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Essays

Sustainability and Civil Law

Enrico Caterini*

Abstract

The legal system shifts its parameters. Democracy is not only a decision-making instrument, it is also a value. The mandatory commitment of social relations imposed the need for all of us to ensure 'the minimum subsistence', with no avoidance for any of us to fulfil the duty of solidarity. Sustainability has become the social analysis of law.

I. Introduction

The gauge of the legal system shifted the importance of its main parameters, ie the individual and the State. The centrality of the individual has had an impact on the market that is no longer a conforming element, rather an element of differentiation. The issue at stake is not the pursuit of the interest as such, but the 'common' interest, thus sustainable development. The mandatory commitment of social relations imposes the need for all of us to ensure 'the minimum subsistence', with no avoidance for any of us to fulfil the duty of solidarity. Fundamental rights are detached and independent from market rules while their expansion depends on the economy. The distribution of sovereignty is functional to a more comprehensive fulfilment of the individual. Democracy is not only a decision-making instrument it is also a value. Sustainability has become the social analysis of Law.

II. What Is a Democracy System?

Democracy must be considered in its several aspects,[1] since it results from the combination of the founding values of the Italo-European legal system. Not only is it a decision-making method but above all the substance that gives shape to a variety of philosophical conceptions of life.

However, democracy cannot be arbitrarily defined. It implies a balance of the values that are recognized and guaranteed by both the national and European

* Full Professor of Private Law, University of Calabria. Translation by F. Zolli and E. Calabrese (paras 9 and 15).

[1] See U. Scarpelli, 'La persona nella filosofia giuridica moderna', in P. Femia ed, *SISDiC - Storie dal fondo* (Napoli: Edizioni Scientifiche Italiane, 2017).

fundamental laws.

The Welfare State – based on the rule of law – stems from this process as well.

Theories such as personalism, solidarism, egalitarianism, labourism, autonomism, liberalism all require a fair balance so as to develop an intrinsically democratic society.

Therefore, the interpretation of law must ensure that human dignity[2] is preserved as a fundamental principle and an inviolable limit.

In this Italo-European context, there is a need to harmonise the values of the human being and the free market, since both of them are granted at national and supranational level.[3]

The primacy of the human person gives emphasis to the problem of equality. Equality cannot be achieved by standardising people. Everyone should be treated differently in order to effectively guarantee his or her own right to freedom and dignity.

Formal equality, a cornerstone of western civil law, is basically a legal fiction[4] and thus it has been called into question. Every person is an indivisible whole and as such must be considered by the law.

In contrast, free-market economy defends the principle of formal equality, as it is based on the standardisation of human behaviour so as to make them measurable and predictable. People are objectified, they are only the means to an end, which is increasing the production.

Nonetheless, if human dignity is placed at the heart of the European legal system, sustainable development becomes possible. This in turn involves the sustainability of the European civil law.

III. Individualism and Solidarism

The constitutions and the treaties explicitly lay down the human rights that characterise the national and European institutions.[5] The human being therefore takes on a systemic role as an individual and part of the society. The legal system should defend the individual from the State and from the market.[6]

[2] See, E. Caterini, 'L'«arte» dell'interpretazione tra fatto, diritto e persona', in M. D'Arienzo ed, *Il diritto come "scienza di mezzo". Studi in onore di Mario Tedeschi* (Cosenza: Pellegrini, 2017), I, 469-498.

[3] A.M. Poggi, *I diritti delle persone. Lo stato sociale come Repubblica dei diritti e dei doveri* (Milano: Mondadori, 2014).

[4] A. Luna Serrano, 'Le finzioni nel diritto', in A. Palazzo ed, *Quaderni di diritto e processo* (Perugia: Università di Perugia, 2008).

[5] See P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008).

[6] P. Perlingieri, 'Produzione, beni e benessere', in N. Lipari ed, *Crescita, benessere e rapporti civili. Lo sviluppo oltre la crisi*, Atti del 9° Convegno Nazionale in ricordo di Giovanni Gabrielli, 8-9-10 maggio 2014, Royal Continental Hotel, Napoli (Napoli: Edizioni Scientifiche Italiane, 2014), 509.

Historically, individualism contrasted with solidarism and celebrated the freedom and self-determination of men, seen as stand-alone entities detached from the social context. Neo-individualism has, however, a different connotation: it focuses on the idea of human person, defending it against the unbearable intrusiveness of modern technology[7] in order to uphold the value of human dignity.[8]

Human beings are not mere self-sufficient individuals; they are members of a community. This belonging is what gives them a true meaning. Thanks to relationships and social interaction, the mortality of men turns into the eternity of mankind.

In this perspective, the Welfare State based on the rule of law must guarantee both the inviolable and social rights. The distinction between them is purely theoretical, since in practice they form a continuum. The inviolable rights of the individual are social rights as well.[9]

Neo-individualism also aims to stem the migratory phenomenon and protect national identity. However, this trend is in clear contrast with the universal human values. Thus, the inability of the institutions to deal with the problem of immigration becomes a national and European axiological issue.

IV. The Minimum Core Content

Not only the public and private institutions, but also the individuals, both citizens and foreigners, look at the human being as the ultimate goal of their actions.[10] The human person is thereby the general interest of the whole legal system, going from a quantitative dimension to a qualitative one.

The Latin motto *primum vivere deinde philosophari* has a great legal significance as well. Alongside the inviolable rights, it is indeed necessary to recognise the fundamental duties of men, as no society can exist without them: they are essential to effectively providing everyone with a fair and balanced freedom.

The essence of this freedom is the minimum core content, whose purpose is to uphold the value of human dignity. Every right has an economic and social cost as it involves a democratic balance of different interests and values. Specifically, both the individual and social rights can be economically conditioned or unconditioned, depending on whether they are influenced by the rules of the

[7] See P. Barcellona, *Dallo Stato sociale allo Stato immaginario. Critica della ragione funzionalista* (Torino: Bollati Boringhieri, 1994).

[8] U. Galimberti, *Psiche e techne. L'uomo nell'età della tecnica* (Milano: Feltrinelli, 1999).

[9] See, E. Caterini, 'Il «minimo vitale», lo stato di necessità e il contrasto dell'esclusione sociale' *Rassegna di diritto civile*, 1129-1173 (2016).

[10] P. Perlingieri, 'I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici', in Id, *La persona e i suoi diritti. Problemi di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 71.

market or entirely guaranteed by the social community: while the former relate to the status of citizen (Art 3 of the Italian Constitution), the latter more generally relate to the status of human person (Art 2 of the Italian Constitution). There is no conflict but continuity between the two statuses.[11]

Were the minimum core content subject to the logic of the market, the natural consequence would be social injustices and imbalances, all the more so as the inviolable rights include not only the positive and negative freedoms, freedoms to and freedoms from, but also the social rights. Among the latter, the rights which ensure a free and dignified life are the most important ones.

The beneficiary of the minimum core content must nonetheless respect the fundamental duties[12], whose impact on people's lives is enhanced by the need for sustainability.

The republican institutions are responsible for correcting social injustice without impinging beyond measure on the individual and collective liberties, which are the essence of the human person: the principle of horizontal subsidiarity does not prevent the State from taking action, it means indeed that the actions of private citizens are harmonised by the public authority in order to achieve the common good.

The inalienable rights to social security include the rights to health, education, housing, knowledge and access to employment, all of which are fundamental duties as well. However, the social rights have both an inviolable content, consisting of those rights and duties[13] inherent in the status of human person, and a disposable content, linked to the rules of the market.

In the current European legal system, a decisive role is played by the loyal cooperation among the supreme courts. They developed the theory of multilevel protection of fundamental rights and the doctrine of counter-limits[14] to leave the Member States a national margin for decision against the European institutions.

This distribution of competences among the law sources must not, however, affect the primary value of the human being: the whole institutional framework is not an end in itself, but rather the means to achieve the self-determination of peoples. The Member States agree to transfer part of their sovereignty to the European Union to universally uphold human dignity, and they are worthy of protection only when they preserve peace and justice, which is to say the fundamental human rights. The constitutional guarantees provided by the Member States serve this same purpose.

When the social and territorial inequities affect even the minimum core

[11] E. Cimbali in an unpublished manual of 1882 edited by P. Fiorentini, *Enrico Cimbali e la funzione sociale dello Stato moderno. Due manoscritti inediti* (Catania: Giuseppe Maimone, 2007).

[12] The constitutional conception originated from the «codice di Camaldoli», 1943-45, see M. Dau, *Il codice di Camaldoli* (Roma: Castelevecchi, 2015).

[13] V. Russo, *Pensieri politici* (Milano: Feltrinelli, 2000).

[14] P. Perlingieri, 'Diritto comunitario ed identità nazionali' *Rassegna di diritto civile*, 530-545 (2011).

content, the institutions fail to provide freedom and justice and therefore they do not fulfil their role.

The decline of the fundamental rights to life and welfare has coincided with the halt in the European integration process, although the causes are still not clear, and has led to a divide among the national legal systems. The European Union has consequently lost its way.

The status quo requires the harmonisation of the national constitutions in order to develop a unitary system focused on the human person. As stated in Art 6, para 3, Treaty of the European Union (TEU), 'the constitutional traditions common to the Member States' are the cultural background that gives life to the fundamental rights, which 'shall constitute general principles of the Union's law'.

V. Inviolable Rights and Fundamental Duties

The divide between the inviolable rights and the fundamental duties distinguishes the market economy, focused only on the individual liberties, from the social market economy, which instead combines market rules and social justice.[15] Liberalism encourages the economic competition, enhancing the logic of productivity;[16] the economic and social inequalities and the minimum core guarantee of freedom and dignity, have no relevance at all.

It is the fundamental duties that introduce a proper idea of justice. That proper idea of justice emphasizes men as social beings and members of communities. And that emphasis implies the concept of sustainability. The assessment of the sustainability of acts and relationships is essential for determining whether or not they are worthy of protection, since the unsustainable ones damage the human person and the society, as well as the social market economy.

The Italo-European legal system guarantees contracts, debts, responsibilities, cohabitations, companies, ownerships, entities, institutions as long as they are sustainable; what promotes self-preservation of the human being is upheld by the law. The growth and welfare of a community are therefore measured by qualitative criteria along with the quantitative ones.[17]

In recent years, a legal fracture has occurred in Europe, leading to a lack of coordination: the European Union has proclaimed its sovereignty over the market, while the Member States have kept their authority over the social economy and rights. This institutional competition largely depends on current sovereign debts, since the highly indebted States have inevitably reduced the rights to social security. The Italian Constitutional Court stated, however, that also sovereign

[15] See, E. Caterini, 'La tutela giuridica del consumo nell'economia sociale di mercato europea. Dal globalismo ai globalismi', in A. Amatucci et al eds, *Scritti in onore di Vincenzo Buonocore* (Milano: Giuffrè, 2005), II, 1007-1024.

[16] P. Perlingieri, 'Diritto dei contratti e dei mercati' *Rassegna di diritto civile*, 877-900 (2011).

[17] See R.F. Kennedy, *Sogno cose che non sono state mai* (Torino: Giulio Einaudi, 2012).

debts must be sustainable, in accordance with the principle of solidarity, which involves an implied responsibility towards future generations.

The migratory phenomenon has raised the issue of the minimum core content of the social rights, widening the concept of sustainability, but this issue cannot be solved simply by denying or halting the migratory flows.

Europe is now excessively concentrated on enterprises, markets and consumers at the expense of the human person, so much so that even the European budget aims almost entirely to build a competitive cohesive free market, which overlooks the social rights guaranteed by the treaties and constitutions. The principle of conferral of competences (Art 5 TEU), which staunchly defends national prerogatives, has allowed only the moderately indebted countries to ensure the rights to social security, while the highly indebted ones have impoverished the weakest in society. This is the meaning of the term two-speed Europe.[18]

Nonetheless, it is unacceptable that the enhanced cooperation among a minimum of nine Member States leads to social inequalities and unsustainability.

VI. Sustainability and the Democratic Control Over the Economy

The principle of sustainability demands social and democratic control over the economy.

Economic enterprise has a social value only if commutative and distributive justice are brought under control, which specifically means the just distribution of risk, resources, income, obligations and the guarantees inherent in the minimum core content among the weakest in society. Every right – be it real or personal, individual or collective – and every duty call for democratic supervision, which is an imperative and essential component of the protection of the human being.

Art 11 of the Italian Constitution, to this end, limits national sovereignty. There can be no justice among peoples unless the social and economic conditions are evened out in order to achieve the common good: the European public and private economic policies must therefore make the economy sustainable and accessible to the weaker economic entities as well as non-economic ones, and must also avoid market concentration.

Democracy, which is not only a method but, above all, substance, confers the power of knowledge on the people accessing the market and imposes the duty of transparency on the economic operators; the principle of democracy must always be respected, both when making legal agreements or transactions and when assuming responsibilities or obligations.

There is no knowledge without transparency and no sustainable market without democracy: contracts, obligations, responsibilities, companies, entities,

[18] See European Commission, *White Paper on the future of Europe. Reflections and scenarios for the EU 27 by 2025*, available at www.eur-lex.europa.eu.

public and private institutions are sustainable as long as they are democratic.

VII. A Sustainable Market in the European Union

The power of the European Union to coordinate economic, social and employment policies (Art 5 TEU), the legal provision of social guarantees and the measures taken to promote social inclusion, education, training and health are the means to ensure respect for human dignity, freedom, democracy, equality, the rule of law and protection for human rights (Art 2 TEU). At the same time, it is necessary to build a sustainable market based on balanced economic growth, social economy, full employment, social progress and environmental protection (Art 3, para 3, TEU).[19]

The objectives of the European Union stem from the principles laid down in national constitutions and give emphasis to the minimum core content, which provides every human person (not simply every citizen) with a free and dignified life.[20] Although the Treaty of Lisbon clearly makes the economic growth conditional upon the achievement of minimum social objectives, in order to achieve the social market economy provided for in Art 3 of the TEU, the European Court of Justice tends to give precedence to economic enterprise over the social rights, weakening their content and increasing the risk of social dumping.

The decline of social justice calls for promotional measures of the European Union based on the principles of conferral, subsidiarity and proportionality.

In the European legal system, the national fundamental rights are deeply integrated with the supranational ones, and this has widened the degree of protection of human rights and has redefined the concept of limitations of sovereignty provided for in Art 11 of the Italian Constitution. Any limitation that may allow European law to breach the fundamental principles of the constitutional system or human dignity is unacceptable, according to the doctrine of counter-limits.

The common basic principles are the cornerstone of Europe, which means that both limitations and counter-limits aim to coordinate rather than to divide the national and European legal systems so as to increase the protection of human rights.[21]

[19] The so-called Brundtland Report, see World Commission on Environment and Development, *Il futuro di noi tutti* (Milano: Bompiani, 1988), 32-78 and 321-381 considers sustainable development the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

[20] P. Ridola, 'Diritti fondamentali e "integrazione" costituzionale in Europa. Tra passato e futuro: questioni di metodo comparativo nella costruzione di un diritto costituzionale europeo', in A. Cerri et al eds, *Il diritto fra interpretazione e storia*, Liber amicorum *in onore di A.A. Cervati* (Roma: Aracne, 2010), IV, 181.

[21] S. Pagliantini, 'Diritto giurisprudenziale, riconcettualizzazione del contratto e principio di effettività', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, contratto, mercato*

The 'conditions of equality with other States' (Art 11 of the Italian Constitution) are the essential legitimising premise of the supranational actions intended to restore the violated human rights. The coordination of economic, social and employment policies is justified by the verticalization of national powers and makes the enhanced or multi-speed cooperation reasonable.

Sovereignty is no longer a strictly national concept, but rather the means to achieve social equality and the integration among the European peoples and to ensure the sociocultural development of the human person. When it fails to do so, the European institutions are allowed to take action under the principle of subsidiarity (Art 5, para 3, TEU and Art 352 Treaty on the Functioning of the European Union (TFEU)), which states that

> 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Art 5, para 3, TEU).

However, it is quite clear that Europe has still not met the objectives set out in Art 3, para 3, TEU

> ('The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced')

and referred to in Art 120 TFEU concerning the European economic policy.

The ultimate aim is to uphold human dignity (Art 2 TEU), which fully (if not exclusively) expresses itself in the right and duty to work. Labour is the foundation of the Italian democratic Republic as well as a right granted to everyone 'according to personal potential and individual choice' (Art 4 of the Italian Constitution); it provides common ground between the human dimension and the economic one, without the latter prevailing over the former.

The European objective of full employment protects work in all of its forms, not only subordinate work (Art 36 of the Italian Constitution), and ensures its

e rapporti di consumo (Napoli: Edizioni Scientifiche Italiane, 2017), 1401.

dignifying function in all contexts.

VIII. The Sovereign Debts

The issue of sovereign debts cannot be solved at national level, as the unbridgeable social gap between the European peoples is a sign of a far more widespread crisis.[22]

Art 136 TFEU allows the European Council to adopt measures specific to those Member States whose currency is the euro in order to strengthen the coordination and surveillance of their budgetary discipline and sets out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

The European Council Decision 199/2011 established the European Stability Mechanism to deal with the severe national financial crises that the euro area Member States are unable to overcome autonomously. The legitimacy of the procedure establishing the European Stability Mechanism (ESM) was called into question in *Pringle* v *Ireland*, but the European Court of Justice determined that the ESM Treaty is compatible with EU law.

The purpose of the ESM is to provide financial assistance to the Member States under strict conditions in order to safeguard the financial stability of the Euro area: Art 13 of the ESM Treaty sets out in detail the procedure for granting stability support in the form of a financial assistance facility, whose content and conditions are included in a memorandum of understanding between the ESM and the ESM Member concerned.

Some have welcomed this financing mechanism as a step towards the development of solidarity among the European peoples, but this seems to be a questionable belief. The ESM, as a legal person that provides loans, operates under the economic logic of reciprocal contracts, so that it actually focuses on debt payment rather than debt sustainability. In other words, social progress is given no importance at all.

The permanent bailout fund may be used for loans (lasting at most thirty years), purchase of national bonds, recapitalisation of banks and other financial institutions and for precautionary financial assistance. A prior assessment of the reliability and creditworthiness of the State concerned is always required.

The ESM, on the other hand, aims to balance the budgets but overlooks past debts, which is to say that it acts on the effects rather than the causes of the crisis. Greece, Portugal, Cyprus and Spain, whose economies have been devastated by the credit crunch driven by the US sub-prime mortgage crisis, have asked the ESM for financial aid and have received it, but at the same time they have had

[22] R. Cisotta, 'Disciplina fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi: alcuni spunti ricostruttivi' *Il Diritto dell'Unione Europea*, 57 (2015).

to cut salaries and pensions, which has led to a decrease in the social rights of citizens. The ECJ determined, however, that this social unease must not be ascribed to the ESM, but to national institutions.

IX. The Nominalistic Principle as a Technical Principle

In the Civil Code, the principle of nominalism, that is a principle of law related to the monetary rule of law, aims at protecting the Italian economic and fiscal policy. The latter restricts the autonomy of individuals with a view to maintaining the constant balance of financial obligations tied to a monetary and numerical parameter. Currency is indeed a means for stabilizing markets.

Hence, the Constitution provides for the need to protect savings (along with the value of currency) and to counteract devaluation to support general economic policies.

However, Europe's monetary policies should primarily operate to the advantage of small savings and of their purchasing power. To this end, the Constitution guaranteed small savings access to investment forms such as capital goods or capitals, in lieu of fixed-income investments, because the latter are normally drastically affected by inflation or economic crises. The Constitution's guarantee is based on the nominalism-based principle that

> 'the subject of obligation is not a matter of the materials of which coins are made, rather a quantity adjusted to the value attributed to them'.

The principle fulfils the need to represent money debts under the form of constant and defined entities. This is also true when reference to monies with intrinsic value is inferred from the debt instrument. In this case, the real value will be expressed in the form of a numerical value as a result of the commutation of the value-based debt into a sum of money.

The code sets forth the 'natural fecundity of money' resulting in the need for credit increase. For this reason, Art 41 of the Code of Commerce was extended to all certain, liquid and exigible civil debts for which interest is automatically accrued.

Art 820 para 3 of the Italian Civil Code establishes for any legal fruit a functional link between the utilization of the asset and the benefit originating from it. This establishes that the consideration for the utilization derives from the nature of the legal relationship whose corresponding potential changes as the measure of the civil fruit does. As a consequence, the interest rate, that is the legal fruit of the monetary obligation, varies according to the economic value of the legal relationship. The quantification of interest rates relates to the variability of the asset utilization value. Thus, the crises originating from the deviations due to the spread between currency and value also have an impact on the excess of public debt. The connection between devaluation and crisis had already emerged in the discussion of Art 47 of the Italian Constitution during the Constituent

Assembly. The severe monetary devaluation affecting Italy and Europe before the two World Wars had been represented as the plague for small savings of weak social classes. It then became an issue of social policy that spared the middle class that was able to use devaluation to its own advantage. Luigi Einaudi was the first to raise the issue of the gold clause. He proposed the introduction of a clause, affirming, 'to this end, the respect for the gold clause is ensured'. Among the reasons for this proposal was the need for effective protection of savings. Such a clause would also expose the State-Debtor and generate a reduction of interest rates, as well as greater loyalty towards creditors in case of insolvency, as a consequence of extraordinary and unforeseeable events. For Einaudi, a State acting as an honest debtor that admits its inability to pay is always better than a State that repays its creditors with devaluated currency, even though the latter has the same nominal value of the debt. His proposal was rejected and, in any case, its limit was that it exclusively relied on negotiating autonomy and, thus, it was a choice left only to creditors with a strong bargaining power. This clause would have left the choice between the value-based debt and currency-based debt to the financial autonomy of individuals and would have ensured *protection* to some savings only. This would favour strong creditors without any discrimination among different kinds of debt producing obligations.

On the contrary, it is the nature of the obligation that should axiologically set the distribution of a risk deriving from the fluctuation of the ratio between currency and value.

This alters the parameters of distinction between currency-based debt and value-based debt and re-establishes the content of the nominalism principle that becomes a technical principle to accomplish an equal distribution of the risks originating from the fluctuations of financial markets. Hence, the source of obligations will indicate the essential interest on which the principles of effective protection and risk distribution rest.

