into Section 2-503 of the Uniform Probate Code; see in the text and n 29 below. In that regard see also G.Y. Gürer, 'No Paper? No

facilitate the free expression of the testamentary intent of the decedent, led in the 1990s to the introduction of a provision headed ‘harmless error’ (Section 2-503) in the Uniform Probate Code.²⁹ That provision treats a testamentary will not written in perfect compliance with the formal requirements of the relevant state as valid if there is clear and convincing evidence that the document constitutes the decedent’s testamentary will, an addition thereto or revocation thereof (even if partial).

The rationale of the provision, which to date has been adopted in the statutes of nine US states,³⁰ is the need to guarantee that the testator’s will, if authentic, is effectively carried out after his or her death despite the commission of some formal errors writing the testamentary will. That section of the Uniform Probate Code strikes a fair balance between observance of will formalities (designed to protect the testator against any outside interference) and protection of the testator’s testamentary intent.³¹

Problem: Ushering in Electronic Wills Through California’s “Harmless Error” Provision’ 49 *University of California Davis Law Review*, 1955 (2016).

²⁹ *Uniform Probate Code*, Section 2-503: ‘Harmless Error: Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

(1) the decedent’s will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will’, available at <https://tinyurl.com/y7e6zjxj> (last visited 30 June 2018).

³⁰ See for example Section 6110(c)(2), *California Probate Code*: ‘If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will’; para 3B:3.2, *New Jersey Revised Statute*: ‘a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be: (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and at the testator’s direction; and (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgment of the will.

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

c. Intent that the document constitutes the testator’s will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator’s handwriting’; para 29A-2-503, *South Dakota Codified Laws*: ‘Although a document or writing added upon a document was not executed in compliance with § 29A-2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent’s will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of a formerly revoked will or of a formerly revoked portion of the will’.

³¹ G.Y. Güner, n 28 above, 1967. See also M. Glover, ‘The Therapeutic Function of Testamentary Formality’ 61 *University of Kansas Law Review*, 139 (2012).

Reliance on the doctrine of harmless error has lessened the necessity for detailed rules on digital wills because the doctrine enables testamentary wills that do not comply with formal requirements to be treated as valid, including wills written electronically.

Emblematic in this regard is the case of *Taylor v Holt*³² decided by the Tennessee Court of Appeals, in which it was held that a testamentary will drawn up on a personal computer and electronically signed³³ by the testator was valid. Some authors interpreted the decision as the first clear signal of the recognition and validity of a digital will³⁴ while however neglecting an important fact in the case:³⁵ two witnesses testified that the testator voluntarily, lawfully and electronically signed the document and those same witnesses proceeded to sign a printout of the will. In light of those further circumstances the case in question has been downgraded to a mere application of the harmless error provision,³⁶ which US courts often rely on.³⁷

3. Comparative Law. Overview of Provisions in the Spanish, Brazilian and German Legal Systems

The tendency to opt for form over substance is not an exclusively US trait.

However, in some cases that trend has not taken the form of an actual legislative provision but rather judicial precedent. This is the case in Spain³⁸ where Art 687 of the Civil Code unequivocally provides that a testamentary will that does not adhere to the formalities prescribed by law is null and void. That said, the courts (even if mainly in cases concerning notarised wills and not holographic wills) have often saved the (genuine) intent of the testator by drawing a distinction between void and voidable documents or again between form and

³² *Taylor*, 134 S.W.3d, 830.

³³ The electronic signature in the case in question would not comply with what is required by the Italian Digital Administration Code. Specifically, the electronic signature consisted of the testator affixing a computer-generated signature using stylized font to the document without any further formalities.

³⁴ Cf J.W. Martin, 'I Want to Sign an Electronic Will' *Practical Lawyer*, 61, 63 (2009).

³⁵ S.S. Boddery, n 13 above, 203.

³⁶ On this point see also the South African case of *McDonald v The Master*, 2002(5) SA64(N) (S.Afr.). Section 2(1)(a) of the Wills Act of 1953 provides that a testamentary will is valid if in writing, signed in the presence of two or more witnesses and initialled by the testator on each page. In the *McDonald* case, despite the fact that the testamentary will was in a file on a personal computer, the Court held it was valid because section 2(3) of the Wills Act provides that if a court is satisfied that a document was intended to be the testator's true will, it can hold it to be a valid testamentary will even though it does not comply with all of the formalities for executing a testamentary will. For a more in-depth analysis see S.S. Boddery, n 13 above, 204.

³⁷ See *Re Estate of Hall*, 51 P.3d 1134 (Montana, 2002); cf S.S. Boddery, n 13 above, 203, fn 42.

³⁸ See S. Camara Lapuente, 'Testamentary Formalities in Spain', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 91-93.

formalities depending on how grave the error as to form is.³⁹

A similar trend has developed in Brazil.⁴⁰ Despite the fact that a failure to comply with prescribed formalities for writing a testamentary will entails the nullity of the will,⁴¹ the courts have demonstrated a notable willingness to recognise the validity of a will that is defective as regards formalities but that expresses the testator's definite and real intent. The courts have often ruled that testamentary wills affected by minor, and even at times significant, formal errors are valid if the courts are satisfied that the intent expressed in the will is genuine.

Brazilian law is also more open to the use of mechanical means for the writing of testamentary wills: currently the Brazilian Civil Code, as amended in 2002, expressly provides that not only public⁴² but also holographic⁴³ wills may be typed. Indeed, before the 2002 reforms, the courts had also ruled that testamentary wills that had been typed (even if just in part) were valid,⁴⁴ thereby displaying a certain flexibility in assessing compliance with formal requirements. That solution is even more surprising in a legal system devoid of the judicial creativity that one associates with the common law and in which the courts are often criticised for an overly rigid and formal interpretation of the law.⁴⁵

A reluctance to override testamentary formalities was also expressed in Germany⁴⁶ when a proposal was made – in an attempt to reconsider § 2247 BGB on holographic wills⁴⁷ – to eliminate the requirement that such a will could only be handwritten so as to encompass also typed or digital documents (including those drawn up with the assistance of third parties). The proposal was viewed with misgivings, like all those put forward to adapt will formalities

³⁹ Cf STS 11 December 2009.

⁴⁰ See J. Peter Schmidt, 'Testamentary Formalities in Latin America with Particular Reference to Brazil', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 117-119.

⁴¹ See Art 166 IV Civil Code/2002: '*É nulo o negócio jurídico quando: (...) IV - não revestir a forma prescrita em lei*' (The legal transaction is null and void when: (...) IV - does not take the form prescribed by law).

⁴² Cf Art 1864, Parágrafo único, Civil Code/2002. The notary also has to read the will before the witnesses and the testator; at last, the will is signed by the testator, the witnesses and the notary himself.

⁴³ Cf Art 1876 '*Do testamento Particular*': '*O testamento particular pode ser escrito de próprio punho ou mediante processo mecânico*' (The holographic will can be handwritten or written by mechanical means). The holographic will is also read aloud by the testator to three witnesses and signed by everyone; neither indication of date, nor subscription on every page is required.

⁴⁴ See Tribunal de Justiça do Paraná, 8 March 1983, JB 81, Testamento, 171.

⁴⁵ J. Peter Schmidt, *Zivilrechtskodifikation in Brasilien: Strukturfragen und Regelungsprobleme in historisch-vergleichender Perspektive* (Heidelberg: Mohr Siebeck, 2009); Id, 'Testamentary Formalities in Latin America with Particular Reference to Brazil' n 40 above, 117.

⁴⁶ See R. Zimmermann, 'Testamentary Formalities in Germany', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 176-220, 205.

⁴⁷ Proposal made by B. Görgens, 'Überlegungen zur Weiterentwicklung des § 2247 BGB (Eigenhändiges Testament)' *Juristische Rundschau*, 357 (1979).

to the digital age.⁴⁸ Nonetheless, problems in applying the law are resolved by relying on the reasonable assessment of the courts, which over the years have gradually displayed more flexibility⁴⁹ in evaluating formalities with a view to giving effect to the genuine intent of the testator.⁵⁰

On the contrary, Italian case law still exhibits a certain rigidity in assessing compliance with testamentary will formalities. However, Art 590 of the Italian Civil Code contains a general provision apt to remedy an invalid will inasmuch as that article provides that the nullity of testamentary provisions cannot be invoked by whoever confirmed the provision or voluntarily gave effect to it despite being aware of the cause of nullity.⁵¹ Legal scholars have extended that estoppel-like concept of ‘confirmation’ to any grounds for nullity of a will and hence also formal defects. Therefore, Art 590 could be used to uphold also a testamentary will drawn up using electronic or digital means.

With specific reference to the latter case, legal scholars have recently shown a more open mind. While there continues to be significant misgivings about confirming an oral will because the testator’s testamentary intent expressed orally cannot be considered as legally existing,⁵² that conclusion changes when

⁴⁸ F. Hartmann, *Moderne Kommunikationsmittel im Zivilrecht* (Hamburg: Kovač, 2006), 217.

⁴⁹ The law on holographic wills has changed over time in any case. The initial wording of § 2231-2 BGB, required not only that the document be handwritten and signed but that the date and place that it was written be specified. The current wording of § 2247 BGB does not include any obligation to specify the date and place that the will was written and furthermore provides greater flexibility regarding signature, which does not necessarily have to consist of the testator’s name and surname but may also be achieved in a different way.

⁵⁰ See R. Zimmermann, ‘Testamentary Formalities in Germany’, in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 191, 205.

⁵¹ On the legal nature of ‘confirmation’, see G. Giacobbe, ‘Convalida’ *Enciclopedia del diritto* (Milano: Giuffrè, 1962), I, 497; C.M. Bianca, *Diritto civile, 2, La famiglia e le successioni* (Milano: Giuffrè, 2011), 734; C. Gangi, *Le successioni testamentarie* (Milano: Giuffrè, 1952), 272; G. Oppo, *Adempimento e liberalità* (Milano: Giuffrè, 1947), 367; F. Gazzoni, ‘La giustificazione causale del negozio attributivo di conferma’ *Rivista di diritto civile*, 269 (1973); M. Labriola, ‘La conferma del testamento nullo: vizi formali e vizi sostanziali’, in F. Volpe ed, *Testamento: fisiologia e patologie* n 2 above, 70; see also S. Landini, *Le invalidità del negozio testamentario* (Napoli: Edizioni Scientifiche Italiane, 2012).

⁵² See F. Santoro-Passarelli, *Dottrine generali del diritto civile* n 3 above, 243; C. Gangi, *Le successioni testamentarie* n 51 above, 275; M. Labriola, n 51 above, 74. *Contra*, some authors believe that the oral will can be confirmed because the defect is merely formal; see C. Giannattasio, ‘Delle successioni: successioni testamentarie (artt. 587-712)’ *Commentario del codice civile* (Torino: UTET, 1978), II, 42; L. Bigliazzi Geri, ‘Il testamento’, in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1982), 185. See also Corte d’Appello Napoli 3 May 1989, *Diritto e giurisprudenza*, 407 (1989), with note by C. Venditti, ‘Un caso controverso di disposizione testamentaria orale eseguita volontariamente ai sensi dell’art. 590 c.c.’; Tribunale di Belluno 22 December 1997, *Diritto di famiglia e delle persone*, 1110 (2000); Tribunale di Napoli 30 June 2009, *Giurisprudenza di merito*, 3001 (2010); Corte di Cassazione 11 July 1996 no 6313, *Notariato*, 509 (1996), with note by G. Celeste, ‘Conferma del testamento e efficacia dell’atto pubblico: il punto’; and *Rivista del notariato*, 163 (1997), with note by L. Scalia, ‘Confermabilità del testamento orale: prova della volontà del *de cuius*, certezza dei rapporti e funzione notarile. Alcune riflessioni sul tema’.

the decedent's will is expressed through a videocassette or other electronic or digital media. In that case there is a direct and unequivocal link with the testator.⁵³

However, Art 590 is not an efficient solution to the problem of excessive rigidity when it comes to will formalities. Estoppel-like confirmation is a legal concept that leaves it up to the heirs (whether in testate or intestate succession) and legatees to decide whether or not to save the formally invalid will.⁵⁴ Therefore, while this solution enables rigid will formalities to be mitigated, it risks not giving actual effect to the testator's intent because the decision in that regard would lie with the decedent's successors, who at times could have an interest different to or even at odds with the testator's intent, and with an impartial third party like a judge.

III. Notarised Wills

After having assessed the solutions adopted in other legal systems to mitigate the rigidity of will formalities, it is necessary to now dwell on the rules governing the forms that a testamentary will has to take in Italy with a view to assessing how relevant those forms are to modern needs and proposing possible reforms going forward.

Among the various forms of ordinary wills, the Italian legal system envisages two types drawn up with input from a public official: public wills and secret wills.

A public will (regulated by Art 603 of the Civil Code)⁵⁵ is entirely drawn up by the notary in the presence of two witnesses and signed not only by the testator but also by the witnesses and the public official. A secret will (regulated by Arts 604⁵⁶ and 605 of the Civil Code) consists of two indispensable elements:

⁵³ See M. Labriola, n 51 above, 77; D. Fiorda, 'Il testamento su videocassetta: libere considerazioni su un futuro ormai alle porte' *Vita notarile*, XXXIV (1995).

⁵⁴ Cf G. Pasetti, *La sanatoria per conferma del testamento e della donazione* (Padova: CEDAM, 1953).

⁵⁵ Art 603 of the Italian Civil Code states that: 'A public will is received by a notary in the presence of two witnesses.

The testator, in the presence of the witnesses, declares his intention to the notary and it is reduced to writing by or under the supervision of that notary. He reads the will to the testator in the presence of the witnesses. Mention is made of each of such formalities in the will.

The will shall indicate the place, the date of reception and time of subscription and be subscribed by the testator, the witnesses and the notary. If the testator cannot subscribe or can only do so with great difficulty, he shall declare the reason, and the notary shall mention this declaration before reading the instrument.

For the will of a dumb or deaf person the rules established by the law governing notaries for public acts of such persons are observed. When the testator is unable to read, four witnesses shall be present'. See J.H. Merryman et al, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 2010).

⁵⁶ Art 604 of the Italian Civil Code states: 'A secret will can be written by the testator or a third person. If it is written by the testator, it shall be subscribed by him at the end of the provisions; if it is written in whole or in part by others, or if it is written by mechanical means, it shall also bear the subscription of the testator on each page, whether attached or separate.

the actual will itself drawn up by the testator or a third party and a subsequent deed of receipt drawn up by the notary.

1. The Advent of Electronic Public Deeds and the Applicability of the Rules to Public Wills

Decreto legislativo 2 July 2010 no 110 introduced the concept of electronic public deed into the Italian legal system, thereby making significant changes to notarial law.⁵⁷ In essence, the legislation made electronic notarial deeds equivalent to notarial deeds on paper.⁵⁸ The new Art 47-*bis*, para 1, of legge 16 February 1913 no 89, as amended in 2010, expressly states that ‘the provisions of this law and implementing regulations shall apply to the public deed referred to in Art 2700 of the Civil Code drawn up electronically’.

A feature of a digital notarial deed is how it completely differs from a paper one as regards both its creation and its subsequent sending and conservation. An electronic public deed must be signed *personally* by the parties (as well as the witnesses and interpreters, if any) by digital or electronic signature, including through an electronic handwritten signature, while the notary must use his or

A testator who knows how to read but not to write or was not able to add his subscription when he had the provisions written, shall declare to the notary who receives the will that he read it and add the reason that prevented him to subscribing to it; mention is made of this in the act of reception.

One who cannot or does not know how to read cannot make a secret will’. See J.H. Merryman et al, *The Italian Civil Code and Complementary Legislation*, n 55 above.

⁵⁷ On the electronic public deed, see F. Delfini et al, *Atto pubblico informatico, Commentario ai d.lgs. 110/2010 e 235/2010* (Torino: UTET, 2011); G. Navone, n 11 above, 185; F. Delfini, ‘Documento informatico e firme elettroniche’, in D. Valentino ed, *Manuale di diritto dell’informatica* (Napoli: Edizioni Scientifiche Italiane, 2014), 191; P. Sirena ed, *L’atto pubblico notarile* n 11 above, *passim*; M. Mirrione, n 11 above, 731; M. Nastri, n 11 above, 566; M. Miccoli, n 11 above, 724.

⁵⁸ Before decreto legislativo 2 July 2010 no 110, legal scholars debated whether an electronic public deed drawn up by a notary was actually possible in the absence of an express legislative provision to that effect. The majority of scholars were of the opinion that there could be no digital public deed since it was impossible to reconcile the provisions of the then Notaries Law with the electronic drawing up of a document (see G. Finocchiaro, *Firma digitale e firme elettroniche* (Milano: Giuffrè, 2003), 128; S. Tondo, ‘Formalismo negoziale tra vecchie e nuove tecniche’ *Rivista del notariato*, 967 (1999); Id, in S. Tondo et al, ‘Il documento’ *Trattato di diritto civile CNN*, directed by P. Perlingieri, (Napoli: Edizioni Scientifiche Italiane, 2003), IX, 506; V. Moscarini, ‘Formalismo negoziale e documento informatico’, in C. Castronovo et al, *Studi in onore di Pietro Rescigno, V, Responsabilità civile e tutela dei diritti* (Milano: Giuffrè, 1998), 1066). On the contrary, a number of authors maintained that even before the issuing of the said legislative decree, digital public deeds were actually possible under then existing law. In this sense G. Petrelli, ‘Documento informatico, contratto in forma elettronica e atto notarile’ *Notariato*, 583 (1997); see also G. La Marca, ‘L’atto pubblico notarile in forma digitale. Attualità e prospettive normative dell’ordinamento pubblico italiano’ *Diritto dell’informazione e dell’informatica*, 804 (2009); M.C. Andrini, ‘Dal Tabellone al sigillo elettronico’ *Vita notarile*, 1798 (1998); Id, ‘Forma contrattuale, formalismo negoziale e documentazione informatica’ *Contratto e impresa/Europa*, 201 (2001). For a more complete examination on the theme, see F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 34.

her digital signature⁵⁹ issued by the National Council of Notaries pursuant to Art 23-*bis* of the Notaries Law.⁶⁰ The option for the parties to sign using an electronic handwritten signature⁶¹ can be explained by the desire of lawmakers to facilitate computerised procedures also for persons who do not have advanced electronic or digital signature certificates.

The fact that a will drawn up by a public official constitutes a public deed⁶² has led some to assert, rather simplistically, in the wake of the 2010 reform that a testamentary will can take the form of an electronic public deed.⁶³ From a purely legal standpoint that assertion is true, but a closer look at practice reveals that there are still many misgivings when it comes to practical application.

2. Practical Problems: The Remote Drafting of an Electronic Public Will and Its Conservation

The actual wording of Art 52-*bis* of the Notaries Law – which requires the parties to personally sign *in the presence* of the notary – leads one to suppose that the changes made by decreto legislativo 2 July 2010 no 110 were of a merely formal nature. It did not seem that the legislation was of any practical utility because it did not allow the true potential of the digital revolution to be exploited, especially all of the opportunities to overcome spatial barriers (through the remote drawing up of an electronic public deed without the need to be

⁵⁹ Cf Art 52-*bis* legge 89 of 1913.

⁶⁰ For a detailed examination of the procedure, see L. Domenici, 'L'atto pubblico informatico e la sua conservazione a norma', available at <https://tinyurl.com/ybkaap6y> (last visited 30 June 2018), 2; P. Pellicanò, 'Commento all'art. 47-bis l. not.', in Id et al, *Atto pubblico informatico, Commentario ai d.lgs. 110/2010 e 235/2010* (Torino: UTET, 2011), 34; V. Tagliaferri, 'Commento all'art 52-bis l. not.', *ibid.*, 53.

⁶¹ An electronic handwritten signature can be affixed in two different ways: either through scanning a handwritten signature on a sheet of paper – a method that scholars on notarial law strongly caution against since it offers less certainty that the signature is actually that of the stated person – or through signing an electronic document using a tablet or touch screen device equipped with a pen. On this point see L. Domenici, n 60 above, 9. More recently, a so-called 'graphometric signature' has been devised, which is equated with an advanced electronic signature and can be handwritten by the signatory on an electronic signature pad using a special pen and whose software enables a series of biometric features of the signature to be recorded like the graphics of the signature, pressure, speed, acceleration etc., that make it possible to establish the signature's authenticity and link to the signatory in the case of a dispute. Naturally, the use of such devices and other electronic handwritten signature mechanisms is allowed and indeed encouraged provided that the whole process takes place before the public official, whose function as guarantor prevents – at least in theory – outside interference.

⁶² On the legal nature of the public will, see G. Branca, 'Dei testamenti ordinari, Artt. 601-608', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna- Roma: Zanichelli, 1986), 115; V. Tagliaferri, 'Il Testamento pubblico', in G. Bonilini ed, *Trattato di diritto delle successioni e donazioni* n 3 above, 1324; G. Capozzi, *Successioni e donazioni* (Milano: Giuffrè, 3rd ed, 2009), I, 848.

⁶³ See F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 62; G. Navone, n 11 above, 187, fn 103.

physically present before the public official).⁶⁴ This is for two reasons: firstly, the clear incompatibility with some provisions of the Notaries Law and, secondly, less certainty associated with remotely ascertaining the will of parties who could easily be subject to external influence.

The problem would now seem to have been resolved thanks to the introduction of *iStumentum*,⁶⁵ software developed by Notartel⁶⁶ (a company owned by the National Council of Notaries) that facilitates the remote conclusion of contracts by allowing the parties to appear before various public officials that jointly arrange for the drawing up of the deed. However, the physical presence of the parties before a notary (or to be more precise, the notaries) is indispensable.⁶⁷ Therefore, the openness towards remotely concluding deeds loses all of its sense as regards a public will, which is by its very nature a unilateral act because in that case the testator is still obliged to appear before a public official in order to express his or her testamentary wishes.

Another obstacle is Art 47 of the Notaries Law, which requires the notary to receive the deed in the presence of the parties, to inquire as to their intent and to complete the deed in full under his or her direction. This provision is designed to ensure that the intent expressed by the party in the legal deed corresponds to his or her true and free will.⁶⁸ Moreover, the presence of the public official guarantees that the testator's will is free from external pressure and influence and that the testator's wishes have been correctly translated into legal language.

The pursuit of those objectives without the presence of the public official would seem to be arduous to achieve because of the difficulty of locating means

⁶⁴ See F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 38; see also C. Sandei, 'L'atto pubblico elettronico' *Nuove leggi civili commentate*, 472 (2011); L. Domenici, n 60 above, 9; P. Pellicanò, n 60 above, 36; M. Natri, *Le opportunità dell'atto pubblico informatico* n 11 above, 568, who also points out that postulating the remote signing of electronic public deeds would contradict the current organisational model of the notary profession, effectively abolishing the distribution of notaries on a territorial basis.

⁶⁵ The first simulation of a remote public deed using *iStrumentum* was carried out in the second half of 2016 between Genoa and Milan (see C. Nadotti, 'Gli atti ora anche a distanza: rivoluzione digitale per i notai' *Repubblica on line*, 4 May 2016, available at <https://tinyurl.com/y9q55g5h> (last visited 30 June 2018)). April 2017 marked the first signing of remote electronic deeds using a graphometric signature (see the press release issued by the Regional Notarial Committee of Sicily on 14 April 2017, *Agrigento, primi atti notarili informatici con firma grafometrica. Dalla verifica dei dati alla firma: tutto diventa digitale*, available at <https://tinyurl.com/y8uucwy2> (last visited 30 June 2018)).

⁶⁶ 'Notartel' is a company founded in 1997 on the initiative of the National Council of Notaries and the National Notary Fund, with the aim of creating and managing IT and telematic services for Italian notaries. The company is committed to the implementation of the informatics policies defined by the National Council.

⁶⁷ See G. Navone, n 11 above, 188.

⁶⁸ Cf G. Casu and A. Lomonaco, 'Art. 47', in G. Casu and G. Sicchiero eds, *La legge notarile commentata* (Torino: UTET, 2011), 233.

apt to guarantee a secure and protected connection⁶⁹ and to conclude the process through the electronic or digital signing of the document. Additionally, a connection through which the parties are visible does not rule out problems of comprehension and expression or the total absence of outside influences.⁷⁰

For that reason, an electronic public will can be received solely when the parties are present before the notary and therefore opting for an electronic public deed is a mere embellishment of no real practical use.⁷¹

3. Secret Wills

A secret will⁷² (regulated by Arts 604 and 605 of the Civil Code) serves two purposes: firstly, it assures that the provisions are secret and, secondly, enables the testator to use a process that concludes with input from a public official who guarantees the conservation and protection of the document.

Despite the fact that a secret will shares many of the most important advantages of a public will and a holographic will, it is rarely used in practice probably due to how complicated the process is.

A secret will⁷³ entails two stages:⁷⁴ the initial writing of the testamentary will itself by the testator or a third party and the subsequent deed of receipt thereof drawn up by the notary. Therefore, it is necessary to assess how compatible each such stage is with the electronic drafting of documents.

Art 604 of the Civil Code – which deals with the initial stage of writing the actual will – provides that the testamentary will may be drafted not only by the

⁶⁹ On the necessity to establish a secure video link ‘immune from possible outside interference’, see F. Cristiani, n 8 above, 64.

⁷⁰ As remarked by P. Pellicanò, n 60 above, 36; v. M. Natri, n 11 above, 568.

⁷¹ A further problem with specific regard to the electronic public will concerns its conservation; see I. Sasso, n 8 above, 204-209.

⁷² On secret wills, see G. Tamburrino, ‘Testamento (diritto privato)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLIV, 490; A. Palazzo, *Testamento e istituti alternativi* (Padova: CEDAM, 2008), 123; A. Genovese, ‘Il testamento segreto’, in G. Bonilini ed, *Trattato di diritto delle successioni e delle donazioni*, n 3 above, 1367; F. Fusi, ‘Il testamento segreto’ *Giustizia civile*, 291 (1993); G. Bonilini, *Manuale di diritto ereditario e delle donazioni* (Torino: UTET, 2016), 348; E. Marmocchi, ‘Forme dei testamenti’, in P. Rescigno ed, *Successioni e donazioni* (Padova: CEDAM, 1994), I, 757.

⁷³ The legal nature of a secret will is still the subject of debate among legal scholars. One view holds that they will consist of two separate documents, namely, a private one consisting of the actual will written by the testator and a public one consisting of the deed of receipt drawn up by the public official: C. Giannattasio, n 52 above, 176; C. Gangi, *La successione testamentaria* n 7 above, 215. By contrast, another view holds that a secret will consists of one document of a composite nature although involving a series of separate formalities: see G. Tamburrino, n 72 above, 490; G. Capozzi, n 62 above, 855; G. Caramazza, ‘Delle successioni testamentarie’, in V. De Martino ed, *Commentario teorico-pratico al codice civile* (Novara-Roma: Edizioni Pem, 1982), 149.

⁷⁴ As remarked also by F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 66; A. Genovese, n 72 above, 1368.

testator but also by a third party and it may even be typed.⁷⁵ However, there is no mention of the possibility of signing it electronically. Notwithstanding the absence of an express provision in that regard, the fact that the actual will itself is a private document⁷⁶ means that Art 21 of the Digital Administration Code applies with the ensuing possibility for a testator equipped with his or her own advanced electronic signature device – qualified or digital – to use that device to sign the document.

However, there are still some steps envisaged by Art 604 of the Civil Code (the requirement that the testator sign each half sheet of the document if it has been drafted by a third party)⁷⁷ that prevent a complete dematerialisation of the process and that necessitate a change to the law so as to allow the full use of electronic means in the formation and drafting of secret wills.⁷⁸

The situation is further complicated as regards the second stage: the deed of receipt of the actual will by the notary. The current wording of Art 605 of the Civil Code sets out a series of prerequisites that are basically incompatible with a total digitalisation of the process, like the fact that the actual will has to be personally handed by the testator to the notary, the fact the deed of receipt has to be written on *paper* to be wrapped around the will and the rules on how the will is to be sealed.

Although it is possible to come up with ‘electronic alternatives’ for each of the steps mentioned above,⁷⁹ they would be incompatible with the letter of the law and would simply add to the complexity of the procedure and the risks that such would entail.⁸⁰

Therefore, the law on secret wills is once again incompatible with electronic legal deeds. However, any proposal for reform – more about which in the conclusions of this work – cannot be limited to merely adapting the rules but must entail a complete overhaul. Although reform would not necessarily lead to elimination of secret wills as a form, it would be best to update the requirements or provide more flexible alternatives in line with modern needs.

⁷⁵ In that case proof that the document is from the stated author is afforded by the fact that the actual will must be personally handed by the testator to the notary to enable the latter to draw up the deed of receipt.

⁷⁶ See C. Gangi, *La successione testamentaria* n 7 above, 216.

⁷⁷ Actually using an advanced electronic signature or digital signature could immediately solve the problem by unequivocally connecting the document to the signatory thereby guaranteeing its authenticity. In this regard, see G. Navone, n 11 above, 69.

⁷⁸ For a more complete examination, see I. Sasso, n 8 above, 210.

⁷⁹ For example, the possibility of transmitting the file to the notary by means of certified e-mail thereby guaranteeing its origin or of arranging for encryption of the document to ensure its sealing.

⁸⁰ For example, where the testamentary will has been encrypted by the testator but the latter did not disclose the key or password before his or her death. For a more complete examination, see I. Sasso, n 8 above, 210-212.

IV. Holographic Wills: The Limitations of the Current Rules and Outlook

The last ordinary form of will (together with notarised wills) in the Italian legal system is a holographic one, which is probably the form that least lends itself to digital technology.⁸¹ Indeed, Art 602 of the Civil Code provides that the defining requirement of a holographic is that it be hand written in its entirety by the testator and not just signed by the latter.⁸² This is an insurmountable obstacle to using electronic means for that form of will.

Despite the fact that a holographic will constitutes a private deed⁸³ and Art 21 of the Digital Administration Code equates an electronic document bearing an advanced electronic signature with a private deed, a holographic will cannot be electronic because that type of will requires that additional formalities be met over and above those pertaining to private deeds in general.

However, in requiring that the entire will be handwritten, Art 602 of the Civil Code does not specify the means by which the document must be drafted nor the medium into which it must be incorporated. Legal scholars and the Constitutional Court have often displayed a certain flexibility in that regard by maintaining that a testamentary will can be drawn up on a medium other than paper (like fabric, wood or glass)⁸⁴ and that the instrument used to write it may be other than just a pen (and hence any type of liquid or ink that one can write with).⁸⁵ In any case, it is necessary that the document be hand written (which rules out a typewriter or computer)⁸⁶ without assistance from third parties.

⁸¹ Cf F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 46; Id, *Nuove tecnologie e testamento* n 8 above, 460; G. Navone, n 11 above, 186; cf also A. Gentili, 'Documento informatico (diritto civile)' *Enciclopedia del diritto, Annali* (Milano: Giuffrè, 2012), V, 636.

⁸² On the holographic will, see A. Ambanelli, 'Testamento olografo', in G. Bonilini ed, *Trattato di diritto delle successioni e donazioni* n 3 above, 1265; G. Musolino, 'Aspetti formali e validità del testamento olografo' *Nuova giurisprudenza civile commentata*, 49 (2005); G. Tamburrino, n 72 above, 490.

⁸³ Cf G. Capozzi, n 62 above, 842; Corte di Cassazione 5 July 1979 no 3849, *Repertorio Foro italiano*, 'prova documentale' no 33 (1979); Corte di Cassazione 28 January 1987 no 790, *Giustizia civile*, 862 (1987); Corte di Cassazione 22 April 1994 no 3833, *Massimario di Giustizia civile*, 550 (1994); Tribunale di Roma 17 May 2001, *Giurisprudenza di merito*, 1312 (2001). Cf also G. Tamburrino, n 72 above, 488.

⁸⁴ A. Ambanelli, n 82 above, 1279; R. Triola, *Il testamento* (Milano: Giuffrè, 2012), 81; L. Barassi, *Le successioni per causa di morte* (Milano: Giuffrè, 1947), 345; C. Gangi, *La successione testamentaria nel vigente diritto italiano* n 7 above, 130; G. Branca, n 62 above, 66; F. Degni, 'Della forma dei testamenti', in M. D'Amelio ed, *Codice civile. Libro delle Successioni per causa di morte e delle Donazioni* (Firenze: Barbera, 1941), 422. For Italian case-law see, Corte di Cassazione 10 April 1963 no 920, *Massimario di Giustizia civile*, 433 (1963); Corte di Cassazione 10 March 1965 no 394, *Massimario di Giustizia civile*, 127 (1965).

⁸⁵ C. Gangi, *La successione testamentaria* n 7 above, 130; G. Azzariti, *Le successioni e le donazioni* (Padova: CEDAM, 1982), 385; Corte d'Appello Firenze 13 July 1925, *Foro toscano*, 101 (1925); Corte d'Appello Bologna 10 March 1955, *Giurisprudenza italiana*, I, 186 (1956).

⁸⁶ This opinion is also supported in the Spanish legal system: cf S. Camara Lapuente, 'Testamentary Formalities in Spain', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 83-84; *contra* A. Romero Pareja, 'Testamentos electrónicos' *La Ley*, I, 7151 (2009).

From that standpoint, is it arguable that it is possible to use computer applications or software that produce the testator's hand writing on electronic⁸⁷ media, for example, using devices like electronic pens allied to a touch screen?

The answer must be negative:⁸⁸ the handwriting reproduced by such devices cannot be considered as handwriting in a strict sense. Writing on a touch screen does not materially imprint the author's writing on a surface but merely sends the computer's memory input to reproduce the handwriting on the screen through conversion into a binary sequence that by its nature is duplicable and modifiable.⁸⁹ The answer does not change if one considers using graphometric devices⁹⁰ apt to guarantee the authenticity of the handwriting and that cannot be duplicated. Like other touch screen devices, that advanced technology does not meet the requirement as to handwriting and its use is permitted in the drawing up of digital public deeds solely if there is also a public official who guarantees the authenticity and authorship of the writing.

Having established that a holographic will cannot take the form of an electronic document, it is necessary to evaluate whether the legal system would be ready to embrace a new concept of holographic will whose author could be unequivocally established without the need that it be handwritten.

1. The Rationale of Holographic Wills and Relevance Nowadays

The rationale for handwriting in a testamentary will lies in the necessity to establish the authenticity of the document and its authorship,⁹¹ and more so in the case of a holographic will in which there is no figure (the public official) who can vouch that the document is indeed authentic.

Having the entire document in handwriting also serves to ensure that the testator will have suitably reflected on its content: by writing each and every word the testator will be fully aware of the intent expressed, sealed by his or her final signature.⁹² Moreover, the handwriting serves an essential probative

⁸⁷ See – following the entry into force of decreto del Presidente della Repubblica no 513 of 1997 – S. Patti, in C.M. Bianca ed, 'Commentario al d.p.r. n. 513/1997' *Nuove leggi civili commentate*, 694 (2000); the author raises that issue based on the basic equivalence between a handwritten signature and a digital signature and concludes by asserting that a digital signature can be used whenever the law expressly requires a handwritten signature. See also F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 53.

⁸⁸ *Contra* A. Ambanelli, n 82 above, 1282: 'Some computers (...) allow the author's handwriting to be reproduced through using a sort of a pen on a screen that deputises as a 'sheet of paper'. In that case I maintain there is no reason why the requirement as to handwriting cannot be considered as fulfilled because it is simply a different surface that is used. Naturally, greater attention must be paid to any alternations or modifications of the text so as to avoid a situation whereby a third party by changing the position of the words could alter the overall meaning'. (our translation)

⁸⁹ As observed by G. Navone, n 11 above, 186-187, fn 103.

⁹⁰ Cf n 61 above.

⁹¹ A. Ambanelli, n 82 above, 1268; P.M. Putti, n 8 above, 1233.

⁹² A. Ambanelli, n 82 above, 1269; A. Colucci, 'Autografia cosciente e olografia nel testamento'

function: it allows the authorship of the will to be established through comparing it with other documents written by the testator.⁹³

That said, the rationale for holographic wills today is starting to show some weaknesses compared to what might well have been solid reasons for that type of will historically. For example, whereas in the past the probative function was of great importance in light of the widespread use of handwritten documents, today that function serves little or no purpose.⁹⁴ Recourse to paper documents is now increasingly rare for reasons of speed and standardisation in drafting documents to the extent that a holographic will could paradoxically constitute the sole sample of the author's handwriting without anything else to compare it against. Indeed, within a few years the very notion of holographic document will probably be obsolete and incomprehensible to the new generations.

There are two possible solutions: totally abandoning the whole idea of holographic wills⁹⁵ (leaving only wills drawn up by notaries, already partially oriented towards embracing electronic and digital technology) or adapting the concept of holographic wills to constantly developing standards of technology.

The first solution would be less than optimal. A holographic will is the only form of will that allows everybody to express their testamentary wishes. Its elimination would curtail the options open to those without the means to pay for a will to be drawn up by a notary and would be an unreasonable restriction on the exercise of their freedom of disposition upon death.⁹⁶ Moreover, a holographic will exhibits a number of advantages over other forms of will: secrecy of content and rapidity in that paper and pen is all that is required to make a valid will (for example, for a person on their deathbed a holographic will may be their only valid last chance to put their affairs in order for after their death).⁹⁷

Therefore, any reform must move in the other direction: not towards abandoning holographic wills completely but rather towards adapting them to fit the current social and technological context.

2. Towards a New Concept of Holograph: Video Wills

Diritto e giurisprudenza, 558 (1976) (comment to Tribunale di Napoli 5 May 1975 no 2870); A. Liserre, n 3 above, 142.

⁹³ A. Ambanelli, n 82 above, 1271; S. Patti, n 1 above, 996.

⁹⁴ As observed by S. Patti, n 1 above, 998.

⁹⁵ In this direction F. Padovini, n 2 above, 58; on this aspect see also the remarks of M. Cinque, 'Capacità di disporre per testamento e "vulnerabilità senile"' *Diritto delle successioni e della famiglia*, 369 (2015).

⁹⁶ G. Perlingieri, 'Invalidità delle disposizioni «mortis causa» e unitarietà della disciplina degli atti di autonomia' *Diritto delle successioni e della famiglia*, 138 (2016).

⁹⁷ For the same reason it does not seem reasonable to limit the use of holographic wills to individuals with limited means solely in order to safeguard their right to make a will (as proposed by S. Patti, n 1 above, 1007). As highlighted, a holographic will is not only economic but also ensures secrecy and immediacy.

In the current socio-economic context it is necessary to assess the existence of digital devices capable of achieving the same aims as a holographic will (including as regards authenticity and authorship). The analysis must be limited to those devices that enable one with a high degree of certainty to be sure that the will expressed is actually that of the testator, for example, through recourse to biometric identification methods or fingerprints.⁹⁸ However, those techniques are not yet widely accessible and are expensive. Therefore, it is worth focusing on a widely available means that enables one to totally establish the authenticity of the testator's will, in other words, a video recording.

Watching a video in which an individual states their last will and testament aloud allows one to directly and immediately link that will to the testator. Indeed, the connection is even clearer compared to the traditional paper will.⁹⁹

Naturally, a video recording is not an absolute guarantee of the authenticity of the will expressed therein since one cannot rule out that there might be a person behind the scenes orchestrating the testator's words or otherwise exercising a dominant influence over the testator.¹⁰⁰ But that is also a risk that applies in the case of a traditional paper will. Indeed, a video could reduce that risk because it could potentially reveal even the slightest uncertainty on the part of the testator in expressing his or her will.¹⁰¹

A video will could in theory thus constitute a valid alternative to a holographic will. Naturally, if one were to make provision in law for a video will, it would also be necessary to give some consideration to specifying formalities to be complied with. Indeed, in regulating holographic wills Art 602 of the Civil Code provides that not only must the entire document be in the testator's handwriting but it must also be dated and signed.

The obligation to state the date¹⁰² (necessary to accord priority to the testamentary will over earlier ones or to check the testator's capacity at the time of writing the will) could be dispensed with for video wills because it can be gleaned directly from the digital device (which automatically stores the date and time of the video).¹⁰³

⁹⁸ Cf F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 55; P.M. Putti, n 8 above, 1229.

⁹⁹ Cf M. Grondona, n 12 above, 235; the author considers the video recording as 'un'interpretazione autentica perché appunto non mediata da un testo cartaceo' ('an authentic interpretation, ie one which is non mediated by paper'); see also E. Max, 'Videotaped Wills: Status of Present Statutory Law and Implication for Expanded Use' 4 *Connecticut Probate Law Journal*, 143 (1988).

¹⁰⁰ P. Pellicanò, n 60 above, 36.

¹⁰¹ M. Grondona, n 12 above, 235.

¹⁰² On the legal function of the date in the holographic will, see A. Cicu, *Le successioni. Parte generale. Successione legittima e dei legittimari. Testamento* (Milano: Giuffrè, 1947), 310; M. Allara, *Principi di diritto testamentario* (Torino: UTET, 1957), 84; Id, *Il testamento* n 3 above, 288; G. Branca, n 62 above, 81; G. Musolino, 'L'elemento della data nel testamento olografo' *Rivista del notariato*, 476 (2002); A. Ambanelli, n 82 above, 1285; C.M. Bianca, *Diritto civile, 2.2, Le successioni* (Milano: Giuffrè, 2015), 287.

¹⁰³ Although the courts are still very reluctant to recognise a date that is not actually

The situation is more complicated as regards the requirement as to signature. Incorporating a signature into a video containing an individual's oral will (in order to make it definitive) is difficult to imagine. Neither would it be feasible for the testator to sign the media containing the video (be it a DVD, a USB flash drive or other memory device).¹⁰⁴ In short, the passage from a holographic to a video should not be weighed down by further formalities.

To render the testamentary will final, it should be sufficient for the testator to make it abundantly clear that his or her statements expressed in the video constitute his or her last will and testament, thereby making any signature superfluous.

That solution may seem to be farfetched and in part contrary to the legal rules that currently govern the making of holographic wills.¹⁰⁵ However, that solution does not appear to conflict with the underlying principles and rationale

included in the handwritten document itself (cf Corte di Cassazione 11 November 2015 no 23014, *Rivista di diritto civile*, 1405 (2016), with note by F.P. Patti, 'La dichiarazione «oggi finisco di soffrire» e la data del testamento olografo' *Corriere giuridico*, 615 (2016); with note by A. Carrato, 'Il testamento olografo come negozio in bilico tra forma e formalismo' *Diritto delle successioni e della famiglia*, 689 (2017); with note by C. Cicero, 'Formalismo testamentario e tutela della volontà del disponente' *Notariato*, 172 (2017); with note by V. Borgonuovo Turnaturi, 'Testamento olografo e certezza della data: questioni interpretative' *Notariato*, 175 (2017). See also Corte di Cassazione 8 June 2001 no 7783, *Rivista del notariato*, 476 (2002), with note by G. Musolino, 'L'elemento della data nel testamento olografo' n 102 above; Corte di Cassazione 9 December 1988 no 6682, *Nuova giurisprudenza civile commentata*, I, 597 (1989), with note by C. Hübler, 'Testamento olografo'; Tribunale di Oristano 11 June 2005, *Rivista giuridica sarda*, 769 (2005), with note by A. Luminoso, 'Mancanza della data e non verità della data nel testamento olografo'. But see Tribunale Vigevano 16 May 1998, *Nuova giurisprudenza civile commentata*, I, 304 (1999), with note by A. Finessi, 'Problemi relativi alla data nel testamento olografo', it would not appear that that approach can be extended to video wills in which the date can be stamped with certainty and little margin for error by the recording device, a circumstance that effectively eliminates stating the date as a requirement for the validity of the will and enables the requirement as to certainty of the time of the will to be satisfied.

¹⁰⁴ V.T. Zickefoose, 'Videotaped Wills: Ready for Prime Time' 9 *Probate Law Journal*, 152 (1989), who advocated that a change be made to the US Uniform Probate Code by introducing videotaped wills accompanied however by further formalities like the presence of two witnesses allied to the sealing of the media containing the video and its signature by the testator and the witnesses. In this regard see the careful points made by M. Grondona, n 12 above, 235, fn 29.

¹⁰⁵ As narrowly interpreted by the Italian courts, which excluded the validity of the holographic will written with the help of a third party: cf Corte di Cassazione 10 July 1991 no 7636, *Giurisprudenza italiana*, 197 (1993); Corte di Cassazione 17 March 1993 no 3163, *Massimario di Giustizia civile*, 514 (1993); Corte di Cassazione 7 July 2004 no 12458, *Rivista del notariato*, 395 (2005); Corte di Cassazione 3 November 2008 no 26406, available at www.dejure.it; Corte di Cassazione 27 April 2009 no 9905, *Rivista del notariato*, 503 (2010); Corte di Cassazione 10 September 2013 no 20803, *Rivista del notariato*, 779 (2014); Corte di Cassazione 6 November 2013 no 24882, *Rivista del notariato*, 601 (2014), with note by G. Musolino; Corte di Cassazione 6 March 2017 no 5505, *Foro italiano*, 1619 (2017). See also Tribunale Napoli 5 May 1975 no 2870, *Diritto e giurisprudenza*, 558 (1976). The Corte di Cassazione exceptionally upheld a testament drawn up with the 'merely mechanical (aid) of a third party': Corte di Cassazione 7 January 1992 no 32, *Giurisprudenza italiana*, 1740 (1992).

of the formalities associated with that form of testamentary will. Moreover, the proposal reflects a need to face the reality that the current system is unlikely to last.