The settlement, in its effective essence, in view of the (occasional or institutional) entitlements and of the sequence of the legal transactions of a financial operation, will determine a financial obligation of value or of currency based on the reasonable balance of interests and values that bind the parties in a specific relationship and the nominalism principle will effectively and concretely protect the interest that will be more protected by the constitutional order.[23]

This interpretation explains why some savings are guaranteed while others are under the decimation of markets and why some credits are privileged and others run the risk of a totally non-remedial extinction.[24]

Therefore, also the gold clause or other value clauses, though being related

[23] See P. Perlingieri, *Le obbligazioni tra vecchi e nuovi dogmi* (Napoli: Edizioni Scientifiche Italiane, 1990).

[24] E. Caterini, 'I privilegi, il principio di legalità costituzionale e le classi di creditori' *Rassegna di diritto civile*, 390-413 (2015).

to the negotiating autonomy do not deserve protection in themselves, but they require a functional alignment to the principles set forth by the Constitution that guarantees the protection of the value of some credits while excluding others.

Currency and price stability are not substantial values *per se*, above all when they are jeopardized by devaluation processes as well as by market or government crises; in these cases, the protection of savings is even more a nominal protection, apart from guaranteed savings. The latter, being a type of ownership, can only be identified with what is set forth and protected by Art 42 of the Italian Constitution and thus, it is subject to a different level of Constitutional protection based on the existential or property function of the provision.

As a consequence, the financial obligation deriving from a financial transaction should be the result of the type of debt, the person entitled and the reference markets. This will have an impact on the so called 'fecundity' of the money and on the extent of protection of the financial obligation. Currency stability can be ensured in some functions, but not for all of them. The protection of savings envisaged by the Constitution cannot be equally guaranteed for all forms of savings, but it is based on a certain level imposed by the Constitution itself. The bail-in mechanism is in line with the perspective outlined above. The definition of a prioritization of the entitlements affected by losses is a first response. However, what better responds to the circumstances outlined above is the setting of a threshold for guaranteed savings. Art 96-*bis* of the Consolidated Banking Act sets what deposits are entitled to reimbursement in the case of compulsory administrative liquidation of the depository bank and raises the threshold of one hundred thousand euros guaranteed in the case of natural-person creditor that has greater availability of proceeds deriving from tenancy property rights, of rights originating from divorce allowances, pensions, severance indemnities, disability or death; or also insurance or compensatory indemnity arising from personal damages including crimes or unfair detention. The legislative choice aims at discriminating the nature of savings taking into account their existential function, generally indicated in a deposit threshold of one hundred thousand euro which is increased for special causes. In these circumstances the protection of small savings or of savings specifically protected by entitlement cannot be expressed through the nominalism principle, that is insufficient *per se*, but it requires recourse to the principle of effectiveness and, thus, to the preservation of 'guaranteed' savings.

Art 48 of the Consolidating Banking Act, entitled 'financing of businesses guaranteed by transfer of ownership of a property subject to a condition', instead introduced the *Patto Marciano* in our legal system. In particular, it established that the financing concluded between an entrepreneur and a bank or another authorized party is guaranteed by the transfer of ownership of property, or of another property interest, also of third parties, in favour of the creditor. The transfer is suspended and subject to the condition of non-performance by the debtor. In the case of ownership transfer, a technical expert will assess the

difference between the value of the property and the amount of the credit, based on some objective and pre-determined requirements. This provision envisages compliance with Constitutional values, as the special protection of the bank institution should be balanced with the interests primarily protected by our legal system. In fact, para 3 states that

> 'the transfer of ownership cannot be agreed upon with reference to properties fitted out for residential use of the owner, his/her spouse or relatives and relatives in law within the third degree of kindred'.

Even tax debts in favour of the tax collection agency can be paid in seventy-two/one-hundred and twenty instalments (based on an ordinary or extraordinary plan), when the objective and temporary difficulty of the debtor, or the debtor's difficulty to comply connected to the economic crisis, makes the debtor's exposure higher than twenty per cent of his/her income, or higher than ten per cent of the production value. The observation of the objective difficulty, in combination with debt solvency in the period of debt re-scheduling, makes the financial obligation strictly dependent on its function.

To sum up, financial obligations from saving are value-based or currency-based according to the type of obligation and of the guaranteed or recognized nature of the saving itself, thus, the Constitution guarantees the effectiveness of protection of (main or accessory) financial obligations with high axiological value that are also protected from events of financial market crisis. The nominalism principle is a technical principle and, as such, it refers to the various functions of financial obligations arising from savings.

Also, sovereign debt should be considered as a financial obligation whose distribution of the state risk should take into account the nature and value of the obligations. The European power of coordination of economic and monetary policies that aims at rebalancing excessive debts may require the institution of a real-estate fund that should include the available public goods with a view to capitalizing debts and protecting creditors-savers based on the above-mentioned prioritization.

Conversely the right of people to self-determination, enshrined in Art 1 of the United Nations Charter, is considered an international customary principle automatically transposed into Art 10 of the Italian Constitution as a fundamental right. Tolerance towards excessive discrepancy among the European public debts converts the EU into an instrument that generates subjugation and dependence of some Member States on others and, above all, of some peoples with *effective* fundamental rights and others with *declared* fundamental rights.

X. Immigration, the Right and Duty to Work

The social legal system based on the rule of law and on the social market economy is effective only if it guarantees the minimum core content, making no

distinction between citizens, foreigners and stateless persons when it comes to their needs for healthcare, knowledge, housing and minimum income, and ensuring that they respect the fundamental duties.

Every human person has the right and duty to work and, more precisely, to choose it freely according to their personal potential: labour is the main solidarity instrument granted by fundamental laws and allows human beings to contribute to social progress and also to fulfil themselves in the society.

Therefore, upholding the right to employment may be considered the first step towards ensuring the minimum core content to the poorest.

Things have become considerably more complicated nowadays because of the current migratory flows. When the inviolable rights of men are concerned, the principle of reciprocity stated in the Italian law is inadmissible and anachronistic.[25]

Art 78 TFEU guarantees international protection to nationals of third countries and sets out the principle of non-refoulement; however, this protection may be granted exclusively for political reasons, while humanitarian protection covers a wider range of cases, including when a person is in a situation of vulnerability due to economic reasons.[26]

As the Tribunal of Milan has recently stated, the rights to health and nutrition are inherent in the status of human person, since they stem directly from the rights to life and physical integrity, and therefore the poor are entitled to humanitarian protection, according to constitutional and international law. In other words, nationals of third countries must be granted the minimum subsistence figure, namely the right to a free and dignified life, if they are denied it in their country of origin. Famine jeopardises human dignity and this is unacceptable.

Immigration has raised the issue of democracy in terms of cultural and religious integration: in a democratic society based on pluralism (Art 2 TEU), both the exclusivism of Saint Cyprian and Barth and the inclusivism of Rahner seem inadequate. What may indeed be necessary is to focus on inter-religiosity as an approach that can bridge the gap between different religions[27] and place the human person at the heart of the whole system of values.

XI. The Political Parties

General interest is no longer a monopoly of public law.[28] Art 118 of the Italian Constitution allows citizens, both as individuals and as members of associations, to carry out activities of general interest on the basis of the principle

[25] P. Perlingieri, 'Interpretazione assiologica e diritto civile' *Le Corti Salernitane*, 465-495 (2013).

[26] E. Caterini, 'Il «minimo vitale»' n 9 above.

[27] V. Mancuso, *Io e Dio. Una guida per i perplessi* (Milano: Garzanti, 2011); P. Flores D'Arcais and V. Mancuso, *Il caso o la speranza? Un dibattito senza diplomazia* (Milano: Garzanti, 2013).

[28] G. Vecchio, 'I partiti. Autonomia associativa e regime europeo di democraticità nella partecipazione politica', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2016), II.

of subsidiarity, so that they play a significant role in achieving the Italo-European objectives.

When it comes to the forms of association, one cannot fail to mention political parties. Although in the Italian legal system they are not considered legal persons, they can determine national policies through democratic processes (Art 49 of the Italian Constitution).

Legge 21 February 2014 no 13 has given great importance to their statutes, which have indeed become proper legal sources. Statutory rules are set out in accordance with the laws and the Constitution[29] and recognise the value of the human person by guaranteeing principles such as transparency and participation of minorities, which underlie the public administration activity too.

As well as being rules of general interest and public order, they are the benchmark for assessing political behaviour and the economic activities carried out to finance political initiatives.

Moreover, the statutes and financial statements of parties are monitored by an *ad hoc* commission provided for in Legge 13/2014.

Two essential features may therefore be ascribed to parties: the purpose of general interest and the democratic function, which is needed to fulfil that purpose.[30] All their financial resources, which can be obtained by self-financing as well, have to be used to achieve the political and social institutional objectives laid down in their statutes, and their budgets have to respect the principles of clarity, truthfulness and transparency.

Political parties are ideological and cultural entities that express democracy through democratic methods and may provide individual benefits while upholding collective interests, so that they become proper social institutions, whose activity is based on knowledge, participation and the supervision of decision-making.[31]

XII. Nation-State and Human Person: Their Impact on Civil Law

All the European legal systems have undergone deep changes in the last decades, and therefore many traditional legal concepts seem outdate nowadays. First of all, the idea of a Nation-State founded on a common cultural and religious identity and provided with absolute sovereignty appears outmoded.

The globalisation of markets has made individual States unable to control the

[29] E. Caterini, 'Proprietà', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2005), III.

[30] G. Azzariti et al, *Partiti politici e ordinamento giuridico in ricordo di Francesco Galgano* (Napoli: Edizioni Scientifiche italiane, 2015), in particular see the contributions of D. Memmo, 'Il ruolo dei gruppi intermedi dalla costituente ad oggi e il contributo di Francesco Galgano alla collocazione dei partiti politici nel sistema giuridico', 1; P. Femia, 'Politica e libertà di contratto. I partiti politici nel pensiero di Francesco Galgano', 25.

[31] G. Vecchio, *Le istituzioni della solidarietà. Il sistema delle associazioni nel codice civile e nella legislazione speciale* (Napoli: Edizioni scientifiche italiane, 1998).

economy.[32] Factors such as the global economy, immigration and supranational organisations need to be taken into consideration in order to understand current society; the conflict between intercultural dialogue and legal codification[33] that we are witnessing today represents the conflict between the new social demands and a law that does not always reflect them.[34]

As pointed out by the Italian Court of Cassation, multiculturalism is an essential component of modern society but must not undermine the principles and values upon which a certain legal system is based.[35] It may therefore be said that there are some inviolable limits to be respected in promoting the integration among different cultures.[36]

Judges are responsible for ensuring a coherent interpretation of fundamental values and legal institutions in order to avoid a worrying axiological fragmentation and, in carrying out this task, they can apply general clauses of law such as sustainability, which has social and economic implications as well as legal implications.[37]

The concept of human person has a significant impact on civil law.[38] Human

[32] G. Calabrò, *Il bisogno dello Stato. Alla ricerca dell'ordine perduto* (Pisa: Pacini, 2017).

[33] P. Barcellona, *Dallo Stato sociale allo Stato immaginario. Critica della "ragione funzionalista"* (Torino: Bollati Boringhieri, 1994).

[34] R. Ajello, *Dalla metafisica alla socialità. La rivoluzione moderna e le ambiguità italiane* (Napoli: Istituto Italiano per gli Studi Filosofici, 2015).

[35] G. Baumann, *L'enigma multiculturale* (Bologna: il Mulino, 2003).

[36] V. Mancuso, 'Vorrei individui pensanti', in M. Vergottini ed, *Martini e noi. I ritratti inediti di un grande protagonista del Novecento* (Milano: Piemme 2015); E. Scalfari and Pope Francis, *Dialogo tra credenti e non credenti* (Torino: Einaudi, 2013); V. Mancuso, *Obbedienza e libertà. Critica e rinnovamento della coscienza cristiana* (Roma: Fazi, 2012).

[37] S. Trentin, *La crisi del diritto e dello Stato* (Roma: Gangemi, 2006), however the book dates back to 1934 and is prefaced by F. Geny.

[38] Personalism is the philosophical school of thought that gathered politicians, philosophers, legal experts, scientists, pedagogists, artists, laic and religious representatives focussing on modern constitutionalism centred on the value of the individual. It developed legal systems with some notions that have not yet disclosed their potential. People like Hannah Arendt, were part of it; she denominated the individual as 'plural individual', as well as Lelio Basso who started from Marxism to reach the concept of class struggle to confirm the full dignity of all human beings; Carlo Bo who – criticizing Croce's Hegelianism and Gramsci's Marxism – supported the advent of the 'issue of the individual'; Norberto Bobbio who, after the Italian neo-idealism addressed to laic personalism based on the historical and social concept of the individual as a person per se and in relationship with the others; Dietrich Bonhoeffer started his reflection on Christ as an individual and Christ in the world that becomes shape of man; Helder Pessoa Camara who founded his Catholic personalism on the process socialization of the individual; Giuseppe Dossetti, who enhanced social entities in lieu of the State assigning them different tasks: the first are the spaces where human personality develops while the State is instrumental to human beings; Giuseppe Flores D'Arcais who considered education as a tool for training individuals of value and Christian faith as the full conscience of the ontological existence of man; Agnes Heller who reinterprets Marxist philosophy and transforms historical materialism into the theory of the individual's emotional needs among which he includes instincts, affection and any human contingency that contributed to the development of a new social anthropology; Adriano Olivetti, who combines plants, persons and beauty thus making working places unaccomplished chimeras; Riccardo Orestano who combated against formalism and dogmatism to invite us to 'reflect on

beings are complex entities they are unique in their diversity and cannot be treated as an indistinct mass of individuals. Therefore, the principle of formal equality, according to which all men are equal before the law, shows its hypocrisy. In contrast, substantive equality focuses on the differences between men in order to overcome them, giving emphasis to their basic needs and putting social progress before economic progress.

Formal law, which evens out differences and is fragmented into numerous specialisms, cannot be effective. The legal system needs a substantive and unitary law to protect human dignity and recognise men as social beings.

The concepts of society and human person are inextricably linked; without the one, the other has no meaning.

XIII. Competitiveness and Sustainability

Contracts, responsibilities, properties and the other legal institutions of the European civil law are sustainable if they have a social purpose.

Due to the inadequacy of Nation-States as political institutions, it is up to legal systems to achieve this social purpose by using various means, including the principle of horizontal subsidiarity.

In the European legal framework, the concept of sustainable development implies a balance to be struck between monetary and economic stability and social stability, which is defined by full employment, social progress and environmental protection (Art 3, para 3, TEU).

The clause of conditionality provided for in Art 3 of the ESM Treaty legitimises the economic aid aimed at safeguarding the euro area's financial stability, but it appears to overlook the principles and values laid down in the Charter of Fundamental Rights of the European Union. The European Court of Justice (ECJ) has declared the restrictive measures imposed on the debtor Member States compatible with the Charter, although they have actually subordinated social stability to monetary and economic stability.

In contrast, all the legal institutions of the European civil law should have two coexistent essential features: competitiveness and sustainability. While the

reflections' of the right to be aware of the historical nature of institutions; Pietro Perlingieri who gave positive substance to personalism in the Constitution, indicating the bonds among law and culture, sociality and historical aspects, and the systemic unity of the legal system. A real cultural and political project around which a school of thought developed. It stressed the concept of law as having a noble and socially equal role as against the neo-idealistic ideas that considered law as a property of educated barkers. Others should also be mentioned such as Ferdinand Max Scheler, Luigi Sturzo, Jean Lacroix, Giorgio La Pira, Lorenzo Milani, and Jacques Maritain who affirmed that 'there are more things in the individual that philosophy is able to grasp', he criticized the pursuit of the Ego in freedom and autonomy as tools that generated the dominion of man over forces such as the State, opinion etc., and sought for personology in human dignity that he identifies in his own soul. For a more detailed recognition on Personalism see A. Pavan ed, *Enciclopedia della persona nel XX secolo* (Napoli: Edizioni Scientifiche Italiane, 2009).

former relates to the logic of profit, the latter relates to social justice.[39]

The notion of sustainability has also redefined the function of the rule of law, which is no longer seen as an end in itself, but rather the means to achieve the fundamental values of democracy, equality, solidarity, freedom and human dignity.

XIV. Market and Contract Sustainability

The sustainability of the European internal market requires a balance between economic growth and social justice,[40] in accordance with the notion of corporate social responsibility.[41] Therefore, companies should act to improve their social impact and focus on the European objectives of development, innovation, training, production quality, gender policy and environmental protection.

As far as the environment is concerned, the self-regulation of enterprises becomes particularly important, as environmental violations may compromise the human rights laid down in the European Convention on Human Rights. In this case, individuals are entitled to apply to the Strasbourg Court, even when no explicit legal provision exists. An example of environmental violations may be excessive noise pollution, which can significantly affect people's wellbeing.

To strike a balance between private economic interests and collective social interests should be the ultimate aim of sustainable development. Deceptive and wrongful business practices such as unfair competition and abuse of a dominant position are prohibited by the law as they damage consumers and competitors, undermining the above balance.[42]

In recent decades, great attention has been paid to the protection of consumers and subordinate workers against companies, both at national and European level: the fundamental human rights are the basis of contractual relationships and establish a connection between efficiency and human dignity, ensuring that the enterprises' need for increasing the production does not prevail over the respect for the human person.[43]

[39] E. Caterini, 'Il diritto «giurisprudenziale» e l'«arte» del diritto nel pensiero di Francesco Carnelutti', in G. Tracuzzi ed, *Per Francesco Carnelutti a cinquant'anni dalla scomparsa* (Padova: CEDAM, 2015), 71; Id, 'L' "arte" dell'interpretazione tra fatto, diritto e persona', in G. Perlingieri and M. D'Ambrosio eds, *Fonti, metodo e interpretazione*, Primo incontro di studi dell'Associazione dei Dottorati di Diritto Privato, 10-11 novembre 2016, (Napoli: Edizioni Scientifiche Italiane, 2017), I, 25.

[40] U. Comite, Accountability *e bilancio sociale nei tribunali* (Padova: CEDAM, 2013); G. Rusconi, *Il bilancio sociale delle imprese. Economia, etica e responsabilità d'impresa* (Roma: Ediesse, 2013), passim, where they explain the theories of the *stakeholder*, social responsibility and *accountability*.

[41] P.L. Scandizzo, 'Il mercato e l'impresa: le teorie e i fatti', in V. Buonocore ed, *Trattato di diritto commerciale* (Torino: Giappichelli, 2002), VI, 141.

[42] E. Caterini, 'La terza fase del "diritto dei consumi" ' *Rassegna di diritto civile*, 320-337 (2008).

[43] E. La Rosa, *Tecniche di regolazione dei contratti e strumenti rimediali. Qualità delle regole e nuovo assetto dei valori* (Milano: Giuffrè, 2012).

Therefore, it may be said that sustainability relates to contracts as well. More precisely, contracts are sustainable if the contracting parties have equal bargaining power, so that none of them can impose its conditions on the other. This would lead to blatant social inequalities that the legal system does not accept.[44]

Fair contracts, namely sustainable contracts, meet the demands of welfare society, a model of community in which not only the State, but also companies and civil society organisations are responsible for fulfilling social needs.[45]

Beside equal negotiation, the sustainability of contracts involves the respect for the principle of non-discrimination. For example, in Italy it is common practice for property owners not to rent houses to homosexual couples or immigrants, as shown by the Italian case law. If on the one hand it seems necessary to uphold the right of each party to freely choose its counterparty, on the other hand it seems equally necessary to avoid that contractual freedom that results in discriminatory behaviours, which clearly contrast with human dignity and the principle of equality. The solution to this issue may be once again to balance the competing interests in the way that best ensures social justice.

XV. Tort and Sustainability

The obligation arising from tort is based on the statutory reservation of Art 23 of the Italian Constitution, and on other constitutional rules that intervene in each particular case. The reservation aims at restraining the limitations to the personal freedom and freedom of property arising from binding legal effects. Although the reservation is relative, it is necessary to distinguish between a 'statutory' reservation and a reservation of 'legality'.[46] This difference points out that when the obligation is directly connected to existential situations the autonomy of the statutory reservation is limited through the application of regulatory provisions; whereas, when the obligation restrains patrimonial freedoms, the reservation widens its scope and allows an autonomist intervention providing for rules and principles. This has an impact on the contents of the regulation on obligations arising from tort. Since the discipline of torts is characterized by patrimonial effects, as a consequence of circumstances that have an impact on both existential situations and patrimonial situations,[47] it is evident that such effects should be taken into account in their potentially dual nature.

In addition, Art 23 of the Italian Constitution endeavors to protect the limitations of personal freedoms and patrimonial freedoms concerning the action

[44] M.L. Chiarella, *Contrattazione asimmetrica. Segmenti normativi e costruzione unitaria* (Milano: Giuffrè, 2016).

[45] P. Perlingieri, 'Diritto dei mercati e dei contratti' *Rassegna di diritto civile*, 877-900 (2011).

[46] E. Caterini, 'Proprietà' n 29 above. The expression 'reservation of legality' should be interpreted as a reservation pertaining regulations containing principles.

[47] P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 2504-2511 (2011).

of a person that has committed the potential tort; thus, the topic of statutory reservation and reservation of legality does not only concern the effects of the act, once it has been qualified as tort, but also the qualification of the act itself as such. It is important to be clear in this respect. The theoretical debate on the proper construction of Art 2043 of the Italian Civil Code provides a not very persuasive alternative[48] when the damage is classified as 'wrongful' rather than defining an act as a 'tort' or 'wrongful action'. The consequences of the two opposing views would have an impact of the legal characterization of the rule of the code that could be interpreted as primary or secondary; however, it should be borne in mind that the sense of the reservation envisaged by the Constitution should be primarily referred to human behaviour and, as a consequence, to its effects.

Based on this interpretation, the issue still remains undefined. In fact, it could include the following: an unlawful conduct causing wrongful damage; an unlawful conduct not causing damage; an unlawful conduct causing damages that could be refundable without being wrongful (based on the theory of business risk), or a non-illegal conduct producing wrongful damage.

Thus, it is important to attempt a reorganization of the ill-posed issue, by including the parameter of sustainability in the argument.

Classifying a fact or an act as unlawful, implies the solution given by the balance between patrimonial or existential legal situations within the scope of the entitlement of the parties to the relationship or the fact. Such a balance implies an evaluation based on the hierarchy of the values stated by the Constitution, both when existential situations are at stake and when patrimonial situations are in conflicts with one another. In other words, an act is unlawful when the restriction on the freedom of the damaged party – deriving from the *sub judice* action – is not reasonable *vis-à-vis* the likewise restriction of the action of the party causing the damage.

However, in the evaluation of the restrictions that affect the freedom of the legal spheres involved, it is necessary to consider the justifying reasons – in other words, the functions that lead the assumed restricting action and the action opposing such restriction. These grounds will allow reasonable balancing.

Wrongful damage derives from such consideration, as the mere loss of property is not an indication of anything, and not even of an unlawful conduct. Therefore, Art 2043 of the Italian Civil Code should not be literally interpreted in a way that would separate the classification of damage as 'wrongful' and actions as 'unlawful'. The damage is wrongful insofar as the action classified as unlawful is wrongful. The fact that the legal system envisages compensatory measures even in the absence of such reasoning, will in any case depend on the evaluation of reasonable balance which takes into account legal situations that are opposed based on a justice parameter that is no longer of retributive justice, rather than of distributive justice. Suffice it to mention the regulation on the damage caused

[48] P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017).

by an incompetent person.[49] In this case, it is the judge that is entitled to establish fair compensation for the injured party, whenever the latter was unable to obtain the compensatory measure from those who were appointed to monitor the incompetent person. Such a provision encompasses explicit consideration of the economic conditions of the parties, whereby fair compensation has no longer the remedial function of the injury suffered. The objectively wrongful act committed by an incompetent person is devoid of this connotation because of the absence of the unlawfulness of the conduct; despite that, it produces an unlawful damage whose effect could be both the refund obtained by the person appointed for monitoring the incompetent person and the fair compensation with a redistributive function. The latter cannot exclude a punitive function, thus a punitive one, imposed on the assets of the incompetent person. In all the hypotheses considered, the wording 'wrongful fact' or 'wrongful act' will be used in the awareness that the adjective encompasses several functions implying just as many effects.

On the other hand, the fact that, in a more strictly economic perspective the compensatory measure is not limited to the remedial function, can be inferred from Art 2058 of the Italian Civil Code, stating that the judge has to choose between compensation by equivalence and specific compensation, excluding the latter when it turns out to be unreasonably costly. The use of the adverb ('unreasonably') does not exclude the imbalance between the damage suffered and the compensatory measure, it just prevents excessive imbalance, thus the consequence of a wrongful effect depending on the measure of the imbalance, not on the unbalance itself. The non-excessive imbalance of the compensation may imply a sanctioning function. The recent guidance of the Cassation Court recognises the inherent and ontological punitive function and the deterrence function of civil liability, provided that a balanced dosimetry is taken into account in the quantitative evaluation of the damage.[50]

The aspect that we will subsequently try to explain is when tort can be reasonably compensated through civil penalty. In the meantime, another hypothesis should be outlined. Let us think about the occupation of uncultivated land made in a state of necessity for the purpose of fulfilling the primary needs of a community in emergency conditions, it being an occupation made in the absence of the envisaged legal conditions. This act should be considered lawful, because it lacks any unlawfulness; however, since it will imply the carrying out of farming activities, the typical and lawful risk arising from that should be borne by the entrepreneur. Therefore, the damage originating from lawful occupation of land could imply compensatory measures that should be borne by the organized and regular business, since a damage of this kind can be considered

[49] E. Caterini, 'Il «minimo vitale»' n 9 above, 1.

[50] M. Grondona, *La responsabilità civile tra libertà individuale e responsabilità sociale* (Napoli: Edizioni Scientifiche Italiane, 2017).

as a business cost. The hypothesis highlights the limit of objective liability arising from business risk. In this case the balance poses the primary value of the existential situation to the vital minimum, which – despite being effective by means of a business activity – makes the patrimonial limitation of an abandoned property fully reasonable. There is no injustice, nor tort, thus no compensation is due. The two cases highlight the role of the sustainability of the tort and of its effects. In fact, it is necessary to consider that tort cannot be objectively assessed, since subjective interferences can be sometimes essential because of the interests arising from it and of the balance stated above. The need for an individual to guarantee a vital minimum for himself and his family, according to the jurisprudence of the Court of Cassation, justifies the illegal occupation of uninhabited accommodation. The above, without prejudice to the balance between the state of necessity of the occupier and the potential inviolable rights of the owner of the occupied property, such that the occupation itself should be 'sustainable' only when the property right on the property is not concretely exercised in the dynamic phase. Unavoidability and relevance of danger become parameters to assess the conduct that aims at balancing conflicting interests and concurrent values. The objective element of fault, different from culpability, is evaluated on the basis of behavioural standardization. Negligence, malpractice, imprudence, breach of rules and ignorance of the same are weighted based on abstract behaviour, fiction and expected conduct. This is not always compatible with the protection of the individual. It is not an abstract concept, the effective protection of a person's dynamic personality implies full consideration of the individual's concrete contribution to the commission of the fact, especially when an organic relation is established between the interest and the interest holder.

Let us consider the issue of ignorance of the law. The constitutional interpretation of Art 5 of the Italian Criminal Code poses the conditions of excusability of the error, excusability of ignorance and inevitability of ignorance as conditions, thus personalizing criminal liability. If this is allowed for criminal liability, which is personal, why should this be uncritically excluded from civil liability? It all depends on the function of civil liability, which is – in turn – bound to the personalist principle. Admitting a preventive function of the civil liability, it is recognised that it depends on the deterrence capacity that it has towards the individual. Once the awareness of unlawfulness of the conduct is excluded, also the generically preventive function is completely neutralized.

On the other hand, the fault itself, as objectively construed in the sequence of the elements that form the circumstances of the unlawful act, has different legislative interpretations. Fault in its ramifications is, in some cases, considered less strictly, while in others the evaluation is based on its threshold of severity. The above-indicated parameters of de-responsibilization in the case of free provision of services (Arts 1710 and 1768 of the Civil Code) or of particular technical difficulties (Art 2236 of the Civil Code) are not different methods of

categorizing the conduct required to evaluate the concrete behaviour of the acting party. Such parameters express the effective relevance of the sustainability of the unlawful act in the presence of unavoidable subjective qualities. In the case of professional liability, some objective situations within the framework of the institutional purview of the debtor are present, ie some interests will be better satisfied though an owner of the debt having concrete technical solvency such that the creditor could hold him to the debt. There is no raising of the threshold of non-liability, rather a concretization of the threshold in respect of the qualities of the parties involved. The same is true – although in an opposite direction – for an authorized agent acting on a free basis. In this case, the law envisages a lower level of diligence by the agent, however, his or her personal qualities cannot be neglected when the mandate will imply legal acts whose effective importance will be directly linked to existential situations of the principal or when the contract concerns, for example, human organs to be used for human transplantation.

In such circumstances the element of fault highlights the connection between the protected interest and the value of the individual, as well as the constitutional impracticability of the interruption of such connection. The sustainability of the unlawful act goes beyond the gap between fiction and reality and includes the individual in the balance.

Let us consider the recent reform as per legge 8 March 2017 no 24 in the field of healthcare liability.[51] The law regulates a kind of liability similar to that implied by business management, or business-like management, with the features of continuity and calculability in terms of costs. Despite that, the liability is not objective, but it is based on malice or fault. It is a liability resting with the organised structure which provides the services that could be delivered and their quality by means of the *Atto aziendale* (a document outlining the business organization and management of the Healthcare Unit, as well as its relationships with the local authorities). This document falls within the scope of the organizational autonomy set forth in private law and its adoption is compulsory for any healthcare manager. The provided healthcare services are categorized in the recommendations of the guidelines, apart from the specifics of the concrete case where the element of fault is generally objectivized. This is envisaged in the perspective to simplify access to compensation for the injured party preventing excessive extension of the liability for healthcare professionals; in fact excessive burden of liability for single physicians, rather than having a preventive-deterrent function, may lead to the so-called defensive medicine, ie an excessively precautionary healthcare service provision focussing its interest in fragmenting the service into superfluous conduct which however mitigates the liability of co-performers. The focus is on the

[51] G. Alpa ed, *La responsabilità sanitaria. Commento alla legge 8 marzo 2017, n. 2* (Pisa: Pacini, 2017), passim, but especially, *ex plurimis*, E. Caterini, 'Atto aziendale e responsabilità sanitaria', 76; G. Alpa, 'Dal medico all'équipe, alla struttura, al sistema', 203; D. Pittella, 'L'evoluzione della responsabilità civile in ambito sanitario', 232; L. Di Donna, 'Ripartizione dei rischi e responsabilità civile della struttura sanitaria', 283.

accuracy and suitability of the organisation where single healthcare professionals operate. By means of the reform, fault was transferred onto the administrators of the healthcare facility by means of the *Atto Aziendale* from which creditors obtain the due quality of the services as a whole. In this instance, it is worth highlighting the legislative aim of simplification to the access to compensation as a result of an unlawful (contractual and non-contractual) action and a concurrent fair distribution of the fault between the business organisation and healthcare professionals who shall not be exempted from a personal contribution considering the specificity of the case in point. The discipline of unlawful acts, with its multi-faceted functions, includes a redistributive perspective aiming at facilitating access to the compensation of the injury to existential situations, or of patrimonial situations that are essential to free and decent living. Such perspective is based on the axiological value of the person and the concretization of the subjective contribution by the tortfeasor, which needs to be evaluated through discernment and concrete fault. There are specific criteria to quantify the personal injury whenever it is impossible to convert the damage into money by means of ontological parameters. That is why quantification tables have been developed and they are considered as an instrument of 'collective fairness'. Thus, the unlawful act is even more illegal, the greater its infringing power is exercised on legal situations that are more protected by the legal system. The greater the infringing power, the more the reservation of the law should be, ie it should leave minimum space to the autonomy of the debtor. As a consequence, fault must be measured with the utmost diligence leaving narrow and well defined exemption margins; similarly, the discernment of the tortfeasor requires considerable accuracy and the full awareness of the infringed value.

An effect of the above-mentioned variables is evident in the unlawfulness of the fact or the damage, whose (either remedial or sanctioning) preventive function, is in line with the infringing power of the unlawful act. In this context, punitive damages[52] are not incompatible as a redistributive effect of an extremely reprehensible act.

To this extent, it is worth mentioning the reform of liability within the healthcare system. Leaving aside the theoretical discussion on the contractual or non-contractual nature of the liability, which is of no use in this context, the technical standards of the guidelines establish a minimum threshold of diligence also with a view to limiting discretionarily in the choice of the obligation due by the debtor. This is in line with the reservation of law, insofar as it is an activity that is potentially harmful to existential situations. However, the right to health implies several categorizations, based on the type of healthcare service; these multiple aspects correspond to a certain level of flexibility that is variable on the basis of the seriousness of the existential risk. The evaluation of diligence is left

[52] A. Venchiarutti, 'Brevi note in tema di ammissibilità dei "danni punitivi" nell'ordinamento italiano', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo* n 21 above, II, 2401.

to the regulatory provisions (ie the technical and scientific skills of healthcare professionals) requiring them to act with maximum professionalism. The compensatory measure follows the level of unlawfulness. However, a technically unsound infringement of the standard of professional healthcare provision could justify a sanction detached from the mere compensation for the injury caused.

The observations above are supported by the need to regulate the state of necessity, a rule that has no feature of exceptionality, which however completes the matter of illegality. It states the primacy of the individual in the balancing mechanism resulting from an unlawful act. The provision of healthcare services raises the level of the state of necessity in that it legalizes the act that harms the psychophysical integrity, provided that the act presents the features of unavoidability and necessity. The conduct of healthcare professionals, limited to the scope of technical standard, still remains subject to the compensation fairly established by a judge, even when it diverges from the technical standard in the absence of an equally technical reason. The application of sanctions would not be inappropriate in this case. It is known that the discipline of the reform does not adopt such a solution, however the case was useful to develop the discourse on healthcare, a field that is well suited to this approach.

In conclusion, there is a strict link between unlawfulness of conduct, illegality or wrongfulness of the effects and the balance between the evaluated subjective legal situations, such a link makes one measure of compensation, and only one, sustainable in the concrete case.

XVI. Property and Sustainability

Let us now consider the relationship between property and sustainability. The ECHR upholds the right to property,[53] which is defined as everyone's right to the peaceful enjoyment of his or her possessions. On the basis of this definition, the Strasbourg Court provides a materialistic interpretation of ownership by identifying it with the possessions themselves.

Such an interpretation may be an oversimplification in some cases. Indeed, ownership has not only an economic function, related to production and trade, but also a social function, as it allows human beings to fulfil their primary needs in life. What is purchasing a home, if not satisfying personal or family needs?

As explicitly stated in Art 42 of the Italian Constitution, property must also be accessible to all. This legal provision, which may be better understood in the light of the principle of equality, aims to promote ownership, in view of its social value. To this end, laws were enacted to introduce preferential loans for first-

[53] E. Caterini, 'La proprietà nel mercato europeo secondo le giurisprudenze superiori. Paralipomeni al volume sulla Proprietà', in L. Mezzasoma et al eds, *Il controllo di legittimità costituzionale e comunitaria come tecnica di difesa* (Napoli: Edizioni Scientifiche Italiane, 2010), 375.

time home buyers.

Although it is usually defined as an inviolable right, property is subject to limitations. More precisely, it may be considered inviolable as long as it does not contrast with the greater values of social solidarity and public interest. Some examples related to the Italian civil law may be useful to clarify such a concept.

XVII. Sustainable Development and Reasonableness

Sustainable development is based on reasonableness.[54] In everyday language, reasonableness is a synonym for good sense, but in legal parlance it has a more specific and complex meaning.

When applying rules to facts, judges have to strike a balance between the competing interests involved in a certain case: reasonableness allows them to harmonise these interests and to make decisions that are consistent with justice.

If fairness refers to the principles of equality, proportionality and justice, and good faith to the principles of solidarity, cooperation and protection of the contracting parties, reasonableness refers to the interpretation and application of every general clause of law, thus establishing itself as an indispensable interpretive criterion for judges. The ability to decide reasonably and proportionally is an essential component of their cultural background and results in the ability to decide fairly and effectively.

As far as sustainability is concerned, it is both an interpretive criterion and a general clause of law. Sustainable development implies an economic growth that respects human dignity and places the human person at the heart of the European legal system. Civil law therefore acquires a fundamental social function, enhancing social cohesion along with economic cohesion. Without an effective protection of the weakest in society and their needs, the European project is destined to fail. This means that institutions cannot ignore the needs of people who experience suffering and poverty.

If Europe wants to achieve its objectives, a turnaround is necessary. Law must defend first of all the poor and the needy, upholding human dignity and the fundamental principles, instead of serving the interests of the well-off and the powerful, who aim to consolidate the *status quo*.

[54] E. Giorgini, *Ragionevolezza e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2010).

Essays

Let's Disagree to Disagree. Relevance as the Rule of Inter-Order Recognition

Filippo Fontanelli*

Abstract

Santi Romano's intuitions on legal pluralism ring truer now than ever. This article explains the notion of inter-order relevance and repositions it in the current scenario of global legal disorder. Drawing from a series of recent episodes of high stakes clashes between legal orders, the article demonstrates that, ultimately, there is no normative robustness to pluralism. Orders react to each other and manipulate each other's legal materials according to their internal point of view. The resulting arrangements might occasionally approximate a reasoned order – but it is a contingent *κόσμος*, not *τάξις*. Legal orders select which external elements are legally relevant, which elements count as facts and which do not count at all.

I. Introduction

This year marks the one-hundredth anniversary of the publication of Santi Romano's *L'Ordinamento Giuridico* (hereinafter, '*The Legal Order*') in book form. Last year, Mariano Croce published the English translation of this work,[1] an accomplishment long overdue, yet not one that comes too late. Both circumstances offer an opportunity to test the current relevance of Romano's 1918 work. This article sets out to do so, with specific reference to one aspect of Romano's thought on pluralism (tackled in the second part of *The Legal Order*). The central claim of this essay is that Romano's notion of 'relevance' retains analytical and heuristic value to explain and understand the conflict between legal orders in the contemporary world.[2]

I had the occasion a few years ago – when no English translation existed – to carry out a study on the continued relevance of *The Legal Order* in EU, international and transnational legal studies.[3] That work contained an overview

* Senior Lecturer in International Economic Law, School of Law, University of Edinburgh; rapporteur, ILA Committee on the Procedure of International Courts and Tribunals.

[1] S. Romano, *The Legal Order* (Abingdon: Routledge, 2017), edited and translated by M. Croce. All excerpts used in this article are taken from this edition.

[2] See M. Croce, 'Il diritto come morfologia del sociale. Il pluralismo giuridico di Santi Romano' *Diritto Pubblico*, 841, 858 (2017), defining the notion of 'relevance' as a 'very underrated innovation of Romano's the theorical construction' (*innovazione assai sottovalutata dell'edificio teorico di Romano*).

[3] F. Fontanelli, 'Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten

of the book's main ideas. That overview might still be helpful as an introduction but, in the wake of Croce's translation, there is no need to offer a similar summary as a necessary courtesy to Anglophone readers. Moreover, that article proposed to acknowledge and broadcast the oft-ignored position of Romano in the genealogy of ideas. It was therefore apt to discuss in detail the first part of *The Legal Order*, setting out the tenets of his institutionalist theory.

The present article has a narrower objective. I do not try to set the record straight about the size of the intellectual debit that contemporary scholars, unbeknownst to many of them, owe to Romano. The only objective of this work is to distil from *The Legal Order* some ideas that still retain distinct value and surpass competing theories. This article does not deal with the historical authority of *The Legal Order*. It deals with its contemporary significance.

In recent months, several vivid instances of inter-system conflict have occurred. Some of them make for excellent case-studies: those for which no single rule of conflict exists or applies. In these cases, *two* orders of disagreement are at play. The first-order disagreement is about the legality of certain conduct. The second-order disagreement is about how to solve the first-order one, or whether a solution in a proper sense is possible: the rulebook contains no answer. Judges, scholars and practitioners called upon to interpret or explain these cases might fail to find an appropriate heuristic model in their toolkit.

Part II of this article briefly presents the concept of inter-system relevance that Romano introduced in the second part of *The Legal Order*. Part III reviews some recent instances of inter-system collisions begging for analytical clarification. Part IV applies the notion of inter-systemic relevance to these cases. Part V explores the wider helpfulness of this notion, and extols its heuristic value.

II. The Notion of Inter-Order Relevance in *The Legal Order*

The Legal Order, in its first part, advocated institutionalism as the correct model to describe and analyse law. According to this model, every organised social institution is inherently a legal order. *Ubi societas, ibi jus*. Law constitutes the order, and the order is constituted to observe its ordering principle. The law is the foundation and the realisation of any organised order/institution/society.[4] The idea was not unprecedented: the adage '*populus est collectio multorum ad iure vivendum, quae nisi iure vivat, non est populus*'[5] contains in essence the

Masterpiece for Contemporary International, Transnational and Global Legal Relations' 2 *Transnational Legal Theory*, 67 (2011).

[4] S. Romano, n 1 above, 20: 'That such an order is always and necessarily legal can be attested by noting that the characterizing purpose of law is that of social organization'.

[5] See 'De verbis quibusdam legalibus', in F. Patetta ed, *Scripta anedocta antiquissimorum glossatorum* (Bologna, 1892), II, 129, para 39. Translation: 'a people is the gathering of many persons for the purpose of living together under the law. If they do not live under the law, they are not a people'.

same intuition,[6] and dates back to the twelfth century. These earlier occurrences of the equivalence between people, order, and law foreshadowed the function and essence of statehood. In Romano, this intuition is developed further and justifies the legal autonomy of non-state orders.

The direct corollary of institutionalism is the existence of non-state law and, as a result, of multiple legal orders beyond (and within) states. Their existence and dignity as full-fledged legal orders does not rule out, and rather sets the hypothesis for, their interaction. Often, different legal orders relate to each other, without that relation implying a form of absorption or subsumption. In Romano's example, the international legal community clearly shows that states maintain their autonomy even when they partake in the international community, a literal 'institution of institutions'.[7]

That legal orders interact is commonplace, yet how that process occurs and how it is governed requires analysis. The trite example of organised crime as an autonomous legal order shows clearly that the relationship between legal orders could amount to outright rejection:

> 'a revolutionary society or a gang (of criminals) are not law for the state they aim to wipe out of whose laws they infringe; likewise, a schismatic sect is declared to be outlaw by the Church. But this does not exclude the fact that in these cases we are presented with institutions, organizations, orders, which, taken in isolation and in their own right, are legal'.[8]

The interplay between state law and a criminal institution is extreme but revealing. It signals the possibility that one order's relational mode towards another is the outright refusal to acknowledge it, or its action, as legal.

Inter-order allegations of sheer illegality occur in reality. In September 2018, US National Security Advisor John Bolton threatened the judges and the staff of the International Criminal Court (ICC),[9] in the wake of the ICC Prosecutor's request for authorisation of an investigation into the behaviour of US personnel in Afghanistan.[10] Bolton questioned and rejected the legality of ICC's action

[6] According to F. Calasso, this motto encapsulates the 'true essence of legal order'. See *I glossatori e la teoria della sovranità – Studio di diritto comune pubblico* (Milano: Giuffrè, 2nd ed, 1953), 92-93, as cited in M. Lupoi, *The Origins of the European Legal Order* (Cambridge: Cambridge University Press, 2000), 79. On the relevance of this adage and Calasso's commentary thereon, see M. Croce, *Self-Sufficiency of Law: A Critical-institutional Theory of Social Order* (Dordrecht: Springer, 2012), 69.

[7] S. Romano, n 1 above, 50.

[8] ibid 21.

[9] The transcript of the speech is available at *Full text of John Bolton's speech to the Federalist Society*, 10 September 2018, available at https://tinyurl.com/y98wdcu3 (last visited 27 December 2018).

[10] International Criminal Court, Public redacted version of '*Request for authorisation of an investigation pursuant to article 15*', 20 November 2017, ICC-02/17-7-Conf-Exp. See in particular para 4: 'the information available provides a reasonable basis to believe that members

over US citizens. In two paragraphs of his speech, he juxtaposed the claim to legal relevance advanced by the ICC order and how the US order intends to handle it.