Furthermore, the recent legge 22 December 2017 no 219 on informed consent and advance healthcare directives is evidence of more openness towards using digital means. Art 4, para 6, of the law in question enables patients in a certain physical condition¹⁰⁶ to give advance healthcare directives through a 'video recording or other devices that allow the disabled person to communicate'. Although that law concerns directives that cannot strictly be classified as a 'will' (although colloquially referred to as a 'living will') and that in part are intended to take effect even before death, it does however permit the use of digital means when the patient cannot proceed otherwise. From this standpoint, it would be reasonable to permit a person of sound mind but in very poor physical condition to avail of those digital means also to dispose of his or her property upon death.

The principles of substantive equality and reasonableness mandate that the disabled be afforded an opportunity to make a valid testamentary will so as to avoid unfair discrimination.¹⁰⁷

In this regard a video will could offer even greater advantages compared to a holographic will. This is also true for individuals who, though not disabled, are unable to use one of the forms of testamentary will set out in Art 602 of the Civil Code, for example, individuals who are illiterate or temporarily unable to make a testamentary will in writing.¹⁰⁸

V. Final Remarks

An analysis of the rules governing ordinary wills and new technologies reveals a gap that is difficult to bridge. Even in areas where there are not legal obstacles, there are practical problems to be overcome.

The rules on the forms of testamentary will are beginning to show their age, meaning that there is a pressing need to introduce a comprehensive body of new rules that takes account of the changed social and technological context.

The problems that came to light during the course of this work reveal that it would be of little use to simply 'label' the current rules as inadequate and obsolete inasmuch as those rules are almost entirely premised on wills written on paper. At the same time it would be futile to attempt to set out an extremely detailed set of rules on making digital wills given the numerous forms that they could take.

The real step forward for Italian law would be a reform that, although

¹⁰⁶ See Art 4, para 6, legge 22 December 2017 no 219.

¹⁰⁷ Cf G. Perlingieri, 'La diseredazione e il pensiero di Alberto Trabucchi' *Diritto delle successioni e della famiglia* 344, fn 4 (2017).

¹⁰⁸ In this regard see the interesting National Council of Notaries query no 605/2014-C about a holographic will entirely drawn up and signed by the testator using his mouth.

safeguarding the need for certainty and authenticity of a testamentary will, introduces a variety of instruments to achieve the same goal thereby allowing the testator – without eliminating the paper form – to resort to a number of instruments capable of satisfying the rationale of current testamentary will formalities.

That reform would require multidisciplinary input, hence not only from legal experts but also IT specialists who appreciate what specifications would be required to ensure that the chosen instruments would be fit for purpose from a legal perspective too.

While it might be too much to expect a complete overhaul of the law, it would be sufficient to take the cue from developments across the Atlantic and introduce a saving clause permitting the courts – and not simply the parties as envisaged by the Italian rules on the estoppel-like concept of confirmation – to uphold the testator's will even if expressed in a way that does not totally comply with the statutory requirements as to form¹⁰⁹ provided that the court is satisfied as to its authenticity.

Cherishing and protecting freedom of disposition as a paramount value underpinning the law of succession upon death should be given concrete effect through legislating for means to safeguard it. While defending that freedom warrants the imposition of some rigid formalities, they cannot end being chains so to speak. Especially if those chains are the result of a different historical and social context:¹¹⁰ before long the idea of putting pen to paper to express one's last will and testament will seem not only anachronistic but also probably surreal.

G.W. Beyer and C.G. Hargrove introduced an interesting work on electronic wills with the provocative question 'If it ain't broke, don't fix it?'.¹¹¹ One could reply that the solutions offered by the law must be consistent with the times

¹⁰⁹ See the view expressed by C. Cicero, n 103 above, 696: '*il formalismo va attenuato rispetto alla esigenza di salvaguardare la sostanza dell'atto al fine di rispettare le volontà del testatore, soprattutto nella corretta ottica di esaltazione dell'autonomia testamentaria e della centralità della persona umana*' ('formalities are to be mitigated when that serves to safeguard the substance of the deed and the testator's will, especially from the correct standpoint of valuing freedom of disposition upon death and the centrality of the human being'). Moreover, many of the statutory formalities governing wills are designed to achieve '*una maggiore tutela della libertà, della spontaneità dell'attribuzione e la conservazione della volontà*' ('greater protection of the *freedom*, the *spontaneity* and the *preservation* of one's will'). Consider, for example, Arts 624 and 626 of the Civil Code, whose provisions differ from the analogous ones on contract not so much due to the 'unilateral nature of the will but (to) the intent to protect the *freedom* and the *spontaneity* of the will' (*natura unilaterale del testamento, ma [per l'intento di tutelare la libertà e la spontaneità dell'attribuzione]*): to quote G. Perlingieri, n 96 above, 122.

¹¹⁰ 'Oppressive' is the term used by V. Barba, 'Atti di disposizione e pianificazione ereditaria', in Id et al, *Libertà di disporre e pianificazione ereditaria, Atti del 12° Convegno Nazionale S.I.S.D.i.C.* (Napoli: Edizioni Scientifiche Italiane, 2017), 182, to describe the form and formalities associated with testate succession.

¹¹¹ Expression contained in the Cambridge Dictionary of American Idioms, 48, 2003; cf G.W. Beyer and C.G. Hargrove, n 13 above, 865.

that they are intended to be used in. Continuing to repeat the mantra that ‘if it ain’t broke, don’t fix it’ would be tantamount to not taking due account of the need to provide citizens with suitable means to guarantee that they can lawfully and adequately exercise their freedom of self-determination.

Apathy Revisited*

Cindy Skach**

Abstract

Contemporary world events, characterized by violence and extremism, force us to revisit the potential uses and abuses of political apathy in democracy. This article unravels the concept of apathy, placing it within its semantic field, qualifying it with respect to different political contexts, and making it relative to its possible conceptual opposites. In so doing, this article clarifies both the potential harms, and the probable values, of apathy – and of its alternatives – in contemporary democratic theory and practice. The article argues that the dividing line between a hundred percent participation, extremism, and violence is increasingly fragile in the divided societies that characterize contemporary democracies. In so doing, the article offers a defense of apathy, not as an inherently ‘good’ element of a democracy; but rather, as the least damaging to democracy in comparison with its real and potential opposites.

I. Introduction

What is apathy, and what place does it have in contemporary democratic theory and practice?¹ The word apathy is derived from the Greek root *pathos*, meaning feeling, suffering: to be ‘apathetic’ is to be (a = without, pathy = feeling) without feeling. The etymology of this term ‘apathy’ thus suggests in it a neutral element. Ironically, when the context of this term is democratic theory, authors are not always indifferent to apathy. Apathy as a concept in political theory and practice has been criticized, accounted for, and explained.² In fact, much work

* This essay is dedicated to the memory of Giovanni Sartori, 1924-2017.

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¹ As Held notes, apathy can be crucial, to the extent that it may be one of the actual ‘grounds for accepting or complying, consenting or agreeing, with something’ in modern democratic politics. D. Held, *Models of Democracy* (Cambridge: Polity Press, 1996), 195. The point of this article is to provide further examination along these lines motivated by Held, in an attempt to see how knowing the alternatives to apathy alters our judgment and analysis of legitimate democratic government.

² See most recently R. Jacoby, *The End of Utopia: Politics and Culture in an Age of Apathy* (New York: Basic Books, 1999); I. MacKenzie and S. O’Neill eds, *Political Morality in an Age of Skepticism* (New York: St Martin’s Press, 1999); T. De Luca, *The Two Faces of Political Apathy* (Philadelphia: Temple University Press, 1995).

has been done to measure apathy, to suggest its potential sources, and to identify the apathetic ‘elements’ of society.³ Discussions defending apathy in politics have met with even more criticisms.⁴ What becomes apparent in this literature, however, is that the critics and defenders of apathy are often talking past one another. This is due, in part, to their less than explicit discussion of key conceptual questions: To what particular group does apathy refer, what is the degree of apathy being discussed, and perhaps most crucially, what do we perceive as the potential and real alternative(s) to apathy?

This lack of specification in the literature leads us to wonder, how do the criticisms and defenses of apathy gain or lose significance as the referents, the degrees, and the alternatives to apathy change? Can apathy be healthy for democracy? If so, why and when? These questions are increasingly relevant in today’s world, as scholars and practitioners seek institutional arrangements that might effectively, and democratically, help polities best accommodate difference.⁵ The question, ‘when apathy?’ is therefore timely and interesting for both the theory and practice of democracy in the contemporary world.⁶ Yet unless the concept is unraveled, ie – qualified in different contexts and made relative to its possible conceptual opposites – the critics and the defenders of apathy will continue to talk past one another, and we may never clearly identify the potential harms or values of apathy, or its alternatives, in contemporary politics.⁷ This paper therefore ‘revisits’ apathy in an attempt to clear up the concept for discussion, and then to suggest the conditions under which apathy may actually be healthy for democracy, and those in which it may not.

³ I have in mind M. Rosenberg, ‘Some Determinants of Political Apathy’, in H. Eulau et al eds, *Political Behavior* (Glencoe: The Free Press, 1955), 160-169; G. Di Palma, *Apathy and Participation* (New York: Free Press, 1970); and more recently, R. Putnam, S. Pharr and R. Dalton, ‘Introduction: What’s Troubling the Trilateral Democracies?’, in S. Pharr and R. Putnam eds, *Disaffected Democracies. What’s Troubling the Trilateral Countries* (Princeton: Princeton University Press, 2000).

⁴ For example, see B. Berelson, ‘Democratic Theory and Public Opinion’ 16 *Public Opinion Quarterly*, 313 (1952), discussed below.

⁵ A. Stepan, ‘Modern Multinational Democracies: Transcending a Gellnerian Oxymoron’, in J. Hall ed, *The State of the Nation: Ernest Gellner and the Theory of Nationalism* (Cambridge: Cambridge University Press, 1998), 219-239. Also see E. Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983); B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: New Left Books, 1983); S. Huntington, *The Clash of Civilizations and the Remaking of the Modern World* (New York: Simon & Schuster, 1996).

⁶ Empirically, well before Brexit, the June 2004 elections to the European Parliament already showed what newspapers refer to as a voter apathy rate of fifty-five percent, and European politicians worry that neither the ‘democratic and civil ethos,’ nor the ‘praxis,’ of the European polity is in good health. Indeed, since the first European parliamentary elections in 1979, an increasing number of Europeans have either voted for ‘Eurosceptic’ political parties, or have simply abstained from voting altogether, raising interesting questions.

⁷ On conceptual cleaning, see R. Adcock and D. Collier, ‘Measurement Validity: A Shared Standard for Qualitative and Quantitative Research’ 95 *American Political Science Review*, 529-546 (2001); G. Sartori ed, *Social Science Concepts: A Systematic Analysis* (Beverly Hills: Sage, 1984).

II. Debating Apathy

W.H. Morris-Jones offers one of the first defenses of apathy and argues its place in contemporary democratic theory, providing the starting point for this discussion.⁸ For Morris-Jones, apathy refers to a citizen's non-participation in voting (non-voting). The opposite of apathy, in his context, is voting, exercising the right to vote. He distinguishes the right to vote from the duty to vote, and subsequently questions the existence, justification or value of the latter for the functioning of political institutions. The context of the discussion is parliamentary democracy, which he asserts may be regarded in two ways: First, it may be viewed as a system of government resting primarily on participation and consent such that 'the more there is of these (measured quantitatively) the better.' In this case, emphasis on an obligation to vote is expected, 'for to withhold one's vote is to make the system as a whole the poorer'. However, when parliamentary democracy is viewed in another manner, as a way of 'dealing with business', it is 'distinguished by its love of trial and its willingness to admit error', and then

'Participation and consent may be useful and desirable, but only as aids to a complete and adequate debate... All that is imperative for the health of parliamentary democracy is that the right to vote should be exercised to the extent necessary to ensure that the play of ideas and clash of interests can take place'.⁹

In sum, when parliamentary democracy is thought not to rest upon maximized electorate participation (voting maximized quantitatively), but rather, on the optimal degree of electoral participation that expresses the diverse interests in society, 'heavy polls are largely irrelevant to the healthy conduct of political business'.¹⁰

One criticism is that Morris Jones' argument assumes that apathy will be proportionate in each sector of the society with different interests. In other words, those who do choose to participate, although a fraction of the whole, will represent the diverse interests of the whole. Yet, don't different sectors of society, citizens with different levels of education for example, tend to vote more than others?¹¹ Does Morris Jones expect class-proportionate apathy in spite of this? Probably not – but his point is simply to explain how parliamentary democracy can work at all given an apathetic part of society, and his observation is that as

⁸ W.H. Morris Jones, 'In Defense of Apathy: Some Doubts on the Duty to Vote' *Political Studies*, II, 25-37 (1954).

⁹ *ibid* 35.

¹⁰ *ibid* 35.

¹¹ B.Jr. Powell, 'American Voter Turnout in Comparative Perspective' 80 *American Political Science Review*, 17-43 (1986), is interesting here. Also see R. Timponi, 'Ties That Bind: Measurement, Demographics, and Social Connectedness' 20 *Political Behavior*, 53-77 (1998). The point is also related to J.S. Mill, *The Subjection of Women*, edited by S. Mansfield ed (Arlington Heights: AHM Publishing, 1980).

long as the minimal degree of voting expresses the diverse interests in society, apathy does not harm the system. He agrees that

‘a people gets the politicians it deserves; that corrupt and weak political leaders indicate a lack of developed standards among those who choose them; and that such a lack in turn comes from inadequate interest...’¹²

This said, Morris Jones doubts that this possible low-quality problem could be solved by an increase in quantity. We note, therefore, that his defense of apathy in the electorate is also based on his doubts as to the ability of ‘a quantitative instrument designed to make a qualitative choice’, to work as planned.¹³

Next, Morris Jones continues to defend apathy ‘on more positive grounds, on the ground that it is a political virtue’, an aid to and proof of liberal democracy. Quoting Hogan (1923), Morris Jones contends, ‘the apathy or caprice for which political democracy has been blamed is seen to be rather to its credit than otherwise’. And since apathy attests to the fact that

‘“people are free to interest themselves or disinterest themselves, as they please in politics...The apathetic part of the electorate”...is a sign of a liberal democracy...’¹⁴

That is to say, being a liberal democracy, it recognizes and accepts the fact that

‘“ there are and always will be some persons for whom political activity would be largely a waste of time and talent” and is prepared to leave them alone’.¹⁵

Let’s pause on this point. Here Morris Jones suggests the existence of a link between liberal democracy and apathy: he associates a democracy’s acceptance of apathy with the ‘understanding and tolerance of human variety’ – two conditions which are facilitating to, as well as characteristic of – liberal democracy in a pluralistic society. But Morris Jones seems to suggest, moreover, that the freedom to vote and the freedom not vote, to *not take part* in the democratic procedure, these freedoms together, are liberty. One indication of liberty for Morris Jones, then, would be not only ‘I can participate if I want to’, but also, conversely, where our context is participation-as-voting, ‘I don’t have to participate if I don’t want to’. In order to test the relationship, can we imagine

¹² W.H. Morris Jones, n 8 above, 36.

¹³ See Sartori’s discussion of ‘selection’ in elections. G. Sartori, *The Theory of Democracy Revisited*, 140 (Chatham, New Jersey: Chatham House, 1987).

¹⁴ W.H. Morris Jones, n 8 above, 36.

¹⁵ *ibid* 36-37.

a political system which does not allow apathy in the electorate, where the ‘I don’t have to participate (vote) if I don’t want to’ is not an acceptable statement, and predict that negative liberty in this system may also be restricted? Indeed, totalitarian regimes, where voting is mandatory and liberty is negated, seem to fit well. Yet, the ‘apathy representing liberty’ relationship cannot be stretched too far. Thresholds and degrees of indifference are important. Moreover, liberty is not an ‘effortless’ thing: It needs effort. Harold Laski reminds us ‘Liberty cannot help being a courage to resist the demands of power at some point that is deemed decisive’.¹⁶ The point is driven home by Sartori who stresses that

‘liberty as nonrestraint is not an end in itself, and political freedom requires positive action and active resistance.¹⁷ Where there is wholesale apathy, liberty is easily lost’.

Now before the discussion gets stretched too far, I should add that nowhere does Morris Jones advocate ‘wholesale apathy’. But, this helps to demonstrate the point: degrees, referents and qualifications are crucially important in these discussions and criticisms.

Another premise on which Morris Jones’ defense is based is, what he calls, apathy’s ‘beneficial effect on the tone of political life itself’. An ‘apathetic part of the electorate’ is ‘a more or less effective counter-force to the fanatics who constitute the real danger to liberal democracy’.¹⁸ Here, Morris Jones is specific: the referent of apathy is the electorate; its beneficial quality is recognized relative to its potential opposite – fanaticism; and, apathy is qualified as a more or less effective counter-force, not as the best or absolute answer to extremism (defined here as fanaticism).

Summing up, we have discussed Morris Jones’ defense of apathy as non-voting with respect to (a) his contention that a right to vote is not necessarily an obligation to vote; (b) his argument that the toleration of apathy in a liberal democracy underscores the liberalism of that democracy; and, (c) his identification of a ‘counter-force’ quality of apathy, which acts as a cushion to fanaticism. One final point of his defense may be added to this list: Morris Jones indicates the potential ‘limiting’ quality of apathy: apathy limiting the politicization of society. He warns that a

‘State which has ‘cured’ apathy is likely to be a State in which too many people have fallen into the error of believing in the efficiency of political solutions for the problems of ordinary lives’.¹⁹

Morris Jones drives his point (against politicization) home by emphasizing

¹⁶ H. Laski (1930), quoted in G. Sartori, n 13 above, 329.

¹⁷ G. Sartori, n 13 above, 305.

¹⁸ W.H. Morris Jones, n 8 above, 35.

¹⁹ W.H. Morris Jones, n 8 above, 37.

that ‘man is a great deal more than a political animal; and the best parts of the best men are those with which parliament has nothing to do’.²⁰

Another often-cited ‘defender’ of apathy is Bernard Berelson who claimed, ‘lack of interest by some people is not without its benefits, too’.²¹ Berelson’s reasoning is that in order for a ‘mass democracy’ to function in a ‘complex society’, certain ‘political shifts’ are necessary, and these necessary political shifts are facilitated by maneuvering room and compromise. Compromise, in turn, and according to Berelson, is ‘more often induced by indifference.’ Let’s ask an important question, one that he asks implicitly, and answers explicitly. In Berelson’s contention that compromise is more often induced by indifference, the question then becomes, more often than what? In other words, what are his perceived potential alternatives to indifference that would not be as conducive to compromise? Or, similarly, against what other *kind* of participation does non-participation fare better? The answer is easily extracted from his discussion on ‘Involvement and Indifference,’ by noting that each citation of participation is qualified in the extreme. In other words, his perspective is really one advocating indifference ‘by some’ as opposed to ‘all the people...deeply involved’. In fact, almost everywhere that participation is mentioned in the discussion of indifference, it is *qualified* by an adjective indicating the extreme sense of the term, in degree of intensity and extension: ‘Extreme interest goes with extreme partisanship and might culminate in rigid fanaticism that could destroy democratic processes if generalized throughout the community’.²² What’s more, Berelson does not suggest a necessarily causal relationship between extreme participation and the dangers of fanaticism; his ‘might’ and ‘could’, as well as the ‘if generalized’ suggest only possible dangers and potential consequences. Berelson’s other references to participation are, likewise, all qualified. And of equal importance, his defense of apathy is not one of wholesale indifference, but rather that of a limited apathy, as opposed to a potential and qualified-in-the-extreme participation. Berelson does not exalt widespread apathy in a so-called ‘elitist revolt from the masses’; Rather, he indicates the benefits of ‘lack of interest by some people’, ‘moderate indifference’, and ‘action with little passion behind it’ when the other possibility is a population ‘too interested in politics’ and ‘motivated by strong sentiments’.

Now with this light on his discussion, can we find evidence in it to prove Berelson’s so-called ‘elitist fear’ of participation? It was Bachrach who found, in Berelson, a ‘revolt from the masses’.²³ It cannot be found here. Berelson’s fear is one of extreme partisanship and extreme interest, of a rigid fanaticism that we

²⁰ Hogan (1930), in W.H. Morris Jones, n 8 above, 37.

²¹ B. Berelson, P. Lazarsfeld and W.N. McPhee, *Voting* (Chicago: University of Chicago Press, 1954), 314.

²² *ibid.*

²³ P. Bachrach, *The Theory of Democratic Elitism: A Critique* (Lanham: University Press of America, 1980), 33-35.

probably are all ('elitist' and non-elitist alike) fearful of. Consequently, any discussion using Berelson's 'defense of apathy' as a proof of his 'elitist revolt from the masses', is simply unfounded. Berelson does confuse us somewhat by having different referents in the discussion. 'Extreme Partisanship' may imply a level of participation beyond voting. It also interestingly suggests a relationship between the party activists and the electorate: When extremist party mobilizers mobilize inactive members of the electorate – what are the possible outcomes? If all that happens is that the 'intense, extremized participant usefully challenges an excess of inertia of the inert citizen,' he may therefore be 'performing a positive role within the context of representative democracy'.²⁴ But there are at least two cases where this mobilization may be destructive to democracy: (a) when mobilization leads in a direction towards 'the permanent participation of all in everything' which is, in Dahrendorf's view, 'in fact a definition of total immobility,'²⁵ or (b) when increased mobilization of the electorate by extreme party activists leads to an extremist 'knowledge-negating' tyranny of the majority resembling something like the Weimar Republic.²⁶ If this is Berelson's fear of the masses, then the point is well taken: moderate apathy fares better for democracy than both immobility and tyranny.

Berelson's defense is much like that of Morris Jones' defense, in that both authors indicate the usefulness of apathy as opposed to its opposite – participation qualified in the extreme, where extreme refers to number of participants *or* intensity (sometimes both), of which the consequences may be immobility or fanaticism, respectively.

Yet, one critique of these authors is that neither Morris Jones nor Berelson explicitly mentions the threshold at which apathy stops being an effective counterforce to fanaticism, and starts to reflect a 'serious defect of democracy.' It at first appears from Morris Jones' defense that he assumes apathy to be equally distributed among social classes, and therefore, while parliamentary democracy 'demands expression of interests', 'All that is imperative for the health of parliamentary democracy' is that the right to vote be used 'only to the extent necessary to ensure that the play of ideas and clash of interests can take place'.²⁷ But we could ask: If there are some inactive groups, with interests unique to that group, how will *their* interests be articulated so that a representative 'play'

²⁴ G. Sartori, n 13 above, 119.

²⁵ R. Dahrendorf, 'Citizenship and Beyond: The Social Dynamics of the Idea' *Social Research*, 691-692 (1974) (also quoted in G. Sartori, n 13 above, 246).

²⁶ The exception, and thus the problem (theoretically) is the abstentionist; he is not participating, yet if his non-participation is some sort of 'statement', if indeed it 'means something', then he may still feel intensely on the subject and not be indifferent. What we do here to simplify is to consider participation as behavior, as taking part, and apathy as not-taking-part. Therefore, intensions or feelings, though important, don't count in our cases. Still, it's worth noting that the abstentionist may appear apathetic in the electoral sense, but if he doesn't like the outcome and has intense feelings, he may become quite active.

²⁷ W.H. Morris Jones, n 8 above, 35.

and ‘clash’ could take place? Now, out of fairness to Morris Jones’ discussion, he does not claim that democracy *should* work like this, or that this way is good, but rather, he indicates what is necessary so that it can work at all. In effect, he states that

‘it will no doubt be said that a people gets the politicians it deserves; that corrupt and weak political leaders’ are ultimately due to “inadequate interest” from the electorate’.²⁸

Berelson, on the other hand, explicitly addresses this problem in an earlier work, which may have been overlooked by his anti-elitist critics.²⁹ In this essay Berelson does support the view of those theorists who suggest, ‘a sizable group of less interested citizens is desirable as a ‘cushion’ to absorb the intense action of highly motivated partisans.’ He notes further:

‘If everyone in the community were highly and continuously interested, the possibilities of compromise and of gradual solution of political problems might well be lessened to the point of danger’.³⁰

And most important for our thread of the discussion is Berelson’s suggestion that what democracy perhaps ‘really requires is a body of moderately and discontinuously interested citizens within and across social classes’.³¹ This qualification is important for two reasons; (1) it re-emphasizes Berelson’s defense as being one of moderate indifference, or ‘discontinuous indifference’, as opposed to unrestricted indifference, and (2) it indicates that where Berelson supports apathy, it is a support for *proportional apathy*, that is, ‘within and across social classes’.

Again we can raise the same question: is ‘proportional apathy’ probable, or are some classes more apathetic? It is Dahl who suggests that apathy is found within certain classes more than others.³² He contends, ‘in the real world, political indifference (apathy) is in fact inversely proportional to education and several other indices of knowledge’.³³ Dahl’s interest in the ‘disinterested’ really is part of his inquiry as to the relationship between participation, consensus, and polyarchy. Dahl indicates that ‘current evidence suggests that in the United States the lower one’s socioeconomic class, the more authoritarian one’s predispositions and the less active politically one is likely to be’.³⁴ Assuming this relationship to be true, Dahl then infers that if the ‘authoritarian minded’,

²⁸ *ibid* 36.

²⁹ B. Berelson, n 4 above.

³⁰ *ibid* 317.

³¹ *ibid* 109.

³² R. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).

³³ *ibid* 39 fn 5.

³⁴ *ibid* 89.

politically inactive segments of society become active and enter the political arena, consensus on basic norms must be declining and in turn, to the extent that this consensus declines, polyarchy would be expected to decline. Dahl's theoretical argument is not an outright defense of apathy. More accurately, it is a response and counter-proposal to the notion that an increase in political activity is always associated with an increase in polyarchy. But for our purposes here, the important element in Dahl's discussion is his assertion that the citizens from lower socioeconomic classes tend to be – in direct relation to their socio-economic level – (i) less politically active, and (ii) of a more authoritarian predisposition. Now, from this relationship, can we infer that the less politically active (the apathetic) are (a) from lower socio-economic classes, and (b) of a more authoritarian predisposition? If so, this may raise several implications for our discussion. Yet, before going too far, we must note that the referent model of democracy for Dahl's discussion is the American model, and 'as for the finding that the rich participate in politics more than the poor, it is above all an American finding'.³⁵ Let this suffice to raise questions as to the probability of proportionate apathy, and the potential harms from 'selective' apathy.

Summing up and sorting through the previous discussion, we can now distinguish and discuss some of the potential harms and values of apathy in a liberal democracy. First, an apathetic part of the society may serve as a counterforce to the extremely interested, the fanatics, 'who constitute the real danger to liberal democracy,' as suggested by Morris Jones.³⁶ Berelson's discussion calling for a 'healthy balance' between the strong and weak-passioned citizens also underscores the potential value of a politically indifferent *part* of society as a *counter balance*, or 'cushion', to the 'highly interested ... motivated by strong sentiments.' Moreover, tolerance and cooperation, two facilitating conditions for the smooth functioning of liberal democracy in a pluralist society, are perhaps more induced by indifference than by its possible opposite, extreme participation.

Another proposed, potential benefit of apathy is its 'virtue' as an indication of the liberty in liberal democracy.³⁷ The argument, touched upon earlier, contends that the accepted existence of an apathetic section of the electorate demonstrates that people are free to participate or not to participate in politics. As Morris Jones noted, 'the apathetic part of the electorate...is a sign of a liberal democracy that is prepared to recognize that 'there are and always will be some persons for whom political activity would be largely a waste of time and talent' and is prepared to leave them alone.' Although we may agree that any attempts to coerce the apathetic into participating are unacceptable for a liberal democracy, and therefore the apathetic should be left alone, this is not the same as to find

³⁵ G. Sartori, n 13 above, 105.

³⁶ W.H. Morris Jones, n 8 above, 37.

³⁷ Here it is interesting to note the role of apathy, versus toleration, in Athenian democracy, as discussed by Thucydides in *The Peloponnesian War*.

'virtues' of liberal democracy among those citizens who show no interest in the democracy's 'workings.' As discussed earlier, liberty is as difficult in theory as it is in practice. So on this proposed 'pro' of apathy, we may wish to pass or call it a draw; 'Accepted apathy' in the electorate as a sign of freedom from coerced participation – yes. But that's about it, since freedom is really much more complicated and, at certain crucial junctures, may demand active participation for its achievement and subsistence. We recall, 'where there is wholesale apathy, liberty is easily lost'.³⁸ What is more potentially harmful to liberal democracy than the loss of liberty? The general point is that discussions of apathy that fail to specify referents, degrees, or relativity to other concepts can get mixed up, leaving loopholes for readers, and often messing up the readers as well.

Next, does apathy, being conducive to toleration, tend to prevent fragmentation? Berelson makes reference to the value of 'not caring much' in preventing party splintering. He asserts, 'the splinter parties of the left, for example, splinter because their advocates are *too* interested in politics' (emphasis his). While I would suggest that party fragmentation is due to more than this, Berelson's point is well taken. It is true that toleration may be better facilitated by indifference than by rigid fanaticism; and toleration of differing viewpoints does seem to be indispensable not only in the mass electorate, (if, for example, the 'other' candidate wins and some cannot tolerate this outcome, what may happen?) but also in political parties and parliamentary groups, where pluralism and difference of opinion, when paired with rigid fanaticism, tend toward immobilism and group paralysis. So, the importance of toleration is accepted. But does toleration in this case come from apathy? When our reference groups are taking-part-in-person groups such as parties and parliaments, should toleration be discussed vis a vis fanaticism versus apathy? Certainly in the mass electorate, the answer is clearer: non-participants, by their virtue of not demonstrating any opinion, let alone a strong one, are then by definition tolerant. It makes sense to talk of an apathetic, non-participating member of this group. But in Berelson's example of the fragmented party whose fragmentation he attributes to its 'too interested advocates', I would suggest that sources of party fragmentation may also be found, and maybe more so, among the party activists and mobilizers. Isn't it often the divergent opinions among activists regarding mobilization tactics and party platform specifics (ie, the concerns of party activists and leadership) that may lead to a party's fragmentation? Is the splintering of the Chilean Communist Party attributed to its 'too interested advocates,' or to divergent opinions between hard-liners and soft-liners among the party's elite? In the party activist arena, would toleration be induced by apathy on the activist's part? The 'apathetic activist' is a weird thing to hope for. At this level of participation, it is more likely respect and compromise that help prevent fragmentation. The point is to notice how the 'value' of apathy changes

³⁸ G. Sartori, n 13 above, 305.

as the reference group makes apathy a sometimes more, and sometimes less, salient concept.

I would like to pause on this point about apathy and its potential opposites in different arenas of participation. Interesting questions may be posed regarding the discussion of apathy among different referents. Taking the example above of parties, we can look at: (a) party advocates (horizontal relations within the electorate), (b) party activists (horizontal relations within the party), and (c) party advocates and activists (vertical relations between both groups). Discussing only the first two will still demonstrate the point. First, when we are referring to party advocates in the electorate, as in Berelson's discussion, the analysis of the potential value of indifference is based on an 'apathy vs. 'rigid fanaticism' ' continuum. Both of the polar opposites, apathy and rigid fanaticism, are plausible concepts for this reference group (a). The continuum here makes sense. And here Berelson's defense of moderate indifference as an alternative to rigid fanaticism can be defended. But if we follow my suggestion that in exploring party fragmentation we should also look at party activists, our reference group becomes (b) and the discussion concerns the tone of intra-party dynamics. Is the apathy v rigid fanaticism continuum still salient? Does it still make sense to argue about the pros and cons of apathy with respect to this reference group? No, for such an argument would make the mistake of inaccurately confusing indifference as non-participation, with non-extremism.³⁹ The distinction is crucial since we can argue that once a citizen becomes a party activist, he is by definition participating, being active, and therefore, non-apatetic. So, one possibility here is still rigid fanaticism. What about apathy? Indifference is not a good opposite for fanaticism in this reference group and is, moreover, an inaccurate term.

The argument may be generalized by noting that once we change our reference group from the electorate to any other collectivity where mere membership in the group indicates a degree of real participation, the discussion as to the pros and cons of apathy changes. In fact, once we pass to some other 'spheres' of participation apart from the mass electorate, it is no longer apathy that is relevant to a discussion of the conditions facilitating the functioning of democracy. What becomes apparent by sorting through the discussion is the lack of conceptual clarity surrounding the concept of apathy, emphasized by the fact that apathy may even become an inaccurate term as the subject of the discussion changes. Thus, the salience of apathy as a concept in the discussions depends much upon what reference group or participation arena we choose to discuss. Inspired by the difficulties of sorting through the discussion, the following is a proposed manner of cleaning up the concept.

³⁹ The distinction between non-extremism and non-partisanship is made by W.G. Runciman and discussed in G. Sartori, n 13 above, 129, fn 71.

III. Conceptualizing Apathy: Another Try

This conceptual clarification of apathy involves two components. First, we are discussing apathy in terms of what it is not. Apathy is zero percent participation, a polar opposite of ‘intense participation,’ where ‘intense participation may be (i) 100% participation, extremism, or (iii) violence. Apathy is a of intensity of participation which is equal to 0.’ Second, participation may be simultaneously thought of as having different spheres or arenas. For the purposes of this paper, I will distinguish four different arenas of participation, each differentiated from the other by: (a) How many can participate, and, (b) What the participants participate in. It is important for the discussion that all concepts be clearly defined; participation here means ‘taking part in person, and a self-activated, willed taking part’. Furthermore, its ‘authenticity and effectiveness ... is inversely related to the number of participants’.⁴⁰

The first sphere of participation is the mass electorate. Here, the citizen is free to participate by 1. voting, or 2. some form of mass demonstration. Granted,

‘when we speak of electoral participation and, in general, of mass participation, the concept is overstretched and points, more than anything else, to ‘symbolic participation’, to the feeling of being included’.⁴¹

For this reason, this is our ‘lowest’ sphere of participation, characterized by the participation ratio (as a fraction representing ‘share’ in participation) being its smallest.

Then I distinguish an arena that includes party activists and mobilizers. In this sphere, participation is (expected to be) ‘greater’ (in degree of intensity) because a) ‘taking part in person’, the ratio expressed by a fraction, is larger, since the group of activists and mobilizers tends to be smaller than the entire electorate, and b) the activity of the party activists and mobilizers is actually active ‘activity’; it is more participation than mere ‘voting’ or demonstration because it implies 1. more decision making power in the activity at hand, and 2. more continuous (time frame) participating. Moreover, as discussed above, membership in this arena of participation assumes participation. In other words, he who is a party activist belongs to this arena because we have identified him as an activist by observing his active participation; here a degree of intensity of participation is assumed. Unlike the electoral arena where membership signifies only the option to participate if so desired, it is the exercised option to participate – and to participate in more than voting – that distinguishes the activist from the interested voter. The importance of this distinction for the discussion we have been pursuing is that once our reference group changes from the electorate to this second arena of party activists, by definition apathy (as non-participation)

⁴⁰ *ibid* 113-114.

⁴¹ *ibid* 233.

is no longer a salient issue. True, there may be a party activist who becomes inactive, apathetic; but such behavior, being contrary to the defining characteristics of his arena, would probably bring about his retreat or removal from this sphere.

I must stress here that these spheres can be placed on a continuum, indicating that there are degrees of participation in between the ones designated by our four spheres. A citizen's participation in community groups, voluntary associations, and other such collectivities provides participation activities which do allow for more 'real' participation in terms of a smaller number of total participants. But the vertical placement of the spheres serves to suggest a more 'real' participation in the 'higher' arenas, in terms of competence, due to the selective election or appointment processes by which members become members. This applies to the last two spheres. For the present discussion, only four spheres are distinguished to keep it simple. The continuity between arenas, the existence of groups in-between these spheres, however, is important and the role of these groups (or sub-spheres) should not be disregarded.

A third participation arena I have chosen to distinguish here includes the elected body – such as parliament.⁴² Again, membership assumes a degree of intensity of participation that is greater than zero percent. Moreover, to the question, Participating in what? We can reply – participation as taking part in person in decision making. Just as the case of the arena 'below' it, a discussion of apathy (as non-participation) here becomes pointless. Elected representatives have chosen to participate, it is their business to participate, and they are where they are because they have promised to participate on behalf of somebody else, some 'body' being segments of the electorate. So, apathy as non-participation loses significance here. Now, a counter argument may suggest that the case of the apathetic or indifferent parliament member is conceivable. I would concede that this may be possible a) only on a discontinuous basis, ie –indifference on certain distinct issues, and b) that even in this case, 'indifference' as non-participation is not an accurate term to use in this arena and should not be confused with non-extremism (a discussion discussed earlier).

Finally, we come to the last arena being distinguished here: the committee sphere, the decision making and decision-forming arena. The argument is the same as for the previous two spheres. Since committee membership assumes participation, a discussion of the potential pros and cons of apathy becomes meaningless. And this contention is most accurate here, in the committee arena, where a committee – a) by way of its small size, allows for a larger participation ratio (each member thus has more weight) and; b) by way of what the committee members participate in – decision making – represents 'the optimal unit for real

⁴² Again, participation in this arena is increasingly relevant as we move toward supranational government structures such as the EU. See L. Sidentop, *Democracy in Europe* (London: Penguin, 2000).

participation...'.⁴³

So, where does our discussion of apathy lead to now having marked these participation arenas? What I have suggested throughout the review of the literature, and what becomes more apparent through the distinction of participation spheres, is that a discussion of the positive or negative role played by apathy in a liberal democracy changes as we change referents (arenas). After the first sphere, what becomes meaningful to the discussion is no longer the 'apathy vs. its potential opposites' question, but rather, a) what is the relationship between these potential opposites? And, b) is there a tendency towards one of the opposites, more than another, in the different spheres? I propose we turn to each of these points.

Earlier I suggested a set of continua that seems useful for discussing the concept of apathy in politics. Apathy was defined as non-participation, a conceptual polar opposite of 'intense participation', where intense participation may be thought of as a hundred percent participation, extremism, or violence. Depending on a citizen's degree of intensity of participation at time *t*, he would be placed on a point between apathy and one of the opposites on one of the three continua. Now, in addition, at time *t*, a citizen may be placed in one of the four participation arenas (or somewhere in a sphere on the continuum between the four designated arenas), according to 1. what he takes part in (voting, demonstrating, mobilizing, government decision making) and 2. the context of his participation (a dispersed voting collectivity, non-institutionalized community assembly or party, a concrete/institutionalized assembly, or a committee).

What the discussion has suggested thus far is that when we speak of the citizen in sphere 'A' or in an intermediary sphere up to, but not including, sphere 'B', we can theoretically speak about his degree of intensity of participation being somewhere between zero percent (apathy) and: a hundred percent participation, extremism, or violence. However, once we discuss the citizen as a part of sphere 'B' and beyond, the concept of apathy does not apply; the citizen is – by his location in sphere 'B' or beyond, – a participant. And since moving from sphere 'B' and beyond involves 1. an increased share of participation (smaller ratio) as spheres tend to become smaller, 2. greater institutionalization – the participationist is probably participating more, and 3. in more decision making. His intensity of participation on the zero percent to a hundred percent continuum approaches the one hundred percent extreme. But, this does not necessarily correlate with extremism or violence. And, inversely, the citizen at the mass level may decide to demonstrate by himself twenty-four hours a day. This would be a hundred percent participation, but would this be extremism, or both? This raises an important question.

How is the a hundred percent participant related to the extremist or the violent man? Is associated with a high intensity. Why would he participate a

⁴³ G. Sartori, n 13 above, 233.

hundred percent, doing nothing else but participating? He must feel intensely about something, the intensity then encouraging his one hundred percent devotion to participation, which in turn reflects the intensity of his action. We may even say,

‘(...) Participation in the full sense assumes ‘intensity.’ The full participant is such because his reward is the activity itself. Whatever the prior motivations, the party activist, the incessant demonstrator, the engaged member of a grouping, feels intensely about politics’.⁴⁴

In the continuum here a hundred percent participation is presented as the polar opposite of zero percent participation or apathy. The higher the degree of intensity, the nearer the citizen is located to the one hundred percent participation extreme.

Second, with regard to the zero percent Participation v Extremism continuum, the same argument applies: The nearer the citizen is to extremist behavior, the greater the degree of intensity of this individual. We must keep clear the relationship: Wherever there is extremity, there is probably intensity. But the contrary is not always true since a person may be intense without being extreme. Extremity is a position on a continuum of possible positions, while intensity tells how strongly a person feels about his or her placement. So the one hundred percent participant and the extremist are related *at least* through high intensity. But, what is specific to the extremist? ‘The extremist is such because he has no doubts; he already knows, and is sure of what he knows’.⁴⁵ In this sense, the extremist is not a knowledge seeker, rather, a knowledge destroyer in that ‘extremists are usually taking a more selective view of a situation and must devote energy...to screening out opposing considerations’.⁴⁶

Next, we can apply this criterion of intensity ‘telling how strongly a person feels’, to our third opposite, violence. To start off clearly, it’s helpful to have some idea of the characteristics of the violent citizen. It was Cotta who suggested, ‘The violent man is generally conceived of as impulsive, inconstant, and passionate’.⁴⁷ And with regard to these three, ‘it is passionality that impresses upon violence and the violent agent its typical distinctive tone and mode of being’. Since passion is itself associated with high intensity of feeling, then that passion-as-intensity which characterizes violence, also links violence to the other extremes, which share intensity as a characteristic. But, what is particular to violence and distinguishes it from other types of intense behavior? Where is the fine line, across which the violent man stands, and the one hundred percent

⁴⁴ *ibid* 118.

⁴⁵ *ibid*.

⁴⁶ R. Lane and D. Sears, *Public Opinion* (Englewood Cliffs: Prentice Hall, 1964).

⁴⁷ S. Cotta, *Why Violence?: A Philosophical Interpretation* (Gainesville: University of Florida Press, 1985).

participant or extremist does not pass? One answer may be the use of physical force; but is there more to it? We recall Cotta's insight into how the violent man is conceived: 'impulsive, inconstant, and passionate.' Is it the inconsistency and impulsive nature of the violent man that distinguish him from the one hundred percent participant and the extremist? It really is not degrees of intensity distinguishing these three, for they are all characterized by their high degree of intensity. Again the question – What distinguishes the violent man from his equally intense counterparts? This leads back to developing a clear idea of 'violence' and the 'violent man.'

Cotta suggests that it is passionality, characterized by 'immediacy, discontinuity, and unexpectedness' that 'impresses upon violence and the violent agent its typical, distinctive *tone* and mode of being'.⁴⁸ But we may find a citizen who is immediate, discontinuous and unexpected in his participating behavior: this does not necessarily make him violent. But, if the citizen is discontinuous, immediate and unexpected – and is *also* really passionate (read highly intense), then we have something more than a nearly one hundred percent participant. To simplify these characteristics of violence, we may ask, what is their common thread? 'What, in fact, is the element common to immediacy, discontinuity, nondurability, and unforeseeability if not indeed the absence of measure?'.⁴⁹

Our answer, then, according to Cotta, is the absence of measure. Violence finds its source in a passion (intensity) which is 'outside the control of reason ... unruly ... not subject to any restraint.' We have, then, violence originating in an intensity (passion), an intensity without constraint, reason, or measure. Is it here we draw the line between violence, extremity and a hundred percent participation? All three of these share a high degree of intensity. But the intensity of the violent man becomes an autonomous, unrestrained intensity. The one hundred percent participant is intense, but can be intense inside constraints, within measure, within rules. The extremist comes closer to the violent man, and we may suggest that the extremist is a potentially violent man. We recall that 'the extremist is such because he has no doubts...he already knows, and is sure of what he knows', conditions which allow us to associate 'extremist behavior' with 'cognitive blindness'.⁵⁰ With the extremist, there is no sense in talking out the issues. Since he already knows, he seeks no further opposing knowledge, he negates other knowledge. Violence, similarly, 'denies at the root the dialogical nature of existence...' Violence is 'cessation of the reciprocal recognition,' it 'refuses the dimension of otherness, and thus dissolves coexistence...'.⁵¹

But then, can't the extremist be extreme within rules, within measure?

⁴⁸ *ibid* 63 (emphasis in original).

⁴⁹ *ibid* 64.

⁵⁰ G. Sartori, n 13 above, 118-119.