First, on how the ICC seeks to be relevant to the US, Bolton noted:

> 'According to the Rome Statute, the ICC has authority to prosecute genocide, war crimes, crimes against humanity, and crimes of aggression. It claims "automatic jurisdiction", meaning that it can prosecute individuals even if their own governments have not recognized, signed, or ratified the treaty'.[11]

Then, he informed the audience on how the US in fact accords little or no relevance to the ICC's claims to effectiveness. In his view, the US should rather treat the consequent ICC actions as facts, possibly amounting to criminal conduct:

> 'in 2002 Congress passed the American Service-Members' Protection Act, or ASPA, which some have branded 'The Hague Invasion Act'. This law (…) authorises the president to use all means necessary and appropriate, including force, to shield our service members and the armed forces of our allies from ICC prosecution. It also prohibits several forms of cooperation between the United States and the court. (…) We will respond against the ICC and its personnel to the extent permitted by US law. We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans'.[12]

These examples are helpful for signposting: they remind us that all instances of order-interaction develop, essentially, from each order's internal perspective. Inter-order relevance is not (necessarily) the function of some overarching moderating regime or dialogic exchange. If the gang of criminals' example seems a bit extreme, bear in mind how John Bolton characterised the actions of the ICC.

In *The Legal Order*, Santi Romano coined a notion that would denote the effects that one order has on another order, or more than one: legal relevance.[13] One order's relevance to another can take many forms, but they do not come in a pre-determined catalogue of ideal types. Romano's effort went to clarify more

of United States of America ('US') armed forces and members of the Central Intelligence Agency ('CIA') committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period'. The possibility of prosecuting US nationals, in spite of the US not being party to the ICC Statute, depends on the nexus between the alleged crimes and the Afghan conflict, see ibid paras 248-252.

[11] Bolton's speech, n 9 above.

[12] ibid.

[13] S. Romano, n 1 above, 69: 'My analysis of the relations between different legal orders necessarily dovetails with the analysis in which one of them can be relevant to the other'.

precisely what can be relevant to what, without prejudging how that would have to happen in specific cases:

> 'To condense my thinking into a quick formula, I can say that in order for legal relevance to obtain, the *existence* or the *content* or the *effectiveness* of an order has to be conditional on another order on the grounds of a legal title'.[14]

This open-ended notion of relevance is pliable and has tremendous descriptive power. In some circumstances, one legal order is superior to another,[15] or presupposes it.[16] In other cases, more likely to arise, inter-order relevance derives from a third order that 'coordinates them':[17] unilateral openings of one order to the other,[18] or the circumstance of an order being 'transfused' into the other.[19] These scenarios (superiority, presupposition, external coordination, unilateral opening, succession) amount to as many 'titles' that 'make an order relevant to another', with respect to its existence, content and effectiveness.[20]

Romano's toolkit of institutions was not as rich as ours. There are only so many ways in which the laws of states, municipalities, states of a federation, international law and the Church order can interact. We are familiar with the existence of countless legal regimes, of national, supranational, transnational and international character. For the most part, the difficulties of explaining and interpreting this 'global Bukowina'[21] derive from two of the various titles of relevance discussed above: the title of superiority and that of unilateral opening. In the first case, what is at stake is not so much the existence of the inferior order, but its content. Moreover, unilateral openings are possible. Legal orders continuously advance claims of relevance onto other orders from which they are

[14] ibid 69, italics in the original, footnote omitted.

[15] An apt example would be the condition of superiority of the central state over the regions. Importantly, a situation of superiority 'must be affirmed by both orders', see ibid 74.

[16] Examples of presupposition could be the international legal order, which presupposes the existence of states, or the federal state, which presupposes the existence of the member states. Again, the presupposition of states for the existence of international law is not just a factual proposition, but also a legal one that 'is addressed by international law' (ibid 76). In other words, the inter-system relevance operates not only because states have postulated it, but also because international law has internalised it.

[17] S. Romano, n 1 above, 71. The example here is again states of the international community, which are independent from each other but rely on international law to determine how to behave towards each other in certain matters (for instance, with regard to the laws of war, or the principles of land and maritime delimitation).

[18] That is, an order spontaneously decides to condition part of its content or effectiveness to the content of another order.

[19] Whereby the succession process determines the content and structure of the resulting order. The dynamics of state creation through succession fits this category.

[20] S. Romano, n 1 above, 71. For a fuller discussion see ibid 71-78 (regarding existence), 78-88 (regarding content), 88-93 (regarding effects).

[21] G. Teubner, 'Global Bukowina: Legal Pluralism in the World-Society', in G. Teubner ed, *Global Law without a State* (Aldershot: Dartsmouth, 1996), 3-28.

otherwise disconnected; the assumption there is that the receiving orders have somewhat agreed to recognise – and host – that relevance:

> 'if there were no norm (to impose such relevance across orders), even if the state order had the legal possibility of completely abstracting from the order of the other states, this does not exclude the points that, for whatever reason, even as a matter of convenience, the state order could decide to take them into account. By dint of this *determination*, the foreign order becomes relevant to the state order'.[22]

Even when a legal order cannot or does not affect the *content* of another one, it might still claim to retain *effectiveness* in the receiving order. Domestic laws on the recognition of foreign judgments and international awards constitute a clear example of unilateral openings towards the effectiveness of extraneous legal materials. Even when these openings are embedded into the law of a superior order, the domestic order can carry out its gatekeeper function and close the door.

A case in point can be made by examining the recent decision[23] of the Swiss Federal Supreme Court regarding the enforcement of an international arbitration award issued by a Paris-based tribunal against Uzbekistan.[24] The assignees of the victorious claimants intended to enforce the award attaching some Uzbek assets in Switzerland, and sought the assistance of the local courts. Since Switzerland is party to the New York Convention,[25] in the absence of one of the grounds for refusal exhaustively listed in Art V thereof, enforcement should have been granted. The Swiss court, however held that enforcement could not proceed, since the underlying dispute bore no 'substantial domestic link' (*genügende Binnenbeziehung*).[26] Without such link, Swiss courts would not be even competent to consider an attachment application regarding the assets or a foreign State. Ultimately, the Swiss judge created an internal condition for the effectiveness of foreign awards, in addition to the negative conditions of Art V of the New York Convention. It disregarded the understandable objection that, by design, international arbitration is 'delocalised'[27] and therefore cannot be subject, for its

[22] S. Romano, n 1 above, 83.

[23] Swiss Federal Supreme Court (*Bundesgericht*) Judgment no 5A_942/2017 of 7 September 2018, available (in German) at https://www.bger.ch. For a comprehensive commentary, see J. Hepburn and L Bohmer, 'Swiss Federal Supreme Court declines enforcement of investment treaty award, finding no 'substantial link' to Switzerland in underlying dispute', 14 October 2018, available at www.iareporter.com.

[24] *Oxus Gold* v *Republic of Uzbekistan*, UNCITRAL, Award of 17 December 2015.

[25] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York of 10 June 1958, entered into force on 7 June 1959.

[26] Swiss Federal Supreme Court Judgment n 23 above, para 6.4.2.

[27] On the notion of delocalisation of international arbitration, see J. Paulsson, 'Delocalisation of International Commercial Arbitration: When and why It Matters' 32 *International & Comparative Law Quarterly*, 53 (1983) and J. Beatson, 'International Arbitration, Public Policy Considerations, and Conflicts of Law: The Perspectives of Reviewing and Enforcing Courts' 33

effectiveness, to a domestic link requirement.[28] It insisted that, irrespective of the where the tribunal sits, it is the place of the execution that must bear a link with the underlying dispute and legal relationship.

This case showed the ultimate power of each order to manage its door policy *vis-à-vis* external legal materials. Irrespective of whether this additional requirement breached the New York Convention, it was applied and effectively erected a barrier to the Convention's effectiveness and, in turn, to the effectiveness of the arbitral award.

One order's law could be relevant to another one if it shapes the latter's content, or if it deploys some direct effect therein and – crucially – if the receiving order *recognises that relevance*. With this simplified remark in mind, the analysis then turns to some inter-order incidents in which inter-order relevance was contested. The suggestion, hitherto only foreshadowed, is that relevance is the rule of recognition between orders, through which inter-legality prospers or fails.

III. The Cases

1. A Familiar Occurrence…

The selection of the cases for the present study has no pretense of exhaustiveness. After all, since the claim of this article refers to the possibility of a phenomenon (the *ad hoc* coordination of legal monads), some instances will suffice. In all the cases of next section, the conflict has peaked at some point between 2017 and 2018. In some inferential sense, these episodes chronicle the state of disjointment of legal post-modernism. Perhaps, these episodes indicate a circumstantial weakening of the rule or law operating between and across legal orders. Perhaps, more accurately, these episodes reflect the thinness of inter-legality safeguards. My predilection for non-normative notions of pluralism suggests, quite simply, that these instances of conflict are just normal occurrences that mark the constant and spontaneous re-organisation of, and re-posturing between, legal orders. Other examples could be selected.

In the past, I have selected two cases in which the notion of inter-system relevance had a better heuristic value than that of competing doctrines. These are primacy of EU law over national law and the use of international standards as benchmarks in the interpretation of WTO law obligations.

- As regards the former, the member states claim to ascribe EU law primacy to

Arbitration International, 175 (2017).

[28] Swiss Federal Supreme Court, Judgment, n 23 above, para 6.4.3: '(the applicant) argues that by concluding an arbitration agreement, the parties seek to "delocalise" any litigation by deliberately choosing an arbitration venue unrelated to their contract' (original: '*Sie argumentiert, dass die Parteien mit dem Abschluss einer Schiedsvereinbarung eine "Delokalisierung" allfälliger Rechtsstreitigkeiten anstreben, indem sie bewusst einen Schiedsort wählen, zu dem ihr Vertrag in keiner Beziehung steht*').

a choice of unilateral opening that is conditionally valid, while the Union sees it as a benchmark of superiority. The two views are incompatible, and scholars have formulated *sui generis* doctrines[29] to explain how this apparent misunderstanding operates and keeps EU law afloat. The simple notion that each order determines for itself how it responds to the content of other orders would explain better the dynamics between the Union and its member states, and would bring to the fore its delicate balance.

- With respect to WTO law's use of international standards, the notion of relevance is vastly preferable to the competing ideas of incorporation or 'hardening'.[30] WTO law refers to certain international voluntary standards, observance of which grants states a presumption of compliance with international trade obligations.[31] Yet this operation distorts and upsets the original normative function of the standards. If a standard prescribes a *minimum* percentage of cocoa for chocolate products, it does not rule out, and actually encourages, higher percentages. When the WTO grants a presumption of compliance with trade obligations, it acknowledges that the percentage codified in the standard reflects a plausible public interest and tolerates the trade restriction that it entails. It actively discourages higher percentages – inherently more restrictive – by removing the presumption of WTO-compliance. In other words, WTO turns a minimum (floor) indicator into a maximum (ceiling) one. There is no incorporation[32] into WTO law or 'attribut(ion) of legal force'[33] to soft norms. To say that 'this piece of soft law (the standard), despite its flexibility and somewhat ambiguous status, can be applied in WTO dispute settlement'[34] is misleading: what is applied is not the standard, but its reversed content. A better explanation is that the WTO order has decided, unilaterally, to consider international standards only relevant as facts, and has used their content as a reversed benchmark to set up a system of legal presumptions. This is not a *renvoi*; it rather recalls Duchamp's

[29] M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker ed, *Sovereignty in Transition* (Oxford: Hart, 2003), 521; J.H.H. Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional Sonderweg', in Id and M. Wind eds, *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003), 7, 26 (talking of 'constitutional tolerance').

[30] M.G. Desta, 'GATT/WTO Law and International Standards: An Example of Soft Law Instruments Hardening Up?', in A.K. Bjorklund and A. Reinisch eds, *International Investment Law and Soft Law* (Cheltenham: Elgar, 2012), 148.

[31] For a general overview, see J. Kurtz, 'A Look behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements' 30 *University of New South Wales Law Journal*, 504 (2007).

[32] S. Charnovitz, 'The Supervision of Health and Biosafety Regulation by World Trade Rules' 13 *Tulane Environmental Law Journal*, 271, 286-287 (2000).

[33] P. Delimatsis, 'Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process' 28 *Duke Journal of Comparative and International Law*, 273, 277 (2017).

[34] M.E. Footer, 'The (Re) turn to Soft law in Reconciling the Antinomies in WTO Law' 11 *Melbourne Journal of International Law*, 241, 270 (2010).

way of calling 'Hedgehog' a bottle rack.[35]

Between the publication of my previous article on Santi Romano and the 2017-18 period analysed here, several other instances of regime collisions occurred. One is the conclusive chapter of the *Kadi affaire* in the courts of the EU, whereby the Court of Justice of the European Union refused – again – to defer to the hypothetically supreme authority of the United Nations Security Council.[36] Next was Opinion 2/13 issued by the EU Court of Justice, refusing to authorise the EU's accession to the European Convention of Human Rights, in spite of the Council of Europe, the EU member states and the European Commission's draft agreement to that effect.[37] Another is the judgment of the Italian Constitutional Court of October 2014,[38] where it indicated that Italy's compliance with a judgment of the International Court of Justice on sovereign immunities[39] would be unconstitutional and, therefore, must be avoided.[40] Another story of inter-order collision regards the UK's refusal to obey to the judgments of the European Court of Human Right on the right to vote of prisoners.[41] Other cases could be recited from memory, to show that the 2017-18 episodes do not have merely anecdotal quality; they are part of a constant and recurring phenomenon of high-stakes friction between legal orders.

2. … And the 2017-18 Season

In this section, I will present three case studies. In section (a), I will discuss the Russian Constitutional Court's decision regarding the *Yukos* judgment issued by the ECtHR. In section (b), I will examine the reaction of investment tribunals to the EU Court of Justice's judgment in the *Achmea* case. In section

[35] R.T. Doepel, 'Marcel Duchamp's Bottlerack (1914/1964)' 23 *De arte*, 28 (1988).

[36] See, respectively, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* (Kadi I), [2008] ECR-06351 and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and others* v *Kadi* (Kadi II), [2013] ECLI:EU:C:2013:518. For a comprehensive study, see G. Martinico, F. Fontanelli and M. Avbelj eds, *Kadi on Trial* (Abingdon: Routledge, 2014).

[37] Court of Justice of the European Union, *Opinion 2/13 pursuant to Article 218(11) TFEU on Access of the EU to the ECHR* of 18 December 2014, ECLI:EU:C:2014:2454.

[38] Corte costituzionale 22 ottobre 2014 no 238. An English translation is available on the website of the Court at https://tinyurl.com/ycw64l88 (last visited 27 December 2018).

[39] International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99.

[40] For an introduction, see F. Fontanelli, 'I know it's wrong but I just can't do it right. First impressions on Judgment no. 238 of 2014 of the Italian Constitutional Court', 27 October 2014, available at https://tinyurl.com/yaklaxcz (last visited 27 December 2018). On the wide-reaching repercussions of this decisions and on how to overcome the stall it caused, see V. Volpe, A. Peters and S. Battini eds, *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (forthcoming 2019).

[41] Eur. Court H.R. (GC), *Hirst (n° 2)* v *the United Kingdom*, Judgment of 6 October 2005, available at www.hudoc.echr.coe.it. M. O'Boyle, 'Electoral disputes and the ECHR: An Overview' 30 *Human Rights Law Journal*, 1 (2009); G. Slapper, 'The Ballot Box and the Jail Cell' 75 *The Journal of Criminal Law*, 1 (2011).

(c), I will consider the judgment of the Brussels' Court of Appeal regarding the jurisdiction of the Court of Arbitration for Sport (CAS) over FIFA-regulated matters.

a) The Russian Constitutional Court's Reaction to *Yukos* ECtHR Judgment

In 2011, the European Court of Human Rights (ECtHR) found that Russia had breached the rights of the applicant, the oil company Yukos, under the European Convention on Human Rights (ECHR).[42] Specifically, it held that Russia had breached Yukos's right to property and to fair trial by subjecting the company to disproportionately severe and retroactive tax assessments, and by subsequently imposing excessive and inflexible tax penalties. In June 2014, the ECtHR determined the amount of compensation owed by Russia: roughly EUR one point eight billion.[43] The Russian Ministry of Justice asked the Russian Constitutional Court (RCC) whether Russia could execute the ECtHR's decision.

The RCC, with a judgment delivered in January 2017, found that the Russian Constitution did not allow Russia to comply with the ECtHR's decision.[44] In its view, the state measures that the ECtHR had found to be in breach of the Convention were compatible with the Russian Constitution. Their constitutionality had been confirmed by the RCC itself, before the applicant launched proceedings in Strasbourg. Thus, the RCC concluded that, since the contested measures were in line with the spirit of the Constitution, the execution of the ECtHR's *Yukos* decision (that is, the payment of monetary damages) would contradict the principle of equality in fiscal matters. This, in the RCC's view, would constitute an example of high-stakes conflict that occasions when ECHR law, as interpreted in Strasbourg,

> 'comes into conflict with the provisions of the Constitution of the Russian Federation, having their grounds in the international public order and forming the national public order'.[45]

Interestingly, the RCC took upon itself the right to decide which ECtHR

[42] Eur. Court H.R., *OAO Neft yanaya Kompaniya Yukos* v *Russia*, Judgment of 20 September 2011, available at www.hudoc.echr.coe.it.

[43] Eur. Court H.R., *OAO Neft yanaya Kompaniya Yukos* v *Russia* (Just satisfaction), Judgment of 24 June 2014, available at www.hudoc.echr.coe.it.

[44] RCC, Judgment of 19 January 2017 no 1- П /2017 in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 31 July 2014 in the case of OAO *Neft yanaya Kompaniya Yukos* v *Russia* in connection with the request of the Ministry of Justice of the Russian Federation. A translation is available on the website of the RCC at https://tinyurl.com/y787ksrq (last visited 27 December 2018). For a fuller discussion on this judgment and its significance, see K. Dzehtsiarou and F. Fontanelli, 'Unprincipled Disobedience to International Decisions: A Primer from the Russian Constitutional Court' *European Yearbook on Human Rights*, 319 (2018).

[45] RCC Judgment, n 44 above, part 2, 8.

judgments attract the exceptional stigma of non-executability. In other words, and using a terminology that is by now familiar, the RCC determined the lack of legal relevance of the ECtHR decision in the Russian legal order. What strikes the eye in this case is the RCC's contention that the ECtHR's judgment was mistaken. The RCC essentially took its own prior pronouncements on the Russian measures' constitutionality as evidence of their lawfulness *across* Russian and ECHR law. In so doing, it replaced an external standard of review (compliance with the ECHR) with an internal one (compliance with the Constitutional core provisions).

The move was unwarranted and, patently, politically motivated. Therefore, the close analysis of legal reasons that paper over the genuine motivations might be ultimately pointless. Nonetheless, this is an excellent instance of apparent disagreement over a disagreement. The interaction between the ECHR and the domestic legal order should, in principle, operate through other legal devices immune from the possible arbitrariness of state bodies. The legal relevance of the ECHR into Russian law should be determined by the rules of international law (Art 27 of the Vienna Convention on the Law of Treaties)[46] and by the ECHR itself (Art 46(1) on the binding nature of ECtHR's decisions).[47] However, the RCC chose an altogether different benchmark to regulate the conflict, an internal one. As a result of using this internal benchmark of ECHR's relevance, compliance with the Russian Constitution can trump an infringement of the ECHR, and deprive ECtHR's judgment of effectiveness.

Granted, the rule of conflict in international law – which should have applied without any doubt – pointed to the opposite solution. International obligations bind states; domestic law, even that having constitutional in rank, is irrelevant. However, the legal order is ultimately capable of withdrawing any offer of open-ended observance of other orders' instructions. An order's promise to maintain the inter-systemic relevance of other orders is always contingent and quickly revocable. The consequences in the 'other order' if such withdrawals – namely, the determination state responsibility – are ultimately unable to penetrate the original order.

The weakness of the RCC's judgment, in effect, is not so much in its invocation of the Constitution as a barrier to the effectiveness of the ECtHR's decision. Incidents of sudden dualism are not uncommon. The Italian Constitutional Court took a similar posture *vis-à-vis* the International Court of Justice's judgment in *Germany* v *Italy*, and so did the UK legal order when it did not execute the ECtHR's decisions on prisoners' voting rights.[48] Italy and the UK formulated

[46] Reading: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

[47] Reading: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

[48] For an overview of national resistance to ECtHR's decisions, see P. Popelier, S. Lambrecht and K. Lemmens eds, *Criticism of the European Court of Human Rights* (Cambridge: Intersentia,

additional conditions, of domestic origin, that would prevent the domestic effectiveness of international decisions interfering with some fundamental national interests.

What is striking about the RCC's decision is that it failed to apply the device of its own choosing. The RCC expressly announced that its task was to

> 'solv(e) constitutional-law collisions, which may arise in connection with interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms as an international treaty of the Russian Federation'.[49]

Even admitting that the Russian Constitution could prevail over ECtHR's decisions, there is no evidence that the Russian measures contested had constitutional rank. The acts which engaged Russia's state responsibility had statutory nature. That they were *permitted* by the Constitution (in proceedings about their constitutionality) does not entail that they were *required* by the Constitution. These measures were in other words incapable of triggering a 'constitutional-law collision'.

A compelling challenge to the RCC's handling of the interplay between the ECHR and the Russian legal order, in fact, would adopt the internal point of view of the latter. The RCC identified some benchmarks within Russian law, according to which, relevance to the rulings of the ECtHR could be accorded or denied. Yet, the RCC apparently misused these benchmarks.

b) The Reaction of Investment Tribunals to *Achmea* CJEU Ruling

In December 2012, an arbitral tribunal constituted under the UNCITRAL rules handed down the award in the *Achmea* v *Slovak Republic* case.[50] The claimant, a company incorporated in the Netherlands and providing health insurance policies in Slovakia, sued Slovakia under the Dutch-Czechoslovak Bilateral Investment Treaty (BIT), for some alleged unfair actions against its business.[51] Resort to arbitration was ostensibly ensured by an arbitration clause of the BIT.[52] The investment tribunal, sitting in Frankfurt, upheld the investor's claim. Prior to the decision on the merits, the tribunal had rejected the

2017).