⁵¹ S. Cotta, n 47 above, 66.

Even though he opposes the ‘other’, does he not recognize it? The answer is more difficult, but it is still probably – yes. The extremist has not necessarily broken with measure. Extremity may lead to rupture, but it is not defined by it. In fact, isn’t the Extremist extreme because of his strong inner measure, by which he selects and screens out opposing considerations? By this inner measure, doesn’t the extremist’s behavior become predictable? The extremist would say either ‘black’ or ‘white’, but he is always siding with one extreme and completely opposing the other – implying a routine, a rule. In contrast, the violent man is unpredictable and impulsive.⁵²

The line is very fine, yet important, between extremism and violence. And what the difficulty of distinguishing clearly between our three extremes has suggested is that while one does not necessarily imply the other, they are closely related. The danger implied here, and important to our discussion, is that the one hundred percent participant appears to be closely related to the extremist and the violent man.

Having worked up to this point, to one of ‘extremes’, it is time to wind down and to tie up all the ends as we go. We just suggested a potentially close relationship between one hundred percent participation, extremism, and violence. We are left to discuss the salience of these extremes and the potential relationship, against their opposite – apathy – in each of the participation spheres.

In the committee sphere, characterized earlier as ‘optimally’ meeting the ‘real participation’ criteria, we make no sense if we speak of the ‘apathetic’ committee member. Moreover, the extreme or violent committee member would lose his job: Unanimous agreements – facilitated by adherence to formal and informal rules, compromise, respect and discipline – are characteristic of the committee. The committee member, then, would probably sit somewhere on the zero percent to one hundred percent participation continuum. Given the high degree of participation (high ratio, decision making participation, and participation ‘competence’), of the committee member, he would most likely be somewhere *nearer to* the one hundred percent extreme. But both extremes are excluded: zero percent, because it makes no sense, and one hundred percent participation, because as we have suggested earlier, the line differentiating the one hundred percent participant, the extremist, and the violent man is very fine; The high intensity of the one hundred percent participant relates him to the extremist and the violent man, neither of whom would last long on a committee.

In the sphere of ‘the elected’, a parliamentary body, the argument is somewhat similar: again, the zero percent endpoint is excluded. In parliament, the apathetic member is really not a possibility. And even if he is apathetic for a while, the law of anticipated reactions from the electorate probably challenges his inertia. The

⁵² Cotta distinguishes three different ‘rules’ in the discussion of violence. Due to space constraints, they have not been extensively treated here.

other two continua, with the opposites of extremism and violence, cannot be completely ruled out. The Weimar Republic, the French Fourth Republic, and the Chilean Parliament under Allende suggest the possible and dangerous relationship, in this sphere, between participation, extremism and violence.

This is a good lead in for discussing the next sphere: party activists and mobilizers. The intensely participating party activist or mobilizer may be beneficial to a democracy: he may be stimulating the inactive citizen, spreading information, and other positive deeds. But a transformation to an extreme or violent activist or mobilizer poses a potentially uncontrollable threat. Through his role as mobilizer, he connects to the spheres below, the masses, and transfers his own intensity to these masses in the mobilization process. The violent, extreme, or even the one hundred percent-participating party activist then has the potentially dangerous power to multiply his own intensity. So, in this sphere, we hope the activist exercises self-control of this power. Unlike the committee or the parliament where the selection and election processes tend to control the intensity of the members, the activists and mobilizers must themselves keep from becoming what Hoffer warns against, 'True Believers'.⁵³

We come full circle in the discussion, and return to the 'masses', the electorate, and the analysis of apathy in this specific sphere. In light of the discussion, how does apathy fare? First, referents make the difference. Within this sphere, we have two cases: 1. if apathy means not participating as non-voting, we are concerned that all the interests of society may not be articulated, particularly those of disadvantaged social groups.⁵⁴ Here apathy is troublesome, but neither breaks nor makes democracy; it reflects the neutrality of the term, 'apathetic.' However, 2. when we consider cases in which the potential opposite of apathy is some variable degree of participation beyond casting a ballot, then the apathy may have a 'more than neutral' role in liberal democracy. Degrees and probable alternatives are important, for neither wholesale apathy, nor highly participator, extremist, or violent masses, are congenial to liberal democracy.

IV. Conclusion

Suggestions that we attempt to improve the practice of democracy by moving towards one hundred percent participation (in greater intensity or extension) away from apathy should consider other possible 'endpoints' of political apathy besides voting, and the intricate relationships between them.

⁵³ R. Lane and D. Sears, n 46 above, 94-95. It is interesting to note, in this vein of True Believers, Lipset's discussion of coerced participation and the extremely high voter 'turn-out' in authoritarian systems. S.M. Lipset, *Political Man: The Social Bases of Politics* (New York: Doubleday, 1963).

⁵⁴ A. Lijphart, 'Unequal Participation: Democracy's Unresolved Dilemma' 91 *American Political Science Review*, 1-14 (1997).

The dividing line between one hundred percent participation, extremism, and violence, while critical in theoretical terms, is increasingly fragile in the divided societies that characterize contemporary democracies. It is in view of these more harmful, and possible, directions that authors have come to defend apathy in the past, and may have serious grounds to do so today: not as an inherently 'good' element of a democracy; but rather, by default, as the least damaging to democracy in comparison with its real and potential opposites.

The GDPR and the LIBE Study on the Use of Hacking Tools by Law Enforcement Agencies

Giovanni Ziccardi*

Abstract

Digital information is, today, at the center of the cultural, social, technological and political discussions, above all with reference to its protection. In the age of big data, automated processing of information, large-scale use of algorithms and profiling systems, the risk of losing control over data and the fear of activities carried out in violation of the rights of the individuals, are very real. Over the last two years, in the context of the initiative that led to the adoption of the EU General Data Protection Regulation (the GDPR) and in some parts of a study commissioned by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) on the use of certain investigative tools by Law Enforcement agencies, data protection has been in the center of the legal debate. The GDPR places the person in the core of its protection system, and protects the individuals through the protection of their data. The LIBE Commission study, while moving from a different point of view more connected to the protection of civil rights during investigations, evaluates, at some point, the risks of individual's data processing without proper guarantees. In this essay, the two documents will be presented, trying to draw some common conclusions.

I. Introduction

Data are, today, at the center of the information society, and this is well known. That is the reason why data protection,¹ over the last twenty years, has become a central topic of political, technological, social and legal analysis.

In recent years, the national and international legislators have pointed out that, on the one hand, a strong automation process has caused the loss of control over the circulation of data and, on the other hand, it is necessary to raise the level of protection in order to guarantee the rights of the individual in the

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¹ For an introduction to data protection issues see, among others, M. Jori, 'Libertà di parola e protezione dei dati' *Ragion Pratica*, 109-150 (1999); P. Perri, *Protezione dei dati e nuove tecnologie. Aspetti nazionali, europei e statunitensi* (Milano: Giuffrè, 2007); Id, *Privacy, diritto e sicurezza informatica*, (Milano: Giuffrè, 2007); W. Faulkner, *Privacy. Il sogno americano: che cosa ne è stato*, (Milano: Adelphi, 2003); G. Sartor and J. Monducci eds, *Il codice in materia di protezione dei dati personali. Commentario al D.Lgs. 30 giugno 2003, n. 196* (Padova: CEDAM, 2004).

technological society.² In the age of algorithms, artificial intelligence and big data, the individual is protected through the protection of his data, also in the States where the individual lives.³

In 2016, the GDPR significantly renewed the traditional protection tools, trying to adapt the data protection rules to the diffusion of social network platforms and to the practice of commercial and behavioral profiling (seen as a new frontier for online marketing).

A year later, in 2017, the LIBE Committee of the European Parliament addressed, in a very complex and innovative study, the issue of data protection and information systems during the investigations concerning the digital data of individuals (with particular regard to the suspects).

The two documents, although related to norms and areas only partially overlapping, are linked by a common thread: the idea that data, in today's society, must be considered as a fundamental good, linked to the rights of the individual. The protection of data becomes, in fact, the instrument to guarantee the protection of rights as well.

II. A Stronger Concept of 'Data Protection' in the General Data Protection Regulation of 2016

The recent GDPR clearly lays down additional obligations on private companies and public authorities that process personal data, through a new and proactive approach. The purpose of the GDPR, in fact, is to protect personal data in the information society, and is permanently applicable in all EU Countries as of 25 May 2018. It is a new, important Regulation that has impacts on daily work activities and introduces, in case of violations, a penalty system that aims to protect individual's rights and data. GDPR penalties consist of fines, possible claim for damages, and criminal penalties (if introduced by national legislations).

Fines are imposed by a Data Protection Supervisor, following investigations or claims; this Authority can, in minor cases, enact warnings, formal notices, process inhibitions or monetary fines, and it is always possible to appeal to the Court against the Data Protection Supervisor's decisions.

Particularly important for the purposes of this essay is the fact that the GDPR has considerably strengthened monetary fines, bringing them up to twenty million euros or up to four per cent of the company global turnover of the previous year. The amount of the fine depends on the nature and severity of

² See S. Rodotà, *Il mondo nella rete. Quali i diritti, quali i vincoli* (Roma-Bari: Laterza, 2014).

³ See U. Gori and S. Lisi eds, *Information warfare 2013. La protezione cibernetica delle infrastrutture nazionali* (Milano: Franco Angeli, 2014); S. Mele, *I principi strategici delle politiche di cybersecurity*, available at <https://tinyurl.com/yc9j4k2w> (last visited 30 June 2018); Id, *Cyber-Weapons: Legal and Strategic Aspects*, available at <https://tinyurl.com/yakopzdl> (last visited 30 June 2018).

the data breach, length of behavior, negligent or intentional nature of the conduct (eg knowingly ignoring a non-compliant situation), recidivism, and the presence of aggravating or mitigating factors.

Anyone who has suffered damage can claim compensation, both from the interested party (the Data Controller) and from third parties (for example, from companies that used the data); compensation can be claimed for asset damage (eg financial loss) and non-asset damage (eg loss of reputation).

The request shall be lodged with the judicial authorities against the Data Controller or Data Processor responsible for the violation, and the Data Controller (or Data Processor) is exempted from damages only proving that the harmful event is not imputable to it.

The GDPR does not directly provide for criminal penalties, but provides for the possibility of EU Countries to issue laws with criminal penalties for data processing breaches.

Concerning the individual protection, the GDPR is applicable to data relating to natural persons (in the EU, regardless of nationality and residence), including data under the control of the Controller or Processor established in the EU, data that is being processed in the EU and data processed in a public cloud (because the geographic location of the data cannot be determined). It is not applicable to data relating to legal persons or to data processed for personal (or household) use; some exceptions apply, also, in the interest of the freedom of expression and freedom of the press.

In the text of the GDPR it is possible to intend ‘data protection’ in many ways.

The first interpretation describes data protection as the person’s sovereignty over their own personal data. The person (‘data subject’) must be always ‘informed’ (with an ‘Information Statement’) about the processing of the data, and has the possibility to take decisions (for example: the exercise of some rights) on the basis of this information. The statement will explain who is processing the owner’s data, how data will be processed, what data is being processed, where data will be processed (geographically or in the cloud), the purpose of the processing activity and the rights that the person can exercise.

‘Personal data’ means any information relating to an identified or identifiable natural person, such as, for example, name/first name, surname/last name, place and date of birth, location data (home, personal or work address), identification codes (credit card, bank account), online ID (identification codes, IP address) and sensitive personal data (health status, habits, chronic diseases, hereditary diseases, diets), daily activities, membership in trade unions or political parties, sexual life and orientation and racial or ethnic origin.

The processing of personal data is forbidden unless specifically agreed by the data subject, except under special circumstances, such as the need to exercise a right related to work and social security, when life protection is threatened or

for reasons of public interest.

Special categories of personal data (sensitive data) concern political opinions, religious or philosophical beliefs, trade union membership, health, sexual orientation, racial or ethnic origin, genetic data or biometric data. At the same level of importance are data relating to criminal matters, such as criminal convictions, offenses committed, security measures related to criminal convictions (eg probation, restraining order).

A very interesting category of data are 'risky data', which imply high risks for the dignity and freedom of the person, and are subject to specific measures based on the 'impact assessment' (prior checking). Such data include profiling, mass data processing, video surveillance, geolocation, data that makes identity theft easier (eg: IP addresses, identification codes, bank account, credit card information, etc).

The processing is any operation, or set of operations, which is performed on personal data, whether or not by automated means, from collection to destruction or erasure, including consultation.

Each person shall have the right not to be subject to a decision based only on automated processing, including profiling, which produces legal effects for him or similar effects. In particular, 'profiling' in the GDPR means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person.

The Data Protection Supervisor is an independent authority, acting in full autonomy, with a mandate that has a variable duration depending on each country. The Data Protection Supervisor is responsible to supervise and ensure the application of the rules in the country, promote awareness and foster understanding of the EU Regulation, examine claims from interested parties, investigate the application of the rules, impose administrative penalties, monitor technological developments that can affect people's privacy and collaborate with the supervisory authorities of the other EU Countries.

A new professional role, the Data Protection Officer (DPO), is placed at the heart of the data protection framework: the DPO supervises data protection within the company, and should not have conflicting interests with other functions that he may be required to perform. The DPO provides advice to the Data Processor and Data Controller, supervises compliance with the regulations and company provisions regarding data processing, supervises the proper staff training and information regarding data processing obligations and cooperates with the Data Protection Supervisor. The DPO must be promptly and adequately involved in data protection issues, must be supported with necessary resources, must be independent and not receive instructions, and must report directly to top management. Moreover, he can be contacted directly by any party, can perform other tasks (if not in conflict of interest), and cannot be removed from the fulfillment of its tasks. Contact details of the DPO are communicated to the

Data Protection Supervisor and reported on all Privacy Statements.

The Officer is appointed by a Data Processor or by a Data Controller and shall be a person who meets requirements of professionalism (legal, IT and other skills and expertise), experience in the field of privacy and the ability to perform the assigned tasks. Such appointment is mandatory for public entities, while for private companies is mandatory only in specific cases (eg for companies dealing with big data such as private hospitals or insurance companies that handle large amounts of sensitive personal data).

One of the central issues of the GDPR is the security of data processing. The security system must adequately protect personal data at each stage of processing, and must protect the security of company assets that are used for processing. The aim is to prevent the risk of damage to data subjects.

The Data Controller and Data Processor must identify and adopt security measures, must provide the staff involved in processing operations with instructions and training on the topic, must check the effectiveness of the system and monitor the security system constantly and keep it updated. Staff involved in processing operations must treat the data according to the instructions received, be aware of the risks and act accordingly.

Last but not least, general protection and safety⁴ of data is linked to the concept of ‘accountability’: it is compulsory to provide documentation and proof of the correct processing of personal data in accordance with the provisions of the GDPR, the availability, integrity and confidentiality of data, the resilience of systems and services, the use of pseudonyms or data encryption systems, the capacity to restore the system in the event of an accident and to perform efficacy tests.

The aspects of the GDPR summarized above place data protection at the center of the new legal framework. In particular, one should note the reference to ‘sensitive’ data, ie information that in today’s society have become particularly serious and able to harm the rights of the individual, the new approach to the idea of security and accountability, and the new role of the Data Protection Officer who acts as a guardian to ensure a higher level of protection of the individual and respect for the law during data processing activities.

The purpose of the GDPR is to raise the level of information protection in a highly automated context, managed in many cases by algorithms and artificial intelligence and capable of profiling citizens with great precision.

⁴ See B. Schneier, *Carry on: Sound Advice from Schneier on Security* (Indianapolis: Wiley, 2013); Id, *Liars and Outsiders: Enabling the Trust that Society Needs to Thrive* (Indianapolis: Wiley, 2012); Id, *Schneier on Security* (Indianapolis: Wiley, 2008); Id, *Secret and Lies: Digital Security in a Networked World* (Indianapolis: Wiley, 2004).

III. The LIBE Commission Study of 2017 Concerning Hacking Tools Used by Law Enforcement During Investigation Activities

In March 2017, the European Parliament (Directorate-General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs) published a study of over one hundred forty pages entitled 'Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices'.

It is a very complex study, urged by members of the LIBE Commission, which aims to draw several concrete legislative proposals that are appropriately preceded by a schematic (but accurate) review of the regulatory framework of six European Union States, and of three non-European states. In addition, it presents a comprehensive analysis of the ongoing political debate on the subject, and calls for a solid (and common) legal basis to regulate the phenomenon in a way that is respectful of the fundamental rights of citizens.

The underlying premise of the whole study is that the so-called 'hacking by law enforcement' (that is, the use of hacking techniques in investigative activities) is presented as a relatively new phenomenon (at least in its 'official' and 'visible' form) within the older (and traditional) political problem of finding a constant balance between security requirements and protection of data and privacy in the information society.

On the one hand, law enforcement agencies and law enforcement practitioners justify the use of such strategies (and actions) on the basis of the assertion that the use of hacking techniques has now become indispensable to bring more security, representing the only solution to the challenge that encryption has placed in the search for the elements of a crime.⁵ In fact, this challenge could not be overcome by trying to systematically weaken encryption (for example, by introducing backdoors, a process that would be very complex not only from a technical point of view, but also from a 'political' one), but only by 'anticipating' the issue and penetrating directly into the information system. In simpler terms: if encryption exists, and it has been applied to data, the only two ways to overcome it are either attacking and weakening it, or by inoculating into the system a trojan that acquires data in the 'plain' and 'clear' communications environment, just before someone activates the encryption system to 'close' the information.

On the other hand, civil society actors and the scholars who are more concerned with the respect for privacy and the rights of the individual, have argued that hacking is an extremely invasive investigative tool, able to significantly

⁵ See L. Lupária, *Sistema penale e criminalità informatica* (Milano: Giuffrè, 2009); Id and G. Ziccardi, *Investigazione penale e tecnologia informatica. L'accertamento del reato tra progresso scientifico e garanzie fondamentali* (Milano: Giuffrè, 2007); C. Pecorella, *Il diritto penale dell'informatica* (Padova: CEDAM, 2006); G. Pica, *Diritto penale delle tecnologie informatiche* (Torino: UTET, 1999); L. Picotti ed, *Il diritto penale dell'informatica nell'epoca di internet* (Padova: CEDAM, 2004).

impinge on fundamental rights and on the privacy of individuals. But not only that: the use of tools that should ‘crack’ and make systems insecure could also have a direct impact on the security of the Internet itself, and on the technology infrastructure in general. Using techniques, viruses and exploits to ‘poison’ the common information systems would result in a widespread insecurity and vulnerability. Very recent is the case of viruses, worms and ransomware circulating worldwide, infecting critical systems in over a hundred States, which were originally developed by enforcement or intelligence agencies: ‘technological weapons’ produced by States that, suddenly, began to circulate and attack the entire civil infrastructure.

The study, and this is certainly a very good point, has a highly interdisciplinary approach: firstly, it analyzes the debate at the international level and then proceeds, from a procedural standpoint, to propose possible ‘legal foundations’. Finally, with a more practical approach, the relevant regulatory framework is analyzed in six European countries (France, Germany, Italy, the Netherlands, Poland and the United Kingdom) and three non-European countries (Australia, Israel and the United States of America).

The conclusions, which we will better comment in the second half of this short contribution, take the form of an interesting piece of legislative policy proposals (with accompanying recommendations). 2016 has been repeatedly indicated, among the lines of the study, as a crucial year for the subject of computer State-trojans and hacking tools: all States have shown a regulatory interest (including, ad hoc reforms) or have started drafting a legislative strategy for the foreseeable future.

The study wants to be probably an ‘answer’ to such a sudden ‘change of course’, and wants to raise the level of attention in all the operators, investigators, politicians, magistrates, lawyers and scholars dealing with human rights.⁶

The debate from which the study originated has developed, over the last few years, moving from a clear awareness of the legal challenges posed by encryption (in general), to the modern possibilities of investigation (in particular).

This awareness has given rise to a period characterized by what the study defines as the ‘going dark’ phenomenon: a framework in which there has been a growing lack of power in accessing data ‘legally’ during investigation and in effectively acquiring and examining sources that are today ‘resident’ on the most commonly used electronic devices, or ‘constantly moving’ through communication networks. Such ‘darkening’ of the digital sources would cause blocking of investigations, and encryption techniques are seen as one of the strongest barriers to this access.

At the same time, however, a political (and commercial) analysis reveals

⁶ See M.I. Franklin, *Digital Dilemmas. Power, Resistance and the Internet* (Oxford: Oxford University Press, 2013); S. Rodotà, n 2 above; G. Ziccardi, *Resistance, Liberation Technology and Human Rights* (Berlin: Springer, 2013).

that it is still clear the intention to support strong encryption around the world, especially in products and services sold by 'big players' of the Internet, and that the ideas of 'institutional backdoors' appear unattainable.

This has led, in practice, to the use of hacking techniques during investigations to bypass encryption, by borrowing and refining the operating modes used by hackers.

At the same time, however, the study highlights clear risks for the fundamental rights to the protection of privacy and freedom of expression of thought and information: hacking techniques are, in fact, extremely invasive, especially if compared to the more traditional 'intrusive' techniques (such as interceptions, inspections, searches and seizures). Through hacking, Law Enforcement Agencies can access all data in a device or in a system. This means the management of a very large amount of data: a recent investigative activity carried out by the Dutch authority, mentioned in the study, led to the collection of seven Terabytes of data, more or less eighty-six million pages of this Journal. At the same time, the data being processed are not only significant, but are also particularly sensitive: the geographic location, movements in everyday life, communications that the subject spreads and receives, all the data stored relating to his/her life, including the most intimate ones and possibly not of interest in that specific investigation.

All these worrying aspects have not, however, prevented the political world from perceiving these tools as necessary. There was, in particular, no great public debate about the opportunity (or not) to admit similar proofs in front of a Court. They have entered slowly, in investigative everyday life, and have been used for years in many States. The discussion on the eligibility of hacking tools has never come to a real political confrontation, and has never directly involved citizens (except, perhaps, in Germany and in the United States of America, where some issues related to the matters at hand have been recalled also in the mainstream media).

A second risk is purely technological, and would ask a re-examination of the security of the Internet itself and its infrastructure: the hacking activities of Law Enforcement agencies may go beyond the targeted system, and cause damage to other unrelated systems. All in conjunction with possible ethical problems (the obligation, or not, for the Law Enforcement Agencies to report the discovery of digital weapons that they would rather prefer to reuse for investigative purposes).

There would then be a risk that involves the broader idea of territorial sovereignty: the device hacking activity could be located in another state or even 'in transit'. The same tools used to do hacking (such as a 'Remote Administration Tool') could be sold to governments or agencies with little regard for human rights, and could be used for illicit purposes (to investigate journalists, dissidents or political opponents).

In conclusion, hacking practices by Law Enforcement Agencies are seen as necessary (and admitted) in all six Countries analyzed by the Authors of the report. Four States (France, Germany, Poland and the United Kingdom) have already adopted specific rules; Italy and the Netherlands are experiencing a phase of legislative development, which, according to the study, generated a sort of ‘gray zone’ (hacking techniques are used by Law Enforcement Agencies, but without an express legislative framework that allows it).

The study mentions France, a State that has reported a major reform in 2011 of the Code of Criminal Procedure that has significantly increased the interception powers, reformed by Law 3 June 2016 no 731, which allowed remote access to computers and other devices. In Germany, the issue arose following a well-known decision by the Constitutional Court which established a new fundamental right to the confidentiality and integrity of computer systems (Decision BvR 370/07). Strictly speaking, German law allows the use of hacking tools both in the Criminal Procedure Code and in the Federal Crime Police Act. In Italy, use has been made, over the years, of these instruments, although not expressly governed by law. There is, however, a specific bill on the subject (with a very technical approach) and case law. In the summer of 2017, a broad reform of the whole Criminal Procedural Code included the generic possibility to use hacking tools. In Poland, regulatory reform took place in 2016 with the reform of the Police Act and the explicit provision for the possibility of hacking systems. Also the United Kingdom, since November 2016, has established a solid regulatory basis for similar practices in the Investigatory Power Act.

Such a complex legal and technological framework must inevitably provide several guarantees: the report deals with ‘*ex ante*’ guarantees and ‘*ex post*’ guarantees that in some States have already been implemented.

‘*Ex ante*’ guarantees are, in fact, the conditions under which, when and how (with what formalities) such tools can be used. In this case, particular attention is paid to the fact that the use must be proportionate and necessary, that there must be a Court decision as a legal basis (the report usually defines it as a ‘judicial authorization’), and that there must be guarantees of duration, purpose and the limitation of such investigative techniques to a certain type of crime.

‘*Ex post*’ guarantees are related to the presence of a supervisor, the ability to view log files and remedies to be put in place in case of incorrect use of such tools (resulting in compensation for damages or compulsory mitigation of harmful effects).

Concerning the limitation on the use of such tools based on the crime or the maximum duration of the prison term for specific offenses, all six States restrict the use of hacking tools on the basis of the severity of the crime. In some States, legislation provides for a specific list of crimes where hacking is permitted. In other States, however, the possibility of the use of such tools is provided only for those crimes that are punished with a high maximum of prison’s years (in this

case, the study records significant differences between the various States). Some States, moreover, limit the timeframe in which hacking activities can be carried out: from one month (France and the Netherlands) to six months (UK), although time extensions are allowed.

Such ‘*ex ante*’ guarantees, coupled with additional, specific ‘*ex-post*’ guarantees (such as target notification of illegal hacking practices, log file keeping of all activities, and activation of audit and control systems) should ensure a balanced and as fair as possible picture of everyone’s rights.

IV. Conclusions

There are some aspects that link the two documents that we have described above, and which allow us to draw some interesting considerations on the treatment and protection of data in today’s society.

First of all, the idea behind the GDPR is to address matters regarding personal data in a ‘more modern’ way which is more closely linked to the era of smartphones, fitness bracelets,⁷ social networks, profiling algorithms, data mining activities⁸ and automated decisions. Secondly, in addition to the more traditional concept of personal data, which remains, the focus is on data that are connected to the electronic life of the individuals and their identity on social networks and that deserve, today, the same level of protection.

At the same time, the LIBE document highlights the level of dissemination that data have achieved in our society – data that are controlling the citizens,⁹ that crosses the boundaries and that requires, in its treatment, a necessary cooperation between public and private, especially in case of computer crimes¹⁰ or big data breaches and security flaws.

⁷ See E. Germani and L. Ferola, ‘Il wearable computing e gli orizzonti futuri della privacy’ *Il Diritto dell’Informazione e dell’Informatica*, 75-101 (2014).

⁸ D.J. Solove, ‘Data Mining and the Security-Liberty Debate’ 75 *The University of Chicago Law Review*, 343-362 (2008), also available at <https://tinyurl.com/6p8ark> (last visited 30 June 2018).

⁹ Concerning the use of technologies as a control tool, see D. Campbell, *Il mondo sotto sorveglianza. Echelon e lo spionaggio elettronico globale* (Milano: Eléuthera, 2003); D. Lyon, *L’occhio elettronico. Privacy e filosofia della sorveglianza* (Milano: Feltrinelli, 1997); Id, *La società sorvegliata. Tecnologie di controllo della vita quotidiana* (Milano: Feltrinelli, 2002); Id, *Massima sicurezza. Sorveglianza e “guerra al terrorismo”* (Milano: Raffaello Cortina, 2005).

¹⁰ See L. Lupária, n 5 above; C. Pecorella, n 5 above; G. Pica, n 5 above; L. Picotti, n 5 above.

Hard Cases

Res Iudicata in Breach of the ECHR: The Italian Constitutional Court's Point of View

Carlo Petta*

Abstract

In the judgment no 123 of 2017 the Italian Constitutional Court declared inadmissible the question of constitutionality stemming from a Code of Administrative Procedure provision (Art 106) in the part in which it does not provide for the possibility to review a ruling in cases of conflict between domestic judgments and judgments of the Court of Strasbourg. The paper firstly introduces the obligation of the Contracting States to conform their legal systems to judgments of the Court of Strasbourg (according to Arts 46, para 1, and 41 of the ECHR). Secondly, it focuses on the case-law and the systematic evolution that has recently led to overcome national *res iudicata*, especially in case of conflict between criminal judgments. Thirdly, the paper proceeds to analyse the arguments of decision no 123 of 2017, which will lastly be the subject of some final considerations. The author, similarly to the ruling of the Constitutional Court, duly considers the jurisprudence of the European Court of Human Rights and the legal systems of the main continental systems referred.

I. Introduction

In the judgment no 123 of 2017,¹ for the first time the Italian Constitutional Court dealt with the delicate issue of the revocability of the administrative judgments that violates the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the ECHR).

The issue addressed by the Court is particularly complex because it affects the principle of intangibility of the final judgment, which is one of essential principle in a legal system. Indeed, this principle guarantees the legal certainty through the definitiveness of the decision contained in a decision, both under the aspect of procedural law and under that of substantive law.

In the Code of Administrative Procedure (decreto legislativo 2 July 2010 no 104) the definition of 'final judgment' in administrative matters is absent. Therefore, it is necessary to apply the provisions of the Code of Civil Procedure (Art 39 of the Code of Administrative Procedure refers to the rules of the civil

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¹ Corte costituzionale 26 May 2017 no 123, available in English at www.cortecostituzionale.it. The judgment was decided on 7 March 2017 and published on 26 May 2017.

trial, if compatible, in case of lack of specific discipline). At the systematic level, there are two reference provisions in Italian law. On the one hand, Art 324 of the Code of Civil Procedure sets the notion of ‘formal *res iudicata*’ (the decision is unappealable for the exhaustion of the ordinary appeals). On the other hand, from the Art 2909 of the Civil Code, the notion of ‘substantial *res iudicata*’ is inferred, in terms of incontrovertibility of the assessment in the final judgment.

Concerning the judgment in no 123 of 2017, it should be pointed out that the Constitutional Court declared the issue inadmissible about Arts 24 (right of defence) and 111 (right to a fair trial) of the Italian Constitution. In the opinion of the Court, the question is also unfounded about Art 117, para 1, Italian Constitution, that allows the Convention to be assessed as a parameter ‘interposed’ between the Constitution and the Italian ordinary law.

This judgment must be taken into account first of all for the delicate and current subject matter, and for well-argued arguments that consider the case law of the Court of Strasbourg and the evolution of several legal systems in Europe.

Additionally, the judgment sets out some of the issues that the Constitutional Court had already dealt with regarding criminal *res iudicata* in the decisions nos 129 of 2008² and 113 of 2011³ (regarding the so-called *Dorigo* case)⁴, and no 210 of 2013⁵ (connected to the *Scoppola* case).⁶

In order to understand the reasons of the ruling, first of all, it is appropriate to proceed with a concise exposition of the protracted judicial proceedings before the Italian Administrative Courts, the Court of Strasbourg and finally the Constitutional Court. Then it examines the principles drawn up by the Constitutional Court in criminal matters whenever there is a contrast between domestic and European judgments, and finally to analyse the arguments of judgment no 123 of 2017.

II. The ECtHR Decisions *Mottola and Staibano v Italy* and the Italian Case Law

The trial case that led to the judgment commented here is particularly complex but its exact understanding is necessary to grasp the arguments of the Constitutional Court in judgment no 123 of 2017.

² Corte costituzionale 30 April 2008 no 129, *Giurisprudenza italiana*, 2142 (2009), available at www.cortecostituzionale.it.

³ Corte costituzionale 7 April 2011 no 113, *Giurisprudenza italiana*, 2646 (2011), and furthermore available in English at www.cortecostituzionale.it.

⁴ Eur. Commission H.R., *Dorigo v Italy*, Judgment of 20 May 1998, available at www.hudoc.echr.coe.int.

⁵ Corte costituzionale 18 July 2013 no 210, *Giurisprudenza italiana*, 392 (2014), and furthermore available in English at www.cortecostituzionale.it.

⁶ Eur. Court H.R., *Scoppola v Italy*, Judgment of 17 September 2009, available at www.hudoc.echr.coe.int.

The complicated judicial case of the judgment no 123 of 2017 starts with a claim brought to the Regional Administrative Court. The facts concerned the legal qualification of the relationship between the Hospital of the University of Naples ‘Federico II’ and some practitioners who, between 1983 and 1997, had carried out professional activity paid with the ‘job on call’ system. Subsequently, these practitioners were hired for a fixed term.

Following an assessment by the Italian Social Security Agency, some of these practitioners filed claims to the Regional Administrative Court (*Tribunale Amministrativo Regionale* or *TAR*) of Campania in order to have their employment relationship accepted and acknowledged by the University and, therefore, to obtain the right to the payment of social security contributions. These lawsuits by a first group of applicants were successful both before the *TAR* and in the appeal before the Council of State. Consequently, the University of Naples implemented these judgments by acknowledging the employment relationship.

However, in 2004, a second group of practitioners paid by the University of Naples ‘Federico II’ with the ‘job on call’ system, brought another claim to the Regional Administrative Court of Campania, demanding the same issues of the first group of claimants.

In the decision no 2527 of 24 March 2005,⁷ the Regional Administrative Court accepted the claim partially, assimilating the activity carried out by the practitioners to that of university researchers. This assimilation allowed to state that the administrative judge was competent to decide. In the opinion of the judges at first instance, even if formally defined as a free collaboration without any subordination link, the contractual relationship between the University and its temporary physicians presented all the characteristics of employment in the public sector.

Differently, the Council of State, in plenary session (*Adunanza Plenaria*), in the judgment no 4 of 2007⁸ accepted the appeal of the University and considered applicable Art 45, para 17, of decreto legislativo 31 March 1998 no 90 (New provisions on the organisation and employment relationships in public administrations, jurisdiction in labour disputes and administrative jurisdiction, issued for implementing Art 11, para 4, of Law 15 March 1997 no 59), then merged into the current Art 69, para 5, of decreto legislativo 30 March 2001 no 165 (General rules on the regulation of employment by public administrations).

This provision is particularly important in the division of jurisdiction between ordinary judges and administrative judges. Specifically, the aforementioned

⁷ Tribunale amministrativo regionale Campania-Napoli 24 March 2005 no 2527, available at www.giustizia-amministrativa.it.

⁸ Consiglio di Stato-Adunanza Plenaria 21 February 2007 no 4, *Corriere del merito*, 536 (2007).

article provides that for disputes relating to 'privatised' civil service, cases, concerning employment contracts stipulated before 30 June 1998, remain assigned to the exclusive jurisdiction of the administrative judge if submitted by 15 September 2000, under penalty of expiration.

This provision was subject to an interpretative contrast.

Indeed, a first unusual permissive orientation held that the second part of Art 69, para 7, of decreto legislativo 30 March 2001 no 165, was to be understood as meaning that appeals incorrectly submitted to the administrative court after 15 September 2000, could be resubmitted to ordinary courts (acting as labour courts).

However, a different and more rigid orientation prevailed in the jurisprudence of the Court of Cassation and the Council of State. Appeals submitted belatedly, radically lost the right to assert, in any forum, their claims. The purpose of this orientation (also endorsed by the Constitutional Court)⁹ was to avoid ordinary courts having to rule on disputes concerning employment relationships established at a time when they were not yet competent for dealing with them.

The *Adunanza Plenaria* adhered to the second and more rigorous orientation: consequently, the lawsuit of the appellant parties, brought before the administrative judge in 2004 and, thus, after 15 September 2000, was declared inadmissible by the Council of State due to delay.

Adhering to the most rigorous interpretation, the Council of State prevented the *translatio* of the trial to the ordinary judge with jurisdiction, due to the statute of limitations set by the legislator in the aforementioned Art 69, para 7 of decreto legislativo 30 March 2001 no 165.¹⁰

Some of the unsuccessful appellants, therefore, lodged an appeal to the European Court of Human Rights (hereinafter ECtHR). The Court held two decisions of 4 February 2014 (*Staibano and others v Italy*¹¹ and *Mottola and others v Italy*),¹² which became final on 4 May 2014, ascertained the violation by Italy of Art 6, para 1 of the ECHR, and of Art 1 of the first Additional Protocol.

Specifically, the Court of Strasbourg clarified the scope of the right of access to justice and the conditions under which it may be limited. The limitations must not lead to the total compromise of the individual's right and, moreover, they must pursue a legitimate purpose, respecting a reasonable proportionality

⁹ Corte costituzionale ordinanza 6 July 2004 no 214, *Critica del diritto*, 543 (2004); Corte costituzionale ordinanza 26 May 2005 no 213, *Corriere del merito*, 983 (2005); Corte costituzionale 11 May 2006 no 197, available at www.cortecostituzionale.it.

¹⁰ The same *Consiglio di Stato*, with a ruling of 13 November 2006, decided on a case of a doctor in the same conditions who acted before 15 September 2000, and, in this case, confirmed the assessment of the TAR which considered the working relationship between the doctor and the University as a public employment relationship.

¹¹ Eur. Court H.R., *Staibano and others v Italy*, Judgment of 4 February 2014, available at www.hudoc.echr.coe.int.

¹² Eur. Court H.R., *Mottola and others v Italy*, Judgment of 4 February 2014, available at www.hudoc.echr.coe.int.

between means and purposes.

With these premises, the Court ascertained the violation of Art 6, para 1 of the Convention regarding the right of access to a court since in this case that right had been unjustly harmed, due to the jurisprudential change of the aforementioned Art 69, para 7 of decreto legislativo 30 March 2001 no 165.

Furthermore, the Court held that Italy had also infringed Art 1 of the first Additional Protocol to the same Convention. The appellants were holders of an ‘possession’ within the meaning of the aforementioned conventional parameter since their pension credit right had a sufficient basis in domestic law in light of the jurisprudence that was prevailing at that time.

The decision of the Council of State had, therefore, deprived the appellants of their legitimate expectation of achieving this ‘asset’.

As concerns the question of just satisfaction under Art 41 ECHR, the Court had made reservations on this point, urging the Italian Government to reach a settlement agreement before the judgment became final under Art 44, para 2, ECHR.

III. The Constitutional Issues by the Council of State Sitting in Plenary Session

In light of the *Staibano* and *Mottola* judgments, the unsuccessful parties of the aforementioned judgment no 4 of 2007 of the *Adunanza Plenaria* (some of which were parties to the trial in Strasbourg), started proceedings to obtain the revocation of that judgment, asking the Council of State to proceed with the constitutionally oriented interpretation or, in the alternative, to raise the issue of constitutional legitimacy of Art 106 of decreto legislativo 2 July 2010 no 104 (the Code of Administrative Procedure),¹³ as well as of Arts 395 and 396 of the Code of Civil Procedure referred to by it.¹⁴

The Council of State in plenary session, therefore, was unable to give the law an extensive interpretation, or one conforming to the ECHR as compulsory. Since it could not set aside the domestic laws in contrast with the conventional text (not being the law of the European Union),¹⁵ it raised an issue of constitutional legitimacy. Precisely, it asked the Constitutional Court if these provisions do not provide for a different case of revocation when this becomes necessary to implement final rulings of the European Court of Human Rights.

According to the most recent jurisprudence of the Constitutional Court, the

¹³ Art 106 of the Code of Administrative Procedure provides that the of the Regional Administrative Tribunals and the State Council judgments are revocable, in the cases and under the conditions provided by the Arts 395 and 396 of the Code of Civil Procedure.

¹⁴ Arts 395 and 396 of the Code of Civil Procedure do not provide for the revocation when the decision is contrary to the ECHR.

¹⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal S.p.A.*, [1978] ECR -00629; Corte costituzionale 8 June 1984 no 170, *Foro italiano*, 2062 (1984).

Convention, interpreted by the Court of Strasbourg, assumes importance as intermediate rules between the law and the Constitution in Italian legal system. It integrates the parameter of Art 117, para 1, of the Italian Constitution, that binds the legislators (national, state and regional) to comply with the international obligations assumed by the Italian State, which includes the ECHR.¹⁶

On the other hand, as the Council of State pointed out correctly, the position of the Convention in the Italian system of legal sources did not change even after the entry into force of Art 6 of the Lisbon Treaty, which provides for the European Union to join the ECHR and which has still not been implemented.¹⁷ Consequently, any court, when it has to decide on a contrast between the ECHR and a rule of domestic law, will be required to try to interpret the provision in accordance with the Convention before raising the issue of constitutional legitimacy.¹⁸

On the basis of these premises, the Council of State detected a tension between the internal rules governing the revocation of a final administrative judgment and Art 46 ECHR which requires Member States to comply with the decisions of the Court of Strasbourg by taking all general and/or necessary measures to remedy the alleged infringement.

Considering that in the present case, as mentioned above,¹⁹ the Court of Strasbourg ascertained the violation of the right of access to a Court (Art 6 ECHR) and the right to property (Art 1 Additional Protocol no 1), the impossibility of revoking judgment no 4 of 2004 of the Plenary Session would have meant for the appellants the definitive loss of the possibility of access to a Court, and the

¹⁶ See Corte costituzionale 24 October 2007 nos 348 and 349, *Danno e responsabilità*, 973 (2008).

¹⁷ Corte costituzionale 11 March 2011 no 80, *Diritto penale e processo*, 404 (2011).

¹⁸ Please, pay attention to Corte costituzionale 26 March 2015 no 49, *Foro italiano*, 1623 (2016), also available in English at www.cortecostituzionale.it, para 7: 'The Italian courts will only be obliged to implement the provision identified at Strasbourg in cases involving 'consolidated law' or a 'pilot judgment' by adjusting their criteria for assessment in line with it in order to resolve any contrast with national law, primarily using 'any interpretative instrument available' or, if this is not possible, by referring an interlocutory question of constitutionality (see Judgment no 80 of 2011). Consequently, and as a general matter, this consolidated law, as an interposed rule, will take on the meaning already established within European case law, which this Court has in fact repeatedly asserted it cannot 'set aside' (see *inter alia* Judgment no 303 of 2011) save in the exceptional eventuality that it, and thus also the implementing law, is found to violate the Constitution (see *inter alia* Judgment no 264 of 2012), which is strictly a matter for this Court.'

On the other hand, in the event that the ordinary court questions the compatibility of an ECHR provision with the Constitution, it goes without saying that, absent any 'consolidated law', this doubt alone will be sufficient to exclude that rule from the potential content which can be assigned through interpretation to the ECHR provision, thereby avoiding the need to refer a question of constitutionality by interpreting the provision in a manner compatible with the Constitution'.

See also, A. Terrasi, 'The Relationship between the Italian Constitution and the European Convention on Human Rights' *Italian Yearbook of International Law*, 536 (2016).

¹⁹ See para II above.

opportunity to assert the pension rights they would have been entitled to.

Finally, the Council of State raised the issue of constitutional legitimacy of Arts 106, 395 and 396 of the Code of Administrative Procedure, citing as constitutional parameters the following provisions. Firstly, Art 117, para 1, of the Italian Constitution which, in this case, points out the commitment undertaken by the Italian State – with the ratification and execution of legge 5 August 1955 no 848 – to comply with the judgments of the Court of Strasbourg, with specific reference to Art 46 ECHR. Secondly, Art 111 of the Italian Constitution (a rule that guarantees the so-called ‘fair trial’) and Art 24 (right of defence).²⁰

IV. ECHR Violations and *Res Iudicata*

1. The Article 46 ECHR and *Res Iudicata* in the Convention’s System

Before analysing the content of the ruling of the Constitutional Court, it is necessary to set out the structure outlined by the Convention concerning the possible conflict between judgments and the evolution of the Court of Strasbourg and Italian jurisprudence in criminal matters, with particular reference to that of the Constitutional Court.

The matter being examined by the Constitutional Court falls among what doctrine has defined as ‘erosion of the *res iudicata* myth’.²¹ This phenomenon has affected many State systems that, starting after the Second World War, opened up to international and supranational experiences of protection of fundamental rights. Primarily, the value of *res iudicata* as a crucial element of legal certainty, is questioned in the face of the ever-increasing weight within national legal systems of the ECHR and the jurisprudence of the Court of Strasbourg.

As is well known, unlike European Union Law, which uses the preventive instrument of reference for a preliminary ruling,²² Art 35 ECHR imposes the

²⁰ Consiglio di Stato-Adunanza Plenaria ordinanza 4 March 2015 no 2, para 17 ‘*Ritiene, dunque, il Collegio di dover sollevare questione di legittimità costituzionale degli artt. 106 c.p.a. e 395 e 396 c.p.c. in relazione agli artt. 117 co.1, 111 e 24 Cost nella parte in cui non prevedono un diverso caso di revocazione della sentenza quando ciò sia necessario, ai sensi dell’art. 46 par. 1, della Convenzione europea dei diritti dell’uomo e delle libertà fondamentali, per conformarsi ad una sentenza definitiva della Corte europea dei diritti dell’uomo*’ (‘The Court believes that it should raise a question of constitutional legitimacy of the Arts 106 of the Italian Civil Code and 395 and 396 in relation to the Arts 117, para 1, 111 and 24 of the Constitution in the part in which they do not provide for a different case of revocation of the sentence if necessary, pursuant to Art 46, para 1, of the European Convention on Human Rights and Fundamental Freedoms, to comply with a final ruling by the European Court of Human Rights’).