[49] RCC Judgment, n 44 above, part 2, 7.

[50] *Achmea B.V.* v *The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 (formerly *Eureko B.V.* v *The Slovak Republic*), Award of 7 December 2012.

[51] Namely, the Slovak Republic had passed a law that, for five years, prohibited the distribution of profits from the sale of private health insurance services.

[52] See Art 8 of the BIT: 'Each Contracting Party hereby consents to submit (all disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter) to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement'.

respondent's preliminary objections to its jurisdiction, supported by the European Commission. According to Slovakia and the Commission, the arbitration clause of the BIT, which entered into force in 1992, has been inapplicable since the Slovak Republic's accession to the EU in January 2004. The objections hinged on a claim of *ineffectiveness* of the treaty clause due to the *content* of EU law. This inter-system argument was rejected.

The respondent sought to have the arbitral award set aside in domestic proceedings and sought the assistance of the German courts to that purpose by invoking the relevant provision in the German arbitration law.[53] The German court of first instance rejected the annulment action.[54] The Federal Supreme Court,[55] convinced that the determination of the case implied a question of EU law (that is, the effectiveness of the arbitration agreement under the applicable EU norms), lodged a preliminary question to the EU Court of Justice. The German judges asked whether infra-EU investment arbitration is compatible with EU law, in particular the EU Treaties and the general principles of EU law.

In March 2018, the Court of Justice issued the *Achmea* ruling. The ruling stated that EU law's autonomy and founding features rule out infra-EU investor-State arbitration, with the latter constituting a method of dispute resolution disconnected from the judiciary of the EU and its member states. This conclusion was premised on the inevitable application of EU law in arbitration cases. Accordingly, the Court of Justice of the European Union (CJEU) noted that:

> 'to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law … (I)t is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member State … (T)he judicial system as thus conceived has as its keystone the preliminary ruling procedure … which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.[56]

[53] See Section 1059(2) of the *Zivilprozessordnung* (Code of Civil Procedure). Under this provision, an award can be set aside for specific reasons, including the invalidity of the arbitration agreement under the applicable law, and when the award's recognition or enforcement would be against public policy.

[54] Judgment of the Higher Regional Court of Frankfurt (Germany) of 18 December 2014, available at https://tinyurl.com/ydhlfyox (last visited 27 December 2018).

[55] The *Bundesgerichtshof* (Federal Court of Justice, Germany), decision of 3 March 2016, available at https://tinyurl.com/y8t6nllf (last visited 27 December 2018). An English translation is available at https://tinyurl.com/yce5kwx8 (last visited 27 December 2018).

[56] Court of Justice of the European Union, Case C-284/16 *Slowakische Republik* v *Achmea*

The exclusive jurisdiction of tribunals over investment disputes would contravene, in the CJEU's view, the principles on which the effectiveness of EU law relies.[57] Obviously, the implications of the ruling exceeded the specific *Achmea* controversy. The CJEU's dictum cast a shadow on all cases of arbitration between an investor from an EU member state and another member state. Tribunals' jurisdiction in pending and future cases would be challenged, as would be the recognition and enforcement of past awards.

Immediately, parties in pending cases were asked to brief the tribunals on the *Achmea* issue. The tribunals in *Masdar*,[58] *Vattenfall*[59] and *UP and C.D.*,[60] with slightly different arguments, all took upon themselves the challenge to determine the legal relevance of the *Achmea* ruling in the disputes at hand. As the *Vattenfall* tribunal put it, the question was precisely 'whether, and, if so, how, the ECJ Judgment can legally come into play'[61] in the analysis of the objections to its jurisdiction.

These tribunals ultimately considered that the *Achmea* ruling did not affect their jurisdiction.[62] They held that their competence had been validly established under the applicable clauses of the bilateral or multilateral investment treaties invoked by the investor. EU law, in a nutshell, could do nothing to affect that determination, even if it might have considered the resulting proceedings to breach EU law. Consider, for instance, the statement of the *Vattenfall* tribunal, which addressed the risk that its award would be unenforceable for breach of EU law:

> 'In respect of Respondent's allegations relating to the three breaches of EU law, the Tribunal considers it important to clarify that in this Decision,

BVCJUE, Judgment of 6 March 2018, ECLI:EU:C:2018:158, 35-37.

[57] ibid 58: '(The BIT arbitration clause) is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation'.

[58] *Masdar Solar & Wind Cooperatief U.A.* v *Kingdom of Spain*, ICSID Case no ARB/14/1, Award of 16 May 2018.

[59] *Vattenfall AB and others* v *Federal Republic of Germany*, ICSID Case no ARB/12/12, Decision on the Achmea issue of 31 August 2018.

[60] *UP and C.D. Holding Internationale* v *Hungary*, ICSID Case no ARB/13/35, Award of 9 October 2018. The award is confidential. A reliable report is provided by IAReporter, see 'In a striking new award, ICSID tribunal rules that Achmea judgment does not cast shadow over ICSID-based arbitration; but efforts to empanel ad-hoc committees to review such intra-EU bit awards keeps getting harder,' 11 October 2018, available at www.iareporter.com.

[61] *Vattenfall* n 59 above, 129.

[62] The *Masdar* tribunal essentially distinguished *Achmea*, holding that its reasoning would not translate to arbitration under a multilateral investment treaty like the Energy Charter Treaty (see 678-682). The *CD* tribunal also relied on a distinction: the *Achmea* arbitration was under the UNCITRAL Rules, whereas the case at hand was an ICSID one (see IAReporter, n 60 above). These decisions show, in their simplicity, how ultimately it is for each legal order to decide when, and under which terms, other orders can deploy legal effects on and within them. The *Vattenfall* tribunal invoked a diverse host of reasons to reject the infra-EU objection and the relevance of the *Achmea* ruling. Some are discussed in the body of the article.

> the Tribunal is concerned only with the implications of the ECJ Judgment on the jurisdiction of the Tribunal over the dispute between Claimants and Respondent. The Tribunal is not concerned with whether Claimants' actions, either of continuing this arbitration or of seeking an enforcement of an award of compensation, if any, would amount to a breach of EU law'.[63]

In other words, the *Vattenfall* tribunal refused to draw from the *Achmea* ruling a lesson about the effects of EU law within the investment treaty, or on its content. EU might have some relevance for the Energy Charter Treaty (ECT), but that relevance is determined internally, not by the EU itself; conversely, the tribunal did not care at all about the possible repercussions of its decision on the EU legal order.[64] Arguably, the CJEU's insistent use of its unmitigated point of view outside the remit of EU law (that is, to define its legal relevance for non-EU orders) did not help.[65]

The better argument raised by Germany, in fact, regarded the *internal* point of view of the treaty regime that the tribunal oversaw. Art 26(6) ECT codifies a unilateral opening to the norms of other orders, which expands the content of the law applicable in the arbitration:

> 'A tribunal (…) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law'.

The tribunal's failure to apply EU law, therefore, was not just an unsurprising refusal to defer to an external order. It also represented, on its face, a refusal to acknowledge the relevance that the treaty order had unilaterally and expressly accorded to EU law.

On 31 October 2018, the Federal Supreme Court found that no arbitration agreement existed between Achmea and the Slovak Republic, and set aside the investment award.[66]

c) The Reaction of the Belgian Courts to the *Seraing* CAS Award

[63] *Vattenfall* n 59 above, 231.

[64] As the *Vattenfall* tribunal noted, other tribunals faced with the same inkling of inter-order conflict had tried to address it in different ways. See ibid 147: '(…) tribunals that have considered the relationship between EU law and the ECT have attempted to resolve conflicts, if any, between them. They have done so, for example, by (i) endorsing a harmonious interpretation, (ii) prioritising international law over EU law, or (iii) finding that there is no conflict that requires resolution'. (footnotes omitted).

[65] For a critical reading of the *Achmea* ruling, and in particular of the narrowing overture of the EU legal order to external law, see C. Cantore and P.C. Mavroidis, 'Another One BITes the Dust The Distance between Luxembourg and the World is Growing after Achmea' (2018) *Working Paper RSCAS 2018/47*, 9: 'While we are waiting for the CJEU to state some (probably) definitive words in Opinion 1/17, we cannot be certain of anything anymore'.

[66] The *Bundesgerichtshof* (Federal Court of Justice, Germany), decision of 31 October 2018, available at https://tinyurl.com/y7r2pc2g (last visited 27 December 2018).

A Belgian football club (RFC Seraing) transferred to a multinational equity fund a quota in the rights of some of its footballers, in exchange of money. Clubs use this form of transaction, called third-party ownership (TPO), to raise funds to sign players. Investors, conversely, engage in TPO seeking to profit from future re-sales of these players. FIFA, the international association regulating football, frowned upon these transactions and included a prohibition in the Regulations on the Status and Transfer of Players (Regulations), fearing that TPOs give to third subjects undue power of influence over the management of football clubs, undermining their independence.

Under this clause in the Regulations, FIFA issued a sanction in September 2015 against the Belgian club. This sanction consisted of a monetary penalty and a temporary ban on purchasing new players. In January 2016, the club impugned the sanction and launched CAS arbitration, requesting the tribunal to declare the illegality of the Regulations' prohibition of TPOs. The tribunal considered that the EU law on the four freedoms in the single market would apply to the dispute, insofar as they would constitute imperative norms – and thus could not be contracted out by the parties –[67] under the Swiss law on private international law.[68]

The CAS tribunal, in March 2017, found that the FIFA prohibition did not breach the principle on the free movement of capital,[69] workers and services;[70] the Regulations also were compatible with the Treaty rules on competition[71] and the other standards invoked by the applicant. The CAS tribunal thus confirmed the FIFA sanction almost in full.[72]

RFC Seraing then turned to the Belgian courts to challenge the FIFA penalties. The respondents invoked the clause of exclusive arbitration of the FIFA and UEFA Regulations, prescribing recourse to arbitration and barring access to domestic courts. The Belgian court noted that, under Belgian law, valid arbitral clauses can cover disputes 'regarding a specific legal relationship'.[73] However, the FIFA and UEFA arbitral clauses did not contain any specific indication about the legal relationship covered:

> 'The intention of the drafters of this clause is clearly to cover all kinds of dispute between the subjects indicated. Accordingly, this is a general clause that cannot apply, because it does not constitute an arbitration clause

[67] Arbitrage TAS 2016/A/4490 *RFC Seraing c Fédération Internationale de Football Association (FIFA)*, award of 9 March 2017, 73.

[68] Art 19 of the *Loi fédérale sur le droit international privé du 18 Décembre 1987*.

[69] *Seraing* award n 67 above, 125.

[70] ibid 129.

[71] ibid 144.

[72] ibid 179: the tribunal shortened slightly the duration of the purchasing ban.

[73] The original text of Art 1681 of the Belgian Judicial Code reads: '*au sujet d'un rapport de droit déterminé*'.

recognised by Belgian law'.[74]

In so doing, the Belgian court overrode the jurisdictional indication in the FIFA rules, and upheld competence on the claim.

The International Council of Arbitration for Sport (ICAS) immediately issued a press release trying to narrow down the implications of the judgment.[75] The CAS noted that the decision revolved on the non-specificity of the arbitration clause invoked and thus did not rule out the possibility of CAS exclusive jurisdiction in the abstract.[76] It also noted that the Belgian judges had not declared CAS arbitration 'illegal' or invalidated the CAS award in the underlying matter. It also pointed to a practical problem, that might aggravate the impact of this inter-system conflict:

> 'The main difficulty is that one may potentially end up with two contradictory decisions: one issued by the Belgian courts, enforceable in Belgium only, and the original one issued by CAS (and which was confirmed by the Swiss Federal Tribunal), enforceable in the rest of the world'.[77]

On its face, the Belgian court limited itself to the application of Belgian law. Yet, to maintain that the arbitral clause in the FIFA rules was open-ended is a matter of interpretation – it would have been possible to construe the clause as covering only disputes based on the law of the FIFA order; this construction would have vested the provision with an acceptably specific meaning.

In opting for the interpretation that made the clause inapplicable, the Belgian court vindicated the internal point of view of a legal order (the state) about the relevance of another one (the FIFA rules). The FIFA clause intended to produce certain effects in, and shape the content of, Belgian law – carving out from the jurisdiction of its courts a certain category of disputes. However, this unilateral aspiration met with the usual impediment: the legal relevance of one order onto another is conditional on the terms of the latter. In this case, Belgian law requires that the arbitration clauses be re-drafted, to acquire legal relevance.

[74] Cour d'Appel de Bruxelles, 18ème Chambre F (affaires civiles) 2016/AR/2048, Judgment of 29 August 2018, 14 the original reading: '*La volonté des rédacteurs de la clause est visiblement d'appréhender tout type de litige entre les parties désignées, ce qui en fait une clause générale, qui ne peut recevoir d'application, car ne constituant pas un clause d'arbitrage reconnue en droit belge*'. The text of the decision is available at https://tinyurl.com/y828x3v7 (last visited 27 December 2018).

[75] International Council of Arbitration for Sport ICAS / CAS, Media release statement of the International Council of Arbitration for Sport (ICAS) regarding the case *RFC Seraing/Doyen Sport /FIFA /UEFA /URBSFA*, Lausanne, 11 September 2018.

[76] ibid, 'had that specific CAS clause been more detailed, the arbitration exception would have been upheld and the Brussels Court of Appeal could have denied its jurisdiction. Accordingly, the problem lies only with the wording of the CAS clause in the FIFA Statutes; such drafting issue does not affect the jurisdiction of CAS globally'.

[77] ibid.

IV. Disagreements over the Disagreements

As discussed above, these cases share one aspect: the uncertainty about which legal device can arbitrate an inter-order conflict. In each case, the recalcitrant order points to an internal rule of relevance, which displaces the external one. Thus:

- In *Yukos*, the RCC pointed to the Constitution, and its duty to protect it from external threats, to ignore the rules of the Vienna Convention on the Law of Treaties and the ECHR. In principle, these international rules would clarify the effects of the ECtHR's judgments over domestic law, even in the case of conflict. The RCC disagreed.

- In *Achmea*, the EU Court of Justice pointed to the EU legal principles and Treaty law: these norms would clarify, in the case of conflict, the prevailing obligations of member states and individuals in the European Union. The arbitration tribunals disagreed.

- In *Seraing*, the FIFA rules clearly prescribed for exclusive arbitral jurisdiction – they pointed to a clear solution in the opportunity of competing *fora*. The Belgian court disregarded that instruction, stating that it was defective under another – internal – rule of conflict found in the Belgian arbitration law. FIFA though its rule would indicate the outcome, the court of Brussels disagreed.

In all these cases, the lesson learned is that the outcome of the conflict was not dictated by the law of the external order, but by the law of the receiving one. The scenario bodes well with Teubner's warning: 'there is just one way remaining to handle inter-constitutional conflicts – a strictly heterarchical conflict resolution'.[78] The specific reasons behind each instance of 'inhospitality'[79] are beyond the scope of this article. Of course, the case studies selected evince some kind of 'ethical moment' that underpins the 'irreducible conflict'.[80] But – inevitably – the invocation of high values must go largely unchallenged across legal orders. Therefore, FIFA cannot dispute the Belgian courts' interpretation of Belgian law; the International Court of Justice and the ECtHR cannot dispute the interpretation that the Italian and Russian Constitutional Courts give of their

[78] G. Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization* (Oxford: Oxford University Press, 2012), 81. See also G. Teubner and P. Korth, 'Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society', in M.A. Young ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 23-54, 29: '(T)he post-national constellation is characterized by the juxtaposition of a number of structurally closed legal systems, all of which principally claim to be applied pre-eminently within their respective realms. Neither a hierarchical construction of the law nor a Grundnorm nor a common point of final reference can hold these heterarchical systems together'.

[79] The metaphor is borrowed from H. Muir Watt, 'When Societal Constitutionalism Encounters Private International Law: Of Pluralism, Distribution, and 'Chronotopes' ' 45 *Journal of Law and Society*, 185-203, 191-192 (2018), which in turns draws from J. Derrida, *De l'Hospitalité, interview by Anne Dufourmantelle* (Paris: Calmann-Lévy, 1997).

[80] ibid 202, referring to A. Riles, 'Cultural Conflicts' 71 *Law and Contemporary Problems*, 273-308 (2008).

constitutions.[81]

Conversely, the reasons for one order's clamming up can be weighed and discarded by another one, when called upon to assess their inter-order relevance. Consider the mixed fortunes of the principle of autonomy of the EU legal order. In Opinion 2/13, the EU Court of Justice invoked this principle to declare the unlawfulness of the project of EU's accession to the ECHR. The principle of autonomy was used to motivate a choice of autarky,[82] and deny the relevance of the (draft) Accession Agreement. A few years later, instead, the EU Court of Justice's attempt to repeat this move only achieved so much. Through reference to the principle of autonomy, the EU Court of Justice tried to over-impose the relevance of EU law to the specific *Achmea* post-award proceedings in Germany. However, several other tribunals (see above: *Masdar*, *Vattenfall*, *UP & CD*) decided for themselves what to make of this principle and, in essence, ruled out its relevance outside the EU legal order. Each order in a pluralist legal world is potentially responsible for, and the victim of, legal protectionism.

Unilateral openings can allow the circulation of legal materials, but they cannot be taken for granted. As Paulus noted, with respect to the use of international law in domestic courts, when the latter

> 'apply international law or implement international decisions, they do so because domestic law requires it, not because they are organs of the international community'.[83]

Similarly, when an order retracts from certain matters and leaves them to the regulation of another order, coordination occurs *de facto*, by way of choice made within the receiving order. Talking about the relevance of foreign law, which can operate under the rules of private international law, Roman noted:

> '(It is not) the state that confers a legislative competence on the foreign state. This is a process that takes place within the domestic law of the state that limits itself, on its own, and attributes some validity to the order of another state without entering in any relationship with the latter'.[84]

Fundamentally, the EU law and FIFA legal order could not claim legislative power over investment treaty regimes and Belgian law. However, they could plausibly expect that their indications would be accepted by these receiving orders

[81] See A. Paulus, 'National Courts and the International Rule of Law – Remarks on the Book by Andre Nollkaemper' 4 *Jerusalem Review of Legal Studies*, 5 (2012).

[82] P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' 38 *Fordham International Law Journal*, 955 (2015).

[83] A. Paulus, n 81 above, cited in G. Palombella, 'Inter-legality – Theory, Realities and Promises: A Manifesto', in G. Palombella and J. Klabbers eds, *The Challenges of Interlegality* (Cambridge: Cambridge University Press, forthcoming 2019).

[84] S. Romano, *The Legal Order* n 1 above, 85.

and cause them to decide – unilaterally – to accordingly retract their normative reach. Think of the function of FIFA and its aspiration to deploy its legal effects into domestic law, and consider this sober remark by Romano:

> 'social life, which is more empowering and more imposing than state law, took its revenge by constructing, along state law and against it, a series of partial orders within which those necessary relationships can unfold more comfortably and conveniently. For sure, insofar as they are not recognised by the state, these orders are not practically able to attain complete effectiveness'.[85]

The last sentence describes accurately the failed claim to relevance of the FIFA arbitration clause. It can also be abstracted into a more general warning: inter-order effectiveness is desirable, when society is regulated by, and constituted into, several legal orders. But legal relevance across orders, ultimately, depends on the recognition of the receiving order.

V. Conclusions

Understandably, one might wonder whether this 'morphologic'[86] approach yields any useful insight. Naturally, that orders can do as they please, when it comes to recognise and accommodate each other's legal relevance might be an accurate snapshot of pluralism, but it does not offer a taxonomy.

Ultimately, this is already a valid lesson.[87] A non-essentialist vision of pluralism is a better predictive model than essentialist ones. Furthermore, the breakdown of relevance into its possible manifestations (existence, content, effects) lays the foundation of a

> 'methodology of confrontation among legal orders (which) can result from interweaving separate rules of recognition and practices and will be as concrete, in the end, as those practices will be'.[88]

This sketch of a methodology – drawn by Palombella in 2009 – hinted to a specific function of the rules of recognition, that Michaels also identified, at roughly the same time:

> 'Recognition, so despised by early legal pluralism, re-enters the analysis, but the focus is now on recognition as *a practice of the recognizing law* rather

[85] ibid 98.

[86] M. Croce, 'Il diritto come morfologia del sociale' n 2 above.

[87] F. Fontanelli, n 3 above, 114-115.

[88] G. Palombella, 'The Rule of Law beyond the State: Failures, Promises, and Theory' 7 *International Journal of Constitutional Law*, 442–467, 467 (2009).

than as a universal criterion of validity for the recognized law'.[89]

In a truly pluralist context, the rule of recognition that matters is the one used by an order to recognise the *relevance* of other orders. There is a spontaneous ordering (κόσμος) of legal institutions, rather than an organised one (τάξις). The best approach is that of the entomologist: map and classify the instances of interaction, knowing that they are for the most part the function of each order's preference. There will be patterns, forms of prolonged reciprocity, comity, cooperation, harmonisation, voluntary and accidental coordination.[90] And yet, all these phenomena will not define the essence of pluralism: they can only emerge from it by convenience and, very often, by necessity.[91]

An invisible hand, which will function and thrive better in coordination than isolation operates between legal orders. The resulting set of arrangements might resemble a reasoned order of its own – but it is a contingent κόσμος, not τάξις. Legal orders select, within each other's range of social relationships and elements, which deserve recognition as legally relevant and which are mere facts. That selection is an act of willingness exercised from within each legal order. As it was noted:

> 'universalists stress the potential of law as reason, while pluralists stress law as *voluntas*: while to the former law is a point of departure, to the latter it is the arrival point of a vision of law instrumental to the creative political will'.[92]

The powerful lesson of Santi Romano might be relatively underwhelming for the post-modern scholarship of universalism, but it certainly captures what really goes on within and among legal orders. *Voluntas* governs the interplay between order, *ratio* does not.

[89] R. Michaels, 'Global Legal Pluralism' 5 *Annual Review of Law and the Social Sciences*, 243, 256 (2009) (emphasis added).

[90] S. Romano, *The Legal Order* n 1 above, 99: 'when it comes to institutions with a large scope pursuing ends that cover a broad area of social life – on account of the countless links among its various manifestations, often inseparable from each other – those relations between the institutions' orders might be appropriate or necessary'.

[91] G. Palombella, n 83 above: 'the unavoidable interconnectedness of legalities'.

[92] ibid, referring to N. Walker, *Intimations of Global Law* (Oxford: Oxford University Press, 2014), 195-205.

Essays

All You Need Is Control.
Italian Perspectives on Acquisitive Prescription of Immovables

Francesco Mezzanotte*

Abstract

The aim of this paper is to shed some new light on the classic topic concerning the constitutive elements of possession. The cultural diatribe originated with the juxtaposed views of Savigny and Jhering does not seem to have resulted, at least in Italy, in settled positions in the current academic landscape, with subjectivist and objectivist scholars still advocating their preferred interpretation relying on different literal, historical, comparative or systematic arguments. The issue is considered here under a normative approach, widening the scope of the analysis in order to evaluate which of the different theories better suits the rationales that support the application of acquisitive prescription, one of the most important juridical effects of possession. It is surmised that an objective interpretation of possession, deprived of the traditional element of *animus domini*, and merely based on the physical control of a good, is not only more consistent with Italian legislative provisions, but also more effective in supporting the goals generally attributed to the doctrine of acquisitive prescription.

I. Introduction

In the Western legal tradition, factual control of a thing protracted through time grants a legal entitlement on that good in favour of who has exercised it, provided that further conditions are met. In common law countries these issues are addressed under the doctrine of 'adverse possession', which technically extinguishes the right-holder's claim to possession towards the actual possessor. In civil law jurisdictions, the functionally equivalent rule operates according to the mechanism of 'acquisitive prescription', commonly intended as an original (ie non-derivative) way of acquiring the right of ownership.[1]

* Assistant Professor of Private Law, University of Roma Tre, Department of Law.

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[1] For a comparative overview, *inter alia*, S. van Erp and B. Akkermans eds, *Cases, Materials and Text on Property Law* (Oxford-Portland: Hart, 2012), 702; E. Descheemaeker, 'The Consequences of Possession' and R. Hickey, 'Possession as a Source of Property at Common

Jurists rooted in continental Europe are traditionally accustomed to structure their analysis through hypothetical propositions, whose dependent clause consists in a series of factual or normative requirements (*if* A, B, C…), and whose main clause describes the regulatory consequences that the law attaches to them (…, *then* X, Y, Z).[2] When this pattern is applied to the peculiar legal effects of 'acquisition of ownership by prescription', the paramount condition generally formalised in the civil codes requires the long-term controller to be 'possessor'. This introduces further complications to the topic, given that the ways of delineating the constitutive elements of possession are far from settled within civil law culture. This clearly emerges from the persisting diatribe that divides intentional theorists (at least implicitly inspired by the teachings of *Savigny*),[3] and supporters of more objective approaches (generally departing from counter-arguments elaborated by *Jhering*).[4]

The Italian legal system offers a perfect concretisation of this general picture. On the one hand, Art 1158 *Codice Civile* (the Italian Civil Code) formally defines *usucapione* stating that

> 'ownership of immovable goods, as well as limited real rights of enjoyment on the same property, is acquired by virtue of possession for a continuous period of 20 years'.

On the other hand, practitioners and scholars still differently speculate about the exact content of this possession-requirement, in particular whether it should rest on the simple exercise of physical control over a good (*corpus*), or whether it further implies the subjective aim to behave as the owner (*animus domini*).[5]

In dealing with this problem, the academic discussion generally adopts a formalistic approach.[6] At first, the analysis focuses on arguments that exclusively pertain to the dogmatic, historical or comparative framework of possession, and

Law', in E. Descheemaeker ed, *The Consequences of Possession* (Edinburgh: Edinburgh University Press, 2014), 1, 77.

[2] K. Larenz and C.W. Canaris, *Methodenlehre der Rechtswissenschaft* (Berlin-Heidelberg-New York: Springer, 3rd ed, 1995), 71; J.H. Merryman, 'The Italian Style' 18 *Stanford Law Review*, 39, 49 (1965).

[3] F.C. von Savigny, *Das Recht des Besitzes* (Gießen: Heyer, 1803), 188-190.

[4] R. von Jhering, *Ueber den Grund des Besitzesschutzes. Eine Revision der Lehre vom Besitz* (Jena: Mauke, 1869), 42.

[5] To confirm the persistent relevance of the topic in the Italian legal system, see among the most recent contributions, A. Nervi, 'Possesso e detenzione nella circolazione dei beni immobili: incertezze applicative e riflessioni sistematiche' *Rivista del notariato*, 249, 258-260 (2018); C. Cicero, 'Il problema del negozio di cessione del possesso' *Rivista del notariato*, 1082 (2017).

[6] Y. Chang, 'The economy of concept and possession', in Id ed, *Law and Economics of Possession* (Cambridge: Cambridge University Press, 2015), 103, who compares this approach, generally detectable in civil law tradition, with the one adopted in common law: 'while property scholars in civil law countries are zealous in searching for the general principle and debating the conceptual framework of possession, property scholars in the U.S. are far more interested in dealing with specific possession doctrines'.

only at a second stage is the resulting notion applied by the interpreter as a constitutive element of the different possession-based doctrines scattered in the civil code and in other legislative provisions (eg, *bona fidae* purchase of movables from non-owners, acquisitive prescription, *de facto* control of intangibles, etc). As a corollary, these operational doctrines risk being largely dependent on an abstract and highly decontextualized conceptual substratum, which may not be in tune with the underlying principles and rationales that inspire their concrete application in the legal system.

This contribution deliberately takes a different perspective. It starts from the acknowledgment that none of the hermeneutic approaches with which academics have handled relevant norms on possession has been capable of creating consensus or of being perceived as the only possible, univocally 'correct' interpretation of Italian legislative texts. On these grounds, the investigation aims to suggest further arguments relevant for the identification of the *preferable* understanding of the statutory requirements of possession, starting from a descriptive evaluation of how the different theories concretely influence the operational aspects of acquisitive prescription. The traditional research perspective is thence reversed: it is surmised that the analysis of the constitutive elements of possession should not only focus on the internal coherence of abstract legal concepts. Instead, the practical effects of each available hermeneutical solution should be considered, orienting the preference in favour of the interpretation of possessory requirements that appears more coherent with the rationale of possession-based doctrines, such as acquisitive prescription.

The Article proceeds as follows: Section (II) introduces the basic rules of acquisitive prescription of immovables in Italy; Section (III) proposes a basic classification of the most relevant theoretical approaches to the distinguishing features of possession (III.1), and then applies it in a survey of the different positions detectable in Italian scholarship and case law (III.2); Section (IV) turns back to acquisitive prescription, looking first at its standard justifications, and then identifying from these rationales those likely to be applicable to Italian *usucapione*; Section (V) moves from these preliminary results to test which among the available interpretations of possession better suits the legislative aims of acquisitive prescription; Section (VI) summarizes the conclusions of the analysis, arguing in favour of an objective notion of possession.

II. Acquisitive Prescription of Immovables Under Italian Law

The Italian Civil Code recognizes two basic models of acquisitive prescription dedicated to immovables:[7] a general regime (Art 1158 Civil Code); and a special

[7] Special rules dedicated to small rural properties (Art 1159-*bis* c.c.) will not be considered in this paper.

one, characterized by a shortened prescription period (Art 1159 Civil Code).

1. The General Regime of *Usucapione*

The general rule dedicated to acquisitive prescription is laid down in Art 1158 Civil Code. According to its literal requirements, ownership of immovable property, as well as other real rights of enjoinment on the same goods, are acquired by virtue of possession exercised for a continuous period of twenty years. A successful *usucapione* depends on whether the acquisition of possession has been obtained in a peaceful and public way, or through violent or clandestine behaviours. While in the former case computation begins when control of the good is actually obtained by the non-owner, in the latter case the relevant prescription period does not start till the moment when violence or clandestine has ceased (Art 1163 Civil Code). Moreover, possession is relevant for acquisitive purposes only when it has been exercised in a continuous and non-interrupted way throughout the prescription period (Artt 1165-1167 Civil Code).

Under Italian law, the right of ownership, and the associated legal remedies (*rei vindicatio* and *actio negatoria* in the first place)[8] are not subject to extinctive prescription (Artt 948-949 Civil Code). A logic corollary is that the loss suffered by the former property-holder after a successful elapse of the prescription period merely represents an indirect consequence of the *usucapione* regime.[9] Consistently, the doctrine is univocally regarded as an original mode of acquiring property,[10] with retroactive effects.[11] This means, in more explicit terms, that the possessor is considered to have become the owner not at the expiration of the prescription period, but from the very moment when factual control of the good was originally obtained. It is thence undisputed that if all the constitutive elements are met, acquisition of the right of ownership is effective against the formal owner and other third parties regardless of any record in the public register or any further procedural formality.[12]

[8] For a comparative analysis of these rules: F. Mezzanotte, 'The Protection of Ownership of Goods in the DCFR. An "Exclusion Strategy" at the Core of European Property Law?' 21 *European Review of Private Law*, 1009 (2013).

[9] A. Galati, 'Dell'usucapione (Artt. 1158-1167)', in P. Schlesinger and F.D. Busnelli eds, *Il Codice Civile. Commentario* (Milano: Giuffrè, 2013), 99.

[10] Though criticized by authoritative scholars – see P. Rescigno, *Manuale del diritto privato italiano* (Napoli: Jovene, 12th ed, 1997), 276 – this point is undisputed in case law (cf among others, Corte di Cassazione 25 May 2000 no 43, *Foro italiano*, I, 2143 (2000); Corte di Cassazione 14 June 2000 no 8122, *Foro italiano, Repertorio 'Usucapione'*, no 13 (2000)), and absolutely predominant in the academia: see C.M. Bianca, *Diritto civile*, 6. *La proprietà* (Milano: Giuffrè, 2nd ed, 2017), 627 for further bibliographical indications.

[11] R. Sacco and R. Caterina, 'Il possesso', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 3rd ed, 2014), 488-489.

[12] R. Sacco, 'Usucapione' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1999), XIX, 569-570.

2. The Special Regime of *Usucapione Abbreviata* (Shortened Acquisitive Prescription)

According to Art 1559 Civil Code, peaceful acquisition of good faith possession of immovables from a non-owner, by virtue of a suitable title that has been duly registered, determines the acquisitive prescription in favour of the possessor ten years after the registration date. This special regime is dedicated to cases where the acquisition of possession is not accompanied by a valid transfer of the legal entitlement, due to a formal lack of power of disposition in the person of the seller, who turns out to be a non-owner.

In this regard, *usucapione abbreviata* requires a 'suitable title': a legal transaction equipped with all the formal and substantial requirements necessary to transfer ownership, and that would have been valid and effective if entered into by the legitimate right-holder. For example, null contracts cannot be considered suitable titles, distinguishable from merely avoidable agreements, which under Italian law are provisionally effective and thus capable of transferring property.[13] Suitable title may also be represented by a judgement (eg granting specific performance of a duty to enter into a sale contract) or by an administrative order (eg an expropriation decree) potentially apt to transfer the right of ownership.[14]

Another essential requirement of the doctrine is good faith, which implies the justified reliance on the assumption that the party from which possession is derived is the legitimate owner of the immoveable. Good faith is presumed except in cases of evidence of a wilful conduct (ie actual knowledge that the assignor is not the true owner) or gross negligence (eg cases in which the assignee could have easily determined the ownership of the assignor from a mere examination of the title).[15] To exemplify, good faith is excluded by the presence of a prior registration against the assignor, or by the previous transcript of an obligation to transfer the good in the public register,[16] or when the buyer has explicitly exempted the notary from carrying out ordinary cadastral controls, and/or has not performed them on his/her own initiative.[17]

Finally, *usucapione abbreviata* requires a constitutive publicity formality. The period of time relevant for a successful acquisition by prescription starts elapsing the very date of the registration of the suitable title. This rule is consistent with the requirement of good faith by the possessor, given that the accomplishment of the registration formalities represents a valid proof of his/her reliance on the

[13] Corte di Cassazione 20 April 2001 no 5894, *Foro italiano, Repertorio 'Usucapione'*, no 17 (2002); S. Ruperto, 'Usucapione (dir. vig.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLV, 1078.

[14] F. De Martino, 'Del possesso: della denunzia di nuova opera e di danno temuto (Art. 1140-1172)', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli-Foro italiano, 5th ed, 1984), 74.

[15] Corte di Cassazione 20 July 2005 no 15252, *Foro italiano*, I, 437 (2006).

[16] Corte di Cassazione 5 April 1994 no 3239, *Foro italiano*, I, 582 (1995).

[17] Corte di Cassazione 20 July 2005 no 15252 n 15 above.

validity and effectiveness of the transfer. Moreover, this publicity requirement reflects the peculiar need to balance the position of actual owners (who are under the risk of losing their property after a relatively short period of time), and the general interest of reliability of land registers (given that, after the elapse of the shortened prescription period, their records will reflect the actual legal situation of property-holdership).

3. Overview

The brief survey conducted in this Section highlights some peculiar features of the Italian system of acquisitive prescription of immovables that deserve specific attention in light of the arguments that will be developed in the remaining analysis.

First of all, it must be noted that the general regime of acquisitive prescription operates irrespective of the subjective state of possessors. More specifically, apart from an exceptional provision dictated for movable objects, the good faith of the possessor does not represent a condition which is apt, *per se*, to grant a reduction of the ordinary acquisitive prescription period.[18] This remark is not contradicted by the peculiar norm laid down in Art 1159 Civil Code: when referred to factual control of an immovable, good faith represents at most *one* of the constitutive requirements of the peculiar model of *usucapione abbreviata* there regulated.[19]

A second observation concerns the relationship between acquisitive prescription of immovables and land publicity. Registration is not a constitutive requirement in the ordinary regime of acquisitive prescription. As a consequence, the general doctrine of *usucapione* operates independently from the system of public records, so that its effects may be either consistent or inconsistent with the information formally resulting from public registers.[20] An acquisitive prescription benefiting the person who has possessed on the ground of a null, but registered, transfer ensures that public records end up reflecting the actual legal status of the immovable. On the contrary, if the doctrine operates after the occupation of a plot of land, the reallocation of ownership to the bad faith possessor would eventually contradict the situation depicted by the publicity system.[21] This latter outcome

[18] Art 1161, para 1, Civil Code derogates to the general prescription period of twenty years set by Art 1158 Civil Code stating that the ownership of movable property, and other real rights of enjoyment on the same asset, are acquired after only ten years if possession was obtained in good faith. Apart from this norm, the ordinary regime of acquisitive prescription in Italy has a constant structure, based on the fundamental elements of uninterrupted possession prolonged for a given period of time, which varies only according to the nature of the goods: twenty years for immovables, fifteen years for rustic funds, ten years for registered movables: see A. Gambaro, *Il diritto di proprietà* (Milano: Giuffrè, 1995), 846-847.

[19] Cf G. Furgiuele, 'La circolazione dei beni', in N. Lipari and P. Rescigno eds, *Diritto civile* (Milano: Giuffrè, 2009), II/II, 373-374.

[20] L. Moccia, *Figure di usucapione e sistemi di pubblicità immobiliare* (Milano: Giuffrè, 1993), 12.

[21] B. Hoops, 'Legal Certainty is Yesterday's Justification for Acquisitions of Land by Prescription. What is Today's?' 7 *European Property Law Journal*, 189 (2018).

is prevented by the rule on shortened acquisitive prescription, which includes the record of the suitable title of transfer among its mandatory elements, consistently with the general interests of certainty implied in a land publicity system, and with the goal of granting verifiability for all interested third parties.[22]

Lastly, the description of the different *usucapione* regimes of immovables regulated by the Italian Civil Code confirms the pivotal role of possession as the ubiquitous requirement for a successful reallocation of ownership through long-term use. Attention will be now dedicated to this fundamental notion to understand how its different interpretations may influence the concrete application and operational rules of acquisitive prescription.

III. Possession as a Legal Concept

It is frequently debated whether possession is to be regarded as a right or a fact.[23] As comparative analysis shows, the answer to this question crucially depends on the contingent solutions adopted in the specific jurisdiction under analysis. Common law models mainly adopt the former approach; civil law countries tend to describe possession as primarily factual.[24] Even if one focuses on codified systems of law, it is possible to observe that while most of the continental European legislators explicitly treat possession as a material condition,[25] there are also more recent cases of textual provisions defining it as a 'legal status',[26] or even presenting its content as typical of a subjective right.[27]

Irrespective of these different formulations, it is surmised that possession can never be considered as a plain, 'non-legal word', marked by a 'straight forward connection with counterparts of the world of facts'.[28] Even in countries such as Italy, where the notion is openly defined in its physical dimension, lawyers cannot disregard its persistent juridical substance. Put differently, even when the word 'possession' is used by legislators to denote a 'fact', its prescriptive effects inevitably diverge from its ordinary meaning. While in the layman's understanding, possession simply represents 'the act or state of actual holding or occupancy',[29]

[22] C.M. Bianca, n 10 above, 637; S. Ruperto, n 13 above, 1082.

[23] For a survey, R.A. Posner, 'Savigny, Holmes, and the Law and Economics of Possession' 86 *Virginia Law Review*, 535 (2000).

[24] Recently, Y. Emerich, 'Possession', in M. Graziadei and L. Smith eds, *Comparative Property Law. Global Perspectives* (Cheltenham: Edward Elgar, 2017), 173-174.

[25] Eg, in Germany, BGB, § 854; in France, Art 2255 *Code civil*; in Belgium, Art 2228 *Code civil*.

[26] Eg in the Netherlands, Art 3:107(1): 'Possession is the legal status in which a person holds an asset for himself'.

[27] Eg Art 180 Japan civil code: 'Possessory rights shall be acquired by holding thing with an intention to do so on one's own behalf'.

[28] H.L.A. Hart, 'Definitions and Theory in Jurisprudence' 70 *Law Quarterly Review*, 37 (1954).

[29] See 'Possession', in J.M. Hawkins and R. Allen eds, *Oxford Encyclopedic English Dictionary* (Oxford: Clarendon Press, 1991), 1131.

lawyers shall instead consider its relevance only within the specific conditions set by the law.[30]

It is thence crucial to identify the qualifying elements of possession in legal discourse: this is exactly the task to which the following subsections are dedicated.

1. The Distinguishing Elements of Possession

In many legal systems of the civil law tradition, first-year private law students are induced to abandon their pre-juridical property notions as soon as they are instructed that an apparently straightforward position of factual enjoyment of an object may assume at least a twofold meaning in the eyes of the law, being alternatively classified under the different concepts of 'possession' and 'detentorship'.[31]

As for the present analysis, in order to frame the available techniques employed for the juridical qualification of these two legal notions, it appears useful to re-adjust the speculative model formalised by *Jhering* through his 'scheme of three theories',[32] surmising that possession and detentorship may be alternatively distinguished:

(i) according to the 'specific intention' of the factual controller, as inferable from the peculiar circumstances of the case (*concrete Willenstheorie*);

(ii) according to the 'abstract intention' of the factual controller, based on the assumption of conformity of the subjective state of who exercises property-like powers over a good and that of the legitimate right-holder (*abstracte Willenstheorie*);

(iii) according to the 'objective theory', which defines possession on the basis of purely exterior elements of control over goods, in the absence of any legal title granting *de facto* powers exercised *alieno nomine* (*Objectivitätstheorie*).

On a substantive level, the first two theories rely on a subjective element as the distinguishing feature of possession. Both the possessor and the detentor enjoy material control of the good (*corpus*), but while the former exercises her/his powers with the specific intention of being the owner (*animus domini*), the latter's behaviour is accompanied by the inner recognition of someone else's legitimate right (*animus detinendi*). These subjectivist approaches differ in particular on a procedural level. According to the 'specific intention' theory, it is up to the controller who claims possession to provide evidence not just of her/his factual control of goods, but also of the correlative subjective element. Under the 'abstract intention' regime, the burden of proof is eased through a

[30] S. Douglas, 'Is Possession Factual of Legal?', in E. Descheemaeker ed, n 1 above, 66, 75-76.

[31] For a perfect illustration, dedicated to entering students of a transnational law programme, cf B. Akkermans, 'Property Law', in J. Hage and B. Akkermans eds, *Introduction to Law* (Cham: Springer, 2014), 75-76.

[32] R. von Jhering, *Der Besitzwille: Zugleich eine Kritik der Herrschenden Juristischen Methode* (Jena: Fischer, 1889), 19-20.

rebuttable presumption of *animus domini* in who exercises material powers corresponding to those typically associated with the right of ownership. In this latter case, subjective intention does not disappear, but it is largely inferred from the presence of *corpus*.

The third theory operates on objective terms, as it considers possession nothing more than a conscious factual control over goods (*corpus*). In this perspective, the distinguishing feature of possession if compared to detentorship does not rely, in a positive sense, on the presence of a different intention (in both circumstances coinciding with the mere consciousness of a physical relation between the individual and the thing). Rather, the distinction is based on a negative element: the absence of a formal legal title that operates as a *causa detentionis*, capable of justifying the exercise of material powers over a good on behalf of its legitimate holder.

2. The Distinguishing Elements of Possession Under Italian Law

The Italian Civil Code, dated 1942, defines possession as

> 'the factual power over a thing that is exhibited through an activity corresponding to the exercise of the right of ownership or of another real right' (Art 1140, para 1, Civil Code),

and then further specifies that 'it is possible to possess through another person, who is the detentor of the good' (Art 1140, para 2, Civil Code).

Moving from this basic framework, Italian scholars have long debated the distinguishing features of possession and detentorship, with such a heterogeneous variety of arguments and theories that it would be impossible to provide a comprehensive account here. It appears instead sufficient to collect the main hermeneutic approaches elaborated by case law and doctrine, framing them within the conceptual grid that has been previously drafted.[33]

a) Subjectivist Approaches

A traditional hermeneutic approach counts Italy among the jurisdictions based on a subjective view on possession, and grounds the distinction with detentorship on the intentional element of *animus*. This position is the one prevailing in classic readings,[34] it still enjoys broad support among scholars,[35]

[33] For the ease of reading, subjective approaches presented under Section III.1, *sub* (i) and (ii) will be dealt together in a single sub-section.