²¹ R. Caponi, ‘Corti europee e giudicati nazionali’ *Corti europee e giudici nazionali. Atti del 27° Convegno nazionale (Verona, 25-26 settembre 2009)* (Bologna: Bononia University Press, 2011), 239.

²² As is well known, the project of reform of the conventional system to introduce the instrument of the preliminary reference for interpretation is currently stopped because Art 5 of

exhaustion by the appellant of all internal remedies, as a general condition of admissibility of the appeal²³ (with some exceptions²⁴). This mechanism entails an inevitable tension between domestic judgments and the subsequent judgment of the Court of Strasbourg which (if any) has ascertained the violation of the Convention by the State.

Therefore, the problem is how to identify the right remedy to implement the ruling of the European Court of Human Rights in favour of the successful appellants.

The Convention, in the first paragraph of Art 46 (*Binding force and execution of judgments*), provides that 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'. This provision follows that previously contained in Art 53, para 2, amended and transfused by the Eleventh Protocol which radically changed the control procedure on compliance with the Convention.²⁵

The Constitutional Court itself emphasised in judgment no 113 of 2011 that the present regulation has a central importance in the European system of protection of fundamental rights, based on the Court of Strasbourg, being one of the primary obligations that derive from the adherence to the Convention by the Contracting States.²⁶

The first paragraph of Art 46 ECHR imposes a variable obligation on the States depending on the content of the judgment that has established a conventional violation.

Furthermore, we must remember that a judgment of the European Court of Human Rights carries out its binding effect under international law and is compulsory for the State as it is the subject of this treaty-based legal system. Therefore, the ruling has no binding effect in the domestic legal systems since it does not place any national law obligations. Indeed, the mandatory effectiveness, recognised to the Convention within the State legal system, does not automatically

the XVI Additional Protocol of the ECHR (which foresees this instrument) is not yet in force due to the lack of the minimum number of ratifications.

²³ B. Randazzo, 'Il giudizio dinanzi alla Corte europea dei diritti: un nuovo processo costituzionale' *Rivista AIC*, 29 November 2011, 16.

²⁴ In the European Court's opinion, the rule can be derogated when the national law does not offer any remedy or when the exhaustion of possible internal remedies would be solved for the victim in a useless activity due to an unfavorable consolidated case law. See Eur. Court H.R., *Scordino and others v Italy*, Judgment of 27 March 2003, available at www.hudoc.echr.coe.int.

²⁵ G. Raimondi, 'Il protocollo n. 11 alla Convenzione europea dei diritti dell'uomo: una Corte unica per la protezione dei diritti dell'uomo in Europa' *Rivista internazionale dei diritti dell'uomo*, 61-63 (1994); J.F. Flauss, 'La pratique du Comité des Ministres du Conseil de l'Europe au titre de l'Art 54 de la Convention Européenne des Droits de l'Homme' *Annuaire Français de Droit International*, 408 (1998); F. Sundberg, 'Le contrôle de l'exécution des arrêts de la Cour européenne des droits de l'homme' *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan* (Bruxelles: Bruylant, 2004), II, 1515.

²⁶ Corte costituzionale 7 April 2011 no 113 n 3 above.

imply recognition of similar validity to judgments issued by the European Court of Human Rights.²⁷

Art 46, para 1, ECHR was interpreted, historically, in conjunction with Art 41 ECHR, pursuant to which

‘if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party’.

The interpretation of these combined provisions has changed over time, as will be explained further on.

2. The Evolutionary Interpretation of Arts 46, Para 1, and 41 ECHR

Initially, it was considered that the combined provisions of the two articles attributed to the Court of Strasbourg only the power to declare the violation of the conventional obligations. The Contracting States could choose at their discretion how to fulfil the obligation to comply with such rulings. Furthermore, it was considered that the impossibility of achieving the reintegration in a specific form, mentioned in Art 41 ECHR, should be understood as not only a material but also a legal impossibility (‘if the internal law of the High Contracting Party’), thus giving the States the choice whether or not to provide for or limit the scope of the specific reparation.

According to this original approach, therefore, the impossibility to surpass the judgment, constituting a ‘legal impossibility’ of domestic law, would have prevented in any case *restitutio in integrum*, the Court having to opt for a pecuniary conviction.

The original interpretation of Arts 41 and 46, para 1, ECHR was surpassed by an evolutionary interpretation of the provisions aimed at broadening the mandatory scope of the Court’s judgments.

In particular, taking into consideration the textual wording of Art 46, accurate doctrine emphasises that the rule is not limited to sanctioning the binding effectiveness of the judgments of the European Court of Human Rights. However, it contains a *quid pluris*, placing the burden of a real additional obligation (whether to do or not) on the Contracting Parties about the ruling of the Court. This correct interpretation involves the obligation of the State responsible for adopting specific measures to implement the decisions issued against it.²⁸

Since the late 1990s, under pressure from the Committee of Ministers, the

²⁷ P. Pirrone, *L’obbligo di conformarsi alle sentenze della Corte europea dei diritti dell’uomo* (Milano: Giuffrè, 2004), 80-82.

²⁸ *ibid* 3.

Court's judgments have been enriched with content, fuelling the idea that *restitutio in integrum* represents the primary instrument for fulfilling the conventional conformation obligation.

The position taken by the jurisprudence of the Court at the end of this evolutionary path is represented by the judgment of the Grand Chamber *Scozzari and Giunta v Italy*²⁹ of 13 July 2000. In this case, the Court (para 249) 'points out that by Art 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects'.

The interpretative turn was also portrayed by the Italian Constitutional Court in the judgment no 113 of 2011,³⁰ where it was found that 'It is now a well-established position in this regard within the most recent case law of the Strasbourg Court that,

'a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction (...) but also to choose the general and/or, if appropriate, individual measures to be adopted' (see *inter alia*, *Scoppola v Italy*, Grand Chamber, Judgment of 17 September 2009, para 147; Grand Chamber, Judgment of 1 March 2006, *Sejdovic v Italy*, para 119; Grand Chamber, Judgment of 8 April 2004; and *Assanidzé v Georgia*, para 198).

This is because, in the light of Art 41 ECHR, the purpose of awarding sums by way of just satisfaction is

'to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied' (*Scozzari and Giunta v Italy*, Judgment 13 July 2000, para 250).

The objective of the individual measures which the respondent State is required to carry out is identified more specifically by the European Court as *restitutio in integrum*, or full redress, in favour of the interested party.

²⁹ Eur. Court H.R. (GC), *Scozzari and Giunta v Italy*, Judgment of 7 July 2000, available at www.hudoc.echr.coe.int.

³⁰ Corte costituzionale 7 April 2011 no 113 n 3 above.

Accordingly, these measures must put

‘the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded’ (see *inter alia*, Grand Chamber, *Scoppola v Italy*, Judgment of 17 September 2009, para 151; *Sejdovic v Italy*, Judgment of 10 November 2004, para 55; and *Somogyi v Italy*, Judgment of 18 May 2004, para 86’).

The European Court of Human Rights, moreover, has continuously reiterated, even in the presence of this evolution, that in principle it is not up to it to indicate the measures aimed at achieving *restitutio in integrum* and/or the general measures necessary to put an end to the conventional violation, leaving the States free to choose the means for the fulfilment of this obligation, provided they are compatible with the conclusions contained in its judgments.³¹

However, in some exceptional cases, it considers it useful to indicate to the defendant State the type of measures to be taken to put an end to the infringement.³²

Finally, in case of violation of the fair trial rules (Art 6 ECHR), the reopening of the trial or the re-examination of the case are, in principle, the most appropriate, if not the only, means of operating *restitutio in integrum* of the victim.³³

³¹ Eur. Court H.R. (GC), *Bochan v Ukraine (no 2)*, Judgment of 5 February 2015, para 57; Eur. Court H.R. (GC), *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, Judgment of 17 July 2014, para 158; Eur. Court H.R. (GC), *Kuric and others v Slovenia*, Judgment of 26 June 2012, para 79; Eur. Court H.R. (GC), *Davydov v Russia*, Judgment of 30 October 2014, para 25; Eur. Court H.R., *Biblical Centre of the Chuvash Republic v Russia*, Judgment of 12 June 2014, para 66; Eur. Court H.R., *Oleksandr Volkov v Ukraine*, Judgment of 9 January 2013, para 194; Eur. Court H.R., *Jehovah's Witnesses of Moscow and others v Russia*, Judgment of 22 November 2010, para 206; Eur. Court H.R. (GC), *Scoppola v Italy*, Judgment of 17 September 2008, para 147; Eur. Court H.R., *Kollcaku v Italy*, Judgment of 8 February 2007, para 82; Eur. Court H.R., *Zunic v Italy*, Judgment of 21 December 2006, para 75; Eur. Court H.R. (GC), *Sejdovic v Italy*, Judgment of 1 March 2006, paras 119 e 127; Eur. Court H.R. (GC), *Öcalan v Turkey*, Judgment of 12 May 2005, para 210; Eur. Court H.R., *Bocellari and Rizza v Italy*, Judgment of 13 November 2007, para 44; Eur. Court H.R., *Scozzari and Giunta v Italy*, Judgment of 7 July 2000, para 249. All these judgments are available at www.hudoc.echr.coe.int.

³² Eur. Court H.R. (GC), *Davydov v Russia*, Judgment of 30 October 2014, para 26; Eur. Court H.R., *Oleksandr Volkov v Ukraine*, Judgment of 9 January 2013, para 195; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT) v Switzerland*, Judgment of 30 June 2009, para 88; Eur. Court H.R. (GC), *Öcalan v Turkey*, Judgment of 12 May 2005, para 210; Eur. Court H.R., *Popov v Russia*, Judgment of 13 July 2006, para 263. All these judgments are available at www.hudoc.echr.coe.int.

According to the ECtHR, in some cases the nature of the violation would leave no real choice regarding the measures: Eur. Court H.R., *Oleksandr Volkov v Ukraine*, Judgment of 9 January 2013, para 195; Eur. Court H.R., *Aleksanyan v Russia*, Judgment of 22 December 2008, para 240; Eur. Court H.R., *Fatullayev v Azerbaijan*, Judgment of 22 April 2010, paras 176-177; Eur. Court H.R. (GC), *Assanidze v Georgia*, Judgment of 8 April 2004, para 202. All these judgments are available at www.hudoc.echr.coe.int.

³³ *Inter alia*, Eur. Court H.R., *Karelin v Russia*, Judgment of 20 September 2016, para 97;

Recommendation no R (2000)2 to the Member States of 19th January 2000 by the Council of Ministers on ‘the re-examination or reopening of certain cases at the European Court of Human Rights’ and its Explanatory *Memorandum* are particularly crucial in the evolution of the topic we are dealing with here.

Indeed, although it is technically a soft law act, the Recommendation appears to be a particularly important act for determining the obligations of the Contracting States of the Convention for various reasons. First of all, because it comes from the Council of Ministers that is the body responsible for overseeing the execution of condemnation rulings of the Court of Strasbourg. Secondly, because the Recommendation affects the relevant application practice regarding the interpretation of the ECHR under Art 31, para 3, of the Vienna Convention on the Law of Treaties. Finally, since the Court often quotes the Recommendation within the justification of the judgments, integrating the precepts of the Convention with these contents.

Referring to the contents of the Recommendation, it is worth to highlight

‘that the practice of the Committee of Ministers in supervising the execution of the Court’s judgements shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*’.

The Committee of Ministers itself

‘invites (...) the Contracting Parties to ensure that there exists at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*’,

and while acknowledging wide discretion on the point to the individual States,

‘encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention’.

The Recommendation also indicates two situations in which the re-examination of the case is the most appropriate. For example, when

Eur. Court H.R. (GC), *Bochan v Ucraina*, 5 February 2015, para 57; Eur. Court H.R. (GC), *Davydov v Russia*, Judgment of 30 October 2014, para 27; Eur. Court H.R. (GC), *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, para 112; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT) v Switzerland*, Judgment of 30 June 2009, para 89; Eur. Court H.R., *Cat Berro v Italy*, Judgment of 11 December 2007, para 46; Eur. Court H.R., *Kollcaku v Italy*, Judgment of 8 February 2007; Eur. Court H.R., *Zunic v Italy*, Judgment of 21 December 2006, para 74; Eur. Court H.R. (GC), *Öcalan v Turkey*, Judgment of 12 May 2005, para 210. All these judgments are available at www.hudoc.echr.coe.int.

‘the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening’;

or when

‘the judgement of the Court leads to the conclusion that:

a. the impugned domestic decision is on the merits contrary to the Convention, or

b. the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

The Explanatory *Memorandum*, moreover, clarifies that these hypotheses are aimed at identifying exceptional cases in which the purpose of ensuring the protection of individual rights and the effective application of the Court’s judgments, prevail over the principles underlying the *res iudicata* doctrine, and in particular the legal certainty, despite their undoubted importance.

V. The Conflict Between Judgments in Criminal Proceedings in the Constitutional Court’s Case Law

The described regulatory development of the Convention system had an immediate effect on Italian criminal case law. Since the mid-2000s, it has faced the problem of how to incorporate the indications of the Court of Strasbourg concerning the *restitutio in integrum* following the ascertainment of the violation of the right to the fair trial protected by Art 6 ECHR.

In an attempt to find a remedy in the Italian legal system, the Court of Cassation has identified several possible remedies: the exclusive procedure for relief from the time limitations for lodging the appeal (Art 175, para 2, Italian Code of Criminal Procedure);³⁴ or the application for an enforcement review (Art 670 of the Italian Code of Criminal Procedure), by which the enforcement court would have to declare the unenforceability of the national ruling contrary to the Convention;³⁵ finally, through an analogical interpretation, the procedure for extraordinary appeal owing to material or factual errors contained in the measures issued by the Court of Cassation (Art 625-*bis* of the Italian Code of

³⁴ Corte di Cassazione penale 12 February 2008 no 8784, available at www.dejure.it; Corte di Cassazione penale 15 November 2006 no 4395, *Corriere giuridico*, 688 (2007).

³⁵ Corte di Cassazione penale 1 December 2006 no 2800, *Giurisprudenza italiana*, 2281 (2007).

Criminal Procedure).³⁶

However, the prevailing opinion was that these were partial solutions that were incapable of sufficiently achieving the objective.³⁷

The Constitutional Court was the principal architect of the development of the Italian legal system in matters of *restitutio in integrum* on criminal issues thanks to several significant judgments.

The Court dealt with the problem for the first time in the judgment no 129 of 2008.³⁸ In this decision, it declared the non-substantiation of the question of the constitutionality of Art 630, para 1, sub a), of the Italian Code of Criminal Procedure about the parameters referred to Arts 3, 10 and 27 of the Italian Constitution. In this judgment, however, after underlining the complexity and delicacy of the subject of revocation remedies, the Court addressed the legislator with a 'pressing invitation' to adopt the most appropriate measures to allow the Italian legal system to comply with the rulings of the Court of Strasbourg which has ascertained a violation of Art 6 ECHR.

In the absence of an expected intervention of the legislator, the Constitutional Court was faced with the question of the constitutional legitimacy of Art 630 of the Italian Code of Criminal Procedure for the violation of Art 117, para 1, of the Italian Constitution in relation to Art 46, para 1, ECHR, for the second time adopting the judgment no 113 of 2011.³⁹

In this ground-breaking decision, the Court took several factors into account.

First of all, the evolutionary interpretation of the case law of the Court of Strasbourg on the scope of Art 46 ECHR. Secondly, of the continuing absence within the Italian legal system of an adequate instrument to ensure *restitutio in integrum*. In addition, the repeated complaints against Italy by the Committee of Ministers and the Parliamentary Assembly on the occasion of the *Dorigo* case. Finally, the adoption by the many Member States of the Council of Europe of appropriate instruments to allow the reopening of a criminal trial found unfair by the Court of Strasbourg. From a comparative point of view, based on data updated to 2016, it turns out that thirty-three⁴⁰ Member States of the

³⁶ Corte di Cassazione penale 12 November 2008 no 45807, *Giurisprudenza italiana*, 2292 (2009); Corte di Cassazione penale 11 February 2010 no 16507, *Giurisprudenza italiana*, 2643 (2010).

³⁷ Corte costituzionale 7 April 2011 no 113 n 3 above.

³⁸ Corte costituzionale 30 April 2008 no 129 n 2 above.

³⁹ Corte costituzionale 7 April 2011 no 113 n 3 above.

⁴⁰ Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and Turkey. The data is the same as resulting from the *Review of the implementation of Recommendation (2000)2 of the Committee of Ministers to the Member States on re-examination and reopening of certain cases at domestic level following judgments of the European Court of Human Rights*, 12 May 2006, available at <https://www.coe.int>.

Council of Europe allow the reopening of criminal trials.⁴¹

Based on these considerations, the Constitutional Court declared that Art 630 of the Code of Criminal Procedure was unconstitutional insofar as it did not provide for a different ground for the review of a judgment or conviction in order to enable a trial to be reopened when this is necessary, pursuant to Art 46, para 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and to comply with a final judgment of the European Court of Human Rights.

Another fundamental issue for the reconstruction of the relations between the rulings of the Court of Strasbourg and a criminal judgment is that which led to judgment no 210 of 2013.⁴²

In this ruling, the Constitutional Court dealt with the position of the subjects convicted with a final judgment who did not lodge an appeal to Strasbourg but who are in the same situation as those who successfully applied to the Court of Strasbourg.

While denying the nature of a pilot ruling to the Grand Chamber's ruling *Scoppola v Italy*,⁴³ the Constitutional Court shared the observation of the Joint Divisions of the Court of Cassation referring to the presence of the Court of Strasbourg's determination to adopt not only general measures, but also individual actions, having imposed itself on Italy to resolve the violation on a legislative level and to remove its effects in respect of all convicted persons whose circumstances are the same as those of *Scoppola*. According to the Constitutional Court

'it falls first and foremost to the legislator to acknowledge the conflict that has arisen between national law and the Convention system and to remove the provisions that gave rise to it, ensuring that they have no further effect; however, if the legislator does not take action, the problem arises as to how to eliminate effects that have already definitively arisen in cases identical to those in which the Convention was found to have been breached, but which were not appealed to the ECtHR, and have thus become ineligible for appeal. Indeed, there is a fundamental difference between persons who have appealed to the ECtHR after exhausting internal remedies, and those who by contrast have not exercised that right, with the result that their convictions, which have now become final, are no longer eligible for relief under the Convention'.

Moreover, it is stated:

⁴¹ Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision in the domestic legal order for the re-examination or reopening of cases following judgments of the Court, 12 February 2016, DH-GDR(2015)008, available at <https://www.coe.int>.

⁴² Corte costituzionale 10 July 2013 no 210 n 5 above.

⁴³ Eur. Court H.R. (GC), *Scoppola v Italy* n 6 above.

‘The value of a final judgment through which compelling requirements of legal certainty and stability within legal relations are expressed is not moreover extraneous to the Convention system, so much so that the Scoppola judgment itself identified it as a limit on the extension of the *lex mitior* principle, as this Court has already stressed (judgment no 236 of 2011). It must therefore be concluded that, as a matter of principle, the obligation to comply with Convention requirements, in the meaning stipulated by the Strasbourg Court, does not apply to cases – different from that to which this judgment relates – in which the judgment has become final for the purposes of internal law, and that any exceptions to that limit must be inferred not from the ECHR (which does not require it) but from national law’.⁴⁴

The Court, therefore, acknowledged that Italian law does allow situations in which the intangible status of a final judgment may be set aside where the law provides that opposing values – with equal Constitutional standing, but to which the legislator has intended to afford priority status – may be deemed to prevail over the Constitutional value inherent within that principle.

One of these cases is that in which personal freedom has been restricted by an incriminating rule subsequently repealed or modified in favour of the offender (Arts 673 of the Italian Code of Criminal Procedure, and 2, para 3, of the Italian Criminal Code).

However, in relation to the instrument to be used in these cases, according to the Court, the review procedure provided for under Art 630 of the Code of Criminal Procedure, as resulting from the declaration of unconstitutionality in Judgment no 113 of 2011, was not adequate for that case in which it was not necessary to ‘reopen the trial’ on the merits, but was somewhat necessary merely to alter the enforcement of the decision in such a manner as to replace the sentence imposed with one that was compatible with the ECHR, and which was already determined in a precise manner by law.⁴⁵

VI. The Constitutional Court’s Assessment

After having traced the system outlined by the ECHR (with particular reference to Arts 41 and 46, para 1) and examined the evolution of the case law of the Italian Constitutional Court in case of conflict between judges in criminal matters, it is possible to thoroughly analyse judgment no 123 of 2017 which decided the issue of the constitutionality of Art 106 of the Code of Administrative Procedure raised by the Council of State sitting in plenary session.

⁴⁴ Corte costituzionale 10 July 2013 no 210 n 5 above, *Conclusions on points of law*, para 7.2.

⁴⁵ *ibid* para 8.

After a broad description of the fact, the Court proceeded with the examination of the complaints, declaring inadmissible owing to lack of justification on the non-manifest unfoundedness, those relating to Arts 24 and 111 of the Italian Constitution. According to constant jurisprudence, the referring judge (in our case the Council of State sitting in plenary session) should have explained the reasons for the alleged contrast of the rules censured with the evoked constitutional values.⁴⁶

The Court, therefore, deals with the analysis of the alleged breach of Art 117, para 1, of the Italian Constitution in relation to the parameter laid down by Art 46, para 1, ECHR, starting from the findings of *Mottola* and *Staibano*.

Once the relevance of the issue was ascertained, the Court began with the analysis of the merits, declaring the question unfounded.

Firstly, the issue that is dealt with is the one concerning the persons who, despite being in the same substantial situation as the appellants of *Mottola* and *Staibano*, decided not to appeal to the Court of Strasbourg.

With regard to these subjects, the Constitutional Court already decided in a negative sense in the past, since the obligation to reopen the proceedings, pursuant to Art 46 ECHR,

‘in the meaning stipulated by the Strasbourg Court, does not apply to cases – different from that to which this judgment relates – in which the judgment has become final for the purposes of internal law’.⁴⁷

According to the Court, there is

‘a fundamental difference between persons who have appealed to the ECtHR after exhausting internal remedies, and those who by contrast have not exercised that right, with the result that the proceedings relating to them, which have now been resolved by a final judgment, are no longer eligible for relief under the Convention’.⁴⁸

Moving on to the analysis of the position of the subjects who successfully applied to the Court of Strasbourg and recalling their own jurisprudence on the re-opening of the criminal trial which was previously mentioned,⁴⁹ the Court raises the question whether it is possible to reach the same conclusions for trials

⁴⁶ Corte costituzionale 10 June 2016 no 133, available at www.cortecostituzionale.it; Corte costituzionale 16 December 2016 no 276, *Giurisprudenza italiana*, 449 (2017). See also Corte costituzionale ordinanza 11 April 2011 no 126; Corte costituzionale ordinanza 22 July 2011 no 236; Corte costituzionale ordinanza 6 July 2012 no 174; Corte costituzionale ordinanza 11 July 2012 no 181; Corte costituzionale ordinanza 22 November 2012 no 261; Corte costituzionale ordinanza 22 April 2016 no 93; all available at www.cortecostituzionale.it.

⁴⁷ Corte costituzionale 10 July 2013 no 210 n 5 above, *Conclusions on points of law*, para 7-3.

⁴⁸ *ibid.*

⁴⁹ para V above.

other than criminal proceedings, and, in particular, administrative ones.

From an argumentative point of view, the reason of the decision in question is valuable because it achieves the desired dialogue between the Constitutional Court and the European Court of Human Rights, whose jurisprudence is widely considered and referred.

The Constitutional Court first outlines the scope of application of ECHR Arts 41 and 46, in their interpretation provided by the Court of Strasbourg. From the combined provisions of the aforementioned articles, the obligation to comply with the conviction may imply for the condemned State: the payment of fair satisfaction (if ordered by the Court pursuant to Art 41); the adoption, where appropriate, of individual measures aimed at ending the violation; the introduction of general measures to stop the violation deriving from an administrative act or administrative or jurisprudential practice, thus avoiding future violations.⁵⁰

However – as the Italian Court correctly points out in what is probably the essential part of the decision –

‘the ECtHR has been settled in asserting that, as a matter of principle, it does not fall to it to state suitable measures to give tangible expression to *restitutio in integrum* or the general measures necessary in order to put an end to a breach of the ECHR, as the States are free to choose the manner in which that obligation is complied with, provided that this is compatible with the conclusions contained in its judgments (*inter alia*, *Bochan v Ukraine*, Grand Chamber, Judgment of 5 February 2015, para 57; *Centre for legal resources on behalf of Valentin Campeanu v Romania*, Grand Chamber, Judgment of 17 July 2014, para 158; *Kuric and others v Slovenia*, Grand Chamber, Judgment of 12 March 2014, para 80), and has only considered it appropriate to indicate the type of measure to be adopted in a few exceptional cases (amongst the most recent judgments, *Davydov v Russia*, Judgment of 30 October 2014, para 27; *Oleksandr Volkov v Ukraine*, Judgment of 9 January 2013, para 195).

In addition, in cases involving a violation of the provisions on a fair trial (Art 6 ECHR), it has also asserted that the reopening of the trial or the review of the case are in principle the most appropriate ways of providing *restitutio in integrum* (*inter alia*, *Karelin v Russia*, Judgment of 20 September 2016, para 97; *Bochan v Ukraine*, Grand Chamber, Judgment of 5 February 2015, para 58).⁵¹

⁵⁰ Eur. Court H.R., *S.K. v Russia*, Judgment of 14 February 2017, para 132; Eur. Court H.R., *Ignatov v Ukraine*, Judgment of 15 December 2016, para 49; Eur. Court H.R., *Karelin v Russia*, Judgment of 20 September 2016, para 92; Eur. Court H.R. (GC), *Centre for legal resources on behalf of Valentin Campeanu v Romania*, Judgment of 17 July 2014, para 158. All these judgments are available at www.hudoc.echr.coe.int.

⁵¹ Corte costituzionale 26 May 2017 no 123 n 1 above, para 10.

From the ECtHR case law and the Recommendation R (2000)^{2,52} it is therefore possible to find that the obligation to conform the Court's judgments has variable content, and that individual reinstatement measures are only reasonable and must be adopted just where they are necessary to implement the decisions, especially in the case of violation of the rules on a fair trial.

On the other hand, this principle would also be confirmed by the case law of the ECtHR concerning civil and administrative trials.

The Court finds, however,

‘that the assertion that the trial must be reopened as a measure capable of guaranteeing *restitutio in integrum* is only contained in judgments given against states the internal legal systems of which already provide for the review of judgments that have become final in the event that the Convention has been violated (see *inter alia Artemenko v Russia*, Judgment of 22 November 2016, para 34; *Kardoš v Croatia*, Judgment of 26 April 2016, para 67; *T.Ç. and H.Ç v Turkey* Judgment of 26 July 2011, paras 94 and 95; *Iosif and others v Romania*, Judgment of 20 December 2007, para 99; *Paykar Yev Haghtanak LTD v Armenia*, Judgment of 20 December 2007, para 58; *Yanakiev v Bulgaria*, Judgment of 10 August 2006, para 90; *Gurov v Moldavia*, Judgment of 11 July 2006, para 43)⁵³’.

It is clear from the case law of the Court of Strasbourg referred to in the judgment, that the Member States have broad discretion in this regard in order to find a proper balance between the formal obligation to comply with the Court's judgments, on the one hand, and the principles of *res iudicata* and legal certainty, on the other, especially when the dispute concerns third parties, bearers of an independent interest.⁵⁴

The constitutionality issue is decided on the basis of this last argument.

As the Constitutional Court correctly observes, the obligation pursuant to Art 46, para 1, ECHR behaves differently in the case of civil and – in relation to the concrete case – administrative proceedings in which protection must also be ensured to parties other than the State who took part in the ‘internal’ judgment, such as administrations other than the State or private defendants, entrusted with a *public munus* and nominal opponents.

The protection of these ‘third parties’, together with respect towards them of the legal certainty guaranteed by the *res iudicata*, justifies the more cautious attitude of the ECtHR outside the criminal field, where the principles just stated can give way to the deprivation of the personal freedom of the condemned subject in violation of conventional parameters.

This is reflected by the position of various State Parties that have expressed

⁵² para IV.2. above.

⁵³ Corte costituzionale 26 May 2017 no 123 n 1 above, para 12.

⁵⁴ Eur. Court H.R. (GC), *Bochan v Ucraina*, 5 February 2015, para 57.

similar caution in this regard, as was noted – as mentioned above – in *Bochan* and as is apparent from the *Explanatory Memorandum to Recommendation R(2000)2*, the *Review of the implementation of Recommendation* of 12 May of 2006⁵⁵ and finally the *Overview of the Committee of Experts* dated 12 February 2016.⁵⁶

On the basis of these arguments and after outlining a broad overview of the relevant legislation in various European legal systems such as Germany, Spain and France, the Constitutional Court correctly attributes to the legislator the decision, in the light of Art 24 of the Italian Constitution, between the right of action of the interested parties and the right of defence of third parties. According to the Court

‘also under Italian law the reopening of non-criminal trials, resulting in the reversal of a final judgment, require that a delicate balance be struck, in the light of Art 24 of the Constitution, between the right of action of interested parties and third parties’ right to a defence, and that balancing of interests falls primarily to the legislator’.⁵⁷

In this regard, the Court emphasises, however, that third parties are currently not adequately involved in the proceedings before the ECtHR.

In the trials outlined by the Convention, in fact, the necessary parties are the appellant and the State that committed the violation, while the intervention of other parties to the internal appeal – to which, moreover, the appeal does not have to be notified – is subjected to the discretionary assessment of the President, who ‘may (...) invite (...) any person interested who is not the appellant to submit written comments or take part in hearings’ (Art 36, para 2, ECHR). A systematic opening of conventional proceedings to third parties, concludes the Court, would certainly make the work of the domestic legislator easier.⁵⁸

VII. Concluding Remarks

1. The Constitutional Relevance of *Res Iudicata*

In the opinion of the author, the decision of the Constitutional Court in question is acceptable.

In a delicate matter involving several important interests in the national legal system and of constitutional relevance (legal and judgment certainty, right

⁵⁵ *Review of the implementation of Recommendation (2000)2 of the Committee of Ministers to the Member States* n 40 above.

⁵⁶ *Overview of the exchange of views held at the 8th meeting of DH-GDR* n 41 above.

⁵⁷ Corte costituzionale 26 May 2017 no 123 n 1 above, para 17.

⁵⁸ For a critical position on the point, A. Randazzo, ‘A proposito della sorte del giudicato amministrativo contrario a pronunzie della Corte di Strasburgo (note minime alla sent. n. 123 del 2017 della Corte costituzionale)’ *Osservatorio costituzionale*, III, 8 (2017).

of defence, interests of third party nominal opponents, right to a fair trial, etc) and in the absence of the damage to a value such as personal freedom in criminal decisions, it should be the legislator to identify the correct balance by law.

Apart from the necessary protection of the constitutional right of persons other than the State who could not participate in the proceedings before the European Court of Human rights (as will be commented further on), the constitutional value of *res iudicata* must undoubtedly be taken into consideration during the balancing procedure. In Italy, despite the failure of a project to include an article on judgments in the Constitution,⁵⁹ the case law of the Court has continuously affirmed its constitutional value.⁶⁰

Thus, the judgment is assigned ‘inescapable (...) constitutional function’,⁶¹ since it is designed to protect legal certainty and the stability of legal situations,⁶² and this certainty responds to the logical (more than juridical) need that the trial to be concluded with a final solution, that is to say in a definitive ascertainment which constitutes the very purpose of the judicial activity⁶³ and which represents a constitutionally protected value, as it can be linked to the right to judicial protection (Art 24 of the Constitution),⁶⁴ whose effectiveness would be severely compromised if it were always possible to call into question a judicial case.⁶⁵ Furthermore, the principle of a reasonable duration of a trial, enshrined in Art 111,

⁵⁹ F. Modugno, ‘Giudicato e funzione legislativa, introduzione’ *Giurisprudenza italiana*, 2815-2818 (2009); G. Serges ‘Il ‘valore’ del giudicato nell’ordinamento costituzionale’ *Giurisprudenza italiana*, 2819-2827 (2009).

⁶⁰ Corte costituzionale 10 July 2013, no 210 n 5 above.

⁶¹ Corte costituzionale 30 April 2008, no 129 n 2 above.

⁶² Corte costituzionale 10 April 2014 no 90, available at www.cortecostituzionale.it; Corte costituzionale 10 July 2013, no 210, n 5 above; Corte costituzionale ordinanza 20 June 2013 no 149, available at www.cortecostituzionale.it; Corte costituzionale 5 July 1995, no 294, *Corriere giuridico*, 1100 (1995); Corte costituzionale 12 July 1972 no 136, available at www.dejure.it; Corte costituzionale ordinanza 29 October 1999 no 413, *Il Consiglio di Stato*, 1482 (1999).

⁶³ Corte costituzionale 4 February 1982 no 21, *Giurisprudenza italiana*, 582 (1982).

⁶⁴ In the sentence no 364 of 2007, the Constitutional Court traces the need to protect the judged (from the retroactive law), on the one hand to the need to preserve the constitutional prerogatives of judicial authority and, on the other hand, to protect the legitimate expectation of private individuals in the definitive outcome of the process. According to R. Caponi, ‘Giudicato civile e diritto costituzionale: incontri e scontri’ *Giurisprudenza italiana*, 2827 (2009), ‘*le due giustificazioni – apparentemente parallele – si risolvono in una sola: il giudicato come strumento di tutela giurisdizionale dei diritti è costituzionalmente protetto in vista della garanzia della certezza e della stabilità del risultato del processo, nell’interesse delle parti*’ (‘the two justifications – apparently parallel – are resolved into one: *res iudicata* as a tool for judicial protection of rights is constitutionally protected in view of the guarantee of certainty and stability of the outcome of the process, in the interests of the parties’).

See also, Corte costituzionale ordinanza 20 June 2013 no 149 n 62 above; Corte costituzionale 3 July 1996 no 224, *Giustizia civile*, 2468 (1996); Corte costituzionale ordinanza 17 November 2000 no 501, *Giurisprudenza costituzionale*, book 7 (2000).

⁶⁵ Corte costituzionale 10 April 2014 no 90 n 62 above; Corte costituzionale ordinanza 20 June 2013 no 149, n 62 above; Corte costituzionale 5 July 1995 no 294 n 62 above; Corte costituzionale ordinanza 17 November 2000 no 501, *Cassazione penale*, 796 (2001).

para 2, of the Italian Constitution would be compromised.⁶⁶

In matters of balancing, if in criminal matters the decrease in criminal proceedings is justified by the possible compromise of personal freedom (fundamental right of the person protected at constitutional level), the same requirement does not exist in civil and administrative matters. Therefore, the conventional obligation to reopen proceedings would succumb to the constitutional rules laid at the basis of the judgment (Arts 24, 102, 111, para 2, and 113 of the Italian Constitution), thus making, in our opinion, the decision of the Court correct.

In this sense, the Art 30, para 4 of legge 11 March 1953 no 87 (Rules on the constitution and functioning of the Constitutional Court) could also be reinstated and enhanced, which – excluding, outside the criminal sphere, the impact of declarations of constitutional illegitimacy on concluded relationships (including the judgment) – would bear witness to a balance existing in the legal system in favour of the finality of the judicial ascertainment and to the detriment of fundamental rights (even those protected by the Constitution).

It must, however, be stressed that the need to protect civil and administrative judgments is not unconditional and even legge 11 March 1953 no 87, while regulating the operation of the Constitutional Court does not have the status of constitutional rules. Therefore, it does not limit the legislator who, for example, has considered the different values at stake in the event of an extraordinary revocation (Art 395, nos 1, 2, 3 and 6, of the Italian Code of Civil Procedure).

On the other hand, it should be emphasised that the Conventional system in itself, does not seem to oblige the Member States to reopen internal trials to implement the decisions of the Court of Strasbourg. In other words, at present, the interposed parameter mentioned (Art 46, para 1, ECHR) does not require the Italian State to overcome civil and administrative judgments.

The analysis of case law that has dealt with the issue under examination shows, in fact, that the Court of Strasbourg considers the *restitutio in integrum* obligation only in cases where the national laws provide for this hypothesis.⁶⁷ In the case of civil and administrative proceedings (where the personal freedom of an individual is not in danger), Member States have shown greater resistance to questioning some critical internal principles (sometimes of constitutional relevance) such as the legal certainty of *res iudicata* for the protection of third parties.⁶⁸

⁶⁶ Corte costituzionale 7 June 2013 no 132, *Foro italiano*, 2073 (2013); Corte costituzionale ordinanza 17 November 2000 no 501, n 65 above.

⁶⁷ Eur. Court H.R. (GC), *Bochan v Ucraina*, 5 February 2015; Eur. Court H.R., *Steck-Risch and others v Liechtenstein*, Judgment of 11 May 2010; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT) v Switzerland*, Judgment of 30 June 2009, para 89. All available at www.hudoc.echr.coe.int.

⁶⁸ The Court of Strasbourg recognizes, in fact, the importance of the judged, as a principle of a rule of law, as can be seen from the Grand Chamber's judgment of 28 October 1999 *Brumărescu v Romania*, which states (para 61) that 'the right to a fair hearing before a tribunal as guaranteed by Art 6 § 1 of the Convention must be interpreted in the light of the Preamble to

The particularly prudent attitude of the Court of Strasbourg towards the principles enunciated in criminal matters emerges from the Grand Chamber's ruling of 5 February 2015 *Bochan v Ukraine* (referred to by the same Constitutional Court in judgment no 123 of 2017). It states that

'(...) it is for the Contracting States to decide how best to implement the Court's judgments without unduly upsetting the principles of *res iudicata* or legal certainty in civil litigation, in particular where such litigation concerns third parties with their own legitimate interests to be protected. Furthermore, even where a Contracting State provides for the possibility of requesting a reopening of terminated judicial proceedings on the basis of a judgment of the Court, it is for the domestic authorities to provide for a procedure to deal with such requests and to set out criteria for determining whether the requested reopening is called for in a particular case. There is no uniform approach among the Contracting States as to the possibility of seeking reopening of terminated civil proceedings following a finding of a violation by this Court or as to the modalities of implementation of existing reopening mechanisms (see paras 26-27 above).'⁶⁹

the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question'. This judgment is available at www.hudoc.echr.coe.int.

⁶⁹ References to these passages of the *Bochan* ruling are present in the subsequent sentences: Eur. Court H.R., *Goryachkin v Russia*, Judgment of 15 November 2016, para 84; Eur. Court H.R., *Barkov and others v Russia*, Judgment of 19 July 2016, para 28; Eur. Court H.R., *Popov v Russia*, Judgment of 13 July 2006, para 44; Eur. Court H.R., *Gankin and others v Russia*, Judgment of 31 May 2016, para 50; Eur. Court H.R., *Yevdokimov and others v Russia*, Judgment of 16 February 2016, para 59. All judgments available at www.hudoc.echr.coe.int.

The same argumentative setting shines through in Eur. Court H.R., *Ryabkin and Volokitin v Russia*, Judgment of 28 June 2016, para 47: 'However, it is only exceptionally that a violation, by its very nature, does not leave any real choice as to the measures required to remedy it (see *Assanidze v Georgia* [GC], no 71503/01, para 202, ECHR 2004-II). This is particularly true in civil cases where the Contracting States dispose of a variety of means to ensure redress to an aggrieved party (see *Kudeshkina* (no 2) *v Russia* (dec.), no 28727/11, para 77, 17 February 2014). Moreover, such means would frequently be preferable to the reopening of proceedings in view of other equally important considerations, such as the principle of legal certainty, respect of *res iudicata* or the interests of bona fide third parties (see Eur. Court H.R., *Almeida Santos v Portugal*, Judgment of 27 July 2010, para 12; and *Bochan v Ukraine* (no 2) [GC], no 22251/08, para 57, ECHR 2015). Those considerations would in particular prevail over an applicant's interest in having proceedings reopened when the violation of the Convention results from a general problem generating repetitive applications rather than from the specific circumstances of an individual case (see *Davydov v Russia*, n 31 above, para 29; *Henryk Urban and Ryszard Urban v Poland*, Judgment of 30 November 2010, no 23614/08, para 64; *Golubowski v Poland*, Judgment of 5 July 2011, no 21506/08; and, by contrast and compare with *Mirosław Garlicki v Poland*, Judgment of 14 June 2011, no 36921/07, para 154).

In any event, if the internal law allows only partial reparation to be made, Art 41 of the Convention gives the Court the power to award compensation to the party injured by the act or

However, it has been reported⁷⁰ that sometimes the ECtHR has invited the reopening of trials to countries whose legal systems do not yet have a specific remedy, as in the two recent cases against Slovenia *Perak*⁷¹ and *Tence*.⁷²

Therefore, examination of the ECtHR case law currently shows a significant tendency to exclude civil and administrative proceedings from the formal obligation to conform in a specific way, where internal regulations have not yet provided for particular re-examination or revision instruments.

The introduction of such instruments would seem, at present, only strongly advocated.

2. The Third Parties' Right to a Defence

Another element that justifies the particularly cautious attitude on the matter by the European Court of Strasbourg is the protection of the right of defence of those third parties, other than the State, who could not take part in the trial in Strasbourg and who, legitimately, relied on the domestic judgment. As pointed out by the Constitutional Court in the final part of the judgment in question, the participation of these third parties (in respect of which there is no obligation to notify the appeal) is possible and left to the discretion of the President of the Court (Art 36, para 2, ECHR).

The European Court of Human Rights is fully aware of the delicate balance between the protection of the right to a fair trial of both the appellant and third

omission that has led to the finding of a violation of the Convention (see *Papamichalopoulos and Others v Greece* (Art 50), Judgment of 31 October 1995, Series A no 330-B, 58-59, para 34, and *Brumarescu v Romania* (just satisfaction) [GC], no 28342/95, para 20, ECHR 2001-I).

Again, in Eur. Court H.R., *Kudeshkina v Russia* (2), Judgment of 17 February 2015: 'With regard in particular to the reopening of proceedings, the Court clearly does not have jurisdiction to order such measures. However, where an individual has been convicted following proceedings that have entailed breaches of the requirements of Art 6 of the Convention, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation'. The judgment is available at www.hudoc.echr.coe.int.

These arguments were already present in the judgments Eur. Court H.R., *Steck-Risch and others v Liechtenstein*, Judgment of 11 May 2010; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT) v Switzerland*, Judgment of 30 June 2009 available at www.hudoc.echr.coe.int.

⁷⁰ R.G. Conti, 'L'esecuzione delle sentenze della Corte EDU nei processi non penali dopo Corte cost. n. 123 del 2017' *Consulta online*, 333 (2017).

⁷¹ Eur. Court H.R., *Perak v Slovenia*, Judgment of 1 March 2016, para 50, available at www.hudoc.echr.coe.int.

⁷² Eur. Court H.R., *Tence v Slovenia*, Judgment of 31 May 2016, para 43: 'Moreover, while the Slovenian legislation does not explicitly provide for reopening of civil proceedings following a judgment by the Court finding a violation of the Convention (see *Bochan v Ukraine* (no 2) [GC], no 22251/08, para 27, ECHR 2015), the Court has already stated that the most appropriate form of redress in cases where it finds that an applicant has not had access to court in breach of Art 6, para 1, of the Convention would be for the legislature to provide for the possibility of reopening the proceedings and re-examining the case in keeping with all the requirements of a fair hearing (see, *mutatis mutandis*, *Kardoš v Croatia*, no 25782/11, Judgment of 26 April 2016, para 67; and *Perak v Slovenia*, Judgment of 1 March 2016, no 37903/09, para 50)'. The judgment is available at www.hudoc.echr.coe.int.

parties who were unable to participate in the judgments in Strasbourg.

In this respect, as noted above, in the *Bochan* ruling, the Grand Chamber urged States to find the most appropriate system to execute judgments of the Court by weighing up the principles of *res iudicata* and legal certainty with the legitimate expectations of the third parties involved in the trial.⁷³

Not surprisingly in *Review*⁷⁴ of 12 May 2016 and in *Overview*⁷⁵ of 12 February 2016, it should be noted that for some States the interest of third parties, in civil and administrative proceedings, is a significant concern and a reason to refuse the reopening of trials. Additionally, according to some Member States, it should be provided that the ECtHR, where the possible reopening is in the interest of third-parties, invites the latter to participate in the trial under Art 36 of the ECHR.

The position of third parties is relevant at the level of internal balancing as their right of defence is constitutional (Art 24 of the Italian Constitution). Considering the position of the ECHR in the system of legal sources in the Italian legal system as a parameter interposed under the Constitution, the obligation to reopen the trial would be in sharp tension with Art 24 of the Italian Constitution whenever a person other than the appellant or the State has been involved in the civil or administrative proceedings. In these situations, it would not be possible for the conventional revocation obligation to set in.