[34] See *inter alia*, M. D'Amelio, *Del possesso*, in M. D'Amelio ed, *Commentario del codice civile. Libro della proprietà* (Firenze: Barbera, 1942); R. Sacco, 'Possesso (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1985), XXXIV, 491; L. Bigliazzi Geri et al, *Diritto civile* (Torino: UTET, 1988), II, 352-353.

and it is conveyed in some of the most widespread private law handbooks used in Italian law schools.[36]

The arguments put forward by Italian scholars to support this theory frequently rely on the cultural influence historically exercised by the subjectivist roots of the Roman law of possession,[37] as re-elaborated by Savigny and the Pandectist school, and embraced also by the interpreters of the French *code civil*, whose rules were transplanted in Italy as provisions of the first unitary codification, dated 1865.[38] On a more technical level, it is submitted that a *de facto* power over a good could not result in an activity corresponding to the contents of the right of ownership or of another real right (as prescribed by Art 1140 Civil Code) in the absence of a specific intention directing the material behaviour in that direction.[39]

This last consideration also helps explain the predominance, within the subjectivist trend, of the abstract intentional theory. The requirement of *animus* is generally considered by scholars and courts implicit in exercising powers that are typically associated with the position of a formal right-holder,[40] and thus ordinarily inferred from objective parameters and exterior conduct.[41] The crucial implications assumed by theoretical discussions on the concrete distribution of the burden of proof in property litigation were indeed already clear to the drafters and first commentators of the Italian Civil Code.[42] In this regard, preparatory works explicitly testify the need to 'properly balance subjective and objective elements of possession', specifying that

> 'the individual intention is relevant for the legal system only as it is materialised though an external demeanour, so distinguishing the different kinds of possession'.[43]

[35] Among others, R. Caterina, 'Il possesso', in A. Gambaro and U. Morello eds, *Trattato dei diritti reali*, I, *Proprietà e possesso* (Milano: Giuffrè, 2008), 379; C. Tenella Sillani, 'Possesso e detenzione' *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET, 1996), XIV, 15-16.

[36] See F. Galgano, *Istituzioni di diritto privato* (Milano: Wolters Kluwer-CEDAM, 8th ed, 2017), 96; A. Trabucchi, *Istituzioni di diritto civile* (Milano: Wolters Kluwer-CEDAM, 48th ed, 2017), 719-720; G. Iudica and P. Zatti, *Linguaggio e regole del diritto privato* (Milano: Wolters Kluwer-CEDAM, 17th ed, 2016), 218.

[37] Cf A. Gambaro and U. Mattei, 'Property Law', in S. Lena and U. Mattei eds, *Introduction to Italian Law* (The Hague: Kluwer Law International, 2002), 286.

[38] On the influence exercised by the historical and cultural tradition on the interpretation of the *animus* requirement in Italy, see among others R. Sacco and R. Caterina, n 11 above, 81; R. Sacco, n 34 above, 510; A. Levoni, *La tutela del possesso* (Milano: Giuffrè, 1979), I, 70; D. Barbero, *Sistema del diritto privato italiano* (Torino: UTET, 6th ed, 1962), I, 295.

[39] R. Sacco and R. Caterina, n 11 above, 98.

[40] A. Montel, *Il possesso* (Torino: UTET, 2nd ed,1962), 33-34; L. Barassi, *Diritti reali e possesso* (Milano: Giuffrè, 1952), 2, §169a.

[41] F. De Martino, n 14 above, 2.

[42] L. Barassi, n 40 above, §157; F.S. Gentile, *Il possesso* (Torino: UTET, 2nd ed, 1977), 29.

[43] Cf Preliminary Report to the Italian Civil Code (*Relazione al codice civile* R.R. no 192).

These considerations support a peculiar reading of the legislative provision set forth by Art 1141, para 1, Civil Code, which states that '*possession* is presumed in s/he who controls the good, unless it can be proven that he/she started exercising his/her powers as a mere detentor'. Though in the absence of any textual requirement of a particular intention, this norm is generally interpreted by subjectivist theorists as one introducing a presumption (not simply of possession but specifically) of *animus domini*, rebuttable only through positive evidence that the *de facto* controller has acknowledged (at least implicitly) the presence of a different right-holder.[44]

b) Objectivist Approaches

A different theoretical perspective, not explicitly recognised by any Italian court, but increasingly gaining support among scholars, disregards the relevance of *animus* as a distinguishing feature of possession.[45]

Together with other systematic arguments, supporters of this view stress that there is no formal legal rule to be found in the current Italian Civil Code from which the relevance of any subjective element relating to who possesses may be openly inferred (differently from the explicit provisions dictated by the former version of the code).[46] It is thence suggested that possession should only be interpreted on its objective grounds (as a physical control over a good) and distinguished from detentorship not on the basis of a different intention, but rather considering this latter position as based upon a legal title that serves as a *causa detentionis*.[47]

This conclusion is textually anchored in the provision of Art 1141, para 2, Civil Code, according to which detentorship may be turned into possession only when the title ('*titolo*') on which control is based is substantially changed, either because of the intervention of a third party[48] or because of a formal act of

[44] R. Sacco, n 12 above, 565; F. Galgano, n 36 above, 97.

[45] See among others, F. Alcaro, 'Il possesso (Artt. 1140-1143)', in P. Schlesinger and F.D. Busnelli eds, *Il Codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2014), 84; S. Patti, *Possesso e prescrizione. Le nuove problematiche* (Padova: CEDAM, 2009), 25-27; more remote references: C.A. Funajoli, 'L'animus nel possesso e il dogma della volontà' *Giustizia civile*, 27 (1951); A. Natucci, 'Titolo e «animus» nella disciplina del possesso' *Quadrimestre*, 472 (1989).

[46] Art 686 of the former Italian *Codice Civile* (1865), explicitly required for possessors the intention of controlling the good as their own ('*animo di tenere la cosa come propria*').

[47] This argument is progressively gaining consideration also in institutional treaties (C.M. Bianca, n 10 above, 552-555; B. Troisi and C. Cicero, I possessi, in P. Perlingieri ed, *Trattato di Diritto Civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2005), 11; A. Masi, 'Il possesso e la denunzia di nuova opera e di danno temuto', in P. Rescigno ed, *Trattato di diritto privato*, 8, *Proprietà* (Torino: UTET, 2nd ed, 2002), 540-543) and even influential handbooks (eg A. Torrente and P. Schlesinger, *Manuale di diritto privato* (Milano: Giuffrè, 21st ed, 2013), 335-336; P. Perlingieri and B. Troisi, 'Le situazioni possessorie', in P. Perlingieri ed, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 7th ed, 2014), 257-259).

[48] Eg a contract of sale is concluded with the owner, irrespective of its validity: see Corte di Cassazione 7 December 2006 no 26228, *Foro italiano, Repertorio 'Usucapione'*, no 6 (2007);

opposition directed against the actual possessor.[49] This legal title, irrespective of its nature – statutory,[50] judiciary,[51] or contractual – and even of its formal validity,[52] is thus regarded as the technical element that distinguishes the material powers of the detentor from those of the possessor. More in detail, arguing *a contrario* to the provision of Art 1140, *causa detentionis* delineates a material activity that, differently from possession, does not correspond to the exercise of the right of ownership or of another real right, but that is instead commensurate with the content of a different (personal) right of enjoyment (eg, a lease, a loan, a deposit, etc).[53]

In terms of policy considerations, these interpretative attempts appear apt to address some of the major criticisms that have been raised by authoritative scholars towards the most extreme propositions of the subjective approach to possession.[54] Attention is generally focused on the procedural difficulties inevitably connected with the necessary proof of the state of mind assumed by the controller of a good, and on the connected costs and litigation uncertainties.[55] Indeed, at a closer look, these issues are not completely solved even if one follows the abstract intention theory: the connected presumption of *animus domini* certainly supports physical controllers in their attempt to claim possession, but it simultaneously increases the procedural burdens for challenging the juridical relevance of the counterparty's factual power.

c) Overview

Corte di Cassazione 5 December 1990 no 11691, *Foro italiano, Repertorio* '*Comunione e condominio*', no 63 (1990).

[49] Eg, the custodian of a good explicitly declares to its formal right-holder to consider that asset under his/her exclusive ownership, on whatever ground: for a survey of relevant cases, see F. Alcaro, n 45 above, 115.

[50] Eg, a legislative rule regulating the powers of parents and tutors on the assets formally owned by minors or pupils.

[51] Eg, an adjudication by an administrative or civil court (such as the decision that grants to the divorced partner the right to live in the house formally belonging to her/his former spouse).

[52] Legal scholars and courts tend to agree on the idea that even an invalid or ineffective title may give successfully rise to a factual position of detentorship: R. Caterina, n 35 above, 400; L. Barassi, n 40 above, 209; G. Dejana, 'Spoglio del locatore a danno del subconduttore consenziente il conduttore' *Foro italiano*, I, 517 (1948); Corte di Cassazione 20 May 2008 no 12751, *Foro italiano, Repertorio 'Possesso'*, no 29 (2010); but in critical terms, see S. Patti, 'In tema di prova della detenzione ai fini della tutela possessoria' *Giurisprudenza italiana*, 96-98 (2010), who, adopting an objectivist approach to possession, describes detentorship as a legal – not merely factual – position (as always based on a legal title), and thence considers as a 'possessor' he/she who exercises factual control on a good on the ground of an invalid contract.

[53] R. Omodei Salè, *La detenzione e le detenzioni* (Padova: CEDAM, 2012), 56; G. Liotta, *Situazioni di fatto e tutela della detenzione* (Napoli: Jovene, 1983), 37 and for the interpretation of detentorship as a legal situation: cf S. Patti, n 45 above, 9-27; Id, n 52 above, 96-98.

[54] Among others, cf Rescigno, n 10 above, 445.

[55] F. Alcaro, n 45 above, 84; P. Gallo, 'Possesso e detenzione', in Id and A. Natucci eds, *Beni, proprietà e diritti reali* (Torino: UTET, 2001), II, 204.

The survey conducted in this Section leads me to express a preliminary preference for an objective approach to the interpretation of the normative requirements of possession. Looking at the issue from the perspective of the Italian legal system, this inference appears not only more adherent to the formal legislative texts, but also more effective in ensuring a reliable and administrable system of protection of factual positions of control established by individuals over relevant goods. This preliminary conclusion is also consistent with the results of investigations inspired by efficiency-oriented concerns. As recently demonstrated,

> 'a concise definition of possession – as actual control with no exception – has an optimal level of generality and economizes on information costs for users of the legal system'.[56]

At the same time, it is undisputable that the history of possessory concepts, as illustrated also by comparative analyses[57] and supported by the legislative intent of the drafters of the Italian Civil Code,[58] militates against a complete abandonment of the *animus* requirement. This may well justify the wide array of authoritative commentators still inclined to support the subjectivist approach to possession,[59] as well as the application by Italian courts of a series of declamatory rules that constantly ground the distinctive feature of detentorship on the absence of the controller's intention to behave as the legitimate right-holder.[60]

Moving on from these premises, it is now time to turn back to acquisitive prescription – 'the main effect of possession'[61] – to show that further normative arguments in favour of an objectivist theory can be drawn from its consistency with the fundamental rationales that currently support the operational rules of Italian *usucapione*.

IV. The Justifications of Acquisitive Prescription

[56] Y. Chang, n 6 above, 124.

[57] In Italy, cf R. Sacco and R. Caterina, n 11 above, 186.

[58] F. Alcaro, n 45 above, 23.

[59] Recently, A. Gambaro, *La proprietà. Beni, proprietà, possesso* (Milano: Giuffrè, 2nd ed, 2017), 468.

[60] Corte di Cassazione 23 July 2014 no 9671, *Foro italiano, Repertorio 'Usucapione'*, no 23 (2014); Corte di Cassazione 10 July 2007 no 15446, *Foro italiano, Repertorio 'Usucapione'*, no 11 (2007); Corte di Cassazione 9 September 2002 no 13082, *Foro italiano, Repertorio 'Possesso'*, no 17 (2002); Corte di Cassazione 18 January 2001 no 708, *Foro italiano*, *Repertorio 'Usucapione'*, no 7 (2002).

[61] In these terms, Y. Emerich, n 24 above, 181. See also J.Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton University Press, 1990), 183-184, emphasising the crucial influence exercised by the acquisitive prescription effect on the theoretical notion of possession elaborated in Germany by the Historical school, in connection with the agrarian political struggles of the 19th century.

Various justifications have been put forward in the international literature for acquisitive prescription and its functionally equivalent mechanism of adverse possession.[62] Though strictly interrelated with each other, these rationales will be illustrated here for merely descriptive purposes, distinguishing those that are mainly centred on the position of the individuals potentially involved in a possessory dispute, from those inspired by more general interests of the legal system and society at large. In this survey, standard explanations of acquisitive prescription will be initially presented in general terms (Sections IV.1-IV.3), and a more critical assessment of their basic lines of reasoning will be integrated into the analysis of their possible interactions with Italian law (Section IV.4).

1. The Behaviours of the Parties Involved in Acquisitive Prescription

The basic justifications of acquisitive prescription commonly rely on a series of utilitarian and retributive arguments attached to the behaviour of the right-holder and the factual controller, and specifically concerning their relationship with the asset.

Looking at the topic through the eyes of the paper owner, the doctrine has been interpreted: (i) *ex ante*, as an incentive to monitor his/her goods, and eventually – according to arguments that appear much more disputable[63] – to maximise aggregate welfare by promoting active uses of economic relevant resources;[64] (ii) *ex post*, as a sanction that the legal system imposes, through the loss of the entitlement, on s/he who has 'slept on her/his rights', failing to monitor and control the actual state of her/his belongings.[65]

Conversely, when a long time has passed since someone has taken active control of an asset, granting the possessor a property right on that good represents not just an economic reward for her/his productive activity, but it is also consistent with the reliance that is reasonably generated by the absence of any reaction or interference by a different right-holder.[66] Following *Radin*'s personhood

[62] According to H. Conway and J.E. Stannard, 'The emotional paradoxes of adverse possession' 64 *Northern Ireland Legal Quarterly*, 75, 88-89 (2013), heterogeneous, and even visceral, reactions of the doctrine towards adverse possession (or acquisitive prescription) should not surprise, given its inextricable interrelation with sentimental attachments to property and emotional reaction to its possible loss.

[63] Recently, B. Hoops, n 21 above, 197, stressing that in a relevant series of cases, non-use may be socially more valuable than use (eg for issue of environmental protection); for further criticisms towards this argument, see Section IV.4.a.

[64] *Inter alia*, T.J. Miceli and C.F. Sirmans, 'An Economic Theory of Adverse Possession' 15 *International Review of Law and Economics*, 161 (1995); R.C. Ellickson, 'Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights' 64 *Washington University Law Quarterly*, 725 (1986).

[65] L.A. Fennell, 'Efficient Trespass: The Case for 'Bad Faith' Adverse Possession' 100 *Northwestern University Law Review*, 1059 (2006); T.W. Merrill, 'Property Rules, Liability Rules, and Adverse Possession' 79 *Northwestern University Law Review*, 1122, 1130 (1985).

[66] J.W. Singer, 'The Reliance Interest in Property' 40 *Stanford Law Review*, 665 (1988).

theory of property, these interests deserve legal protection in particular if one takes into account the ties that the concrete exploitation of material resources creates with their users, as a way of expression and development of their personality.[67]

2. Legal Certainty

Looking at the general interests of society, a ubiquitous justification for acquisition by prescription is the promotion of certainty. It is commonly stressed that the doctrine serves this goal mainly by reducing overall information and evidence costs.[68] The more time passes, the more difficult it is to keep track of facts that have occurred in the past. It is thus preferable, not just for the specific individuals involved in a dispute, but also for third parties and for the legal system at large, to rely on the assumption that the positions of the factual and juridical holder of goods are eventually held by the same person.[69]

This, in turn, is said to lower both litigation and uncertainty costs. As for the former, acquisitive prescription should prevent or discourage property lawsuits to be initiated by third parties against the long-time possessor of goods, and allows for the clearance of legal titles,[70] easing the otherwise difficult burden of proof regarding ownership.[71] Moreover, it is frequently submitted that by quieting potential claims of old time property-holders, acquisitive prescription does not only preserve peace and order among citizens, but it further reduces verification costs incurred by third parties, fostering market transactions with interested purchasers of goods and limiting uncertainty for their potential creditors.[72]

3. Redistribution

Further, and more controversial, grounds of acquisitive prescription are connected to its potential redistributive effects. In its straightforward version, this argument focuses on the abstract capability of the doctrine to force the transfer

[67] M.J. Radin, 'Time, Possession, and Alienation' 64 *Washington University Law Quarterly*, 745 (1986).

[68] In general terms, B. Depoorter, 'Adverse possession', in B. Boukaert ed, *Property Law and Economics* (Cheltenham-Northampton: Edward Elgar, 2010), 184-185.

[69] See T.W. Merrill 'Ownership and possession', and H.E. Smith, 'The elements of possession', in Y. Chang ed, n 6 above, 18, 88; C.M. Rose, 'Property and Expropriation: Themes and Variations in American Law' *Utah Law Review*, 1, 13 (2000).

[70] R.A. Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' 64 *Washington University Law Quarterly*, 676 (1986); T.W. Merrill, n 65 above, 1128; J.E. Stake, 'The Uneasy Case for Adverse Possession' 89 *Georgetown Law Journal*, 2451 (2001).

[71] This is particularly true in jurisdiction with negative registration systems: see eg, V. Sagaert, 'Prescription in French and Belgian Property Law after the *Pye* Judgment' 15 *European Review of Private Law*, 265, 270-271 (2007); and *infra* Section IV.4.b.

[72] See among others, D.G. Baird and T.H. Jackson, 'Information, Uncertainty, and the Transfer of Property' 13 *Journal of Legal Studies,* 299 (1984).

of goods among individuals, solving the antagonistic relationships between the idle owner (claiming the asset as a matter of right) and the actual controller (claiming it as a matter of use or need), in favour of the latter.[73]

It must be preliminarily noted that this way of reasoning is far from being unproblematic. First of all, social justice concerns cannot explain all cases of acquisition by prescription. As an expression of a policy option favourable to the reallocation of resources from groups of affluent right-holders to weaker sections of the population, these arguments would hardly justify standard applications of the doctrine such as those deriving from good-faith boundary disputes or from invalid property transfers. Moreover, even focusing on cases where economic disparities are actually relevant, one can legitimately doubt that acquisitive prescription might represent, on a vast scale, an adequate means of properly addressing the issue of wealth inequality.[74]

Despite the merits of these remarks, it is here surmised that the redistribution approach deserves further investigation, if not as an argument autonomously apt to provide acquisitive prescription with a generally valid justification, at least as a rationale capable of supporting more traditional ones in some specific operational contexts.[75]

In particular, social justice may coherently integrate the standard explanations of the doctrine when applied in favour of bad faith possessors. In these cases, the loss suffered by the paper owner cannot be properly justified by solely referring to legal certainty, if only because of the fact that acquisitions by prescription may even render the public records less reliable, reallocating the entitlement to the detriment of s/he who publicly appears as the registered right-holder.[76] As a corollary, the acquisitive effect of prescription risks relying on extremely uncertain grounds, especially when former owners acted reasonably throughout the possession period and cannot be blamed for not having properly controlled their holdings.[77]

Further confirmations of this line of reasoning can be found arguing *a contrario* from liberal approaches to law. Indeed, if one advocates that equality

[73] In this terms U. Mattei and A. Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Cheltenham-Northampton: Edward Elgar, 2018), 42-46; and earlier, E.M. Peñalver and S.K. Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (New Haven: Yale University Press, 2010); B. Gardiner, 'Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws' 8 *Indiana International & Comparative Law Review*, 119 (1997).

[74] In this sense, cf extensively B. Hoops, n 21 above, 205.

[75] T. Davis, 'Keeping the Welcome Mat Rolled-Up: Social Justice Theorists' Failure to Embrace Adverse Possession as a Redistributive Tool' 20 *Journal of Transnational Law & Policy*, 73 (2011), openly looking at adverse possession as a tool for social justice goals; G.M. Duhl, 'Property and Custom: Allocating Space in Public Places' 79 *Temple Law Review*, 241 (2006); J. Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000), 140.

[76] Cf Hoops, n 21 above, 190; and with reference to Italian law, see Sections II.3 and IV.4.b.

[77] For this observation, moving from the sanctioning function of acquisitive prescription, J. Jansen, 'Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law' 1 *European Property Law Journal*, 153, 163 (2012).

issues should not affect the legal regime of property protection, and private law regulation more in general,[78] it is a logical corollary to consider adverse possession and acquisitive prescription as 'anachronistic doctrines',[79] unacceptable in particular in cases of squatters and intentional land grabbers.[80] Paradoxically, while in a normative (*de iure condendo*) perspective similar pleas suggest a complete abandonment of acquisitive prescription, they strengthen redistribution concerns as a plausible justification for those positive rules that, in different jurisdictions, currently safeguard acquisition of ownership by prescription even in cases of bad faith possessors.[81]

4. The Justifications of Italian *Usucapione*

In Italy, justifications for acquisitive prescription have been traditionally linked to the efficient regulation of the conflict between the formal owner and actual possessor of goods and on the promotion of legal certainty.[82] The main findings of these analyses will be summarised here, comparing them to the general justifications given to acquisitive prescription in the international debate.

a) *Usucapione* and the Behaviour of the Parties

Since ownership is not subject to any rule of extinctive prescription in the Italian legal system, non-usage is to be considered among the legitimate powers of the owner and cannot lead, *per se*, to the loss of unexploited property, outside the incidental case of a conflicting possession accompanied by all of the requirements for successful acquisitive prescription.[83]

In the absence of a formal obligation to control or actively use the asset pending on the owner, *usucapione* loses its potential justifications based on the behaviour of parties involved in a property dispute. On the one hand, it would be irrational for the legal system to sanction someone for simply having exercised a right in a legitimate way. On the other hand, it may appear even disputable that aggregate welfare could effectively benefit more from immediate productive activities carried out by the possessor than from simple non-usage and

[78] For a classic illustration of those arguments: L. Kaplow and S. Shavell, 'Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income' 23 *Journal of Legal Studies*, 667 (1994).