To further confirm these arguments, the *Mottola and others v Italy* and *Staibano and others v Italy* rulings, despite having ascertained the double conventional violation (both substantive and procedural) by the Italian State, did not indicate the re-examination or reopening of the trial as a necessary, or

⁷³ In the same meaning the judgments: Eur. Court H.R., *Goryachkin v Russia*, Judgment of 15 November 2016, para 84; Eur. Court H.R., *Barkov and others v Russia*, Judgment, 19 July 2016, para 28; Eur. Court H.R., *Popov v Russia*, Judgment of 31 May 2016, para 44; Eur. Court H.R., *Gankin and others v Russia*, Judgment of 31 May 2016, para 50; Eur. Court H.R., *Yevdokimov and others v Russia*, Judgment of 16 February 2016, para 59.

At last in Eur. Court H.R., *Almeida Santos v Portugal*, Judgment of 27 July 2010, para 12: ‘*La Cour estime d’emblée que la situation litigieuse, qui concernait une succession impliquant une tierce personne, ne se prête pas à une réouverture de la procédure d’inventaire incriminée*’. The judgment is available at www.hudoc.echr.coe.int.

⁷⁴ *Review of the implementation of Recommendation (2000) 2 of the Committee of Ministers to the Member States* n 40 above, para 17: ‘It was underlined, in the first phase of the review, that when States have not given effect to the recommendation to allow for reopening of proceedings in the fields of civil and administrative law; major concerns expressed in this connection relate to the need for legal certainty and the need to protect the interests of good faith third parties’.

⁷⁵ *Overview of the exchange of views held at the 8th meeting of DH-GDR* n 41 above, 7: ‘For a few States third-part interest was a real concern and could be ground for the refusal to reopen proceedings. The wish was expressed that information be gathered regarding the impact that the reopening of proceedings may have on third parties who have not had the opportunity to submit observations to the European Court. It was also suggested that it should really be envisaged that the European Court of Human Rights, in cases where a possible reopening may affect third parties, invite the parties to the proceedings in accordance with Art 36 of the Convention’.

even just adequate measure for the specific remedy.

The non-existence of a conventional obligation of *restitutio in integrum* which involves the overturning of *res iudicata* in civil and administrative matters, confirmed by the Constitutional Court itself,⁷⁶ has correctly determined the groundlessness of the question, since there is no conflict of the rules censored with the interposed parameter of Art 46, para 1, ECHR and, therefore, of Art 117, para 1, of the Italian Constitution.

3. Some Considerations of Comparative Law

The interpretative and systematic difficulties related to the topic under examination are demonstrated by the fragmentary nature of the regulations of other European States on the subject and by the consequent lack of consensus among the Council of Europe.

A quick analysis from a comparative perspective,⁷⁷ indeed shows that many States currently do not allow the revocation of civil and administrative judgments issued in violation of the Convention. The datum, moreover, has been duly taken into account by the Constitutional Court which in the judgment in question refers to the French, German and Spanish legal systems.

From the *Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision of domestic legal order for the re-examination or reopening of cases following judgments of the Court*⁷⁸ it appears that, as of 12 February 2016, twenty-three States⁷⁹ (out of a total of forty-seven) allowed the reopening of civil trials, and in one of them (Italy) the issue was taken into consideration (following the issue of constitutionality raised by the Council of State, negatively resolved by the judgment in question).

The *Overview* also notes that among the States where reopening is permitted,

⁷⁶ Corte costituzionale 10 July 2013 no 210, n 5 above.

⁷⁷ P. Passaglia, 'Gli effetti delle sentenze di condanna della Corte europea dei diritti dell'uomo sulle sentenze dei giudici nazionali passati in giudicato', available at <https://tinyurl.com/yc3jrzt> (last visited 30 June 2018); P. Patrito, 'Revocazione – se sia ammissibile l'impugnativa per revocazione della sentenza del Consiglio di Stato per contrasto con decisione sopravvenuta della Corte EDU' *Giurisprudenza italiana*, 2710 (2015); J. Gerards- J. Fleuren, *Implementation of the European Convention on Human Rights and of the Judgments of the EctHR in National Case Law. A Comparative Analysis* (Cambridge: Intersentia, 2014); *Committee of experts on the reform of the Court (DH-GDR), Compilation of written contributions on the provision in the domestic legal order for re- examination or reopening of cases following judgments of the Court*, DH-GDR(2015)002, 21 May 2015, in www.echr.coe.int.

⁷⁸ *Overview of the exchange of views held at the 8th meeting of DH-GDR* n 41 above.

⁷⁹ Albania, Armenia, Bosnia and Herzegovina, Croatia, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Latvia, Lithuania, the Republic of Moldova, Norway, Portugal, Romania, Russian Federation, San Marino, Serbia, the Slovak Republic, Spain, Switzerland and Turkey. In Eur. Court H.R. (GC), *Bochan v Ukraine (no 2)*, Judgment of 5 February 2015, the Court noted that the number of States providing the remedy was twenty-two. The judgment is available at www.hudoc.echr.coe.int.

there are some who take a very cautious approach and consider the remedy to be rather exceptional.

Even the Grand Chamber, in the aforementioned judgment *Bochan v Ukraine*,⁸⁰ having to take due account of the eventual *consensus* in this regard, acknowledges that out of thirty-eight States surveyed, (as of 5 February 2015) the following sixteen Countries did not provide for the institute in question: Austria, Belgium, France, Greece, Hungary, Italy, Ireland, Liechtenstein, Luxembourg, Monaco, the Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom (England and Wales).

France, however, provided for re-examination in the civil field a year later.

While the *révision* of criminal trials was introduced with Law no 2000-516, which admitted *réexamen* of *décision pénale définitive*, if a breach of the Convention was ascertained by the Court of Strasbourg,⁸¹ the re-examination of civil trials was introduced by Art 42 of *Loi no 2016 - 1547 du 18 November 2016 de modernisation de la justice du XXI siècle*.

Specifically, Art 42 in question provides for

‘the right to seek the cancellation of civil judgments that affect the status of individuals in the event of a ruling against the State by the ECtHR

⁸⁰ Eur. Court H.R. (GC), *Bochan v Ukraine (no 2)*, Judgment of 5 February 2015. The judgment is available at www.hudoc.echr.coe.int.

⁸¹ The Art 622-1 of the *code de procédure pénale* states that ‘*le réexamen d’une décision pénale définitive peut être demandé au bénéfice de toute personne reconnue coupable d’une infraction lorsqu’il résulte d’un arrêt rendu par la Cour européenne des droits de l’homme que la condamnation a été prononcée en violation de la convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales ou de ses protocoles additionnels, dès lors que, par sa nature et sa gravité, la violation constatée entraîne, pour le condamné, des conséquences dommageables auxquelles la satisfaction équitable accordée en application de l’article 41 de la convention précitée ne pourrait mettre un terme. Le réexamen peut être demandé dans un délai d’un an à compter de la décision de la Cour européenne des droits de l’homme. Le réexamen d’un pourvoi en cassation peut être demandé dans les mêmes conditions*’ (‘the re-examination of a final penal decision may be requested for the benefit of any person found guilty of an offense when it results from a judgment of the European Court of Human Rights that the sentence has been pronounced in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its Additional Protocols, since, by its nature and gravity, the violation found causes, for the convicted person, damaging consequences to which the just satisfaction granted in application of Art 41 of the above-mentioned Convention could not put an end to. The review may be requested within one year of the decision of the European Court of Human Rights. The review of an appeal on points of law may be requested under the same conditions’).

On this topic, see C. Pettiti, ‘Le réexamen d’une décision pénale française après un arrêt de la Cour européenne des Droits de l’Homme : la loi française du 15 juin 2000’ *Revue trimestrielle des droits de l’homme*, 3 (2001). Likewise, in Belgium, the *loi 1er avril 2007* introduced, to the arts 442-bis et seq of the *Code d’instruction criminelle*, the instrument of the *réouverture de la procédure pénale* in the event of a supervised sentence by the ECtHR; A. Verheylen and O. Klees, ‘La loi Belge du 1er avril 2007 relative à la réouverture de la procédure pénale à la suite d’un arrêt de condamnation de la Cour européenne des Droits de l’Homme’ *Revue trimestrielle des droits de l’homme*, 773 (2008).

where, due to its nature and seriousness, the violation of the Convention has given rise to a loss that cannot be made good by just satisfaction'.⁸²

At present, however, there is no legal provision that allows the administrative judgment to be overcome. The *Conseil d'Etat* denies the possibility of reopening administrative proceedings that have violated the Convention.⁸³ However, recently the *Conseil d'Etat* has admitted the possibility of reconsidering the legitimacy of a final administrative penalty when the European Court of Human Rights finds a violation of the Convention,⁸⁴ on the basis of a clear distinction between the administrative procedure and the administrative trial.⁸⁵

In Germany,⁸⁶ instead, after a first solution provided by way of interpretation by the *Bundesverfassungsgericht*,⁸⁷ with the *Zweites Gesetz zur Modernisierung der Justiz - 2 Justizmodernisierungsgesetz* of 22 December 2016, the legislator added to classic cases of revocation of civil and administrative judgments, the one in which if the Court of Strasbourg has ruled that the ECHR or its protocols have been violated, the national decision should be based on this violation (§ 580, 8th para, *Zivilprozessordnung*).⁸⁸

In Spain,⁸⁹ with the *Ley Orgánica 7/2015* of 21 July 2015, following several attempts by the jurisprudence to use the special appeal procedures already

⁸² Corte costituzionale 26 May 2017 no 123 n 1 above, para 16.

⁸³ Conseil d'Etat, 11 February 2004, *Chevol*, no 257682: 'il ne résulte d'aucune stipulation de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et notamment de son article 46, non plus que d'aucune disposition de droit interne, que la décision du 13 février 2003 par laquelle la cour européenne des droits de l'homme a condamné la France puisse avoir pour effet de réouvrir la procédure juridictionnelle qui a été close par la décision du Conseil d'Etat du 9 avril 1999 et à l'issue de laquelle Mme X a saisi la cour européenne des droits de l'homme' ('there is no stipulation in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in particular Art 46 thereof, nor any provision of domestic law that the decision of 13 February 2003 by which the European Court of Human Rights condemned France could have the effect of reopening the jurisdictional procedure which was closed by the decision of the Council of State of 9 April 1999 and after which Ms. X has seized the European court of human rights'); Conseil d'Etat, 4 October 2012, *Baumet*, no 328502.

⁸⁴ Conseil d'Etat, 30 July 2014, *Vernes*, no 358564.

⁸⁵ P. Patrino, 'Revocazione' n 77 above, 2710.

⁸⁶ E. Klein, 'Germany', in J. Gerards and J. Fleuren eds, *Implementation of the European Convention on Human Rights* n 77 above, 183 and 202.

⁸⁷ 2 BvR 1481/04, 14 October 2004, available in English at <http://www.bundesverfassungsgericht.de>.

⁸⁸ Zivilprozessordnung para 580 Restitutionsklage 'Die Restitutionsklage findet statt: (...) 8. wenn der Europäische Gerichtshof für Menschenrechte eine Verletzung der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten oder ihrer Protokolle festgestellt hat und das Urteil auf dieser Verletzung beruht' ('The restitution claim takes place: (...) 8. if the European Court of Human Rights has found a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its Protocols and the judgment is based on this violation').

⁸⁹ C. Montesinos-Padilla, 'El recurso de revisión como cauce de ejecución de las sentencias del Tribunal de Estrasburgo: pasado, presente y futuro' *Eunomía. Revista en Cultura de la Legalidad*, X, 98-113 (2016).

present in the legal system extensively,⁹⁰ a revocation measure concerning all judgments in contrast with a final judgment of the Court of Strasbourg was introduced by legislative means.⁹¹

At present, however, only slightly more than half of the Member States of the Council of Europe have provided themselves with appropriate means to overcome judgments in civil or administrative matters, thus determining the lack of consensus on the issue. Therefore, it is likely that if shortly an increasing number of Countries adopt the re-examination procedure for civil or administrative matters, the ECtHR could re-interpret the Convention considering the introduction of re-examination an indefectible and necessary tool to implement its rulings in fields other than the criminal one.

The comparison between different European legal systems and the multiple solutions adopted show that the subject of the revocation of national judgments results particularly complex and it is, therefore, the task of the legislator to intervene by balancing the various interests involved. As a result, the decision of the Italian Constitutional Court appears to be correct. In a democratic society inspired by the principle of division of powers, it should be the legislator to intervene in such a delicate matter, establishing procedures, conditions and timing of a new possibility of re-examination of domestic judgments on civil or administrative issues for ascertained breach of the Convention, thus balancing the different values of constitutional importance at stake, including the right of defence of third parties.

It is possible, however, that the Constitutional Court, if it is again involved in the matter, may consider this form of re-examination with an interpretative approach, as was done in criminal cases⁹² with judgment no 129 of 2008.⁹³ As explained above, with this last judgment the Constitutional Court, while declaring the non-substantiation of the issue of the constitutionality of Art 630, para 1,

⁹⁰ *Inter alia*, in criminal matter, Tribunal Constitucional, *Barberà, Messegué y Jabardo (or Bultò)*, Judgment of 16 December 1991 no 245.

⁹¹ *Ley Orgánica 6/1985*, de 1 de julio, del Poder Judicial, Art 5-bis: '*Se podrá interponer recurso de revisión ante el Tribunal Supremo contra una resolución judicial firme, con arreglo a las normas procesales de cada orden jurisdiccional, cuando el Tribunal Europeo de Derechos Humanos haya declarado que dicha resolución ha sido dictada en violación de alguno de los derechos reconocidos en el Convenio Europeo para la Protección de los Derechos Humanos y Libertades Fundamentales y sus Protocolos, siempre que la violación, por su naturaleza y gravedad, entrañe efectos que persistan y no puedan cesar de ningún otro modo que no sea mediante esta revisión*' ('An appeal for review before the Supreme Court may be lodged against a final judicial decision, in accordance with the procedural rules of each jurisdictional order, when the European Court of Human Rights has declared that said decision has been issued in violation of any of the recognized rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, by its nature and seriousness, entails effects that persist and cannot cease in any way other than through this revision').

⁹² Para 5 above.

⁹³ Corte costituzionale 30 April 2008 no 129, n 2 above.

sub *a*) of the Italian Code of Criminal Procedure, addressed an invitation to the legislator to adapt the Italian system to the canons of the Convention. Only when there was no follow-up to this invitation did the Court decide to intervene with judgment no 113 of 2011,⁹⁴ finally declaring the constitutional illegitimacy of Art 630 of the Italian Code of Criminal Procedure for breach of Art 117, para 1, of the Italian Constitution about Art 46, para 1, ECHR.

Moreover, legislative intervention seems necessary due to the increasing overlapping of the legal systems of national States with those of the Council of Europe and the European Union and the consequent multiplication of different legal levels in the supranational sphere.

This new constitutionalism and the consequent and constant debating between these legal systems inevitably require a rethinking of the categories of national legal systems not only under the aspect of substantive law but also under the point of the procedural law.

From the European Union Law, perspective, the Court of Justice has generally affirmed that the national final judgment in contrast with the EU Law must be preserved, in accordance with the autonomy reserved to the Member States in procedural and jurisdictional matters.⁹⁵ However, the 2007 ruling of the Grand Chamber *Lucchini* privileges the *primauté* of European Law concerning the certainty of national law, should the national judgment compromise a matter falling within the material scope of application of EU Law.⁹⁶

In relation to the European Convention system aimed at the full protection of the human person, today the legislator is called upon to carry out a proper modification of the national system in order to guarantee the execution of the

⁹⁴ Corte costituzionale 7 April 2011 no 113, n 3 above.

⁹⁵ Case C-213/13 *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, [2014], available at <http://curia.europa.eu>, paras 54 et seq; Case C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpclub Srl*, [2009] ECR I-07501, para 24; Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR I-03055; Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren*, [2004] ECR I-00837; Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, [2008] ECR I-00411. See, also, Case C-224/01, *Gerhard Köbler v Republik Österreich*, [2003] ECR I-10239; Case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana*, [2006] ECR I-05177. These last two judgments aimed at compensation for damages deriving from the national final judgment in contrast with the EU law, necessarily presupposed the formal maintenance of the prejudicial national sentence.

⁹⁶ Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, [2007] ECR I-06199, where the Court concludes that: "The answer to the questions referred must therefore be that Community law precludes the application of a provision of national law, such as Art 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final". See, also, Case C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpclub Srl*, n 95 above; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, [2009] ECR I-09579.

judgments of the Court of Strasbourg, a precious instrument to ensure the effectiveness of the so-called multilevel protection.⁹⁷ The ruling of the Constitutional Court, indeed, currently paralyses the internal effects of the ECtHR rulings in civil and administrative matters, actually reducing the content of Art 46, para 1, ECtHR. If, as underlined, it is true that at present the Convention does not require the Member State to reconsider *res iudicata*, it is also true that this represents an indefectible necessity, as proven by the recent proposal for a European review of subjects other than the criminal law in the main European legal systems.

Moreover, unless the legislator intervenes in the Italian legal system there will be a protection vacuum: the judges who will have to resolve a new contrast between the administrative judges and the European judges, being without any specific indications from the Court, will again have to raise the question of constitutional legitimacy.

We, therefore, hope that the Italian Constitutional Court ruling no 123 of 2017 is an invitation that the Italian legislator should seize as soon as possible in order to ensure citizens the effective protection guaranteed by the European Convention and, more generally, by the new multilevel constitutionalism.

⁹⁷ P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale*, (Napoli: Edizioni Scientifiche Italiane, 2008), 11; M. Cartabia, 'The Multilevel Protection of Fundamental Rights in Europe: The European Pluralism and the Need for a Judicial Dialogue', in C. Casonato ed, *The Protection of Fundamental Rights in Europe: Lessons from Canada* (Trento: Quaderni dipartimenti scienze giuridiche, 2004); Id, 'La tutela multilivello dei diritti fondamentali – il cammino della giurisprudenza costituzionale italiana dopo l'entrata in vigore del Trattato di Lisbona', available at <https://tinyurl.com/yangc6wg> (last visited 30 June 2018); A. Barbera, 'Le tra Corti e la tutela multilivello dei diritti', in P. Bilancia and E. De Marco eds, *La tutela multilivello dei diritti. Punti di crisi, problemi aperti, momenti di stabilizzazione* (Milano: Giuffrè, 2004), 89; I. Pernice, 'Multilevel Constitutionalism in the European Union' 27 *European Law Review*, 511 (2002); S.P. Panunzio, *I diritti fondamentali e le Corti in Europa* (Napoli: Jovene, 2005), 5; F. Sorrentino, 'La tutela multilivello dei diritti' *Rivista Italiana di Diritto Pubblico Comunitario*, 79 (2005).

Hard Cases

The Duty to Inform and Voidable Investment Orders

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Abstract

The definition of the relationship between framework contracts and individual investment orders has always been the subject of debate both in legal scholarship and in case law, as it is functional to the solution of various application issues. One of these is the identification of a remedy available to a client in the event of the intermediary's non-compliance with the obligations to obtain information. Once again, the Supreme Court has ruled on this question in a way that differs from previous perspectives, by opening itself up to considering the economic operation as a whole in procedural terms, which is particularly useful in clarifying the position of the intermediary in the light of the duty to protect the best interests of the client, as prescribed by Art 21 of the TUF (Financial Services Act).

I. The Ruling

The Italian Court of Cassation was called upon to decide on the lawfulness of the decision handed down by the Court of Appeal of Florence regarding a claim brought against a credit institution by a client. It concerned avoidance of contract for a breach regarding an individual investment. In the case at hand, this involved the purchase of financial instruments in violation of the obligations to obtain information imposed on the intermediary. The Court of Appeal rejected the request due to the purely executive nature of the order. Thus, it concluded that avoidance should concern the framework contract and not the individual order and that, therefore, the existence of the requirement of severe breach of contract referred to in Art 1453 of the Italian Civil Code should be assessed in relation to the total value of the investments.¹

Defining the relationship between framework contracts and individual investment orders has always been the subject of debate in both legal scholarship and case law, as it is functional to the solution of various application issues:

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¹ Avoidance for breach of contract is regulated by Arts 1453 et seq of the Italian Civil Code. In particular, Art 1453 provides that 'in contracts providing for mutual counterperformance, when one of the parties fails to perform his obligations, the other party can choose to demand either performance or dissolution of the contract, saving, in any case, compensation for damages' (J.H. Merryman et al, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 2010)). Art 1455 Civil Code, states that 'a contract may not be terminated if the non-performance of one party is of little importance compared to the interests of the other'.

from the form required for an order to be valid, to the consequences of failing to respect the obligations to obtain information imposed on financial intermediaries to protect investors, to the nature of the liability of the intermediaries themselves when such a violation occurs.²

Within the space of a few months, the Supreme Court has once more taken a position on all these issues, namely on the form,³ and specifically on the remedies,⁴ available if an intermediary undertakes an investment transaction in violation of the rules of conduct dictated by the Financial Services Act (TUF)⁵ and the Consob Regulations⁶ implementing the primary provision. In other words, where the common ground that unites the accepted solutions is precisely the definition of the current relationship between the framework contract and individual orders.

The ruling in question states in no uncertain terms that both the framework contract and the individual orders are of a contractual nature. It is undeniable that both investment or divestment orders are contractual, as they express, in themselves, the client's interest, which the transaction as a whole represents.

Regarding the remedies available in the event of the breach of the obligation to obtain information, the order would therefore be annulled with respect to the framework contract.⁷ The order represents the implementation phase of the contract, not only in terms of its concrete execution, but also being the means by which the investment decision is expressed. Therefore, it should be possible to annul it. A violation of the rule imposing the obligation to obtain information constitutes none other than a breach of contract.

The Court of Cassation states that its ruling represents the continuation of a previous approach. This is undoubtedly true. Nevertheless, the main passages of the Court's judgment, with explicit recognition of the existence of a procedural sequence putting into effect only the client's interest in the investment, seem to

² For a summary of all these issues, see M. Maggiolo, 'Servizi ed attività d'investimento. Prestatori e prestazioni', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2012); and B. Inzitari and V. Piccinini, 'La tutela del cliente nella negoziazione di strumenti finanziari', in B. Inzitari eds, *Il diritto degli affari* (Padova: CEDAM, 2008).

³ Corte di Cassazione 30 November 2017 no 28816, available at www.dirittobancario.it.

⁴ Most recently, Corte di Cassazione 24 May 2017 no 12937, available at www.dirittobancario.it. But see also Corte di Cassazione 3 May 2017 no 10713, available at www.dirittobancario.it.

⁵ Consolidated Law on Financial Intermediation implementing EU-derived regulations, adopted through decreto legislativo 24 February 1998 no 58.

⁶ The National Commission for Companies and the Stock Exchange (Consob) is the Italian supervisory authority for the financial markets and is also responsible for issuing the regulations implementing the Consolidated Finance Law (TUF). Those mentioned in the text are, in order, the *Regolamenti Intermediari Consob* 11522/1998, 16190/2007, and 20307/2018.

⁷ The remedy referred to in the text is governed by Arts 1453 et seq. of the Italian Civil Code. In the Italian system, this remedy must be distinguished from both nullity (Art 1418 Civil Code) and voidability (Arts 1425 et seq. Civil Code), which constitute possible causes of invalidity of an act, namely, where the remedy under Art 1453 Civil Code can be applied in case of malperformance during the execution of the contractual relationship.

express a new approach to the framework of the transaction itself.

II. The Reasons for the Decision Concerning Safeguards

The tendency to favour the annulment of investment orders in case law undoubtedly stems from the repeated statement by the United Sections of the Court of Cassation of the distinction between the rules of validity and the rules of conduct and their importance in identifying the instruments available to protect investors.⁸

The ruling and its contents are well known. Equally well known is the national and international financial context behind it. In the wake of Argentina's bankruptcy and that of a number of Italian companies that had otherwise been considered fairly solid, those who had bought securities in the first and shares in the second sought to take legal action against credit institutions in order to recuperate their investment on the grounds of the invalidity or the voidability of the purchase contracts.⁹ Some trial judges accepted these claims, declaring the

⁸ This is the well-known Corte di Cassazione-Sezioni unite 19 December 2007 no 26724, *Foro italiano*, I, 785 (2008), which is also much commented on in legal scholarship. Among the more critical commentaries, see A. Gentili, 'Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni unite' *Contratti*, 393 (2008); and D. Maffei, 'Discipline preventive nei servizi di investimento: le Sezioni Unite e la notte (degli investitori) in cui tutte le vacche sono nere' *Contratti*, 403 (2008).

Essentially, the debate stems from the more traditional belief that the distinction between rules of validity and rules of conduct is counterbalanced by the distinction between contractual remedies and remedies concerning the legal relationship. From this perspective, the majority of legal scholars affirm that when a rule of conduct breached (ie, a rule that establishes obligations to be fulfilled in the course of the execution of the contractual relationship), invalidating remedies, such as, for example, nullity and voidability, are never available. Rules of conduct, for example, impose the obligation to obtain information or are discerned by interpretation from the general provision on good faith. On the other hand, rules of validity, the violation of which could be followed by the application of an invalidating measure, identify a structural or content requirement for the validity of an act. On this, see for example, G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996); V. Roppo, 'Contratto di diritto comune, contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppo di un nuovo paradigma', in Id, *Il contratto del duemila* (Torino: Giappichelli, 2002), 46. More recently, for a critical approach on this distinction, G. Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013).

⁹ Under the Italian system, nullity and voidability are associated with invalidity and differ in terms of the interest they serve: one for the protection of a general interest, the other an individual interest. On the basis of this distinction there are some substantial differences regarding the way action is regulated and the legality of the effects of the act. Thus, with regard to nullity, an action is not subject to time limits, the flaw is noted *ex officio* and the act cannot be validated. Regarding voidability, on the other hand, the action is time-barred, the flaw cannot be noted *ex officio* and the deed can be validated. The need for strict correspondence between the remedy and the applicable discipline in these terms has, however, long been the subject of debate. In the recent past, perhaps in the wake of the introduction into the Italian system of so-called 'protective nullity' (*nullità di protezione*) of EU origins, the subject has sparked new

above-mentioned contracts void on the grounds of violation of the obligation of intermediaries to obtain information.¹⁰ In their view, the infringement in question was one of virtual invalidity under the first paragraph of Art 1418 of the Italian Civil Code.¹¹

The United Sections responded to these pronouncements by precisely reiterating the classic distinction between the rules of conduct and the rules of validity, explicitly specifying the scope of the latter. Accordingly, the remedy for invalidity can only be applied in the event of a breach of a rule imposing a requirement of the act, unless the lawmaker provides otherwise. In this case, the breach of a rule of conduct, of which the obligation to obtain information is an example, only gave rise to the right to claim damages.

Once the invalidity option was rejected, the case law sought other remedies, equally capable of giving the clients legal satisfaction. In reality, the Joint Divisions themselves paved the way for the annulment option. The possibility that there is anything in the discipline on investment services that presumes the will on the part of the lawmaker to treat the rules of conduct in the same way as the rules of validity was excluded. Then, the Court of Cassation stated that if violation of the obligations that precede the stipulation of the mediation agreement brings with it pre-contractual responsibility on the part of the credit institutions, there can be no doubt that a breach during the execution phase gives rise to contractual liability,

‘since those duties, albeit of legal origin, derive from mandatory rules and are therefore intended to supplement the rules in force between the parties to all effects’.¹²

It is a short step from breach of contract to the annulment of the individual order. Other rulings followed from this one, specifying with even greater clarity that a breach of the obligation to obtain information downstream of the framework contract can give the client the right to seek its annulment as well as that of individual orders where there is a specific interest.¹³

interest: see, more recently, G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici* (Napoli: Edizioni Scientifiche Italiane, 2011).

¹⁰ See, for example, Tribunale di Mantova 18 March 2004, *Banca, borsa, titoli di credito*, II, 440 (2004), with a comment by D. Maffei, *Conflitto di interessi nella prestazione di servizi di Investimento: la prima sentenza sulla vendita a risparmiatori di Obbligazioni argentine*.

¹¹ In particular, the first para of Art 1418 Civil Code states that, ‘A contract that is contrary to mandatory rules is void, unless the law provides otherwise’ (J.H. Merryman et al, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 2010)).

¹² Corte di Cassazione-Sezioni unite 19 December 2007 no 26724 n 8 above, 785.

¹³ Among the more recent, Corte di Cassazione 6 November 2014 no 23717, available at www.dejure.it; Corte di Cassazione 27 April 2016 no 8394, available at www.dejure.it.

III. The Objections Raised in Much of the Legal Scholarship to the Annulment of an Order Due to Violation of the Obligation to Obtain Information

Once the remedy had been identified, legal scholars turned their attention to its theoretical feasibility, finding many obstacles, ranging from the nature of the orders themselves to extending the requirement obtain information to its execution phase, as well as to that of the framework contract.¹⁴

On the nature of orders, the picture is quite complex. There are essentially two schools of thought: one that denies their contractual nature and one that accepts it. Thus, the possibility of annulling the order on the assumption that the framework contract follows the pattern of the mandate is rejected both by those who consider it a strictly legal act, given that it is an instruction from the client, and those who prefer to refer to the implementation agreement. The order would thus have an impact on the execution phase of the framework contract, where its causal aspect emerges.¹⁵

Conversely, annulment is deemed possible, at least in abstract terms, by those who, considering the framework contract as a normative framework,¹⁶ attribute to individual orders the nature of actual orders to sell or buy,¹⁷ or as offers to sell or buy,¹⁸ depending on whether they are trading on behalf of

¹⁴ The subject of the relationship between the framework contract and the individual order has been addressed by various scholars: among others, see F. Galgano, 'L'inadempimento ai doveri dell'intermediario non è, dunque, causa di nullità virtuale' *Contratto e impresa*, 579 (2006); Id, 'I contratti di investimento e gli ordini dell'investitore all'intermediario' *Contratto e impresa*, 889 (2006); A. Luminoso, 'Contratti di investimento, mala gestio dell'intermediario e rimedi esperibili dal risparmiatore' *Responsabilità civile e previdenza*, 1422 (2007); V. Roppo, 'La tutela del risparmiatore fra nullità, risoluzione e risarcimento (ovvero, l'ambaradan dei rimedi contrattuali)' *Contratto e impresa*, 896 (2006); A. Perrone, 'Regole di comportamento e tutele degli investitori. Less is more' *Banca, borsa, titoli di credito*, 537 (2010). For an effective summary of the terms of the issue A. Tucci, 'Il problema della forma dei contratti relativi alla prestazione dei servizi di investimento' *Rivista trimestrale di diritto dell'economia*, II, 39 (2009). Recently on the subject see also G. Berti de Marinis, 'L'invalidità formale nei contratti di investimento' *Banca, borsa, titoli di credito*, 37 (2013), and G. Conte, 'Forma e sostanza nei contratti aventi a oggetto prestazioni di servizi di investimento' *giustiziacivile.com*, 18 October 2017.

¹⁵ For this line of thought, see especially F. Galgano, *L'inadempimento* n 14 above, 579; Id, *I contratti di investimento* n 14 above, 889.

¹⁶ Albeit with different nuances, before and after MiFID directive see M. Loboano, *La responsabilità degli intermediari finanziari* (Napoli: Edizioni Scientifiche Italiane, 1999), 106; A. Perrone, n 14 above, 537; P. Lucantoni, 'L'inadempimento di 'non scarsa importanza' nell'esecuzione del contratto c.d. quadro tra teoria generale della risoluzione e statuto normativo dei servizi di investimento' *Banca, borsa, titoli di credito*, II, 783 (2010). In terms of effectiveness, the special feature of a framework contract is that the parties only identify the *content* of future contracts and are not obliged to enter into them.

¹⁷ In this sense see especially the case law: among the many cases, Tribunale di Monza 4 June 2008, *Rivista trimestrale di diritto dell'economia*, II, 21 (2009), with a commentary by A. Tucci, n 14 above, 39.

¹⁸ Overall, V. Roppo, *La tutela del risparmiatore* n 14 above, 896.

others or for themselves.

However, also from this point of view, the practicalities of the solution accepted in case law in the event of a breach of the obligation to obtain information are still problematic. The emergence of these obligations for intermediaries is very often linked to framework contracts, as they, being legal obligations, add only to the effectiveness of the contract. Regarding the remedies available in the event of non-execution, therefore, any action for termination should be directed against it alone, and not the order, for which the conditions laid down in Art 1455 of the Italian Civil Code apply. Regarding the order, the obligation to obtain information arises at the stage when the relationship is formed, so that any breach would be a matter of pre-contractual responsibility, in accordance with the provisions of Art 1337 of the Italian Civil Code.¹⁹

All these issues are only briefly mentioned in the ruling in question. What it says is, however, central to the question of the remedies available for individual orders. It concerns, first and foremost, the link between orders and the framework contract stipulated upstream.

If it is true that one of the most significant difficulties in terms of the possibility of annulling orders is first of all the extension of the legal obligations in place to safeguard the client's interests to the execution phase of the framework contract; it is also true, however, that this extension presupposes that those who recognise the contractual nature of the order see the whole question in terms of the connection between the two acts, namely between two contracts, which are, however, autonomous from the functional point of view.

It is this interpretation that the Court of Cassation contests, clearly deeming the relationship between the framework contract and individual orders as

‘a contractual agreement involving a sequence that, being designed as a whole and intending (...) to protect the investor's position (in line with the constitutional principle of safeguarding savings under Art 47 of the Italian Constitution), unfolds in several consecutive stages’.

After this statement, the Court develops its reasoning along two basic lines: on the one hand, it sees the function of the framework contract as the same as that of the individual orders, and on the other, it focuses on the legal framework for protecting investment services. Within this framework, the brokering function takes on a particular importance that runs through the entire relationship between the intermediary and the client, which is best expressed in the choice of an individual investment.

¹⁹ See *ibid.*

IV. Conceptual Presuppositions for Rejecting the Annulment of an Order. The Functional Peculiarities of Trading in Financial Instruments

It should immediately be observed that framing the issue in procedural terms would mean abandoning the use of traditional conceptual schemes in order to define the relationship between the client and the intermediary. Furthermore, from this perspective, it would be more appropriate to see the question as one of duty of care, as those who see the intermediary as an actor under private law²⁰ do. In terms of remedy, it would be more logical to refer to ineffectiveness rather than contract avoidance,²¹ considering that the execution of an inadequate or inappropriate order primarily causes, from the procedural perspective, the loss of the functional link between acts serving the same purpose, being the best investment for the client.²²

Thus, the importance of the ruling in question remains unchanged, considering the functional framework of the situation it has created as a whole. Moreover, recognition of the importance of the aspect of agency could also be useful to avoid the contract under certain circumstances.²³

On the functional level, therefore, the framework contract undoubtedly establishes the rules of future agreements. In this sense, the secondary regulation is clear in its identification of minimum content when specifying the services provided and their characteristics, as well as the methods by which the order is to be made and the fees due to the intermediary. However, it is also true that the conclusion marks the moment when the relationship between intermediary and investor is specified in relation to the investments for which it is preparatory. Thus, it is in the framework contract that the client's general interest in the

²⁰ R. Di Raimo, 'Fisiologia e patologia della finanza derivata, Qualificazione giuridica e profili di sistema', in F. Cortese and F. Sartori eds, *Finanza derivata, mercati e investitori* (Pisa: Edizioni ETS, 2011), 66; Id, 'Dopo la crisi, come prima e più di prima. (Il derivato finanziario come oggetto e come operazione economica)', in D. Maffei ed, *Swap tra banche e clienti. Le condotte e i contratti* (Milano: Giuffrè, 2013), 37; Id, 'Finanza, finanza derivata e consenso contrattuale, a valle delle crisi d'inizio millennio' *Giustizia civile*, 1106 (2015), and Id, 'Ufficio di diritto privato, natura del «potere» dispositivo, e fondamento variabile dell'iniziativa negoziale', in S. Ciccarello, A. Gorassini and R. Tommasini eds, *Salvatore Pugliatti* (Napoli: Edizioni Scientifiche Italiane, 2016), 457. See, from another perspective and with different results from the objective assessment of the intermediary's work, D. Maffei, 'L'ufficio di diritto privato dell'intermediario e il contratto derivato *over the counter* come scommessa razionale', in D. Maffei ed, *Swap tra banche e clienti. Le condotte e i contratti* (Milano: Giuffrè, 2013).

²¹ In the Italian system, ineffectiveness occurs when the act is neither null nor voidable, but nevertheless produces no effects. This category is heterogeneous as ineffectiveness may arise from many factors. For example, the failure of an event to occur, but upon which the effectiveness of the act rests, or, as in the case in point, the lack of entitlement to act on the part of a person who is responsible for the care of the interests of others. The difference compared with avoidance therefore lies in the unfitness of the contract to produce legal effects from the outset.

²² For some further reflection on this point, see section seven below. For further bibliographical references, see the previous note.

²³ See section six below.

investment is expressed to the full, and the method of specification is expressed significantly in the rule in Art 21 TUF, which states that

‘in the provision of investment and ancillary services and activities, the authorised parties must: a) behave with diligence, fairness and transparency, in order to best serve the interests of clients and for the integrity of the market’.

In terms of effectiveness, therefore, it does not seem possible to relegate this contract to the mere framework level,²⁴ given that only when it has been stipulated is the current legal relationship between the parties involved established and specified in the sense mentioned above.²⁵ Basically, through this means, the intermediary and the client establish the rules of their future relations but not only in the terms in which this would develop using a framework contract in the traditional sense. By stipulating the contract, the parties direct the future of the relationship they have just established towards the realisation of the client’s interest in the investment. This realisation is expressed through a procedural process studded with legally imposed duties on the intermediary; they too are instrumental in the implementation of the primary regulation contained in Art 21 TUF.

On the other hand, and in line with the Court of Cassation’s interpretation of the matter as a whole, the framework contract and its effects cannot be isolated from the subsequent acts that make the investment a reality during the course of the operation, since it does not seem realistic to limit the importance of the individual investment to the subsequent agreement between the intermediary and the customer alone. The opinion that recognises the causal autonomy of these contracts is certainly to be upheld given that framework contracts are signed exclusively for the purpose of protecting the customer.²⁶ Yet precisely because an individual investment is not merely the execution act of a framework contract, it is at least logically possible to distinguish a further aspect regarding agents and their care of the interests of others, namely the specification of their clients’ interests.

From this perspective, at least from the logical point of view, the investment

²⁴ Cf A. Perrone, *Regole di comportamento* n 14 above, 537.

²⁵ In this respect, it could be possible to have recourse to the category of organisational effect, on which see P. Ferro-Luzzi, *I contratti associativi* (Milano: Giuffrè, 1972), 170; R. Di Raimo, ‘Considerazioni sull’art. 2645 ter Civil Code: destinazione di patrimoni e categorie dell’iniziativa privata’ *Rassegna di diritto civile*, 953-957 (2007).

²⁶ Moreover, if the framework contract is null and void due to the lack of the client’s signature, the expiration of the order and, with it, the investment that would follow despite respecting the legal safeguards, would depend not on the absence of a valid cause justifying the transfer of assets, but on a precise legislative decision that sees the framework contract as a condition for validity: thus A. Tucci, *Il problema della forma dei contratti relativi alla prestazione dei servizi di investimento* n 14 above, 39.

transaction is divided into a minimum of three phases. The first is completed when the framework contract, which, as we said, sets the rules for future trading in financial instruments, is signed, officialising in particular the client's general interest in the investment, necessarily specified by the intermediary. The second is the transactional aspect of the operation, as it is here that the choice of the single investment is made, and the client's specific interest in the investment finally becomes explicit. The third is the material selection process, performed through a bilateral or unilateral act, depending on the characteristics of the investment service,²⁷ whereby it takes concrete shape.

The need to recognise a specific moment in which the concrete interest in an individual investment can be identified is understood in the context of the peculiarities of trading in financial instruments, for which the traditional rules regarding intermediaries in terms of the classic mandate model need some adjustments.

The difficulty in reconstructing the complex relationship between the parties, which undoubtedly comes into being when the framework contract is stipulated, is precisely this: the investor's interest in a given transaction is clearly expressed only at a later stage and through the action of the intermediary.

Of course, the financial instruments for carrying out an investment are not all the same and often have different complexities. Nor are, by the same token, all investment services the same. This is reflected in the diversity of the rules of conduct imposed on the intermediary according to the type of service and the objective riskiness of the financial instrument. Nevertheless, identifying the client's specific interest, manifested through the execution of the order, is always postponed to a later date.

V. Agency and the Contractual Process

On the regulatory level, apart from the mere execution of orders,²⁸ the

²⁷ V. Roppo, 'Sui contratti del mercato finanziario, prima e dopo la MiFID' *Rivista di diritto privato*, 498 (2008). The admissibility of a structurally unilateral act with attributive effect see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 605. With particular reference to the management of an interest of others see M. Semeraro, *Acquisti e proprietà nell'interesse del mandante* (Napoli: Edizioni Scientifiche Italiane, 2011), 175.

²⁸ It must however be pointed out that, with regard to the regime *before* the Mifid case, the case law already considered the intermediary obliged to inform the client of the characteristics of the financial instrument and to evaluate the appropriateness of the operation in relation to its Italian interest even when merely carrying out orders: Corte di Cassazione 1 February 2018 no 2523, and Corte di Cassazione 23 September 2016 no 18702, both available at www.dirittobancario.it. Concerning the current regulations, the issue to be resolved clearly regards the extension of the scope of consultancy: F. Sartori, 'Autodeterminazione e formazione eteronoma del regolamento negoziale. Il problema dell'effettività delle regole di condotta' *Rivista di diritto privato*, 93 (2009); M. Semeraro, 'Rischio di impresa bancaria e discipline recenti' *Giustizia civile*, 866 (2016).

above-mentioned collaboration of the intermediary for the purpose of specifying the interest in the investment is expressly recognised in some of the rules of conduct to which s/he is subject, normally applied to the execution phase of the framework contract. The obligations they impose are supposed to reinforce the effectiveness of the contract, so a serious failure to fulfil them could be a ground for termination.²⁹

Doubtless, some of the rules of conduct are immediately applicable as soon as the framework contract has been stipulated. For example, those that impose the so-called passive and active obligations to obtain information, meant to clarify the clients' specific interest and help them make informed choices. Nevertheless, the identification of the clients' specific interest, which is implemented through the execution of the order, is always postponed to a later date.

Once again, on the logical level, it is therefore necessary to further distinguish between the phase in which the client's specific interest is identified and the assessment phase before carrying out the investment transaction.

This is confirmed by the undoubted inapplicability of some of the rules on mandate regarding the relationship between intermediary and client, rules that express a synthesis of the interests of the principal and the agent that is difficult to harmonise with the characteristics of trading in financial instruments. One example is Art 1712 of the Italian Civil Code, which grants the principal a period of time within which to assess whether the deal is really in his or her interest, even in cases where the agent has departed from the instructions imparted or exceeded the limits of the mandate. Another example is Art 1715 of the Italian Civil Code, which rules out the possibility of holding an intermediary liable to the principal for the fulfilment of obligations assumed by third parties with whom s/he has entered into a contract, unless s/he was aware, or ought to have been aware, of the party's insolvency when signing the agency agreement. Both these provisions express rules of risk distribution that can be considered rational and reasonable only from the point of view of the acknowledged ability of both parties, especially the principal, to be *in full control* of their own interests.³⁰

When it comes to trading in financial instruments however, the situation is reversed. The investors, in fact, rely on the intermediary not only to look after their interests, but also to define them.³¹ Entry into a framework contract is meant to underpin this very relationship of trust. Regarding the distribution of risk, and considering the element of chance characterising every type of investment, from the simplest to the most complex, and the fact that any assessment of the intermediary's conduct can only be based on the relevant

²⁹ On the five duties that would continue to be imposed on the intermediary also post-Mifid, see A. Gentili, 'Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni unite' *Contratti*, 393 (2008).

³⁰ M. Semeraro, *Acquisti e proprietà* n 27 above.

³¹ R. Di Raimo, *Dopo la crisi, come prima e più di prima* n 20 above, 37; Id, *Ufficio di diritto privato* n 20 above, 457.

concrete result obtained, what is achieved by balancing the client's interests and those of the intermediary can certainly not be made to depend on applying the principle of responsibility for oneself.³²

Ultimately, once the client's aptitude for investment has been ascertained, and with it, the types of investment that best suits his or her interests, the next step is not chosen by the investor alone. The intermediary plays a role in this, providing the necessary information on the characteristics of the financial instrument and its degree of riskiness, also assessing whether it corresponds to the aforementioned interest. The only exception to this is the so-called 'mere execution of orders', and here too clients are not completely devoid of protection, as they must be duly informed of the fact that the intermediary will proceed with the investment without the obligation to fulfil the so-called passive obligations to obtain information.³³

VI. Reflections on Client Protection. The Annulment of an Order

The complex investment process therefore includes a) establishing the client's general interest in the investment, b) the client's specification of the choice of investment, c) the assessment of this choice and, finally, d) its execution.

The general interest, it is now clear, is expressed through the framework contract. This is the means by which, to reiterate, the relationship between investor and intermediary is formalised. This relationship is particularly marked by the importance of the interest in the light of the principles of the system, namely, in the light of the principle of the protection of savings enshrined in Art 47 of the Constitution. This importance lies in the characteristics of the intermediary's position in relation to the client, and therefore can be recognised in the area of practical action and not only in the action of the others' interests. This particular importance also explains the logical need for the pre-existence of the framework contract as an agreement between the parties which, in identifying the rules for future negotiations, also defines the scope of the investments. The specific interest that leads to the choice of the investment is then defined, having been assessed by the intermediary, and only then is the transaction carried out.

The framework contract and the investment lie at the two extremes of this complex sequence: the first, as a point of emergence of the generic interest, and the second, the moment when the specific interest is made concrete. The order lies midway between the two.

Clearly, the investment order may well be solicited by the intermediary; very often it is. But it can also be the result of the client's independent initiative. Nevertheless, in both cases, the order is the place where this specific interest is

³² R. Di Raimo, *Finanza, finanza derivata* n 20 above, 1106.

³³ With reference to the existence of disclosure obligations, even if only for execution of orders, see n 19 above.

first clearly formulated.

The difference between the two hypotheses is that in the first it is presumed that, at the moment when the investment is proposed, the intermediary simultaneously fulfils the obligation to provide information relating to the characteristics of the financial instrument, including its degree of riskiness. The proposal therefore contains, in itself, an assessment in terms of suitability or appropriateness of the type of service provided. In the second, on the other hand, fulfilment comes next, with the order representing the act whereby the legally imposed rules of conduct become binding.

The order, therefore, represents the circumstance wherein the specific interest of the customer is defined and the choice of the concrete investment to be made comes about.³⁴ Compliance with the rules of conduct may be placed upstream of this, if it follows the intermediary's request, or downstream, if it is the result of an independent initiative by the client. However, its significance remains unchanged with regard to assessing the conduct of intermediaries, considering that violation, should the intermediary nonetheless carry out the operation, is in any case a symptom of mismanagement of others' interests.

In terms of remedies, therefore, adopting a procedural perspective, which implies reconstructing the events in terms of a sequence of functionally connected acts by virtue of the ultimate purpose, namely investment, could perhaps lead to solutions other than those offered by the ruling in question.³⁵ Nevertheless, annulment of the order does not seem to be precluded in any way – at least not according to the interpretations found in the greater part of legal scholarship.³⁶

One of the main objections to the solution adopted in case law was, first and foremost, the timing of the obligation to obtain information in relation to the order. Whether the order is interpreted as a contractual offer to sell or a mandate, in either case its performance would be instrumental to the formation of an informed agreement. This is consistent with the logic underlying the EU rules governing individual contractual agreements, where information is seen as the very means by which the position of the parties is balanced in order to avoid market failures. This view, though undoubtedly well established, is subject to many criticisms.³⁷ Nevertheless, it continues to arise, even in the latest financial

³⁴ A function that is clouded by considering the order in terms of proposal for the purchase or sale of the financial instrument. The reference to exchange as a function underlying the order does not in fact give due weight to the function performed by the intermediary as guardian of the client's interest, nor does it fully express the functional specificities of the transaction. In particular, from the functional point of view, the contract of sale expresses an exchange of utility; utilities in the asset bought and sold, and their relative objects in the price. In the contract to be concluded upon acceptance of the order, however, the function is not an exchange: it is first of all a brokerage function, given that the purchase of the final utility on which the customer's interest is based is necessarily mediated by the cooperation of the intermediary.

³⁵ On this point, see section seven below.

³⁶ See n 10 and n 12 above for some bibliographical references.

³⁷ F. Denozza, *I conflitti di interesse nei mercati finanziari e il risparmiatore "imprenditore*

markets reform.³⁸

Once the agency of the intermediary, in objective terms, becomes central to the economic transaction, the precise timing of the obligation to inform seems to lose importance compared with the order. It is true that the obligation to obtain information may precede the intermediary's acceptance of the engagement. However, it is also true that a breach may primarily, and at a functional level, represent a flaw in the subsequent act of investment should this not correspond to the client's interest. This interest can be clearly indicated by means of objective indices (such as investment knowledge, willingness to take risks, and the size of the assets), which the work of the intermediary must safeguard, as established in Art 21 TUF.

In other words, regardless of whether the order is situated upstream or downstream of the rules of conduct imposed on the intermediary, carrying out an unsuitable transaction violating the obligations mentioned above reveals a functional defect in terms of safeguarding the client's interest. This results in non-compliance with the more general duty of care, of which the others represent only specific aspects.³⁹

VII. The Ineffectiveness of an Investment in Relation to the Client's Legal Sphere

We have said that looking at the problem in procedural terms can open the way to different solutions that, by emphasising the function attributed to the intermediary, fully express the flaw that leads to the execution of an order in violation of the rules of conduct established to protect the client's interests in terms of the sequence of the acts.

Only little needs to be said on this, starting with a clarification. It is clear that this way of looking at the question of the breach of the obligation to obtain information in itself is not the issue, although it can clearly be at least indicative of the aforementioned functional flaw. What is most noticeable is the mismatch between investment and customer interest.⁴⁰ This is an interest that, beyond the specific choice indicated in the order, must be identified for the purposes of the subsequent objective assessment to be carried out by the intermediary in the light of specific parameters. These parameters are, in fact, the very object of the

di se stesso", in F. Denozza et al eds, *I servizi del mercato finanziario. In ricordo di Gerardo Santini* (Milano: Giuffrè, 2009), 141; Id, 'Mercato, razionalità degli agenti e disciplina dei contratti' *Osservatorio di diritto commerciale*, 1 (2012), 5-40; Id, 'La frammentazione del soggetto nel pensiero giuridico tardo liberale' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 13 (2014); F. Sartori, *Informazione economica e responsabilità civile* (Padova: CEDAM, 2011).

³⁸ For some points for reflection, see M. Semeraro, *Rischio di impresa bancaria* n 28 above, 866.

³⁹ From a slightly different perspective, M. Lobuono, n 16 above, 144.

⁴⁰ R. Di Raimo, *Finanza, finanza derivata* n 20 above, 1106.

so-called passive obligations to obtain information incumbent on the intermediary. Therefore, as far as the fate of the investment is concerned, the first decisive factor is the suitability or appropriateness test.

This seems to reflect a passage in the ruling in question, where it clearly distinguishes between violation of the rules of conduct and the outcome of the investment, concluding that the latter

‘shows solely, as a measure of the interest that the investor, as a non-defaulting contracting party, may have in relation to the expiry of one (or more) of the orders made’.

The fate of an investment essentially depends on the extent to which the transaction corresponds to the client’s objective interest, rather than its outcome in economic terms. Following the procedural approach, the unsuitability or the inappropriateness of the investment therefore causes a fracture in the sequence of phases. In particular, they lead to a fracture between the framework contract and the subsequent execution of the order.

Above all, the framework contract constitutes the point at which the client’s general interest becomes explicit, and the order is when the specific interest emerges, ie, his or her interest with regard to a specific investment. The transition from general interest to specific interest is governed by the provisions contained in Art 21 TUF, which requires the intermediary to take the best possible care of the client’s interests. The intermediary engaged to execute the order is therefore responsible for assessing it on the basis of specific objective parameters: the client’s investment knowledge and risk profile, as already mentioned. It is only if the choice is consistent with these parameters that the execution of the order is justified, and therefore the investment itself.

As has been emphasised,⁴¹ of particular relevance is the large gap between the figure of the intermediary and the client. The task of attributing the assessment of the suitability of the specific choice to the intermediary is clearly justified in view of the particular importance of the interest in the investment enshrined in the principle of safeguarding savings under Art 47 of the Italian Constitution.⁴²

If the assessment of the suitability of the choice is left to the intermediary in accordance with Art 21 TUF, executing an investment not justified by specific financial knowledge or experience or a specific risk appetite together with a certain level of equity can only represent an imbalance in power.⁴³ From the point of

⁴¹ See section five.

⁴² For some methodological observations, see P. Perlingieri, n 27 above, 326. On the constitutional basis of the negotiating power of the intermediary, see especially R. Di Raimo, *Finanza, finanza derivata* n 20 above.

⁴³ Resorting to ineffectiveness implies overcoming, in terms of remedy, the distinction between abuse and excess; in this regard, see the clear exposition by R. Di Raimo, *Fisiologia e patologia dei rapporti* n 20 above, 66, who successfully achieves this by interpreting the intermediary’s position in terms of a private law function.

view of remedy, this can only lead to the ineffectiveness of the investment with respect to the client's legal sphere.⁴⁴

⁴⁴ However, R. Lener and P. Lucantoni, 'Regole di condotta nella negoziazione degli strumenti finanziari complessi: *disclosure* in merito agli elementi strutturali o sterilizzazione, sul piano funzionale, del rischio come elemento tipologico e/o normativo?' *Banca, borsa, titoli di credito*, 369 (2012), who envisage only compensation as a remedy for the violation of suitability rules.

Hard Cases

‘A Case with Peculiarities’: Mixed Same-Sex Marriages Before the Supreme Court

Matteo M. Winkler*

Abstract

This article examines the judgment of the Italian Supreme Court (*Corte di Cassazione*) no 11696 of 14 May 2018 concerning the legal status of mixed same-sex married couples under Italian law. It explores the problems relating to the recognition and the civil status registration in Italy of couples of the same sex where one spouse is a foreigner and the other is Italian. Legge 20 May 2016 no 76 (registered partnerships law) and decreto legislativo 19 January 2017 no 7 established a regime under which Italian couples who married abroad are recognised and registered, hence downgraded, as civil partners, whereas foreign couples are recognised and registered as married. They say nothing, however, on mixed couples. During the parliamentary debate, however, the government affirmed that their main concern was to avoid Italians to circumvent the registered partnerships law by marrying abroad and then obtaining the recognition of their marriage in Italy. Based on this intent, the Supreme Court found that mixed couples are subject to the same anti-elusive logic – a construction that this article criticises under several viewpoints.

‘Justice is a game of chance, never to be taken seriously’.

Piero Calamandrei

I. Introduction

Almost two years after the enactment of Italian legge 20 May 2016 no 76 on same-sex registered partnerships (hereinafter ‘legge no 76/2016’), the Supreme Court has rendered its first ruling concerning one of the crucial questions addressed therein: the recognition of foreign same-sex marriages and their subsequent civil status registration in Italy.¹

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¹ Corte di Cassazione 14 May 2018 no 11696, currently unreported. See legge 20 May 2016 no 76, *Gazzetta Ufficiale* 21 May 2016 no 118, regulating registered partnerships between persons of the same sex and cohabiting couples (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*) (hereinafter ‘legge no 76/2016’). This law is commented by G. Buffone et al, *Unione civile e convivenza* (Milano: Giuffrè, 2017), 89-431 and G. De

This question, which is now distinctly regulated by legge no 76/2016 and the decreto legislativo 19 January 2017 no 7 ('Decreto no 7/2017'),² has a long history indeed. Since the idea of extending the access to civil marriage to same-sex couples came to the mind of some Dutch legislators in 1996, scholars have enquired about whether 'a marriage contracted between two people of the same sex (would) be recognised abroad'.³ In fact, to put it as the US Supreme Court,

'(b)eing married in one State but having that valid marriage denied in another is one of the most perplexing and distressing complication(s) in the law of domestic relations'.⁴

Nonetheless, besides the scholarly debate, which obviously evolved in parallel with the increasing number of States that introduced registered partnerships and/or same-sex marriage domestically, foreign marriages recognition has profound implications for the identity, equality, dignity and integrity of lesbians and gay men.

In fact, confronted with a hostile environment domestically, 'the affirmation of dignity realises itself through the experience of belonging to a non-discriminatory legal context', which is the foreign law allowing same-sex marriage.⁵ Moreover, as the European Court of Human Rights ('ECtHR') has

Cristofaro, 'Le "unioni civili" fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1-34 dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal d.lgs. 19 gennaio 2015, n. 5' *Le nuove leggi civili commentate*, 101 (2017); in English see M.M. Winkler, 'Italy's Gentle Revolution: The New Law on Same-Sex Partnerships' 1 *Digest – National Italian American Bar Association Journal*, 22-31 (2017) and N. Cipriani, 'Unioni Civili: Same-Sex Partnerships Law in Italy' 3 *Italian Law Journal*, 343, 346-349 (2017).

² Decreto legislativo 19 January 2017 no 7, *Gazzetta Ufficiale* 27 January 2017 no 22, amending the existing provisions of private international law according to legge no 76/2016 (*Modifiche e riordino delle norme di diritto internazionale privato per la regolamentazione delle unioni civili, ai sensi dell'articolo 1, comma 28, lettera b), della legge 20 maggio 2016, n. 76*). Decreto legislativo no 7/2017 introduced new provisions in legge 31 May 1995 no 218, '*Riforma del sistema italiano di diritto internazionale privato*' (Reform of the Italian system of private international law) in order to regulate same-sex unions with transnational elements. This article will not deal with such provisions, which concern, signally, the status of foreign same-sex marriages (Art 32-*bis*), the requirements to enter into a registered partnership in Italy (new Art 32-*ter*); alimony obligations (Art 32-*quater*); foreign registered partnerships (Art 32-*quinquies*). For a commentary of these provisions see C. Campiglio, 'La disciplina delle unioni civili transnazionali e dei matrimoni esteri tra persone dello stesso sesso' *Rivista di diritto internazionale privato e processuale*, 33 (2017); M.M. Winkler, 'Disposizioni di attuazione, finali e transitorie', in G. Buffone et al eds, n 1 above, 394-417; in French M.M. Winkler and K. Trilha Shappo, 'Le nouveau droit international privé italien des partenariats enregistrés' *Revue critique de droit international privé*, 319, 326-333 (2017).

³ K. Waaldijk, 'Free Movement of Same-Sex Partners' 3 *Maastricht Journal of European and Comparative Law*, 271-272 (1996).

⁴ *Obergefell v Hodges*, 135 S. Ct. 2584, 2607 (2015), quoting *Williams v North Carolina*, 317 US 287, 299 (1942).

⁵ B. Pezzini, 'I confini di una domanda di giustizia (profili costituzionali della questione della trascrizione del matrimonio same-sex contratto all'estero)' 2 *GenIUS – Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 77-79 (2015) (translation from Italian).

stated on multiple occasions, the legal recognition of same-sex relationships has, regardless of its concrete effects, ‘an intrinsic value’ which ‘would further bring a sense of legitimacy to same-sex couples’.⁶ Part of this legitimacy derives from both the recognition and registration of the foreign civil status obtained with marriage, which for the ECtHR are also part of an individual’s ‘personal and social identity, and indeed psychological integrity protected by Art 8’.⁷ In this perspective, the ‘cross-border continuity of personal and familiar status’ pertains to every person’s human rights arsenal.⁸

Given these characteristics, it is unsurprising that foreign marriage recognition has been used by Italian same-sex couples, in a true dynamic of ‘strategic litigation’,⁹ to force the Parliament to put a stop to its ‘repetitive failure’ to act when it came to pass a law benefiting them.¹⁰ The famous judgment of the Supreme Court 15 March 2012 no 4184, which acknowledged the ‘social dignity’ of same-sex unions and excluded that same-sex marriage could violate the international public policy (*ordine pubblico internazionale*), represented the highest point of this litigation, generating further workload for both the government and the judiciary.¹¹

⁶ Eur. Court H.R., *Oliari et al v Italy* App no 18766/11 and 36030/11, Judgment of 21 July 2015, para 174, available at <https://tinyurl.com/y8a4tyuy> (last visited 30 June 2018), quoting Eur. Court H.R., *Vallianatos v Greece* App no 29381/08 and 32684/09, Judgment of 7 November 2013, para 81, available at <https://tinyurl.com/yc6cdsfp> (last visited 30 June 2018).

⁷ Eur. Court H.R., *Orlandi et al v Italy* App. no 26431/12, 26742/12, 44057/12 and 60088/12, Judgment of 14 December 2017, para 144, available at <https://tinyurl.com/y7c587a2> (last visited 30 June 2018), quoting Eur. Court H.R., *Dadouch v Malta* App no 38816/07, Judgment of 20 July 2010, para 48, available at <https://tinyurl.com/y8az7udt> (last visited 30 June 2018).

⁸ See G. Biagioni, ‘On Recognition of Foreign Same-Sex Marriages and Partnerships’, in D. Gallo et al eds, *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer, 2014), 359-380, 361, quoting P. Franzina, ‘Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad’ *Diritti umani e diritto internazionale*, 609 (2011).

⁹ B. Pezzini, n 5 above, 78-79.

¹⁰ The ECtHR reproached Italy for its ‘repetitive failure’ to act in *Oliari*, n 6 above, para 184 (where it found that ‘this repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account’).

¹¹ Corte di Cassazione 15 March 2012 no 4184, *Giustizia civile*, 1691 (2012). The Court here denied the possibility to register the petitioners’ foreign marriage but pointed out that such a refusal ‘no longer depended on the marriage’s non-existence or invalidity, but rather on its inability to produce, as marriage, any legal effect in the Italian legal system’. Id, para 4.3. The most important statement contained in this ruling, however, is certainly the acknowledgment that marriage is no longer abiding by the heteronormative paradigm. In fact, according to the Court, ‘regardless of a legislative intervention in this field, (same-sex couples) can seize the judiciary to claim (...) the right to receive an equal treatment compared to that ensured by the law to a married couple and, in that context, to raise the related constitutional review questions applicable to individual cases’. Id, para 4.2. This statement derives from the ruling of the ECtHR in *Schalk and Kopf*, where the Court affirmed it ‘would no longer consider that the right to marry

By introducing positive rules concerning foreign marriage recognition, legge no 76/2016 and decreto legislativo no 7/2017 radically changed the country's legal landscape. This article takes advantage of the case brought before the Supreme Court – a case of recognition and registration of a foreign marriage entered into by an Italian-Brazilian couple – to offer an interpretation of said rules. It starts with an overview of the case (section II) by examining its factual background (II.1), the proceedings (II.2) and the governing provisions (II.3). Subsequently, it analyses the Court's ruling (section III) by presenting its peculiarities (III.1), the Court's reasoning and conclusions (III.2) and some criticism (III.3).

II. The Case

1. Factual Background

The case addressed by the Supreme Court concerned two individuals, an Italian and a Brazilian citizen respectively, who had married in Brazil in 2012 and in Portugal one year later.

In Brazil same-sex marriage is legal since 2013.¹² In a judgment released in 2011 in the context of a direct constitutional challenge, the Supreme Court (*Supremo Tribunal Federal*) had affirmed that the Constitution of 1988 does not assign to the term 'family' any ideological or pre-constituted legal meaning, as 'it is not important whether family is constituted formally or informally, by heterosexual or homosexual people'.¹³ On this ground, the Court directed the judiciary and the executive power to interpret Art 1723 of the Civil Code, which mentions 'a man and a woman' as the typical members of a family, consistently with such a constitutional notion of the same,

'in a way to exclude any meaning of this provision that prevents the

enshrined in Art 12 (of the ECHR) must in all circumstances be limited to marriage between two persons of the opposite sex'. Eur. Court H.R., *Schalk and Kopf v Austria*, App no 30141/04, Judgment of 24 June 2010, para 61, available at <https://tinyurl.com/yalrf27y> (last visited 30 June 2018). In commenting this decision, the Italian Supreme Court further noted that 'the right to marry under Art 12 has acquired, pursuant to the interpretation of the European court – which represents a radical development of a consolidated and ultramillenary notion of marriage – a new and broader content, which includes also the marriage entered into by two persons of the same sex'. Corte di Cassazione no 4184/2012 n 11 above para 3.3.4. As explained by B. Pezzini, n 5 above, 85-88, the ruling no 4184/2012 triggered a wave of registration, at the municipalities level, of Italian same-sex couples married abroad, a move that in turn caused the Ministry of Interior to issue a circular (*circolare*) which instructed the prefects to put a stop to such a move. See Consiglio di Stato 26 October 2015 no 4898 and 4899, *Foro amministrativo*, 2498 (2005), and Consiglio di Stato 1 December 2016 no 5048, *Guida al diritto*, 4, 33 (2017).

¹² See in this respect J.M. Cabrales Lucio, 'Same-Sex Couples Before Courts in Mexico, Central and South America', in D. Gallo et al eds, n 8 above, 93-125, 114-117.

¹³ Supreme Court of Brazil (*Supremo Tribunal Federal*) 4 May 2011, direct constitutional action, ADI 4277 DF, para 3.

recognition of stable, public and durable unions between persons of the same sex'.¹⁴

Following this judgment, in 2013 the National Judicial Council resolved to prohibit local authorities from refusing to perform marriages when requested by couples of the same sex.¹⁵

Portugal also adopted same-sex marriage in 2010.¹⁶ In 2009, the Constitutional Court was urged to determine whether the Constitution commanded same-sex marriage, and responded negatively. It held that, although the Constitution prohibited any discrimination based on sexual orientation, changing the notion of marriage in order to include same-sex couples would amount to an invasion of the competence of the legislature.¹⁷ The Parliament quickly reacted by passing a statute that repealed the requirement of the spouses to be of the opposite sex under Arts 1577 and 1628(e) of the Civil Code.¹⁸

The Italian-Brazilian spouses demanded the Civil Status Office (*Ufficio di stato civile*) (CSO) of Milan to proceed with the registration (*trascrizione*) of their marriage. Had they been an opposite-sex couple, the CSO would have granted such a request smoothly, as registration of foreign marriage is a common practice for CSOs throughout the country.¹⁹ However, in their case the CSO argued that the fact that they were two men prevented such a result. The spouses appealed against the denial, but both the Tribunal and the Court of Appeals of Milan dismissed their case.

2. The Proceedings

According to the Tribunal of Milan,

‘the act of marriage between persons of the same sex cannot be registered because it is incapable of producing any legal effect in our legal

¹⁴ *ibid* para 6. Art 1.723 of the Brazilian Civil Code (2002) so reads: ‘It is recognised as a family the stable union between a man and a woman, configured as public, continue and durable cohabitation with the purpose of establishing a family’ (translation from Brazilian).

¹⁵ Council of National Justice of Brazil (*Conselho Nacional de Justiça*), Resolution 14 May 2013 no 175, para 1.

¹⁶ See T. Fidalgo de Freitas and D. Tega, ‘Judicial Restraint and Political Responsibility: A Review of the Jurisprudence of the Italian, Spanish and Portuguese High Courts on Same-Sex Couples’, in D. Gallo et al eds, n 8 above, 287-318, 304-313; J. Maria and L. Villaverde, ‘And the Story Comes to an End: The Constitutionality of Same-Sex Marriages in Spain’, in M. Saez ed, *Same-Sex Couples – Comparative Insights on Marriage and Cohabitation* (Heidelberg: Springer, 2015), 13-48, 32-37.

¹⁷ Constitutional Court of Portugal 9 July 2009 no 359, available at <https://tinyurl.com/yax9qsg> (last visited 30 June 2018).

¹⁸ Legge 31 May 2010 no 9, allowing civil marriage between persons of the same sex. For the text of these two provisions see J. Maria and L. Villaverde, n 16 above, 33.

¹⁹ See for instance Corte di Cassazione 25 July 2016 no 15343, *Foro italiano*, 3476 (2016) which recognized the validity of a marriage entered into via Skype between an Italian woman and a Pakistani man.

system, given the current state of the legislation'.²⁰

Before the Court of Appeals, the petitioners claimed that, as nowhere in the Italian Civil Code it is explicitly provided that spouses must be of the opposite sex, their marriage had to be recognised and registered as any other marriage. They also claimed that the denial amounted to a discrimination based on sexual orientation. The Court, however, disagreed on both stances.

It held, in particular, that although the difference in the spouses' sex is not explicitly contemplated among the requirements for a valid marriage,

'it cannot be reasonably denied that marriage as regulated by the legislature of 1942, and remained untouched by subsequent reforms of family law, is that between persons of the opposite sex and that it is currently reserved to those couple only'.

As to the second argument, the Court concluded that, even if 'same-sex marriage concretises the recognition of the principles of equality and non discrimination', this marriage still cannot be recognised (nor can it be registered) 'because of the current state of the legislation', whose absence 'cannot be filled by judicial intervention'.²¹

Before the Supreme Court, the petitioners reiterated the same arguments. However, since 2016 the 'state of the legislation' has radically changed, as legge no 76/2016 and decreto legislativo no 7/2017 had entered into force and dictated precise rules for the recognition (or non-recognition) of same-sex marriages contracted abroad.

3. The Provisions of Legge no 76/2016

Legge no 76/2016 introduced in the Italian legal system the new institution of registered partnership between persons of the same.

The registered partnership regime is similar, but not identical, to that of civil marriage. While it is established that all provisions referring to marriage or spouse(s) 'apply also to each party of the registered partnership between persons of the same sex',²² some differences in treatment persist for registered partners *vis-à-vis* married couples. For instance, the registered partnership creates no fidelity duty upon the registered partners.²³ In other cases, the partners benefit

²⁰ Tribunale di Milano, decree 17 July 2014, available at <https://tinyurl.com/yayc2mae> (last visited 30 June 2018).

²¹ Corte d'Appello di Milano, decree 6 November 2015 no 2286, available at <https://tinyurl.com/ycdf3bch> (last visited 30 June 2018). To be true, the wording of the Court mentions the 'marriage between person of the *same* sex', but this is evidently a lapsus.

²² Legge no 76/2016, n 1 above, Art 1(20) (so-called 'general equivalence clause').

²³ Art 1(11) legge no 76/2016, where the 'reciprocal fidelity duty' is missing from the list of effects of the registered partnership on partners. On this issue see M. Gattuso, 'Rapporti

of advantages that remain unavailable to spouses, for example in the entitlement to choose a common family name (whereas the name of the husband is imposed to a married couple).²⁴ Importantly, adoptions are precluded to registered partners, although legge no 76/2016 does not prevent same-sex partner from relying on the stepchild adoption scheme provided by the law of 1983 on adoptions.²⁵

As regards foreign marriages, legge no 76/2016 commanded the government to issue a regulatory framework concerning the update of private international law rules (legge 31 May 1995 no 218 of reform of Italian private international law, hereinafter 'legge no 218/95') according to the following directive:

'by providing the application of the registered partnership regime governed by Italian laws to couples of the same sex who have entered into a marriage, a registered partnership or a similar institution abroad'.²⁶

Under this provision, same-sex unions that are recognised abroad – whether by marriage, registered partnership or similar – would be subject to legge no 76/2016. This technique, which is well-known among private international law scholars as the 'method of recognition of foreign situations' or '*coordination des systèmes*', predicates the generalised application of the law of the forum, and is particularly useful when the latter 'does not have a provision equivalent to that of the otherwise applicable foreign (other State's) law or, for that matter, has a contrary rule'.²⁷ This way, because

'the foreign institution is recognised as the national institution of the jurisdiction where recognition is sought', the rule is also dubbed as of 'accommodated recognition'.²⁸

Accommodated recognition is very often adopted as a rule by national legislatures which preferred a registered partnership scheme to same-sex marriage.

personali', in G. Buffone et al, *Unione civile e convivenza* n 1 above, 145; L. Olivero, 'Unioni civili e presunta licenza d'infedeltà' *Rivista trimestrale di diritto e procedura civile*, 213 (2017).

²⁴ Art 1(10) legge no 76/2016 (registered partners are entitled to choose a name for their family among their own's).

²⁵ See Art 1(20) legge no 76/2016, stating that the general equivalence with marriage 'does not apply to the norms of the Civil Code that are not expressly referred to in this Law, and to the provisions of the legge no 184 of 4 May 1983, without prejudice of what is currently provided and allowed in respect of adoptions by existing laws'. The latter refers to the abundant case law relating to Art 44(d) of legge 4 May 1983 no 184, which allows the partner of a parent to adopt the latter's own child (stepchild adoption). See in this respect Corte di Cassazione 22 June 2016 no 12962, *Foro italiano*, I, 2342 (2016).

²⁶ Legge no 76/2016, n 1 above, Art 1(28)(b).

²⁷ P. Hay, 'Recognition of Same-Sex Legal Relationships in the United States' 54 *American Journal of Comparative Law*, 257, 267 (2006).

²⁸ K. Boele-Woelki, 'The Legal Recognition of Same-Sex Relationship within the European Union' 82 *Tulane Law Review*, 1949, 1967 (2008).

In the United Kingdom, for example, Section 215(1) of the *Civil Partnership Act 2004* provides that '(t)wo people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship'.²⁹ In *Wilkinson v Kitzinger*, the Family Division of the High Court of England enforced this provision by 'treating' the marriage contracted in British Columbia (Canada) by two women domiciled in England 'as a civil partnership'.³⁰ This precedent, however, is no longer applicable to foreign marriages after the *Marriage (Same-Sex Couples) Act 2013* introduced same-sex marriage in the United Kingdom and permitted the conversion of a civil partnership into marriage if the partners so request.³¹

In Switzerland, the matter is regulated by the *Federal Law on Private International Law* of 1987, as amended by the *Federal Law on Domestic Registered Unions* of 2004. Art 45(3) of the former states that 'the marriage validly entered into between persons of the same sex is recognised in Switzerland as domestic registered partnership'.³² No case law has been reported thus far implementing this provision.

Finally, in Germany, where a law on civil partnership (*Lebenspartnerschaft*) has been in force from 2001 to 2017 before being replaced with a law on same-sex marriage in that same year,³³ a foreign same-sex marriage was registered in the civil status registry as *Lebenspartnerschaft* according to a ruling of 2010 of the Administrative Tribunal of Berlin, which applied Art 17b of the Introductory Provisions to the Civil Code.³⁴ Also this example is redundant, as the German Parliament adopted same-sex marriage in 2017.³⁵

The accommodated recognition scheme characterizes legge no 76/2016 as well. Two problems are left open, however. A first problem concerns the qualification – or, better said, the 're-qualification'³⁶ – of the foreign 'registered

²⁹ Civil Partnership Act 2004, 2004 c. 33, Section 215(1).

³⁰ *Wilkinson v Kitzinger*, [2006] EWHC 2022 (Fam), para 25, concluding that, based on Section 215(1) of the *Civil Partnership Act 2004*, '(t)he Petitioner's marriage under Canadian law is an overseas relationship which, by reason of the above provisions, is treated as a civil partnership'.

³¹ See Marriage (Same-Sex Couples) Act 2013, 2013 c. 30, Section 9.

³² Art 45(3) of the Federal Law on Private International Law of 18 December 1987, RU 1988 1776 (2017).

³³ See Law Introducing the Right to Marry for Persons of the Same Sex (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*), 20 July 2017, *Bundesgesetzblatt* 28 July 2017, 2787.

³⁴ Administrative Tribunal (*Verwaltungsgericht*) of Berlin 15 June 2010, 23 A 242.08 *Praxis des Internationalen Privatrechts und Verfahrensrechts*, 270 (2011). Art 17b of the Introductory Provisions to the Civil Code (*Einführungsgesetzes zum Bürgerlichen Gesetzbuche*, EBGB) regulate foreign civil partnerships and establish, at para (4), that their effect 'shall not exceed those arising under the provisions of the German Civil Code and the Civil Partnership Act'.

³⁵ Law Introducing the Right to Marry for Persons of the Same Sex (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*), n 33 above, 2787.

³⁶ See in this regard O. Lopes Pegna, 'Effetti in Italia del matrimonio fra persone dello stesso sesso celebrato all'estero: solo una questione di ri-qualificazione?' *Diritti umani diritto*

partnership' (*unione civile*) and of the foreign 'similar institution' (*istituto analogo*) to which the Italian law should apply. As legge no 76/2016 itself illustrates, the rights, duties and effects of a registered partnership can vary depending on the national legal system where the spouses decide to formalise their relationship, especially in light of 'the lack of uniformity between the legislation of different (...) countries'.³⁷ A second issue pertains to family formats that are open to same-sex as well as opposite-sex couples, such as, for example, the French *Pacte civil de solidarité* (PACS), the Dutch domestic partnerships or the Hungarian cohabitation scheme. As the following paragraph shows, the former problem has only partially been resolved by the regulation enacted by the government according to the directive contained in legge no 76/2016.

4. The Provisions of Decree 7/2017

Because the provision of legge no 76/2016 that addressed foreign marriages recognition generally mentioned same-sex couples who have married abroad, the government intended the Parliament's directive, and the coordination provision contained therein, as having an anti-elusive objective only. In fact, the draft decree prepared by the government mentioned that

'the rationale of the (Parliament's) directive appears (...) reasonably connected to the need to avoid elusive behaviors of Italian citizens who go abroad to marry with the objective of circumvent Italian law in a logic of system shopping'.

In this case, the government concluded that 'the foreign union would be recognised, as to its effects, pursuant not to a foreign law but to legge no 76/2016'.³⁸

According to this view, the accommodated recognition was a mere punishment for attempting to circumvent Italian law, and seemed to pursue no other objective. Based on this premise, the government drafted a text that, by accommodating foreign marriages with a registered partnership regardless of the spouses' citizenships, established that '(t)he marriage contracted abroad by persons of the same sex produces the same effect of a registered partnership regulated by Italian law'.³⁹

Both Chambers of the Parliament, however, found this draft text to be both

internazionale, 89, 112 (2016).

³⁷ K. Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe' 1 *GenIUS – Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 42, 43 (2014).

³⁸ See Report to the draft decree amending private international law rules (*Relazione illustrativa all'Atto del governo sottoposto a parere parlamentare. Schema di decreto legislativo recante disposizioni di modifica e riordino delle norme di diritto internazionale privato in materia di unioni civili tra persone dello stesso sesso*), no 345 of 5 October 2016, 2.

³⁹ *ibid* 3 (draft Art 32-bis of legge 31 May 1995 no 218).

inconsistent with the proper functioning of the accommodated recognition rule and intrinsically overinclusive. They therefore asked the government to redraft the related provision by distinguishing *truly elusive marriages* from *genuinely foreign ones* and therefore limiting the accommodated recognition 'only to Italian citizens who marry abroad'.⁴⁰ The new provision that resulted from this process (new Art 32-*bis* of legge no 218/1995) accommodates only those marriages 'entered into by Italian citizens with a person of the same sex'. Its text now so reads:

'Art 32-*bis* (*Marriage contracted abroad by Italian citizens of the same sex*). – The marriage contracted abroad by Italian citizens with a person of the same sex has the same effects of a registered partnership governed by Italian law'.⁴¹

The wording is clearly misleading. The syntax of the title seems to announce a provision regarding two Italian citizens who marry (in fact, it says '... Italian citizens *of the same sex*', not '... Italian citizens with a person of the same sex').⁴² Furthermore, the text would have sounded better by saying 'marriage contracted abroad *by an Italian citizen*' rather than 'by Italian citizens', as who is marrying are two persons and not three or four. All in all, the text implies that when two Italian citizens marry abroad, their marriage must be qualified as a

'totally Italian situation (*situazione totalmente italiana*) which has been deliberately transformed into a *transnational* one with the objective of applying a legal regime which is not contemplated by Italian law'.

Such a situation, as a result, 'cannot be considered *foreign* but rather *national*, hence the total application of legge no 76/2016'.⁴³

In sum, the parliamentary debate made Italian citizenship the driver for determining elusive marriages as opposed to authentically foreign ones. At the normative level, Art 32-*bis* of legge no 218/1996 applies to the former but not to the latter. As a consequence, foreign same-sex marriages between two Italians are treated as registered partnerships, whereas foreign same-sex marriages between two foreigners are treated as marriages. And as such are they registered by the CSO respectively. Notably, the law says nothing about mixed marriages, where one of the spouses is Italian and the other is a foreigner – the exact situation that landed in the Supreme Court.

⁴⁰ Cf Justice Commission of the Chamber of Deputies (*Camera dei deputati*), Opinion concerning the draft decree no 345/2016, n 38 above, and the hearing held before the Justice Commission of the Senate, 15 November 2016. On this developments see C. Campiglio, n 2 above, 43-45.

⁴¹ Art 32-*bis* of legge no 218/1995, as inserted by Art 1(1)(a) of decreto legislativo no 7/2017.

⁴² See in this regard C. Campiglio, n 2 above, 44-45.

⁴³ Report no 345/2016, n 38 above, 3 (emphasis original).

III. The Court's Judgment

1. 'Peculiarities' of the Case

The Court started its reasoning by noting that the case at issue presents 'some peculiarities that deserve to be mentioned shortly'.⁴⁴ These peculiarities mainly consist in the fact that the petitioners sought the recognition (and registration)

'of their conjugal union as marriage and not as registered partnership, as they deem as illegitimate the application to them of the so-called *downgrading*, ie the conversion of their conjugal union in registered partnership'.⁴⁵

The petitioners argued in this respect that marriage reflected the quality of their relationship in a way that registered partnership did not, and therefore refused to accept the downgrading effected by the accommodated recognition rule under legge no 76/2016. Essential to their view were the differences that exist under Italian law between marriage and registered partnership, which they valued as discriminatory and ultimately degrading (see *supra* section II.3).

Besides these differences, the discrimination is clearly symbolic.⁴⁶ Among the plethora of judicial statements in this respect,⁴⁷ it suffice to recall here the recent judgment of the Austrian Constitutional Court that declared the registered partnerships law discriminatory and therefore unconstitutional. The Court concluded that

'(t)he distinction of the law between opposite-sex and same-sex relationships as two different legal institutions violates the principle of equal treatment, which forbids any discrimination of individuals on grounds of personal characteristics, such as their sexual orientation'.⁴⁸

⁴⁴ Corte di Cassazione no 11696/2018 n 1 above, para 13.2.

⁴⁵ *ibid.*

⁴⁶ See, *inter alia*, *Garden State Equality v Dow*, 82 A. 3d 336 (N.J. Super. Ct. Law Div. 2013) (holding that the New Jersey Constitution commands same-sex marriage notwithstanding the *Civil Union Act* enacted by the legislature which granted same-sex couples the same rights as married couples); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (where the Supreme Court of California held that sexual orientation discrimination requires a strict judicial scrutiny of all statutes concerning same-sex couples). Among scholars see M. Murray, 'Paradigms Lost: How Domestic Partnership Went from Innovation to Injury' 37 *New York University Review of Law and Social Change*, 291, 296 (2013).

⁴⁷ See in this regard M. Gattuso, 'L'unione civile: tecnica legislativa, natura giuridica e assetto costituzionale, in Unione civile e convivenza', in G. Buffone et al, *Unione civile e convivenza* n 1 above, 38-88, in particular 77-88.

⁴⁸ Constitutional Court (*Verfassungsgerichtshof*) (Austria) 4 December 2017, no G 258-259/17, unreported. Here the Court noted that 'on account of the different terms used to designate a person's marital status (married vs living in a registered partnership), persons

It follows that the petitioners' view that refused to accept the downgrading of their marriage to a registered partnership was not at all eccentric from a constitutional standpoint.

Finally, the petitioners assessed the Brazilian citizenship of one of them as an element that made their relationship *genuinely international*, so that the anti-elusive objective of the accommodated recognition rule could not actually apply to them.

2. The Court's Analysis

After addressing two preliminary questions – signally, the duty to notify the petition with the *Procuratore generale*⁴⁹ and the applicability of legge no 76/2016 to marriages contracted before its entry into force⁵⁰ – the Court first found that two norms dictated the solution of the case at issue. One was Art 32-*bis*, which is reproduced in the preceding paragraph;⁵¹ the other was Art 32-*quinquies* of legge no 218/1995, which so reads:

‘Art 32-*quinquies* (*Registered partnership constituted abroad by Italian citizens of the same sex*). – The registered partnership, or other similar institution, constituted abroad between Italian citizens of the same sex who habitually reside in Italy has the same effects of a registered partnership governed by Italian law’.⁵²

As to Art 32-*bis*, the Court considered it ‘crucial’ for deciding the case. It recalled, in particular, that its current wording was the consequence of an amendment imposed by the Parliament to the original draft proposed by the government, which provided for the application of the accommodated recognition rule to *any* foreign same-sex marriage, regardless of the citizenship of the spouses. The Court explained that this application ‘was deemed unjustified under the

living in a same-sex partnership have to disclose their sexual orientation even in situations in which it is not and must not be of any significance and, especially against the historical background of this issue, they are at risk of being discriminated against’. The law that was declared unconstitutional was the Registered Partnership Act (*Bundesgesetz über die eingetragene Partnerschaft*), published in *Bundesgesetzblatt* 18 December 2009 no 135.

⁴⁹ In the Court's view, ‘the petition does not have to be notified to the *Procuratore generale presso la Corte di Cassazione* but only to the *Procuratore generale presso la Corte d'Appello*, as the latter is a party to the proceedings that originated the challenged ruling’. Indeed, in practice the lack of notification is not a ground to challenge the proceedings if the *Procuratore generale* has presented its pleading to the Court and the Court has granted them in its final judgment. Corte di Cassazione no 11696/2018 n 1 above, para 10.1.

⁵⁰ Regarding the retroactivity of legge no 76/2016, the Supreme Court found that it was the rationale behind the new private international law provisions to ‘allow a uniform legal regime to the benefit of couples who had (already) entered into a marriage abroad’. See *ibid* para 12. On this question see Matteo M. Winkler and K. Trilha Shappo, n 2 above, 328.

⁵¹ See the text corresponding to n 41 above.

⁵² Art 32-*quinquies* of legge no 218/1995, as inserted by Art 1(1)(a) of decreto legislativo no 7/2017.

anti-elusive rationale underlying the provision'.⁵³ In particular, 'when the marriage is entered into abroad by two foreigners, there is no intent to circumvent legge no 76/2016': the transaction is 'intrinsically transnational' and 'enjoys a sufficient degree of foreignness in respect of the Italian legal system'.⁵⁴ Since Art 32-*bis* refers to 'the marriage contracted abroad by Italian citizens', it does not apply to marriages between two foreigners. Hence, the accommodated recognition rule does not apply to such marriages, which are registered *as marriages* in the registry of marriages.

As to Art 32-*quinquies*, moreover, the Court qualified such provision as a 'safeguard clause'. By stating that foreign registered partnerships and 'similar institutions' are treated as Italian registered partnerships, it makes 'Italian law prevailing over foreign laws that do not protect (same-sex) relationships with the same intensity (as Italian law does)', and confirms 'the centrality and exclusivity of the choice made by the Italian legislature for the recognition of same-sex unions'.⁵⁵

In the Court's view, both Art 32-*bis* and Art 32-*quinquies* show that the legislature intended to favour the recognition of same-sex relationships both domestically and from abroad. Nonetheless, this favour has to be necessarily coherent with the fact that the legislature opted for a domestic family format that contemplated a registered partnership regime and refused to introduce same-sex marriage. The Court deferred to this choice of the legislature by concluding that

'the freedom to opt for a certain legal model (...) includes the regulation of the effects of foreign unions with anti-elusive and anti-discriminatory objectives'.⁵⁶

On these grounds, the accommodated recognition rule contained in Art 32-*bis* applies not only when the two spouses are Italian, but also when only one of them is Italian. Three arguments support this conclusion. First, the text of the above mentioned provision states that the foreign marriage must be contracted 'by Italian citizens', that preposition 'by' (*da*) being a sign that the legislature meant the accommodated recognition rule to cover mixed marriages as well.⁵⁷ Second, compared to Art 32-*quinquies*, which uses the preposition 'between' (*tra*) and therefore regulates only foreign registered partnerships 'between Italian citizens', the scope of Art 32-*bis* is clearly broader. Third, because legge no 218/1995 regulates the requirements to enter into a valid marriage abroad according to the personal law of the spouses, foreign marriages where one of the spouses is Italian could not be recognised in Italy anyway, as an Italian

⁵³ Corte di Cassazione no 11696/2018, n 1 above, para 13.3.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid* para 13.4. See also C. Campiglio, n 2 above, 47–50.

⁵⁷ Corte di Cassazione no 11696/2018, n 1 above, para 13.4.

citizen is not permitted to marry a person of the same sex in Italy. If they were, this 'would create an unresolved conflict pertaining to the form and the effects of the registration of the foreign marriage'.⁵⁸

Finally, in the Court's view, excluding mixed marriages from the accommodated recognition rule would discriminate Italian citizens who cannot marry in Italy. That way, 'Italian citizens who married abroad and can transfer the form and effects of marriage in our legal system' would be preferred to those that, residing in Italy, cannot marry because the only institution available to them is the registered partnership.

3. A Commentary to the Court's Judgment

On a critical note, one should start with highlighting that the Supreme Court's ruling is based on four different – and progressively applied – hermeneutical canons.

The first is, obviously, the *text* or Art 32-*bis*, which is employed to sustain that the accommodated recognition rule applies to mixed marriage as well as to marriage between two Italian citizens. Second, under a *systematic* approach, Art 32-*bis* is confronted with Art 32-*quinquies*, which however has a different object, ie foreign registered partnerships. Third, the Court is led by a *legislative intent-based* construction of these two provisions to conclude that the former pursues an anti-elusive objective and the latter increases the protection afforded by foreign partnerships when their regime is inferior to Italian law in terms of the partners' rights and benefits. Finally, a *teleological* interpretation allowed the Court to determine the anti-elusive rationale in Art 32-*bis* as the factor driving the fate of mixed same-sex marriages.

Now, accumulating all these canons does not necessarily make the Court's conclusion totally convincing. Indeed, individually taken, they could have led to the opposite outcome, that is to say to recognise and register mixed same-sex marriages as marriages and not simply as registered partnerships.

The Court's reasoning, to begin with, does not acknowledge the conundrum laying behind Art 32-*bis*' text, in particular the conflict – highlighted above – between the provision and its title.⁵⁹ While it is quite obvious, according to the principle '*rubrica non est lex*', that the provision should prevail over the title, it is also obvious that the title could successfully be used when, as is the case at issue, there is a doubt as to the provision's exact scope. In this case, the title could militate in favour of the exclusion of mixed marriage from the provision.⁶⁰

Also the systematic approach seems questionable. Particularly, the association between Art 32-*bis* and Art 32-*quinquies*, which the Court repeated several

⁵⁸ *ibid.* See Art 27 of legge no 218/1995, which conditions the validity of foreign marriages to the requirements provided by the national law of each spouse.

⁵⁹ See the text corresponding to n 42 above.

⁶⁰ See again M. Campiglio, n 2 above, 44.

time throughout its judgment, is not really convincing. The Court used this association to argue that, when the legislature wished to limit the recognition of foreign marriages to those unions between two Italian citizens, it did it expressly. But the two provisions have totally different scopes, and the anti-elusive purpose behind the latter is very limited. In fact, it seems reasonable to assume that two Italians residing in Italy with enough resources to move abroad for a week end with a band of relatives and friends would rather decide to marry than to enter into a PACS or a *de facto* local partnership with less entitlements than legge no 76/2016, as in both cases what they would obtain, once back home, is a registered partnership under Italian law. The requirement of the habitual residence explains this difference very well, although it is an unfortunate circumstance that Art 32-*bis* does not provide for the same criterion. Also, there is a constitutional cover for same-sex unions which is dictated by Art 8 of the ECHR and binds Italy to provide some form of recognition and protection to same-sex couples who formalised their union abroad.⁶¹ The legislature had therefore no alternative than to confer these couples the only institution known to Italian law other than marriage, ie the registered partnership pursuant to legge no 76/2016.

Furthermore, as to the legislative intent-based and the teleological interpretation of Art 32-*bis*, they do not help much. As a general policy, one should be careful not to confuse elusive marriages with truly transnational ones by expanding ‘totally Italian situations’ beyond its own typical boundaries. However, the new texts – and, pursuant to them, the Court – made these boundaries extremely blurred, qualifying as *totally Italian* the marriage with a foreign citizen – a situation that is definitely *not totally Italian*. This could be a ground for constitutional review under the reasonableness test, but the Court quickly dismissed the constitutional law arguments raised by the petitioner as ill-grounded.⁶²

As a precedent in this respect, one should mention a case where Italian courts recognised and registered the same-sex marriage, contracted in France, between an Italian-French binational and a French citizen.⁶³ The Court of Appeals of Naples noted that,

⁶¹ Cf Eur. Court H.R., *Orlandi et al v Italy* n 7 above, para 210, where the ECtHR concluded that ‘in the present case, the Italian State could not reasonably disregard the situation of the applicants which corresponded to a family life within the meaning of Article 8 of the Convention, without offering the applicants a means to safeguard their relationship. However, until recently, the national authorities failed to recognise that situation or provide any form of protection to the applicants’ union, as a result of the legal vacuum which existed in Italian law (in so far as it did not provide for any union capable of safeguarding the applicants’ relationship before 2016). It follows that the State failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions’.

⁶² Corte di Cassazione no 11696/2018, n 1 above, para 13.5 (dismissing the constitutional challenges raised by petitioners relating to discrimination based on sexual orientation).

⁶³ Same-sex marriage is legal in France since 2013. See Law no 2013-404 of 17 May 2013 Opening Marriage to Same-Sex Couples, *Journal Officiel* 18 May 2013 no 114, 8253.

‘as this is a homosexual couple legally married according to the legislation of their national State, which allows same-sex marriage, no questions relating to Italian law arise (. . .)’.⁶⁴

True, this ruling occurred – and became *res iudicata* – before the entry into force of decreto legislativo no 7/2017, but the point is that the Court considered the Italian citizenship of one of the spouses totally irrelevant to establish recognition.⁶⁵

In light of this case, one could conclude that the trouble with the Court’s ruling lays in the use of citizenship as a sort of catch-all criterion to distinguish elusive unions from genuinely transnational ones. In fact, globalization has made citizenship less and less a useful connecting factor for transnational relationships compared, for example, to habitual residence or domicile. It would be better for the legislature to have opted for the same solution adopted in Switzerland, where mixed marriages are recognised and registered as such ‘unless the marriage ceremony was performed abroad with the manifest purpose of circumventing the provisions of Swiss law concerning marriage nullity’.⁶⁶ The choice of the Italian legislator to link the accommodated recognition rule with the Italian citizenship gives rise to potentially unjust situations for mixed couples who lived abroad for long time and may see no reasons why an anti-elusive scheme should apply to them at all.

IV. Conclusion

Piero Calamandrei used to say, quite rightly, that ‘(a) just decision is not always well reasoned, and conversely a well reasoned decision is not always just’.⁶⁷ The Supreme Court’s ruling no 11696/2018 locates in the middle between these two extremes: it did not ensure full justice to the petitioners but did present a genuine interpretation of legge no 76/2016, including its flaws.

⁶⁴ Corte d’Appello di Napoli 13 March 2015, *Foro italiano*, I, 297 (2016), confirmed by Corte di Cassazione 31 January 2017 no 2487, *Rivista di diritto internazionale privato e processuale*, 125 (2017).

⁶⁵ As is irrelevant Art 19, para 2 of legge no 218/1995, which makes Italian citizenship prevail in case of plural nationalities. See in this regard C. Campiglio, n 2 above, 46-47.

⁶⁶ Art 45(2) of the Swiss Federal Law on Private International Law.

⁶⁷ P. Calamandrei, *Eulogy of Judges* n * above, 62.

Italian Constitutional Court's Selected Judgments of 2017

Judgment 7 December 2016 – 24 January 2017 no 20*

(Incidental Review of Constitutionality)

KEYWORDS: Prisoners' Rights – Written Correspondence – Confiscation and Inspection – Equality – Equality in Criminal Proceedings – Unfoundedness of Questions of Constitutionality.

1. The issue raised before the Constitutional Court concerned the constitutionality of Art 266 of the Code of Criminal Procedure, Art 18 (in the version in force preceding the amendments provided for by Art 3, paras 2 and 3, of Law 8 April 2004 no 95, titled 'New provisions concerning the inspection and stamping of the correspondence of prison inmates'), and Art 18-ter of Law 26 July 1975 no 354, establishing 'Rules for the prison system and the execution of measures that deny and limit freedom', with reference to Arts 3 and 112 of the Constitution.

2. Art 266 of the Code of Criminal Procedure provides for the possibility to intercept in-person conversations, telephone communications, and other forms of telecommunications. Arts 18 and 18-ter of Law no 354 of 1975 require, as the only form of monitoring of prisoners' written correspondence, inspection with the application of a stamp.

These provisions were challenged be-

cause they did not permit interception of the content of written correspondence, thus preventing authorities from being able to inspect the content of letters without the sender or the recipient being aware of the inspection, as they can instead do with other forms of communication.

The referring court maintained that the challenged provisions resulted in an infringement of the principle of equality on two grounds. On the one hand, they prescribed an unreasonable difference of treatment for telephone and electronic communications compared to written communications delivered by the postal service; on the other, they attached a privileged status to prisoners compared to defendants who were not detained.

Said difference could have curtailed authorities' powers in seeking evidence, compared to other forms of communication: the impossibility to access certain sources of evidence had a negative impact on the prosecution, thus affecting Art 112 of the Constitution, which establishes the principle of mandatory prosecution.

3. The Constitutional Court declared all the questions of constitutionality to be unfounded.

As the Court held in Judgement no 366 of 1991 and confirmed in Judgment no 81 of 1993, freedom of communication and the confidentiality of corre-

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spondence and each form of communication conflate into the inviolable right guaranteed by Art 15 of the Constitution, which is the ‘vital space that surrounds the person and without which the person could not exist and grow in harmony with postulates of human dignity’.

Considering that a constitutionally protected right may be restricted by a reasonable decision delivered by judicial authorities within the scope of the law, the Court further underscored the dilemma arising with the unrestricted prevalence of one right over others, resulting in the ‘tyrannization’ of the various principles enshrined in the Constitution in accordance with the criteria of proportionality and reasonableness (Judgment no 85 of 2013). Thus, ‘(a)s is the case under other contemporary democratic and pluralist constitutions, the Italian Constitution requires that an ongoing reciprocal balance be struck between fundamental principles and rights, and that none of them may claim absolute status’.

4. A comparison between confiscation and interception was made to assess the degree of influence on constitutional rights of the challenged rules. Confiscation is one of the possible ways through which the freedom and confidentiality of correspondence may be limited, to provide authorities with effective tools in investigations and in the administration of justice in respect of criminal conducts. In this regard, confiscation is not, per se, an unreasonable means of harmonizing conflicting constitutional principles. However, a confiscated item – whether a letter, parcel, package, or telegram – does not reach the expected destination, having been previously ‘physically apprehended’; on the contrary, with mere interception, the communication flow is

not suspended, even the interlocutors’ awareness. The Joint Chambers of the Supreme Court of Cassation firmly rejected the application of the rules concerning confiscation to interception (Judgment no 28997 of 2012).

5. Although Art 15 of the Constitution relates to both ‘correspondence’ and ‘other forms of communication’, including telephone and electronic communications, in-person conversations and the like, the Court recognized that the right at issue does not provide an exhaustive catalogue of the available measures. A suitable solution for different needs and interests is required. The prevention and prosecution of crimes must be ensured as a paramount constitutional principle in itself, and as a goal for the common good of society. Then, providing for the possibility to adopt ‘secretive methods’ in criminal proceedings falls squarely within the powers of the legislature; no unreasonableness can be found if due respect is paid to the reservation of law and jurisdiction enshrined in Art 15 of the Constitution.

6. All of the above led the Court to find the alleged violation of Arts 3 and 112 of the Constitution unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_20_2017.pdf.

**Order 23 November 2016 –
26 January 2017 no 24***

(Incidental Review of Constitutionality)

KEYWORDS: Tax Offences – Limitation Periods – Case Law of the Court of Justice of the European Union – Disapplication of Na-

* By Angelo Rubano.

tional Provisions – Reference for a Preliminary Ruling.

The case originated from criminal proceedings regarding VAT-related tax fraud, in the context of which the Court of Justice of the European Union (CJEU), in its judgment delivered on 8 September 2015 in Case C-105/14, *Taricco*, had addressed the problem of the compatibility, with EU law, of Arts 160, para 3, and 161, para 2, of the Criminal Code, in so far as they established short limitation periods that also applied to cases of serious fraud that significantly affected the financial interests of the European Union (EU).

In particular, in cases of serious tax fraud, the national provisions at issue – in so far as they provide for an overall limitation period deemed excessively short – would prevent the actual imposition of penalties, as the trial often ends after the limitation period has expired. As a result, the financial interests of the EU would be damaged, in breach of Art 325, para 1, of the Treaty on the Functioning of the European Union (TFEU). According to this provision, Member States are required to take effective measures to counter fraud affecting the financial interests of the EU. Therefore, the CJEU held that national courts must disapply the provisions of Arts 160 and 161 of the Criminal Code when they are inconsistent with the protection of the financial interests of the EU.

On 15 September 2015, in a trial for tax fraud, the Third Chamber of the Court of Cassation endorsed the CJEU's reasoning, disapplying the limitation period rules laid down in Arts 160, para 3, and 161, para 2, of the Criminal Code and upholding a conviction.

Soon later, however, the Fourth Chamber of the Court of Cassation

downsized the scope of the principles set out by the CJEU to deprive them of immediate effectiveness. The chamber deemed that there had not been a proper determination of the threshold of the gravity of tax fraud, threshold on the basis of which the national legislation could be disapplied; in any case, such a disapplication could not affect the limitation periods that had already expired, or the status of the offender would have been called into question.

In light of the above decisions, the Court of Appeal of Milan and the Third Chamber of the Court of Cassation raised the question of the constitutionality of the act ratifying the TFEU, in so far as it appeared to impinge upon Arts 3; 11; 25, para 2; 27, para 3; and 101, para 2, of the Constitution, by requiring the application of Art 325 as interpreted by the European Court of Justice in *Taricco*. In so doing, the referring courts invoked the existence of counter-limits to the application of EU law.

In particular, the referring courts considered the following principles had been breached: the rule of law, as limitation is a matter falling within the exclusive competence of the Italian legislature; the principle of non-retroactivity of unfavourable criminal law, as the disapplication of the limitation periods would have resulted in the retroactive application in *malam partem* of the national provisions, given the extension of the limitation period; the principle of *nulla poena sine lege certa*, because no precise criteria were laid down in *Taricco* to determine when tax fraud must be considered 'serious' or what was a 'significant' number of cases subject to time-barring effects.

The Constitutional Court ruled on the questions raised by both courts by making a new preliminary reference to the

CJEU, for a clarification on whether the interpretation of Art 325 TFEU given in *Taricco* was the only one possible or whether ‘even a partially different interpretation, capable of precluding any violation of the principle of legality in criminal matters’, could be given.

The request was raised because the rule set out by the CJEU in its judgment of 8 September 2015 afforded national courts a large margin of discretion in determining the minimum threshold of the gravity of tax fraud and thus infringed the principle of non-retroactivity of unfavourable criminal law.

The Constitutional Court, after declaring that the fundamental principles enshrined in the Constitution were incompatible with the disapplication of the national provisions on limitation periods, noted that the CJEU had held that national courts should engage in such disapplication only if they considered it compatible with the constitutional identity of their Member State, and not ‘when the rule clashed with a core principle of the Italian legal system’.

The Constitutional Court thus decided to refer the following questions on the interpretation of Art 325, paras 1 and 2 TFEU to the CJEU, within the meaning and for the purposes of Art 267 TFEU:

– whether Art 325, paras 1 and 2 TFEU must be interpreted as requiring criminal courts to disapply national provisions on limitation that preclude, in a significant number of cases, the punishment of serious fraud affecting the EU’s financial interests, or that establish shorter limitation periods for fraud affecting the EU’s financial interests than those applying to fraud affecting the Member State’s financial interests, even when there are no sufficiently precise legal grounds for such disapplication and, in the legal sys-

tem of the Member State, limitation forms part of substantive criminal law and is subject to the principle of legality;

– whether the CJEU’s judgment in *Taricco* must be interpreted as requiring criminal courts to disapply national provisions on limitation that preclude, in a significant number of cases, the punishment of serious fraud affecting the EU’s financial interests, or that provide shorter limitation periods for fraud affecting the EU’s financial interests than those that apply to fraud affecting the Member State’s financial interests, even when such disapplication is at odds with the overriding principles of the constitutional order of the Member State or with the inalienable rights of the individual recognized by the constitution of the Member State.

On 5 December 2017, the Grand Chamber of the CJEU delivered its judgment, in which it declared that the aforementioned Art 325, paras 1 and 2, TFEU must be interpreted ‘as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in

force at the time the infringement was committed’.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf.

**Judgment 25 January 2017 –
15 February 2017 no 35***

(Incidental Review of Constitutionality)

KEYWORDS: Electoral Law – Equality of the Vote – Majority Bonus – Ballot – Governability.

1. A number of ordinary courts raised, before the Constitutional Court, questions of constitutionality concerning several provisions of Decree of the President of the Republic 3 March 1957 no 361 (the ‘DPR’) and of Law 6 May 2015 no 52 (the ‘Law’), and also of Legislative Decree 20 December 1993 no 533.

The issues were related to the electoral law for the national Parliament, and in particular: (i) the attribution of the majority bonus; (ii) the compensatory mechanism among the various constituencies, whereby a seat of a specific constituency might be transferred to another one; (iii) the presentation of the lists of candidates and the proclamation of the elected candidates; (iv) the mechanism for the allocation of the seats in the Trentino-Alto Adige Region; and (v) the lack of uniformity between the electoral system of the Senate and that of the Chamber of the Deputies.

2. The first issue dealt with the majority bonus granted to the list obtaining forty percent of the votes: three hundred forty seats out of six hundred thirty of the

Chamber of Deputies were granted to the list that, on the first round, gained forty percent of the votes at national level. This mechanism allegedly breached the principle of equality of the vote and the principle of representativeness of the Chambers of the Deputies.

The Constitutional Court declared such question of constitutionality unfounded. The legislator has wide discretion in the choice of the electoral system and the Court can intervene only if such system appears manifestly unreasonable. In this respect, the threshold provided is not unreasonable, because it aims to balance, on the one hand, the principles of equality of the vote and of representativeness of the Chamber of the Deputies and, on the other hand, the need to guarantee the stability of the Government and the governability of the country.

3. Another question concerned the provision according to which if, in the first round, two lists obtained more than forty percent of the votes, the majority bonus was granted to the list that gained the highest percentage. As a result of this majority bonus, the number of seats attributed to the second list would be unreasonably reduced.

The Constitutional Court also declared this question of constitutionality unfounded, on the basis of the grounds sub 2 above.

4. Among the challenged provisions, there was also one that required carrying out a second round, if in the first one a list obtained three hundred forty seats, but not forty percent of the votes.

The Constitutional Court rejected this interpretation of the law, and recognized that the second round would take place only if at the first one, none of the lists obtained three hundred forty seats.

5. Another issue dealt with the case in

* By Marina Roma.

which, if no list passed the forty percent threshold, the first two lists that obtained at least three percent of the votes would participate in a second round (ie the run-off).

The Constitutional Court declared that, under the above provisions, the second round of elections was a continuation of the first round; therefore, a list could participate in the second round even if, in the first one, it obtained only a small percentage of votes. This mechanism created a conflict between the composition of one of the two chambers of Parliament and the will of the voters.

The challenged provisions were therefore held unconstitutional for breaching Art 3 of the Constitution.

The part of the legal provisions remaining in force was applicable and the Court did not have the power to make any further manipulative or additive interventions.

6. The provision according to which a seat of a specific constituency might be transferred to another constituency (so-called slipping) was also challenged.

The Constitutional Court declared the question unfounded. According to the Court, a systematic interpretation – taking into account the need to guarantee the equal representation of each part of the territory (Art 56) and to consider the consensus that each list obtained (Art 48) – suggested that the slipping effect had only a residual application, namely when, due to mathematic and casual reasons, it was impossible to determine any constituency where there were both a list in deficit and a list with dividers that were not used.

7. Among the issues of constitutionality, ordinary courts claimed that the lists were composed of a ‘head of list’ candidate and other candidates, among whom

voters could pick up to two preferences for candidates of different sex.

The question was declared unfounded because only an electoral system with long closed lists of candidates and without the possibility for voters to pick any kind of consensus for any of the candidates would contrast with the principle of free vote. The legislator has wide discretion in regulating the composition of the lists and the expression of support for certain candidates. The Court also emphasized that the power to select candidates and to choose the ‘head of list’ candidates represents one of the prerogatives that political parties enjoy under the Italian constitutional system (Art 49 of the Constitution).

8. In addition, the ordinary courts challenged the provision according to which if a candidate was elected in more than one constituency, he had to declare to the President of the Chamber of the Deputies the constituency in which he/she wished to obtain a seat within eight days from the last proclamation.

The Court found said provisions to be inconsistent with Arts 3 and 48 of the Constitution, given the lack of any objective criteria to guide the choice of the ‘head of list’ candidates elected in various constituencies.

9. All other questions were declared inadmissible due to groundlessness? and indeterminacy of the petition.

10. To overcome difficulties deriving from a possible application of the electoral system as resulting from the holding of unconstitutionality delivered in this Judgment, the Parliament passed Law 3 November 2017 no 165, that operated a far-reaching reform of electoral law. A mixed system was introduced, with approximately one third of seats allocated using a first-past-the-post method and

two thirds using a proportional method, with only one round of voting.

The full text of the English translation of the Conclusions on points of law, here partly summarized and in some passages reproduced, is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/2017_35_EN.pdf.

Judgment 21 –24 February 2017 no 42

(Incidental Review of Constitutionality)

KEYWORDS: *University – Provisions Regulating Courses Taught in Foreign Languages – Interpretation – General Requirement of Study Programmes also Offered in Italian – Unfounded Question of Constitutionality.*

For an analysis of this Judgment, please see C. Baldus and P.C. Müller-Graff, *Suicide: Not in the Wrong Moment, Please!*, in Volume 3, Issue no 2 (2017), at page 583.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_42_2017.pdf.

Judgment 10 January – 24 February 2017 no 43*

(Incidental Review of Constitutionality)

KEYWORDS: *Administrative Sanction – Final Judgment – Declaration of Unconstitutionality of the Legal Basis of the Sanction – Removal of Final Judgments Limited to Criminal Convictions – Unfounded Question of Constitutionality.*

1. The case that gave rise to the ques-

* By Gabriella Fimiani.

tion of constitutionality was brought against an entrepreneur by the Provincial Director of Labour of Como. Three injunctions were issued ordering the payment of fines imposed for having violated provisions concerning the working hours of employees, pursuant to Art 18-bis, para 4, of Legislative Decree 8 April 2003 no 66, implementing Directives 93/104/EC and 2000/34/EC concerning certain aspects of the organization of working time, as amended by Legislative Decree 19 July 2004 no 213. The Constitutional Court, in Judgment no 153 of 2014, intervened to declare the aforementioned Art 18-bis unconstitutional, on the grounds that said provision had been adopted in the absence of a delegation of legislative powers, thus invalidating the provisions underlying the calculation of the penalties that had been imposed. Therefore, the entrepreneur upon whom the administrative penalty had been imposed challenged the execution of the order for payment.

2. The Court of Como, after rejecting the claim filed, ruled that the compulsory relationship had, by this point, run out because the conviction was already a final judgment. Therefore, said Court raised a question of constitutionality, alleging the violation of Arts 3; 25, para 2; and Art 117, para 1, of the Constitution, in relation to Arts 6 and 7 of the European Convention on Human Rights (ECHR), according to Art 30, para 4, of the Law of 11 March 1953, no 87 ('Rules on the constitution and functioning of the Constitutional Court'). The last of these provisions establishes that 'when, as result of the application of a provision thereafter found to be unconstitutional, a final judgment of conviction has been delivered, the execution and all the penal effects thereof shall cease immediately'. According to the

referring court, when a law providing for an administrative offence is declared unconstitutional, Art 30, para 4, of Law no 87 of 1953 does not extend the removal mechanism to irrevocable judgments for which the relevant sanction has been framed, by national law, as an administrative one, even though the same is qualified as criminal in nature under the ECHR in the light of the Engel criteria.

The sanction provided for by Art 18-bis, para 4, of Legislative Decree no 66 of 2003, despite being expressly categorized as administrative, was of criminal nature according to the Convention, in the opinion of the referring Court. Therefore, it was subject to the principle of legality set out in Art 7 ECHR, which essentially requires crimes and penalties to have a legal basis: removal of this basis would result in the annulment of the judgment pursuant to Art 30, para 4, of Law no 87 of 1953, although this provision refers only to formal national criminal sanctions.

3. The Constitutional Court declared the question to be unfounded. The Court, in fact, agreed with the classification of the fine as a criminal penalty under the ECHR, under the appearance of an administrative sanction. However, the combination of a formal administrative sanction and the national law in criminal matters entails the application, under the ECHR, of all guarantees provided for by the relevant provisions of said Convention, but nothing more. The Engel criteria, therefore, re-qualify as criminal penalties those sanctions that, in the Italian legal system, are considered administrative sanctions, for the sole purpose of ensuring that, despite the different label attributed to them by national law, they do not escape the guarantees provided by the ECHR for substantive penal sanctions. That does not imply the need to en-

sure that principles and provisions of national criminal law laid down in relation to criminal offences and sanctions must also apply to national administrative offences and sanctions, even if they can be classified as penalties according to the ECHR. In other words, the domestic legal system may provide certain guarantees for some penalties that are considered criminal, such as those set forth in Art 30, para 4, of Law no 87 of 1953, and that the same do not extend to other norms that lead to formal administrative sanctions, even if they are substantial criminal sanctions for the purposes of the ECHR.

The national legislator maintains its margin of appreciation when defining the scope of the guarantees applicable only to provisions and sanctions that in the domestic legal system are deemed to reflect the punitive power of the State. As a result, the Constitutional Court declared that Art 30, para 4, of Law no 87 of 1953 does not apply to judgments of unconstitutionality concerning provisions that are the legal basis of final judgments of conviction to sanctions ranked among administrative measures under national law.

4. Finally, the Constitutional Court observed that in the case law of the European Court of Human Rights (ECtHR), there is no rule corresponding to Art 30, para 4, of Law no 87 of 1953. Indeed, no rule was established to make an administrative sanction yield to a supervening declaration of unconstitutionality.

According to the Constitutional Court, the ECtHR also requires that Contracting States refrain from calling into question the principle of *res judicata* and the need for certainty in legal situations. The Constitutional Court, therefore, concluded that the interpretative assumption upon which the referral was based was errone-

ous in nature. Consequently, the question of constitutionality raised on the basis of the alleged violation of international obligations by the national legal system was unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/2017_43_EN.pdf.

**Judgment 7 March –
7 April 2017 no 67***

(Incidental Review of Constitutionality)

KEYWORDS: *Freedom of Religion – Establishment of New Places of Worship – Requirements – Regional Law – Partial Unconstitutionality.*

1. The President of the Council of Ministers raised a question of constitutionality concerning Art 2 of Veneto's Regional Law 12 April 2016 no 12, which added Arts 31-bis and 31-ter to Veneto's Regional Law 23 April 2004 no 11 and established principles governing the planning of facilities for religious services. The claimant argued that the contested provisions infringed the right to freedom of religion, which is protected by the Constitution as well as by international and supranational law, and exceeded the Region's legislative competences.

2. Art 31-bis, para 1, reads as follows: 'The Region and the Municipalities of Veneto, in the exercise of their respective competences, identify the criteria and methods for the construction of facilities of common interest for religious services to be carried out by the entities which are institutionally competent in matters of worship with the Catholic Church or oth-

er religions – whose relations with the State are regulated in accordance to the third paragraph of Art 8 of the Constitution – and all the other ones'. This provision was challenged because it was considered too general and ambiguous, therefore allowing for an excessively discretionary application that could potentially result in a discriminatory interpretation, in breach of Arts 3, 8 and 19 of the Constitution.

On the other hand, Art 31-ter, para 3, provided that those who applied to construct a religious building were obliged to enter into an agreement with the relevant municipality to take, inter alia, 'the commitment to use the Italian language for all the activities carried out in the common interest facilities for religious services, which (we)re not strictly related to ritual practices of worship'. According to the claimant, the provision went beyond the town-planning purposes of the agreement, and affected the ways in which religious freedom is exercised – indeed, the freedom of religion consists of more than the exercise of merely ritual practices, as it also includes other activities, for example of a recreational, aggregative, cultural, social, and educational nature, in which religious freedom may reach its full expression. This regulation resulted in an infringement, by the Region, of the competence reserved to the State in the matters of 'relations between the Republic and religious confessions', as well as of 'public order and security', which fall within the exclusive legislative powers of the State (Art 117, para 2, letters c) and h), of the Constitution), thereby interfering with the exercise of religious freedom, which is protected by Arts 2, 3 and 19 of the Constitution.

3. The Constitutional Court declared the first question unfounded. The repub-

* By Marco Farina.

lican form of state is characterized by the principle of secularism, to be understood not as an attitude of indifference held by the State towards religious beliefs, but as a form of protection of pluralism, supporting the maximum expansion of the freedom of all, in an impartial manner (Judgments nos 63 of 2016, 508 of 2000, 329 of 1997, 440 of 1995).

The challenged Art 31-bis does not conflict with this principle. In fact, by devolving to the Region and the Municipalities the task of identifying the criteria and methods for the construction of religious facilities, it takes into consideration all possible forms of religious thought, without regard to the circumstance of whether an agreement with the State has been concluded (Judgment no 52 of 2016). The alleged violation of the abovementioned constitutional principles, therefore, did not derive from the content of the challenged provision in itself, but rather from its possible and concrete applications that may be discriminatory and thus to be addressed by the competent courts on a case-by-case basis.

4. On the contrary, the second question led to a declaration of unconstitutionality. The regional legislation concerning the construction of worship buildings finds its reasons and justifications – within the scope of the urban planning aspect – in the need to ensure a balanced and proper development of the residential centres and of the provision of services of public interest most broadly conceived, which therefore also includes religious services (Judgment no 195 of 2013). The Region certainly has the right to pass specific provisions for the design and construction of worship buildings and, in the exercise of these powers, it can impose requirements and limitations that are strictly necessary to guarantee

the achievement of the goals related to the management of the territory. However, the Region exceeds a reasonable exercise of these powers if, while protecting urban interests, it introduces an obligation, such as that of the use of the Italian language, that is wholly unrelated to these interests. In fact, language is a strong element of individual and collective identity (Judgment no 42 of 2017), a vehicle for the transmission of culture and the expression of the relational dimension of the human personality. A limitation as to the language to be used, in the absence of a close relationship of instrumentality and proportionality with respect to other constitutionally relevant interests, including in the field of application of regional financing, proves to impinge upon fundamental human rights.

5. In this context, the provision that allows the administration to impose, among the requirements for the conclusion of the urban planning agreement, a commitment to use the Italian language for all activities carried out within the facilities of common interest for religious services was clearly unreasonable. Accordingly, the part of that provision related to the use of Italian language was declared unconstitutional.

**Judgment 7 March 2017 –
13 April 2017 no 86***

(Incidental Review of Constitutionality)

KEYWORDS: Public Administration – Experimental Stations for the Preserved Foods Industry – Suppression – Tasks Transferred to the Chamber of Commerce of Parma – Unfounded Questions of Constitutionality.

* By Marina Roma.

1. The Council of State raised before the Constitutional Court questions of constitutionality concerning Art 7, para 20, of Decree Law 31 May 2010 no 78, which suppressed the Experimental Station for the Preserved Foods Industry (Stazione Sperimentale per l'Industria delle Conserve Alimentari) and transferred its tasks to the Chamber of Commerce of Parma.

2. The provision was challenged because it allegedly infringed the principles of equality and rationality (Art 3 of the Constitution).

According to the Council of State, the fact that the provision was included in Part II of Decree-Law no 78 of 2010, providing for a reduction of the costs of political and administrative bodies, demonstrated that its ratio was to reduce public expenditure for certain non-strategic administrative bodies. However – as emphasized by the Council of State – the Experimental Station was funded mainly by contributions from private operators. Therefore, its suppression was inconsistent with the ratio of the Decree-Law.

The Court declared the question unfounded. The principle of rationality, derived from the principle of equality, requires the legal system to maintain logical, teleological and historical-chronological coherence (Judgement no 87 of 2012). Rationality would be breached in case of 'intra legem irrationality', meaning an inherent incoherence between the ratio pursued by the legislator and the provision itself (Judgement no 416 of 2000). Not every incoherence or imprecision must be held to contrast with the Constitution: rather, only those considered to be evident and obvious (Judgement no 46 of 1993).

Given these premises, the Court stated

that the Council of State placed excessive emphasis on the 'pending review aspects' of Decree-Law no 78 of 2010. The Court highlighted that the Decree, entitled 'Urgent provisions regarding financial stabilization and economic competitiveness', aimed to foster national competitiveness also by means of a reduction in the number of certain public bodies.

The legislator enjoys broad discretion in choosing the most appropriate organizational measures to fulfil its objectives. In this respect, the choice to suppress the Experimental Stations was not manifestly unreasonable in light of their institutional competences and history.

3. Another question concerned the alleged violation of Arts 3, 97 and 118 of the Constitution.

The Court also declared this question unfounded.

Since their institution, the chambers of commerce had a twofold nature: on the one hand, they represented private operators; on the other, they were also considered as vehicles to achieve certain public purposes, and thus as a body of public law. The reforms carried out over the years have not changed these fundamental features; the chambers of commerce also acquired additional competences in relation to (i) the legal publicity of certain information regarding companies (eg conservation of the Companies' Register); (ii) consumer protection; and (iii) supervision of certain products, etc.

According to the Court, the granting of tasks to the chambers of commerce was never related to the local dimension of a specific public interest.

Given, on the one hand, the historical origin of Experimental Stations and their location in certain specific areas in relation to the activities to be carried out, and, on the other, the characters and the tasks

of the chambers of commerce, the choice of the legislator to grant the tasks once conferred upon the Experimental Stations for the Preserved Foods Industry to the Chamber of Commerce of Parma was not manifestly unreasonable or unjustified.

The same criterion was applied to all the other Experimental Stations.

4. The last question also related to Art 3 of the Constitution. The Council of State challenged the provision that referred, to an Interministerial Decree, the establishment of the timeframe and of the terms of the transfer of the tasks of the Experimental Stations.

To declare the question unfounded, the Court said that it was possible to give the provision an interpretation that was consistent with the Constitution, so that the Interministerial Decree had to grant equal representativeness to all private operators. In any case, a possible discrimination based on this decree was subject to appeal before the competent administrative tribunal.

5. The legal reasoning of this judgement, especially with regard to the history and the competences of the chambers of commerce, was recalled in Judgement no 261 of 2017, whereby the Constitutional Court declared unfounded all questions of constitutionality raised by various Regions with regard to Legislative Decree 25 November 2016 no 219, that reorganized the competences and the funding of the chambers of commerce.

**Judgment 21 February –
11 May 2017 no 103***

(Direct Review of Constitutionality)

* By Rocco Alessio Albanese.

KEYWORDS: Civic Uses – Commons – Natural Heritage and Landscape – Regional Law – Unconstitutionality.

1. The Judgment concerns two different issues. The first deals with Art 1, para 12, of Sardinian Regional Law 11 April 2016 no 5, providing the application of certain exemptions from enforcement and bankruptcy laws to certain Sardinian public bodies. However, the most important issue is the second, which derives from a recent conflict between the Autonomous Region of Sardinia and the national Government with regard to the matters of ‘civic uses’ (*usi civici*) and of commons (as will be clear by reading section 5, below, of this comment).

From a theoretical point of view, the categories of ‘civic uses’ and ‘collective-owned lands’ (*demani civici*) are vital in Italian property law. These particular property rights are, at the same time, both individual and collective, as they are attributed to each and every person to the extent that he or she is a member of a certain local community (regardless of the criteria adopted to define the community as a legal entity, at this general level). Together with the category of ‘goods in public use’ (*cose in uso pubblico*), the functioning of civic uses entails a far-reaching dialectic within the proprietary paradigm established by the Western legal tradition in continental Europe. According to this concept, property – namely private property, ownership – is an individual, absolute and exclusive subjective right, an idiosyncratic entitlement covering any sort of use (and misuse) connected to the utilities generated by a thing (namely, the object of property).

During his long tenure as professor of law, the former President of the Constitutional Court, Paolo Grossi, has illustrated

the existence and relevance of different forms of property, such as civic uses and other collective legal relationships between subjects and objects. In particular, civic uses play a crucial role in Sardinia, a region where a large part of the territory – almost twenty percent – is classifiable as civic domain.

2. The legal framework that regulates civic uses is complex, because it consists of various sources of statutory law that have come into force alongside a basis of customary law. At a national level, it is important to take into account Law 16 June 1927 no 1766 and Royal Decree 26 February 1928 no 332. While the main policy pursued by the Fascist legislator concerned the transformation of collective domains into individual property rights, these two sources have assigned a precise rationale to civic uses as a legal institution, by connecting these forms of property to economic activities such as forestry, grazing and subsistence agriculture. In this regard, Law no 1766 provides civic uses with a peculiar legal regime: except for the case of transformation into individual property, they are not subject to statutory limitations and such feature is coupled with a general provision of inalienability. In 1985 the rationale of civic uses has been enriched by Law 8 August no 431 (the so called ‘Calasso Law’), today part of Legislative Decree 22 January 2004 no 42 (Code of cultural heritage and of landscape: see Art 142, para 1, letter h). This legislation acknowledges the decreasing importance of traditional agricultural activities and considers civic uses as a means to protect the environment and the landscape, and thus to pursue goals characterized by national relevance and a crucial role of the State (see Constitutional Court, Judgment no 46 of 1995).

Civic uses can also be regulated under Regional Laws, and this is the case of Sardinia, which enjoys a special status within the Italian constitutional order. According to Art 3, para 1, letter n), of the Regional Statute, Sardinia has an exclusive legislative competence concerning civic uses. In this respect, Sardinian Regional Law 14 March 1994 no 12 has established a legal framework for Regional civic domains.

3. In the case at issue, the national Government called into question the constitutionality of several provisions of Regional Law 11 April 2016 no 5, providing – see, in particular, Art 4, paras 24, 25, 26 and 27 – wider room to declassify and privatize regional civic uses. The national Government assumed that the Region’s regulation was inconsistent, on the one hand, with Art 117, para 2, letter s), of the Constitution (that gives the State exclusive legislative competence with regard to the ‘protection of environment, ecosystem and cultural heritage’) and, on the other hand, with Arts 135, 142 and 143 of the Code of cultural heritage, which assign a central role to the State with respect to any sort of sub-national planning that is likely to affect the landscape. Sardinia maintained that Regional provisions fell under the scope of Regional legislative competence.

4. The Constitutional Court stated that Regional Law no 5 was inconsistent with the Constitution, as it had the unlawful effect of ‘depriv(ing) the collective heritage of large parts of the territory’ (section 3.2 of the Judgment). Taking into account the power of the State to regulate the protection of the environment, the Court underlined that the current concept of civic uses is related to the environmental relevance of the same. As a consequence of this theoretical connec-

tion, the Court, referring to its precedents, established that (i) the provisions of Legislative Decree 22 January 2004 no 42 are ‘norms of major socio-economic reform’, and therefore Regional laws must comply with them; (ii) although Sardinia has an undisputed legislative power with regard to civic uses, such a competence must be exercised through co-planning in agreement with the national administrative bodies.

As a result, Sardinia could not declassify civic domains to legitimize unlawful occupations (Art 4, para 25, of the challenged Regional Law) and without assuring the guarantees provided by relevant administrative procedures (Art 4, paras 26 and 27). At the same time, the Court enhanced the role of the State as the main public body in charge of protecting the environment and planning and monitoring interventions affecting the landscape.

5. The Judgment at issue can be considered as a reiteration of well-established case law: in this respect, it appears important to mention Judgment no 210 of 2014, according to which Sardinian Regional Law 2 August 2013 no 19, providing for a regulation of civic uses similar to that discussed above, was declared incompatible with the Constitution on the same grounds as Judgment no 103. Indeed, the 2017 Judgment contains quotations drawn from the former. Moreover, Judgment no 210 is remarkable because of its reference to the case law concerning commons established in 2011 by the Joint Civil Sections of the Court of Cassation (see for instance Judgment 14 February 2011 no 3665).

6. In the aftermath of Judgment no 103, Sardinia passed Regional Law 3 July 2017 no 11. Although this law was welcomed as an appropriate intervention, aimed at better regulating and protecting

Sardinian civic domains, with deliberation of 29 August 2017 the National Government decided to challenge the constitutionality of the Regional provisions before the Constitutional Court. Therefore, Sardinian civic uses are sub iudice once again, and for the third time in a few years.

Judgment 5 April – 12 May 2017 no 111*

(Incidental Review of Constitutionality)

KEYWORDS: Retirement Age – Equal Treatment Between Men and Women – National Law Incompatible with EU Law with Direct Effects – Disapplication of National Law – Inadmissible Questions of Constitutionality.

1. The question raised before the Constitutional Court concerned the combined provisions of Art 24, para 3, first sentence, of Decree-Law 6 December 2011 no 201 (‘Emergency provisions on the growth, equity and consolidation of the public accounts’) and Art 2, para 21, of Law of 8 August 1995 no 335 (‘Reform of the compulsory and complementary pension system’).

2. According to the referring court, the challenged provisions had discriminatory effects. Indeed, with regard to the prerequisites for eligibility for a pension relating to age for insurance purposes and contribution history purposes to be fulfilled, on the one hand, female public-sector workers who had reached the age of sixty-one prior to 31 December 2011, thereby accruing the right to an old-age pension, are mandatorily subject to the legislation applicable prior to the entry

* By Mario Iannella.

into force of Decree-Law no 201 of 2011. On the other hand, male public sector workers of the same age – who by that date have not yet reached the age threshold (of sixty-five) required for eligibility for the same right – are subject to the ‘new’ regulation provided by Art 24 of Decree-Law no 201 of 2011. Therefore, female public-sector employees are required to retire ‘at the age of sixty-five’, again in the view of the referring court, under the ‘new’ pension legislation, whereas male public-sector workers in a similar situation must by contrast retire at the age of sixty-six.

The challenged legislation is claimed to violate: Art 3 of the Constitution, which enshrines the principle of equality before the law without distinction on the grounds of sex; Art 37, para 1, of the Constitution, which establishes the principle of equal pay for equal work by men and women; Art 11 of the Constitution, in light of the possible contrast with both Art 157 of Treaty on the Functioning of the European Union (TFEU), according to which ‘(e)ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied’ (para 1), and Art 21 of the EU Charter of Fundamental Rights, which prohibits ‘any discrimination based on any ground such as sex’; Art 117, para 1, of the Constitution, in view of the violation of Art 2 of Directive no 2006/54/EC insofar as it defines ‘direct discrimination’ as a situation ‘where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation’ (para 1, letter a).

3. The Court declared the questions inadmissible on procedural grounds. The referring court raised issues related to the violation of Arts 11 and 117, para 1, of the

Constitution, because of an infringement of provisions of EU law, without considering that part of the latter has direct effect in the national legal system. This is the case of the principle of equal pay for men and women, which is a core principle of the common market and one of the ‘social objectives of the Community, which is not merely an economic union’ (Court of Justice, Case C-43/75, *Gabrielle Defrenne v Sabena*, paras 7 to 15). This principle has been considered by the Court of Justice to be binding on public and private entities and to have direct effect (*Defrenne*, paras 4 and 40). This principle has been encapsulated by the other invoked provisions of both the Treaties (Art 3, para 3, of the Treaty of the European Union and Art 8 TFEU) and the Charter of Fundamental Rights of the European Union (Arts 21 and 23).

Thus, the Constitutional Court considered that, in finding that the contested legislation violates Art 157 TFEU, also in light of the abovementioned Court of Justice’s case law recognizing direct effect to that provision, the referring court should have disapplied the provisions that were incompatible with the principle of equal treatment, subject as the case may be to a preliminary reference to the Court of Justice. This process would have made the reference to the Constitutional Court unnecessary.

4. The disapplication of provisions of national law is an obligation incumbent upon the national courts, which are required to comply with EU law and to guarantee the rights arising under it.

Alternatively, the complexity of the issue could have led the referring court to make a reference for a preliminary ruling to the Court of Justice, to ascertain whether the national legislation was incompatible with EU law preventing dis-

crimination between men and women in the employment relationships, as established in the CJEU cases (Court of Justice, Case C-262/84, Vera Mia Beets-Proper v F. Van Lanschot Bankiers NV, paras 34-35, and Case C-356/09, Pensionversicherungsanstalt v Christine Kleist, para 46) and in the Directive no 2006/54/EC.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_111_2017.pdf.

Judgment 8 February – 26 May 2017 no 122*

(Incidental Review of Constitutionality)

KEYWORDS: Prisoner – Strict Regime Prison – Prohibition on Exchanging Printed Materials with External Parties – Alleged Infringement of Freedom of Communication and of Rights to Education – Unfounded Questions of Constitutionality.

1. The questions raised before the Constitutional Court by the Supervisory Judge of Spoleto concerned Art 41-bis, para 2-*quater*, letters a) and c), of Law 26 July 1975 no 354 ('Regulations concerning the prison system and the enforcement of measures that restrict or deprive of personal freedom'). The Supervisory Judge challenged the constitutionality of Art 41-bis in so far as, according to the most widely accepted interpretation (*diritto vivente*), it allowed prison administrations to prevent prisoners from receiving from outside, or sending outside, books or other printed materials: in particular, doubts were raised as to the power of the prison administration to adopt

this measure towards prisoners subject to strict regime detention, in order to prevent them from having contact with criminal organizations.

2. First, the referring judge claimed that a violation of Art 15 of the Constitution had occurred, which reserves any restrictions on the freedom and confidentiality of correspondence, and on every form of communication, to statutory law and to the judiciary. Books and other printed materials may be means to express ideas, feelings, or news: for this reason, they serve as means of communication and should fall under the protection of Art 15 of the Constitution. Consequently, the restriction at stake might only be imposed by the judiciary, as also stated by the above-mentioned Art 18-*ter*.

Furthermore, the provision was alleged to be inconsistent with Art 21 of the Constitution, which protects freedom of expression (in all its breadth) and freedom of the press. According to constitutional case law, a broad construction of that provision extends its scope to the right to inform and to be informed, which is impaired when the prison administration prevents prisoners from exchanging books and other printed materials with external parties. Nor could such restriction increase the safeguarding of public order and safety, which would already be adequately protected by the more flexible mechanism provided for by Art 18-*ter*. Besides, the referring judge applied a similar reasoning with respect to Arts 33 and 34 of the Constitution, which provide for the right to education: the prohibition on receiving publications from outside, making them harder to obtain, would compromise prisoners' right to study.

Last, an infringement of Art 117, para 1, of the Constitution was claimed, with

* By Dora Tarantino.

reference to Arts 3 and 8 of the European Convention on Human Rights (ECHR), which respectively forbid inhuman or degrading treatment and guarantee to every person the right to respect for private and family life and correspondence. The possibility to receive publications from outside, especially from one's relatives, and to send them such material was considered, for a prisoner subject to the restrictive regime prescribed by Art 41-bis of Law no 354 of 1975, as a precious way to maintain human relationships, the denial of which would be disproportionate to the purpose of the special regime itself.

3. The Constitutional Court declared unfounded all the questions of constitutionality.

As far as Arts 21, 33 and 34 of the Constitution are concerned, the measures that, according to the most widely accepted interpretation (*diritto vivente*) of the relevant provision, may be adopted by the prison administration on the basis of the latter do not restrict the right of prisoners to receive and send publications, but rather simply affects the means through which such publications may be acquired. Indeed, prisoners are not prevented from accessing their preferred readings, but are required to ask the prison administration to supply them. Therefore, adverse effects on the rights of the prisoner may derive not from the rule itself, but from the failure of the prison administration to properly enforce it: clearly, this problem falls outside the scope of constitutional review.

Besides, the Court found no violation of Art 15 of the Constitution. Even if it was possible to agree that the exchange of printed materials can have a specific communicative meaning, it would not be possible to call Art 15 of the Constitution into play. Not only publications, but any

item could be in theory suitable to convey communications: as a paradoxical result, for the sake of freedom of correspondence, the prison administration could not impose any restriction on the exchange of items between inmates and outside parties.

Finally, the Constitutional Court rejected the argument based on international law, holding that the mere prohibition on exchanging materials with the outside world does not constitute an infringement of Art 3 ECHR; moreover, even if it did, the ban on inhuman or degrading treatment is absolute, and could not, in any way, be circumvented by a judicial order. With regard to Art 8 ECHR, the Court stated that restricting the channels for receiving printed materials by means of which prisoners can maintain familial relationships does not compromise the freedom and secrecy of correspondence. Even when such restriction does interfere with family life, this would be justified because the measure's aim falls within the category of goals provided for by Art 8, para 2, ECHR.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_122_2017_EN.pdf.

Judgment 7 March – 26 May 2017 no 123

(Incidental Review of Constitutionality)

KEYWORDS: Administrative Jurisdiction – Res Judicata – Ruling Against Italy by the European Court of Human Rights – No Obligation to Reopen Trial – Unfounded Question of Constitutionality.

For an analysis of the Judgment,

please see C. Petta, *Res Iudicata* in Breach of the ECHR: The Italian Constitutional Court's Point of View, in this Issue, at page 225.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_123_2017.pdf.

Judgment 3 April 2017 – 12 July 2017 no 164*

(Incidental Review of Constitutionality)

KEYWORDS: *Judiciary – Action for Liability for Judicial Negligence – Required Admissibility Proceedings – Abolition – Unfounded Question of Constitutionality.*

1. 1. The issues raised before the Constitutional Court concerned Arts 2, para 3; 7, para 1; 5; 8, para 3, of Law 13 April 1988 no 117, as amended by Law 27 February 2015, no 18 ('Provisions on liability for judicial negligence'). Several courts raised questions of constitutionality of the contested provisions, allegedly in breach of Arts 3; 101, para 2; 111; 24; 25 of the Constitution. The Constitutional Court declared three of the four questions of constitutionality inadmissible, for lack of connection between the original proceedings and the process in the Constitutional Court (on the basis of Arts 1 of Constitutional Law 9 February 1948 no 1, and 23 of Law 11 March 1953 no 23). The only question that was decided on the merits by the Constitutional Court concerned the constitutionality of the rewording of Art 5 of Law no 117 of 1988.

2. Art 5 of Law no 117 of 1988 provided that the action for damages against the State for judicial negligence was condi-

tional upon the completion of proceedings to assess the requirements of the judge's liability. This Article was modified by Art 3, para 2, of Law no 18 of 2015. As a result of these legislative changes, the action for damages no longer needs a preliminary analysis before a judge other than the Court having jurisdiction for liability for judicial negligence.

The Constitutional Court considered the validity of Art 3, para 2, of Law no 18 of 2015 for the first time. In the past – before the introduction of Law no 18 of 2015 – the Court only ruled on the validity of Law no 117 of 1988; more particularly, the Constitutional Court (see Judgments nos 18 of 1989 and 468 of 1990) found that Arts 2 and 3 of Law no 117 of 1988 did not conflict with the Constitution, because those rules provided that the action for damages brought against the State for judicial negligence related to cases of intentional fault and serious misconduct.

3. The Constitutional Court declared the question of constitutionality to be unfounded, because Arts 101, para 2; 111, para 2; 25, para 1; and 3 of the Constitution were not infringed by the changes made by Art 5 of Law no 18 of 2015. In particular, the Court noted that the repeal of the so-called 'admissibility proceedings' did not raise the risk of impairing the independence of the judiciary. As a result, Arts 101, para 2 and 111, para 2, of the Constitution were not breached.

The Constitutional Court stated that judicial independence should be ensured by the provision regarding abuse of process, namely Art 96 of the Code of Civil Procedure, which regulates the liability of any person who decides to file suit despite being aware of the groundlessness of his/her claim. Bringing an action that is manifestly unfounded entails the liabil-

* By Fulvio Marone.

ity of the claimant (see Judgment of the Supreme Court of Cassation no 4090 of 2017).

Furthermore, the Court emphasized that the Court of Justice of the European Union requires Member States, in accordance with the principle of effectiveness, to prevent the introduction of unreasonable procedural obstacles (see Judgments nos 30 September 2003, C-224/01, and 24 November 2011, C-379/10).

The Court also excluded a breach of Art 25 of the Constitution: the commencement of a legal action for judicial liability does not imply the application of Art 51, para 1, no 3, of the Code of Civil Procedure, with regard to the abstention (see Judgment of the Supreme Court of Cassation no 1318 of 2015), since the party acting as defendant, in an action for liability for judicial negligence, is the State and not the judge, against whom the President of the Council of Ministers is entitled to take legal recourse.

Finally, the Constitutional Court ruled that the repeal of Art 5 of Law no 117 of 1988 did not constitute an infringement of Art 3 of the Constitution, because new forms of preliminary proceedings were introduced, although only for appellate- (Arts 348-bis and 348-ter of the Code of Civil Procedure) and supreme-court-level proceeding (Arts 360-bis and 375, para 1, nos 1 and 5, of the same Code), while the action for damages against the State for judicial negligence is to be addressed by a court of first instance.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_164_2017_EN.pdf.

Judgment 20 June – 13 July 2017 no 180*

(Incidental Review of Constitutionality)

Keywords: Amendment of Gender Attribution – Modification of Sexual Characteristics – Sexual Identity – Individual Fundamental Rights – Unfounded Question of Constitutionality.

1. The question raised before the Constitutional Court concerned Art 1, para 1, of Law 19 April 1982 no 164 ('Provisions on amendment of gender attribution'), which provides that 'Amendment is made based on the final decision of a court attributing, to a person, a gender different from that written on their birth certificate, following prior modification of his or her sexual characteristics'.

2. The referring Court held that the literal content of Art 1, para 1, of Law no 164 of 1982 did not allow a person 'to amend his or her gender attribution in the absence of surgical modification of his or her primary sexual characteristics, that is to say genitalia, on the basis of which a person's sex is identified at the time of birth'. Pursuant to this provision, the exercise of a right (the right to one's own gender identity) was made contingent upon submitting to invasive and health-threatening procedures.

3. The provision was challenged on two different grounds.

First, Arts 2 and 117, para 1, of the Constitution, in relation to Art 8 of the European Convention on Human Rights (ECHR), were allegedly infringed because the challenged provision required the modification of one's sexual characteristics through highly invasive surgical treatments for purposes of amending the

* By Ippolito Barone.

attribution of gender in one's records, therefore undermining the exercise of the fundamental right to one's own gender identity.

Second, the infringement of Arts 3 and 32 of the Constitution would consist in the inherent unreasonableness of making the exercise of a fundamental right, such as that to sexual identity, contingent upon the requirement that a person undergoes medical treatments (surgical or hormonal) that are extremely invasive and dangerous for health.

4. The Constitutional Court held that a constitutionally oriented interpretation of the challenged provision, in accordance with the case law of the European Court of Human Rights (ECtHR), was possible; so that said provision could be considered compatible with the constitutional values of freedom and dignity of the human person, identified and validated by the case law of both ordinary courts and the Constitutional Court.

In particular, reference was made to Judgement no 15138 of 20 July 2015, in which the Court of Cassation held that, in order to obtain an amendment of gender attribution in civil state records, undergoing surgical procedures that destroy or modify the primary anatomical sexual characteristics is not a mandatory and necessary step.

The Court of Cassation recognized that acquiring a new gender identity may also come as result of a personal development that does not entail the need for such procedures, provided that the serious and unambiguous nature of the chosen path and the defined nature of the final outcome are subject to verification (including technical verification) by the courts.

With reference to constitutional case law, the Constitutional Court referred to

Judgement no 221 of 2015, in which it recognized that the provision at stake constitutes the end point of an evolution in cultural attitudes and the legal system towards the recognition of the right to gender identity as a constitutive element of the right to personal identity; because the same falls squarely within the scope of the fundamental rights of the person, 'in the absence of a textual reference to the manner in which the modification is achieved (surgery, hormones or as a result of a congenital situation), it may be concluded that surgery, as only one of the possible techniques for modifying sexual characteristics, is not necessary for the purposes of access to the judicial process leading to correction in the civil registry'.

5. The Court provided further clarifications as to the constitutionally appropriate interpretation of Law no 164 of 1982. On one hand, it 'allows for the rejection of the requirement of a prior gender realignment surgery' for the purpose of amendment of gender attribution; on the other hand, 'this in no way implies that there is no need for a rigorous assessment – indeed, it confirms its necessity – not only of the serious and unambiguous nature of the person's intent, but also that a prior, objective transition in gender identity, revealed in the path followed by the person in question; a path that corroborates and reinforces the intent thus manifested'.

In any case, the simple will-based element cannot take priority or exclusive importance for purposes of making an assessment regarding the transition: the individual's will is a requirement, but it is not sufficient in itself.

6. The Court emphasized the need to strike a balance between the individual's right to recognition of one's gender identity (with the correspondence between

the gender attributed in official records at the moment of birth and the gender that the individual subjectively perceives and lives out) and the need to have certainty in legal relationships, as a fundamental principle of the legal system, and upon which the purpose of public records is based.

In conclusion, it is up to courts, on a case-by-case basis, to assess the nature and importance of the prior modifications to a person's sexual characteristics, which combine to determine one's personal and gender identity.

7. In light of this reasoning, the question concerning the constitutionality of Art 1, para 1, of Law 19 April 1982 no 164 was declared unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_180_2017_EN.pdf.

Judgment 21 June – 14 July 2017 no 193*

(Incidental Review of Constitutionality)

KEYWORDS: *Closed Farmstead in South Tyrol – Legal Succession – Preference of Men over Women – Alleged Infringement of the Principle of Equality – Unconstitutionality.*

1. The question raised before the Constitutional Court by the Court of Bolzano concerned Art 5 of Law 25 July 1978 no 33 of the Province of Bolzano, regarding the regulation of closed farmstead ('maso chiuso'), as amended by Art 3 of Law 24 February 1993 no 5 of the Province of

Bolzano, in so far as it stipulates that, among those called to succession in the same degree, men have preference over women (while, among the members of the same gender, the oldest one has priority).

According to the referring Court, the aforementioned Art 5 would be contrary to Art 3, para 1, of the Constitution, which establishes the principle of equal social dignity and equality of citizens before the law, without distinction of gender. For those called to take over the farmstead, the contested provision included a preference criterion based on gender, thus determining an unreasonable discrimination against women.

2. The referring Court observed that Law 28 November 2001 no 17 of the Province of Bolzano ('Law on closed farmsteads') repealed the challenged provision and the preference criterion at issue; however, the provision applied to the case at hand because the succession had opened on 12 August 2001, thus prior to the legislative reform.

3. The case concerned the review – based on the principles of equality and reasonableness – of the legal framework of an ancient legal institution (the closed farmstead), present in South Tyrol since the early centuries of the Middle Ages, in accordance with Germanic custom.

The Constitutional Court preliminarily engaged in a brief historical-normative overview of the institution of the closed farmstead and its origins in the Italian legal system.

In view of the normative analysis, the Constitutional Court recognized that the distinguishing characteristics of the institution justified its preservation through a particular regulation.

4. In assessing the compatibility of the challenged provision with Art 3, para 1, of

* By Patrizia Saccomanno.

the Constitution, the Constitutional Court recalled its own previous Judgment (no 40 of 1957), relating to similar matters, in which it held that the contested criterion of preference did not clash with the general principles of the legal system on intestate succession and division of inheritance, or with the principle of equality enshrined in Art 3 of the Constitution. Following the interpretation taken by the previous Judgment no 4 of 1956, the Constitutional Court then declared that the preference for the first-born male provided by the law at that time was justified at the time of the proceedings.

In the case at hand, the Constitutional Court stated that the conclusions regarding male preference had to be set aside to allow the legal system to conform to society and its evolution.

5. The compatibility of the closed farmstead with Italian civil law has been questioned on several occasions. The fact that this institution has always existed in a limited territorial context does not mean that its regulation cannot contain specific rules that acquire a different meaning over time through an evolutionary interpretation, which may lead to a different assessment of compatibility with the constitution.

The protection granted to particular institutions such as the closed farmstead does not justify a derogation from the principles of the legal system, but only from those that are functional to the preservation of the institution in its essential aims and peculiarities (see Judgments nos 173 of 2010, 340 of 1996, 40 and 5 of 1957, 4 of 1956) and that in any case do not involve the violation of fundamental constitutional principles, such as equality.

The principle of equality between men and women played a primary role in as-

sessing the constitutional interests underlying the question under review. The social and legislative evolution – in the opinion of the Constitutional Court – has led to overcome the patriarchal vision of the family and the principle of birthright, as well as the hereditary preemption for male individuals in the assignment of the closed farmstead, which is therefore incompatible with Art 3 of the Constitution. Not surprisingly, these rules were repealed by Provincial Law no 17 of 2001 and, in the past, on minor matters, the Constitutional Court had declared certain rules that were part of the framework of the closed farmstead to no longer be compliant with the original rationale.

6. Hence, the Constitutional Court declared the unconstitutionality of Art 5 of Law no 33 of 1978 of the Province of Bolzano, insofar as it provided that among those called to succession in the same degree, men had preference over women.

Judgment 8 November – 7 December 2017 no 258*

(Incidental Review of Constitutionality)

KEYWORDS: Citizenship – Naturalization – Oath Requested for Individuals Lacking Mental Capacity – Discrimination – Unconstitutionality.

1. The question raised before the Constitutional Court concerned Art 10 of Law 5 February 1992 no 91 (Provisions on Citizenship), which provides that a naturalization decree becomes effective only once a new citizen has pledged allegiance to the Italian Republic, even if he/she is a mentally disabled person who lacks the capacity to take an oath.

* By Marco Rizzuti.

2. According to Law no 91 of 1992, a foreigner, even if born and grown up in Italy, can obtain Italian citizenship only through an administrative decree of naturalization, granted pursuant to a discretionary procedure. Then, the decree becomes effective and can be inserted into the Civil Status Register only if and when the new citizen solemnly pledges allegiance to the Italian Republic. Therefore, if the new citizen suffers from a severe mental disability, and thus lacks the capacity to take an oath, his/her new citizenship will apparently never become effective: this was the situation of the Indian woman suffering from a severe form of epilepsy and pachygyria, whose case led the Court of First Instance of Modena to raise the question of constitutionality.

Under the original provisions of the Civil Code, persons suffering from severe mental disabilities had to be interdicted, in order to be legally represented by a guardian in all their legal acts. When such a representation was impossible, eg when the act was of personal nature (eg marriage), the latter became impossible too. The problem was to ascertain whether the acts relating to citizenship, such as the request for naturalization or the oath of citizenship, fell within the acts of personal nature or acts compatible with legal representation. In this regard, the laws on citizenship never regulated the status of disabled persons.

The oath of citizenship has always been deemed an act of a personal nature, and thus incompatible with legal representation. However, the Council of State, in 1987, interpreted the law on citizenship as implying that an interdicted person was exonerated from the oath.

However, interdictions have become very rare after the entry into force of Law 9 January 2004 no 6, introducing the

new legal institution of supporting administration with regard to any kind of mental or physical disability. The new rules are less rigid and aim to promote, to the greatest extent possible, the disabled person's autonomy: for instance, recent judgments have authorized disabled persons under supporting administration to perform legal acts of personal nature, such as marriage or writing a will, with the assistance of the supporting administrator, and have recognized the power of the supporting administrator to request naturalization for a disabled person (Regional Administrative Court of Lazio, Judgment 4 June 2013 no 5568). In other cases, courts have affirmed the exoneration from the oath of citizenship also for persons under supporting administration, because, according to the new Art 411 of the Civil Code, provisions referred to interdiction must also be applied to support administration in the interests of the disabled person (Court of First Instance of Bologna, Judgment 9 January 2009).

On the contrary, the Court of First Instance of Modena, called to decide on a similar case, held that Art 10 of Law no 91 of 1992 could not be interpreted as exonerating persons under supporting administration from the oath of citizenship, and so deemed the lack of an exoneration to be incompatible with the Constitution.

3. To decide on the merits, the Constitutional Court affirmed the referring court's interpretation, according to which Art 411 of the Civil Code cannot be applied in cases such as the one at hand.

The referring court challenged the violation of Art 2 of the Constitution, which protects inviolable human rights, and Art 3, para 2, which provides for the duty of the Republic to remove the social and economic obstacles impeding the full de-

velopment of each person. It also referred to Art 3, para 1, which prohibits discrimination on the ground of ‘personal conditions’, because also disability, which deserves special protection under Art 38 of the Constitution, must be included among these personal conditions.

The Constitutional Court endorsed these conclusions. Art 10 of Law no 91 of 1992 was thus considered discriminatory on the ground of disability, as it denied in effect naturalization to a person fulfilling all other requirements only because, being a mentally disable person, he/she could not take the oath. By excluding a disabled person from citizenship, it marginalized him/her from society and might marginalize him/her also in the family environment if the other family members were able to naturalize.

Therefore, all persons suffering from documented severe mental disabilities must always be exempted from the oath of citizenship, regardless of the legal classification of their conditions in terms of interdiction, support administration, mere natural incapacity, etc.

4. Art 10 of Law no 91 of 1992 was thus declared unconstitutional, insofar as it did not exempt mentally disabled persons from the oath of citizenship.

The Court of First Instance of Modena, on 13 February 2018, has already had an opportunity to implement the Constitutional Court’s judgment, exempting a Moroccan-born mentally disabled person from the need to take the oath of citizenship for the purpose of naturalization.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_258_2017_EN.pdf.

Judgment 26 September – 13 December 2017 no 262*

(Conflict of Attribution Between Branches of the State)

KEYWORDS: Constitutional Bodies – Internal Regulations – Self-Adjudication (Autodichia) – Labour Disputes – Compatibility with the Constitution.

1. The Constitutional Court was called to rule upon the constitutional dispute between the Court of Cassation, on one hand, and the Senate of the Republic and the President of the Republic, on the other, with regard to their internal regulations (Arts 72-84 of the Rules of the Administration concerning the staff of the Senate of the Republic and Arts 1 of Presidential Decree 24 July 1996 no 81, modified by Presidential Decree 30 December 2008 no 34) that established *ad hoc* internal dispute resolution bodies to settle disputes with their members of staff, reserving to the latter the power to adjudicate this type of dispute.

2. According to the case law of the Constitutional Court, the internal regulations of the constitutional bodies could not be subject to judicial review (Judgement no 154 of 1985), and thus could only be reviewed in the constitutional disputes between branches of State (Judgement no 120 of 2014). For this reason, the Court of Cassation brought two applications before the Constitutional Court, on the assumption that the abovementioned rules violated the staff members’ rights to legal protection and to a fair trial conducted by an impartial judge (Arts 3, para 1; 24, para 1; 102, para 2; 108, para 2; 111, paras 1 and 2, of the Constitution), and resulted in an en-

* By Antonello Lo Calzo.

croachment upon its own sphere of competences, as it was prevented from engaging in the judicial review of such cases. In both applications, the referring court asked the Constitutional Court for a holding on the delimitation of the power of self-adjudication relating to the Senate of the Republic and the President of the Republic.

3. After confirming that the applications were admissible both from an objective and subjective point of view, the Constitutional Court focused on its functions in cases concerning jurisdictional disputes between branches of the State. The Court ‘is not called upon to adjudicate individual questions concerning the constitutionality of regulations, raised in relation to specific constitutional parameters, but rather to ensure a constitutional distribution of competences among the conflicting bodies’; for these reasons, the violation of constitutional parameters concerning individuals rights could be asserted only if the applicant manages to substantiate the impact of the alleged violations on its sphere of constitutional competence.

4. On the merits, the Court held both applications to be unfounded. The Court declared that self-adjudication is a traditional expression of the autonomy of the constitutional bodies, ‘one of the conditions (...) for the free and efficient execution of their functions’. Self-adjudication is closely linked to the rule-making autonomy of the constitutional bodies, which are allowed to regulate their functions, only to the extent that the same are not regulated by the Constitution, but also their modes of internal organization. Such rule-making autonomy, in the opinion of the Court (Judgement no 129 of 1981), has an implied constitutional ground that requires constitutional bod-

ies to be able to carry out their functions independently of the other branches of the State. This autonomy, at the same time, is the foundation of the labour regulations applying to their staff members: in fact, ‘good exercise of the high constitutional functions granted to the constitutional bodies in question depends to a crucial degree on how their personnel is selected, regulated, organized and managed’.

Therefore, self-adjudication is a direct consequence of rule-making autonomy. This concept cannot be limited to ‘the creation of rules, but also includes (...) the application of those rules’. Once the Senate and the President of the Republic have provided for the regulation of their employment relationships with their staff members through their own sources of law, self-adjudication ‘amounts to the logical fulfilment of the organizational autonomy of the constitutional bodies in question, in relation to their necessary bureaucracies, the organization and management of which is thus removed from any external interference’. Indeed, it would be unreasonable to vest, in certain organs, the power to adopt their own internal regulation while reserving to courts the power to enforce it.

For this reason, self-adjudication ‘does not violate the constitutionally allotted competences of others inasmuch (...) as it concerns the employment relationships with staff members’.

5. The Court outlined, however, two limits.

First, the protection of employees must be in any case assured, through internal bodies that do not belong to the judiciary. These bodies are constitutionally justified only if they comply with the requirements of independence and impartiality, in accordance with the principles

enshrined in Arts 3, 24, 101 and 111 of the Constitution and with the Judgement delivered by the European Court of Human Rights in *Savino v Italy*, on 28 April 2009. In particular, internal regulations must provide rules on incompatibility, so as 'to prevent a situation in which the same person can contemporaneously take part in both the administrative body that oversees personnel (...) and the self-adjudicatory bodies', to ensure an adequate technical competence of the judges, and to respect procedural requirements aiming at 'guaranteeing the right of defence and an effective adversarial process'. Only in this way, does the limitation of the right to a judge not amount to a denial of such right. In the light of these principles, the Constitutional Court amended its internal Regulation on personnel disputes on 24 January 2018.

Second, self-adjudication is admissible only for employment relationships. For this reason, constitutional bodies are not entitled 'to regulate legal relationships with third parties or to reserve to their own self-adjudicatory bodies jurisdiction over potential disputes involving their rights and entitlements': these kinds of disputes must be reserved to the common jurisdiction.

6. In the light of these premises, the Constitutional Court declared that the Senate and the President of the Republic are entitled to adopt the challenged rules inasmuch as they refer to the adjudication of labour disputes brought by their own staff members before internal adjudicatory bodies.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_262_2017_EN.pdf.

Judgment 22 November – 14 December 2017 no 268*

(Incidental Review of Constitutionality)

KEYWORDS: Vaccinations – Compensation for Irreversibly Injured Individuals Due to Mandatory Vaccinations – Recommended Vaccination – Lack of Indemnity – Unconstitutionality.

1. The Court of Appeal of Milan raised a question of constitutionality of Art 1, para 1, of Law 25 February 1992 no 210, which grants an indemnity to individuals in case of irreversible injuries due to mandatory vaccinations, transfusions and administration of blood products.

2. After undergoing the influenza vaccination, that was highly recommended by the Minister of Health and by the competent medical centre, a retired man developed Parsonage Turner Syndrome because of the vaccination. Both the Minister of Health and the medical centre denied the indemnity. The question was raised before the Court of First Instance of Milan, which recognized that the recommendation of the influenza vaccination was directed to the target category of people of the same age as the claimant. Therefore, the Court allowed the indemnity to be granted by interpreting Art 1 of the Law in accordance with the Constitution and with the Constitutional Court's case law. Indeed, the Constitutional Court's precedents already recognized the right to indemnity. As affirmed by Judgement no 107 of 2012 (see also judgements no 226 of 2000, no 118 of 1996, no 258 of 1994, and no 307 of 1990), indemnity is also due in cases in which 'the injury was derived from a non-

* By Giulia Terlizzi.

mandatory vaccine treatment, but rather recommended by the National Health Institution in order to protect public health, and precisely, from vaccination against measles, parotids and rubella.'

The Minister of Health seized the Court of Appeal to challenge this interpretation, because the provision only referred to mandatory (and not recommended) vaccinations. The Court of Appeal raised the question of constitutionality of this provision, assuming its incompatibility with Arts 2 (right to solidarity), 3 (right to equality) and 32 (right to health) of the Constitution. As stated by the Court of Appeal, Art 1, para 1, of the Law did not provide 'a right to an indemnity, established and regulated by the same law and under the conditions laid down therein, also for those who (had) suffered injuries and/or infirmities, from which irreversible damage to psycho-physical integrity (had) been caused, for having been subjected to non-mandatory, but recommended, influenza vaccination.' With regard to Art 2 of the Constitution, in fact, if the patient was denied an indemnity, the negative effects of a disease derived from a treatment, promoted in the public interest, lay entirely on the patient who accepted the treatment. This situation might cause discrimination for those subjects who subscribed to health programmes recommended by a national campaign compared to those who underwent mandatory vaccination, in violation of Art 3 of the Constitution. Such a situation, moreover, posed a serious risk of violating the right to health (Art 32 of the Constitution), particularly for the old and weaker parts of the population.

3. The issues arising in the case before the Court were of the utmost importance. First, the interpretation of the meaning of

'recommended vaccination' and 'mandatory vaccination'. Second, the need to find a balance between the protection of the individuals' right to health and the protection of a collective right to health (both taken into account in Art 32 of the Constitution).

4. The Constitutional Court first explained that mandatory vaccinations differ from mere recommendations under the profile of the relationship between the individual and the health authority. For mandatory vaccinations, the freedom of self-determination is restricted by virtue of a statutory provision accompanied by a sanction. The treatment is thus aimed at improving health conditions not only for the patient, but also for the community, in order to protect a right, conceived as a societal interest. For that reason, this type of vaccinations is not incompatible with the right to health of Art 32 of the Constitution. For recommended vaccinations, on the contrary, health authorities act through a public campaign within a health policy programme. This type of vaccinations concerns the freedom of self-determination of the individual.

5. Despite these differences, the Constitutional Court resolutely affirmed that no distinction should be made, since both the obligation and the recommendation pursue the same goal, ie safeguarding health conceived as an interest, which also has a collective dimension. The Court stressed that recommended vaccinations in the context of broad advertising campaigns inevitably generate trust among the population. The influenza vaccine undoubtedly fell among the vaccinations recommended in the programmes disseminated by the Ministry of Health. In this view, the choice to follow the recommendation corresponded to conduct aimed at safeguarding the health of the

community, beyond the underlying personal motivation. Therefore, according to the interests protected by Arts 2, 3 and 32 of the Constitution, the Court legitimated the choice to place, upon the community, the burden of the negative effects derived from individual choices, in accordance with the preeminent right/duty of 'social solidarity'.

6. The reason to grant indemnity does not lie in the mandatory nature of the treatment, but rather with the 'duty of solidarity' imposed upon the entire community for the negative effects suffered by a person as a consequence of a health treatment (whether mandatory or recommended) undertaken also in the interest of the community.

7. The lack of a right to indemnity in cases of non-curable diseases deriving from specific recommended vaccinations, led the Constitutional Court to declare Art 1 of Law no 210 of 1992 unconstitutional insofar as it did not provide for the payment of an indemnity in relation to impairment caused by the influenza vaccination.

The text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_268_2017_EN.pdf.

Judgment 7 November – 14 December 2017 no 269*

(Incidental Review of Constitutionality)

KEYWORDS: Competition and Market Authority – Financial Contributions in Favour of the Authority – Obligation Regarding High-Revenue Companies – Exclusion for Other Subjects – Unfounded and Inad-

missible Questions of Constitutionality.

1. The issue brought before the Constitutional Court concerned the constitutionality of Art 10, paras 7-ter and 7-quater, Law 10 October 1990 no 287, providing rules on competition, the growth of infrastructure, and competitiveness. In particular, the challenged provision imposed a financial contribution in favour of the Competition and Market Authority only to companies having an annual revenue exceeding fifty million euros. The contribution was proportional to the revenue, but a maximum limit on this contribution was also imposed.

2. The Tax Commission of Rome, by means of two orders, raised the following questions. First, with regard to the exclusion of subjects other than private entrepreneurs, such as consumers and public administrations, from the obligation to pay the financial contribution, the referring court argued that an infringement of Arts 3 (principle of equality) and 53 (providing the general obligation to participate in the state expenditure in proportion to contributive capacity) of the Constitution had occurred. In fact, since the activity of the Competition and Market Authority also benefits the above-mentioned categories, the exemption of these subjects from the obligation to pay the contribution would be unreasonable. Second, the limit imposed on the maximum contribution would violate the principle of progressivity of the tax system enshrined in Art 53, as it would result, in proportion, in lower pressure on entrepreneurs with a greater economic power. Third, annual revenue is an unfit parameter to determine contributive capacity, as it does not take into consideration losses, and thus the actual entrepre-

* By Sira Biagia Grosso.

neurs' wealth, with the consequent infringement of Art 53. Finally, according to the referring court, the challenged provisions would also violate Art 23 of the Constitution ('no taxation without representation'), insofar as they vested, in the Competition and Market Authority, the power to establish the specific amount of a financial contribution, while this would be a power reserved to the Parliament.

In a second order, the judge also alleged that a violation of Arts 49 and 56 of the Treaty on the Functioning of the European Union had occurred.

3. The Constitutional Court declared unfounded the questions concerning the alleged violation of Arts 3, 23 and 53 of the Constitution.

First, the Court excluded the violation of Arts 3 and 53. The Court considered that high-annual-revenue entrepreneurs are the main recipients of the Competition and Market Authority's activity. Therefore, as they determine most of the Authority's interventions, greatly affecting the Authority's expenses, the imposition of the financial contribution only on high-annual-revenue entrepreneurs would not be unreasonable.

Second, according to the Constitutional Court, the annual revenue represented a reasonable parameter for triggering the financial contribution at issue, inasmuch as – as said above – the business volume of the entrepreneurs is related to the functioning of the Authority, and thus its expenses.

The Constitutional Court also excluded the violation of Art 23, as the law, and not the Authority, establishes both the object of the contribution and the subjects from whom this contribution is due. The attribution to the Authority of the power to determine the sole amount of the contribution would not violate the

principle of legality in the area of taxation.

4. Finally, the Constitutional Court declared inadmissible the referral order that alleged a violation of EU law. In accordance with its case-law (Judgment no 170 of 1984), the Court stated that the referring court had to assess whether the challenged provisions violated EU law, taking into account that, in case of conflict with a provision having direct effects, courts have to apply EU law without referring the issue to the Constitutional Court. Therefore, the principle according to which courts must automatically set aside provisions of national law conflicting with EU law was confirmed by this judgment. However – as obiter dictum – the Constitutional Court carved out an exception to the mentioned principle, stating that courts were obliged to raise a question of constitutionality before the Court whenever the violation concerns fundamental rights deriving from EU law.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf.

Judgment 6 December – 14 December 2017 no 271*

(Incidental Review of Constitutionality)

KEYWORDS: Mortgage – Judicial Reduction of Mortgage – Lack of Provisions Allowing Reduction by Interlocutory Injunction – Constitutionally-Oriented Interpretation – Unfounded Question of Constitutionality.

1. The issue raised before the Constitutional Court regards the validity of Arts

* By Shaira Thobani.

2877, para 2, and 2884 of the Civil Code, interpreted as not allowing the grantor to obtain the reduction of the mortgage in interlocutory proceedings initiated under Art 700 of the Code of Civil Procedure. According to the Court of First Instance of Padua, which raised the question of constitutionality, such norms would be inconsistent with Art 3 (principle of equal treatment) and Art 24 (right to defence) of the Constitution.

2. Italian law allows for the reduction of mortgages by reducing the sum of money for which the mortgage was registered, or by reducing the mortgage to only part of the goods. The debtor has the right to reduce the mortgage if the registered sum exceeds the value of the credit by one fifth, or if the value of the goods exceeds the value of the credit by one third. This disproportion can derive, for instance, from partial payments made by the debtor, or from the registration of an illiquid credit for an amount that is excessive compared to the presumed value of the credit.

If the creditor does not accept the reduction of the mortgage, the debtor, the grantor or other creditors can seize the court seeking an order of reduction. It is disputed, however, whether such an order can only be issued as a judgment following full contentious proceedings or also as an injunction following interlocutory proceedings initiated under Art 700 of the Code of Civil Procedure. Art 2877, para 2, of the Civil Code, regarding the burden of expenses for the reduction of mortgages, only refers to judgments. Art 2884 states that mortgages shall be canceled following a final judgment or other final court rulings.

Under a strict interpretation, Art 2884 should also apply to the reduction of mortgages, with the consequence that

only final rulings, and not interlocutory injunctions, could bring about the reduction. According to this view, the reduction would indeed result in a partial cancellation of the mortgage and the creditor would risk serious impairment of his/her rights (ie losing the security) if the mortgage were to be reduced following summary proceedings.

A contrary interpretation underscores the difference between the cancellation and the reduction of mortgages: the reduction should not be conceived as a partial cancellation, but rather as a mere rectification of the mortgage. Indeed, cancellation is the product of radically different circumstances from those giving rise to reduction, as it derives from the extinction of the mortgage or from the fact that the creditor did not have the right to register the mortgage in the first place. Art 2884, requiring a final ruling for the cancellation of mortgages, should therefore not apply to the reduction of mortgages, which could also be ordered by means of interlocutory injunctions. Moreover, the reference to a 'judgment' provided for by 2877, para 2, is not circumscribed to final judgments and should be interpreted broadly as a 'court ruling'. To the same end, other scholars emphasize that even interlocutory injunctions should be included in the 'final judgments' mentioned in Art 2884. Following a reform of the Code of Civil Procedure in 2005, certain types of interlocutory injunctions remain valid and effective even in the event that a final ruling does not follow (Art 669-octies, para 6, of the Code of Civil Procedure). In these cases, interlocutory injunctions could be deemed 'final judgments' for the purposes of Art 2884.

3. The referring court adhered to the stricter interpretation, thus not allowing the judge to order the reduction of mort-

gages following interlocutory proceedings. The court argued this to be inconsistent with Art 3 of the Constitution, as it would not be coherent with other provisions allowing the judge to prevent creditors from seizing an excessive amount of their debtor's assets in enforcement proceedings. It also argued that requiring *res iudicata* to modify the registration of the mortgage would hardly be coherent with the fact that the registration of the mortgage is a mere act of the creditor. This would also impair the right of defence as enshrined in Art 24 of the Constitution, as the debtor would be deprived of a rapid and effective means to protect their assets against creditor.

4. The Constitutional Court implicitly recognized that this interpretation could be unconstitutional. However, it underlined that a different interpretation – adopted by both lower courts and legal scholars – is possible, allowing for the reduction of mortgages on the basis of interlocutory proceedings initiated under Art 700 of the Code of Civil Procedure. This interpretation grants full compliance with the principle of equality and the right to defence and is therefore consistent with the Constitution.

As is well established, a legal provision cannot be declared unconstitutional if it is possible to interpret it in a manner that is consistent with the Constitution. This result can be achieved if, as it was in the case at issue, the wording of the challenged provisions is not such as to prevent the judge from giving a constitutionally oriented interpretation. This approach is based, on the one hand, on the need to avoid legal gaps, which would result from the declaration of unconstitutionality, and, on the other, on the duty to interpret legal provisions in accordance with the Constitution.

5. The question of constitutionality was therefore declared unfounded, since Art 2877, para 2, and 2884 of the Civil Code could be interpreted in a way which respected the principle of equality and the right to defence, namely by allowing the judge to order the reduction of mortgages by means of an interlocutory injunction ordered under Art 700 of the Code of Civil Procedure.

**Judgment 22 November –
14 December 2017 no 272***

(Incidental Review of Constitutionality)

KEYWORDS: Filiation – Recognition as a Biological Child – Challenge – Child's Best Interest as Essential Requirement – Unfounded Question of Constitutionality.

1. The issue raised by the Court of Appeal of Milan before the Constitutional Court concerned the constitutionality of Art 263 of the Civil Code with reference to Arts 2, 3, 30, 31 and 117 of the Constitution, the latter in relation to Art 8 of the European Convention on Human Rights and Fundamental Freedoms.

2. The proceedings before the Court of Appeal of Milan concerned an application challenging the recognition of a parent-child relationship with regard to a child born abroad through surrogacy.

The court challenged the provision to be applied, namely Art 263 of the Civil Code, insofar as it did not provide that a challenge to the recognition of an underage child on the grounds that he was not in actual fact the biological child might only be accepted where this reflected the child's best interests. According to the interpretation of the referring court, Art

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263 did not allow, within proceedings to challenge recognition as a biological child, specific consideration to be given to the child's interest 'in obtaining recognition for and the maintenance of his or her parent-child relationship as most closely reflect(ed) his or her life needs'.

3. The Constitutional Court declared the question unfounded, as the interpretation of the challenged provision by the referring court could not be endorsed.

Whilst a marked preference was expressed by the legal order that the status of an individual should reflect the actual circumstances of his or her procreation, the Constitutional Court stated that it could not be asserted that the establishment of the biological and genetic parentage of an individual was a value of absolute constitutional significance, as such immune from any balance. Indeed, the current legislative and systemic framework, under both internal and international law, did not require, within actions seeking de-recognition of filiative status, that such a finding should have absolute priority over all other interests at stake. In all cases in which the genetic identity may differ from the legal one, the requirement to strike a balance between the need to establish the truth and the best interests of the child was apparent from the evolution of the law over time, as the challenged Art 263 itself, among other relevant provisions, could demonstrate. Indeed, the provision was challenged in the version that was applicable *ratione temporis*, that which was in force prior to the amendments introduced by Legislative Decree 28 December 2013 no 154, which limited the exclusion of time-barring exclusively to actions brought by the child, thus providing for limits on all other potential claimants.

4. In light of the principles underlying

the legislative framework and the relevant case law at both national and supranational levels, the Constitutional Court recognized that he need to give specific consideration to the child's best interests in the context of all decisions affecting him or her was strongly rooted in the legal order, and the Court itself had long contributed to this degree of consolidation.

It was consequently not apparent why, when confronted with an action pursuant to Art 263 of the Civil Code, with the exception of those brought by the child him- or herself, the court should not assess, first, whether the applicant's interest in giving effect to the truth should prevail over that of the child; second, whether that action is genuinely capable of realizing that interest; third whether the interest in the truth also has public significance (for example, insofar as it relates to practices that are prohibited by law, such as surrogacy, which causes intolerable offence to the dignity of the woman and profoundly undermines human relations) and requires that the child's best interests be protected insofar as consistent with that truth.

The Constitutional Court highlighted that there are also cases in which a comparative assessment of the interests is carried out directly by the law, such as the prohibition on de-recognition following heterologous fertilization. In other cases, instead, the legislator imposes a mandatory requirement to acknowledge the truth by imposing prohibitions such as the ban on surrogacy. However, none of this entails the negation of the child's best interests. Also for actions seeking the de-recognition of filiation, the legislator has charged the specialist court with the task of assessing the child's interest in the initiation of such action even before the ac-

tion is brought, albeit subject to the limits resulting from the non-public status of the proceedings.

Thus, whilst it is not acceptable under constitutional law for the requirement of truth concerning parentage to prevail automatically over the child's best interests, it must also be asserted that the balancing of that requirement against that interest must not entail the automatic negation of one in favour of the other.

On the other hand, this balance entails a comparative assessment of the interests underlying the ruling concerning the true status, along with the consequences that such a finding may have for the legal status of the child.

It is therefore necessary to carry out a comparative assessment which, as the law is silent concerning this matter, necessarily involves a consideration of the high level of social harm that the Italian legal system associates with surrogacy, which is prohibited by a specific provision of criminal law.

5. The need to balance interests led the Constitutional Court to declare the question concerning the constitutionality of Art 263 of the Civil Code unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_272_2017_EN.pdf.

Judgment 8 November – 14 December 2017 no 275*

(Incidental Review of Constitutionality)

KEYWORDS: *Immigration – Delayed Refoulement with Forced Escort to the Borders – Obiter Dictum on the Infringement of Personal Freedom – Lack of Impact on the Case*

* By Mimma Rospi.

– *Inadmissible Question of Constitutionality.*

1. The question raised before the Constitutional Court by the Court of First Instance of Palermo concerned Art 10, para 2, of Legislative Decree 25 July 1998 no 286 (Consolidated Law concerning regulations on immigration and rules on the condition of aliens), that was challenged for inconsistency with Arts 10, para 2; 13, paras 2 and 3; and 117, para 1, of the Constitution, the latter in the light of the alleged violation of Art 4, para 4, of Directive no 2008/115/EC of 16 December 2008.

2. Legislative Decree no 286 of 1998 establishes two different kinds of the so-called 'delayed' refoulement of an alien. The first one occurs when the alien is stopped by the border police while crossing the border or immediately afterwards, the second when the alien is undocumented but is temporarily admitted on the State's territory because of her/his need of public aid: the refoulement with forced escort to the border is ordered by the commander of the local police.

The party to the proceedings before the referring court was subject to 'delayed' refoulement, and challenged the provision. The same, however, was then subject to another order, based on Art 14, para 5-bis, of Legislative Decree no 286 of 1998, that obliged him to leave the national territory within seven days, so as to put an end to his irregular stay.

According to State Counsel, because of the second order, the first was deprived of effects: therefore the question raised before the Constitutional Court lacked concrete impact on the party's legal status.

3. The Constitutional Court upheld the State Counsel's exception of irrelevance. The Court established that the forced escort to the border embodies one

of the two executive forms of deportation or refoulement and does therefore constitute an alternative measure to the order to leave the territory. As a result, the first order became void because of the second one.

As a matter of fact, the order of forced escort to the border is an urgent measure and must thus be performed immediately. If this order was deferred, the police could restrict an alien's personal freedom (since the forced escort was considered in Judgment no 222 of 2004 a limitation of personal freedom) at any time, without judicial control.

4. While declaring the question of constitutionality inadmissible because of the lack of relevance, the Constitutional Court, in an obiter dictum, warned the legislator to modify the provisions concerning the 'delayed' refoulement with forced escort to the border, in order to take into account its impact on personal freedom, and therefore the need to comply with Art 13, para 3 of the Constitution, according to which 'in exceptional cases of necessity and urgency, strictly defined by the law, law enforcement authorities may adopt temporary measures that must be communicated to the judicial authorities within forty-eight hours. Should such measures not be confirmed by the judicial authorities within the following forty-eight hours, they shall be revoked and deemed null and void'.