[79] C.N. Brown and S.M. Williams, 'Rethinking Adverse Possession: An Essay on Ownership and Possession' 60 *Syracuse Law Review*, 583 (2010).

[80] R.A. Epstein, n 70 above, 667; R.H. Helmholz, 'More on Subjective Intent: A Response to Professor Cunningham' 64 *Washington University Law Quarterly*, 65 (1986).

[81] L.A. Fennell, n 65 above, 1081. For the application of this line of reasoning to the Italian legislative framework, see Section III.4.c.

[82] For a detailed survey of the different possible rationales of *usucapione*, R. Caterina, 'Impium Praesidium. *Le ragioni a favore e contro l'usucapione*' (Milano: Giuffrè, 2001), 9-38.

[83] For classic references, F. Santoro-Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 9th ed reprint, 2002), 114-115; U. Natoli, *Il possesso* (Milano: Giuffré, 1992), 239.

preservation activities, or from exploitation of resources organised through long-term plans by the right-holder.[84]

Acquisitive prescription is thence justified by Italian scholars not as a legal rule aimed at directly influencing the behaviour of specific individuals, but rather as a criterion employed by the legal system for the settlement of a conflict between private parties, only indirectly inspired by the public interest of promotion of wealth-increasing exploitation of resources. Put differently, the doctrine serves more as a parameter of interpersonal conflict resolution (at most, inspired by general policy issues) than as a rule specifically aimed at granting a general public interest against the abandonment (non-use) of goods.[85]

Interpreted in this way, this justification tends to overlap, and eventually fade, into the one connected with legal certainty.

b) *Usucapione* and Legal Certainty

From a general interest perspective, the promotion of legal certainty is the justification of paramount importance for acquisitive prescription in Italy.

The Italian system of property transfer is formally based on the consensualistic principle (Art 1376 Civil Code). Its plain application (based on the *nemo plus iuris in alium transferre potest quam ipse habeat* rule) would logically imply serious problems in providing proof of actual ownership of goods.

As for immovables, these issues are only partially addressed by the negative deeds system of registration operating in Italy.[86] Indeed, the purchaser of a plot of land is protected against any previous unregistered transactions conveying a conflicting property interest on that same good (according to Art 2644 Civil Code, these latter acts

> 'have no effect against third persons who have in any way acquired rights in immovable property on the basis of a transaction recorded prior to the registration of the said acts').[87]

At the same time, the system does not grant protection for the positive reliance on the information provided by the register. The purchaser, even if in good faith, is not necessarily protected if the entry in the land register turns out

[84] R. Caterina, n 82 above, 18-20. The utilitarian argument should at least be adjusted in the sense that the potential acquisition of the good incentives the possessor, during the prescription period, to maintain and preserve the asset, administering it with the same level of care that an owner would show towards her/his goods: cf R. Sacco, n 12 above, 562.

[85] S. Patti, 'Perdita del diritto a seguito di usucapione e indennità (alla luce della Convenzione Europea dei Diritti dell'Uomo)' *Rivista di diritto civile*, II, 663 (2009).

[86] For a survey, A.M. Garro, 'Recordation of Interests in Land' *International Encyclopedia of Comparative Law* (Tübingen: Mohr Siebeck, 2004), VI, 135.

[87] F. Gazzoni, 'La trascrizione immobiliare (Artt. 2643-2645-bis)', in P. Schlesinger and F.D. Busnelli eds, *Il Codice Civile. Commentario* (Milano: Giuffrè, 2nd ed, 1998), 457.

to be based on an invalid or defective title.[88] This latter issue becomes even more problematic given that, according to Art 2650 Civil Code, in order to be effective, the registration must not just be based on a valid title, but also on a series of continuous registered transfers.

Following these reasons, the formal demonstration of ownership is commonly considered a *probatio diabolica*: the fulfilment of the burden of proof may abstractly impose the alleged owner to trace back the complete chain of property transfers up to an original way of property acquisition, in order to be sure about the uninterrupted sequence of successive, derivative right-holders.[89] In this regard, acquisitive prescription is commonly perceived as the most important legal tool capable of providing individuals with full certainty about the actual owners of immovable goods.[90] The elapse of the prescription period performs the fundamental function of title clearance, excluding the need for further investigation on the position of previous right-holders.[91] In particular, thanks to acquisitive prescription, the owner may accomplish his/her burden of proof simply by demonstrating his/her long-term possession of the property;[92] and even if the minimum time requirement required by the law is not met, s/he can still benefit from the rule which grants to successors in title the right to cumulate their possession period with the one enjoyed by formers owners, in order to take advantage of its effects (Art 1146 Civil Code).[93]

These considerations help explain the relatively scarce attention paid in Italy to the international debate after the judgements of the European Court of Human Rights in *Pye* v *United Kingdom*.[94] On a practical level, the arguments raised in that case against the legitimacy of acquisitive prescription have not found any follow-up application in front of an Italian court. While scholars have been obviously invited to reassess the justifications supporting the doctrine of acquisitive prescription, a shared position appears to be that national rules on

[88] R. Caterina, 'Some Comparative Remarks on JA Pye (Oxford) Ltd v. The United Kingdom' 15 *European Review of Private Law*, 273, 276 (2007).

[89] Among others, O. Scozzafava, 'La proprietà', in N. Lipari and P. Rescigno eds, *Diritto civile* (Milano: Giuffrè, 2009), II/II, 94; A. Gambaro, n 18 above, 936-938.

[90] *Ex multis* M. Comporti, 'Usucapione' *Enciclopedia giuridica* (Roma: Treccani, 1994), XXXII, 1; S. Ruperto, n 13 above, 1026.

[91] R. Cooter et al, *Il mercato delle regole* (Bologna: il Mulino, 2nd ed, 2006), II, 33-34.

[92] U. Mattei, 'La proprietà', in R. Sacco ed, *Trattato di diritto privato* (Torino: UTET, 2001), 386.

[93] Cf F. Galgano, *Trattato di diritto civile* (Milano: Wolters Kluwer-CEDAM, 3rd ed, 2015) I, 513; L. Bigliazzi Geri et al, n 34 above, 153-154.

[94] Eur. Court H.R., *J.A. Pye (Oxford) Ltd and Another* v *United Kingdom*, Judgment of 15 November 2005, available at https://hudoc.echr.coe.int/, paras 73-75, which considered been a deprivation of possession regulated under former English law on adverse possession as disproportionate, given the absence of any compensation to the owner; Eur. Court H.R. (GC), *J.A. Pye (Oxford) Ltd and Another* v *United Kingdom*, Judgment of 30 August 2007, Reports of Judgments and Decisions 2007-III, 365, which overruled the first judgement, assessing that the United Kingdom had not violated Art 1 P1-1 ECHR.

usucapione, especially for their role in the proof of ownership, can easily pass the 'general interest' test that ensures their compliance with constitutional principles of property protection (Art 1 P1-1 ECHR; Art 42 It Const).[95] According to the most extreme propositions, the certainty function of acquisitive prescription is so obvious that a theoretical discussion comparing this doctrine to an expropriation would appear 'almost incredible', and at most capable of showing 'the widespread ignorance of elementary notions of civil law'.[96]

Considering the above, the international reader may better understand the tendency – commonly detectable in Italian treatises on possession – to discuss the rationale of the general acquisitive prescription regime in apparently abstract terms, without differentiating the analysis according to the particular position of the *de facto* controller. For example, one might distinguish between transferees of the immovable on the ground of a null sale contract, on the one hand, and squatters or intentional land grabbers, on the other.[97] In contrast to *usucapione abbreviata* (truly acquisitive in nature, as aimed, *ex ante*, at consolidating in favour of the good faith possessor the effects of a precarious transfer)[98], the general regime of *usucapione* is commonly justified under an *ex post* perspective, as it is thought to serve primarily the processual interests of the (true) owner in giving proof of his/her title.[99]

Obviously, this does not mean that the rule laid down in Art 1158 Civil Code should not be considered also according to its more explicit legal effects, as a way of acquiring property. Focusing on this potential application of the doctrine through the lens of legal certainty, the particular conditions of possessors acquires stronger relevance. This is especially clear looking at the distinction between

[95] Cf *inter alia* G. Magri, 'Usucapione ed acquisto a non domino nel prisma della Convenzione europea dei diritti dell'uomo' *Rivista di diritto civile*, 1402 (2014); A. Guarneri, 'Usucapione, acquisti a non domino e Convenzione europea dei diritti dell'uomo' *Nuova giurisprudenza civile commentata*, II, 339 (2014); F. Viglione, 'Proprietà e usucapione antichi problemi e nuovi paradigmi' *Nuova giurisprudenza civile commentata*, II, 464 (2013).

[96] A. Gambaro, n 59 above, 555. Consistently with these consolidated lines of thoughts, a different reasoning has been ventured (only) for that minor part of the Italian territory ('Alto-Adige' and other former Austrian provinces) where land publicity is regulated under a title registration system of German roots (the so called *sistema tavolare*). According to some scholars, this positive system of registration is perfectly suitable to grant full certainty to the legal situation of rights over immovables, and this would limit the possible rationale of acquisitive prescription just to the sanctioning function for the idle owner. Under this view it logically appears more difficult to find a general interest justification supporting the doctrine, with stronger arguments for its contrast with Constitutional principles of property protection*:* cf G. Petrelli, 'Trascrizione immobiliare e Convenzione Europea dei Diritti dell'Uomo' *Rivista di diritto civile*, 329, 345 (2014).

[97] As relevant examples, see A. Gambaro, n 59 above, 553-555; C.M. Bianca, n 10 above, 295-296, 617-618; E. Guerinoni, 'L'usucapione', in A. Gambaro and U. Morello eds, n 35 above, 872; B. Troisi and C. Cicero, n 47 above, 165; P. Gallo, n 55 above, 237; and for critical remarks, R. Sacco and R. Caterina, n 11 above, 464.

[98] L. Mengoni, *Gli acquisti «a non domino»* (Milano: Giuffrè, 3rd ed reprint, 1994), 90-91; and see above, Section II.2.

[99] Explicitly, L. Moccia, n 20 above, 27.

users relying on a transfer (invalid, ineffective but) passible of registration, and bad faith possessors absolutely devoid of any formal title to property. While in the former case acquisition by prescription actually fosters certainty, since it makes the legal and factual holder of goods coincide in the same person, in the latter situation the controller's interest in being protected from a late eviction claim must be balanced with the general interest in the reliability of the public records, that, before the elapse of the *usucapione,* correctly indicate the legitimate owner.[100]

This remark confirms, with specific reference to Italian law, the general observation that when dealing with bad faith possessors, the justification for acquisitive prescription of immovables should look for further arguments that are capable of integrating those traditionally anchored in legal certainty.[101] Moving on from these premises, attention shall now be focused on redistribution issues.

c) *Usucapione* and Redistribution

Though redistribution arguments are substantially absent in Italian case law on acquisitive prescription, they are gaining increased attention in certain sectors of academia.[102]

The irrelevance of social justice concerns in the courts' interpretation of *usucapione*'s requirements holds true notwithstanding the primary value granted to the right to housing in the Italian legal system.[103] Housing is commonly understood as a fundamental right, connected to the universal principle of human dignity, which inspires the democratic state envisaged by the Constitution.[104] On these grounds, courts are unanimous in assessing that 'the right to a dignified home is, undeniably, one of the fundamental rights of the individual'.[105] Interpreted in this way, the right to housing has been specifically applied as relating to other individual rights and public interests, such as: the right to be assigned housing based on public housing policies (in relation to available resources); the right to the stability of enjoyment of familiar accommodation (relating to legislative regimes of minimum duration of lease contracts and of their payment conditions); and the enjoyment of other associated rights and freedoms.[106]

Looking in particular at the situation of squatters, the fundamental value of

[100] Hoops, n 21 above, 191.

[101] See Section IV.3.

[102] Cf among recent publications dedicated to the Italian doctrine of possession, C. Abatangelo, *Il possesso derivato. Situazioni possessorie e loro circolazione negoziale* (Napoli: Jovene, 2016), 29; M. Gorgoni, *La circolazione traslativa del possesso* (Napoli: Edizioni Scientifiche Italiane, 2007), 35.

[103] See E. Bargelli, 'Abitazione (diritto alla)' *Enciclopedia del diritto Annali* (Milano: Giuffrè, 2013), 1; U. Breccia, *Il diritto all'abitazione* (Milano: Giuffré, 1980).

[104] Corte Costituzionale 25 February 1988 no 217, *Giurisprudenza costituzionale*, 833 (1988).

[105] Corte Costituzionale 2 April 1999 no 119, *Giurisprudenza costituzionale*, 1004 (1999).

[106] Among others F. Bilancia, 'Brevi riflessioni sul diritto all'abitazione' *Istituzioni del federalismo*, 231 (2010); G. Paciullo, *Il diritto all'abitazione nella prospettiva dell'*housing *sociale* (Napoli: Edizioni Scientifiche Italiane, 2008), 49, 91.

the right to housing has been occasionally taken into account in order to preclude, under specific circumstances, the punishability of their conduct, considering them justified by a state of necessity (under Art 54, Italian Penal Code).[107] Nonetheless, this line of reasoning has never led Italian judges to provide the right to housing with such a strong horizontal effect as to consider squatters not only exempted from criminal prosecution, but even entitled to a property claim over the occupied immovable. In this regard, the Supreme Court has recently specified that a state of necessity can be detected only in the presence of an 'immediate urgency of saving oneself or others from the current danger of serious harm to the person', and not when necessity is destined to be prolonged in time (as in cases of chronic poverty, such as those connected with a long-term need for housing). This outcome has been formally based on the argument that

> 'the right of the owner cannot be permanently compressed because, otherwise, there would be a substantial deprivation of property outside any legal or conventional procedure'.[108]

This last conclusion effectively demonstrates the presence, within the system of entitlement protection, of a potential tension between the traditional idea of an 'exclusion-based' right of ownership, and a different conception of property inspired by distributive justice concerns.[109] Among other elements, supporters of this latter model focus their attention on the provision in the Italian Constitution that allows for normative interventions apt 'to ensure the social function of property and to make it accessible to everyone' (Art 42, para 2).

This fundamental rule has already played a crucial role in the second half of the last century, supporting the abandonment of an absolute concept of property in favour of a more solidarity-oriented paradigm, in tune with the overall values of the Italian Constitution.[110] More recently, the same constitutional provision has attracted renewed attention as the possible basis for the further development of an inclusive model of property,[111] according to which the relationship between

[107] Corte di Cassazione-Sezione penale 26 September 2007, no 35580, *Foro italiano*, II, 678 (2007), critically analysed by M. Ainis, 'Se la casa è un diritto' *Quaderni costituzionali*, 837 (2007). On different grounds, courts have occasionally absolved pacific possessors of immovables from criminal prosecutions considering the prolonged inertia of the owner as an element legitimately perceivable by squatters as a tacit acquiescence to their occupation, and thus apt to exclude the subjective requirement of intentional behaviour (see, recently Corte di Cassazione-Sezione penale 10 August 2018, available at www.pluris-cedam.utetgiuridica.it).

[108] Corte di Cassazione-Sezione penale 26 February 2015 no 8603, available at www.dejure.it.

[109] Cf U. Mattei, 'Proprietà (nuove forme di)' *Enciclopedia del diritto Annali* (Milano: Giuffrè, 2012), 1117.

[110] Among others, see S. Rodotà, 'Note critiche in tema di proprietà' *Rivista trimestrale di diritto e procedura civile*, 1252 (1960); S. Pugliatti, 'Interesse pubblico e interesse privato nel diritto di proprietà', in Id, *La proprietà nel nuovo diritto* (Milano: Giuffrè, 1964), 3; P. Perlingieri, *Introduzione alla problematica della «proprietà»* (Napoli: Jovene, 1971).

[111] U. Mattei, 'I beni pubblici: un dialogo fra diritto e politica', in G. Alpa and V. Roppo eds, *La vocazione civile del giurista. Saggi dedicati a Stefano Rodotà* (Roma-Bari: Laterza, 2013),

'exclusion and access' in property regulation should not be understood as a rigid 'rule *vs* exception' binomial, but rather as an intermingled mixture of powers of control and rights of inclusion over socially relevant resources, irrespective of their formal holdership regimes.[112]

Within this cultural trend, acquisitive prescription has been perceived, together with other property-related doctrines, as a possible normative basis supporting a decentralized system of regulatory choices that delegate to the interpreter (eventually, the judge) the possibility of deciding on access to property outside the standard scheme of formal interpretation, also taking into account the respective conditions of the parties involved in the legal dispute.[113]

On a deeper level, this policy-oriented approach finds plausible legislative grounds in the fact that under the ordinary *usucapione* regime dedicated to immovables (Art 1158 Civil Code), even bad faith possessors are permitted to prescriptively acquire ownership. Bad faith possessors are also subject to the same time requirement for acquisitive prescription as *de facto* controllers in good faith (twenty years), even though they are aware of exercising their powers to the detriment of a legitimate owner.[114]

The absence of more burdensome conditions (in particular, a longer prescription period) imposed on bad faith possessors is not a distinguishing feature of Italian *usucapione*, and reflects the paramount importance generally attributed to the justification of the doctrine based on legal certainty (which should be safeguarded irrespective of the subjective position of the possessor). Against this background, it appears nonetheless worth noticing that if the interpreter relies only on this latter argument, s/he may still be tempted to introduce ways of distinguishing among possessors in good and bad faith, giving value to their different intentions and conduct without necessarily affecting the proprietary (third party) effects of acquisitive prescription. As a valid example, one may refer to the rule elaborated in 2017 by the Dutch Supreme Court, which, interpreting the norm of the *Burgerlijk Wetboek* that allows any possessor to prescriptively acquire ownership or other limited proprietary interests (Art 3:105),[115] stated that in the case of a *de facto* control exercised in bad faith,

119; and M.R. Marella, 'La funzione sociale oltre la proprietà' *Rivista critica del diritto privato*, 557 (2013).

[112] S. Rodotà, 'Postfazione. Beni comuni: una strategia globale contro lo *human divide*', in M.R. Marella ed, *Oltre il pubblico e il privato. Per un diritto dei beni comuni* (Verona: Ombre Corte, 2012), 311; U. Mattei, 'Una primavera di movimento per la «funzione sociale della proprietà»' *Rivista critica del diritto privato*, 531 (2013).

[113] Cf among Italian scholars, U. Mattei and A. Quarta, n 73 above, 42; M.R. Marella, 'The Commons as a Legal Concept' 28 *Law and Critique*, 61, 69-70 (2017).

[114] See above, Section II.3.

[115] Art 3:105, para 1, *BW* – Acquisition by a possessor through an acquisitive prescription: 'He who possesses an asset (property right) at the moment on which the right of action (legal claim) to end that possession has become prescribed, acquires that asset, even if he did not possess it in good faith'.

former owners may have their loss compensated through ordinary tort law remedies.[116]

A similar outcome significantly undermines the possible relevance of redistribution arguments in the law of acquisitive prescription. At the same time, it would be extremely difficult to imagine it translated into Italian law, where it would be in contrast to the consolidated interpretation given to *usucapione*. Indeed, a logical corollary deriving from the nature of the doctrine as an original title to property, and from the absence of an extinctive prescription regime for the right of ownership, is that the loss suffered by the former property holder represents an indirect consequence of the possessor's acquisition regime.[117] As a consequence, Italian courts and scholars have always considered it impossible for the paper owner, not only to rely on the general remedy of unjust enrichment,[118] but also to sue any dispossessor (a non-culpable encroacher as well as an intentional land grabber) in an action for compensatory damages.[119]

The Italian generalised application of the ordinary regime of acquisitive prescription, irrespective of any inquiry into the subjective status of *de facto* controllers of goods, may thus find additional grounds of justification in social justice arguments. This means, in more explicit terms, looking at the conflict between an idle owner and an active possessor as an adjudication process where prolonged non-usage of resources, on the one hand, and concrete exploitation of available goods, on the other, may work as reliable proxies for a legal intervention inspired (also) by redistributive concerns.

V. The Nature of *Possessio ad Usucapionem* in Italian Law

The fundamental question posed by this Section can be formulated as follows: which of the available interpretations of the essential possessory requirements better fit with the fundamental justifications of acquisitive prescription, as previously illustrated? In light of the survey conducted in Section (IV), it appears legitimate to disregard arguments deprived of any prescriptive value in the Italian legal system, as those centred on the position of specific individuals involved in a property

[116] Hoge Raad 24 February 2017, ECLI:NL:HR:2017:309, *Jurisprudentie Onderneming & Recht* 6 (2017) (a possessor in bad faith who acquired ownership through acquisitive prescription might be liable in tort to compensate the former owner for his loss): cf for a detailed and critical analysis of the case, J. Jansen, 'The Dutch Supreme Court and Law Office History. Acquisitive Prescription for Possessors in Bad Faith: The Dutch Experience (1992-2017)', in B. Hoops and E. Marais eds, *New Perspectives on Acquisitive Prescription* (forthcoming), and Id, 'Schadevergoeding uit onrechtmatige daad na verkrijging ex artikel 3:105 BW' *Rechtsgeleerd Magazijn Themis*, 3 (2018).

[117] E. Guerinoni, n 97 above, 871.

[118] Cf among others P. Sirena, 'L'azione generale di arricchimento senza causa', in N. Lipari and P. Rescigno eds, *Diritto civile* (Milano: Giuffrè, 2009), III/I, 568.

[119] A. Gambaro, n 59 above, 555.

dispute (paper owner, *de facto* controller, etc).[120] Rather, an answer should preliminarily focus on the certainty rationale of *usucapione*, and then develop some further remarks moving from its 'support justification' based on the potential redistributive efficacy of the doctrine.

1. Possession Requirements and Legal Certainty

If one looks at acquisitive prescription as a tool aimed at promoting legal certainty and predictability in property relationships, there should be little doubt that a purely objective notion of possession (based on actual control of a good) is more apt than a subjective one (centred also on the inner intent of the controller), saving parties on both information and evidence costs.[121]

With regard to informational burdens, this conclusion may appear almost self-evident. A third party – and a judge in first place – can hardly infer solely from the fact that someone exercises material powers on someone else's land whether the former intends to acquire prescriptively the latter's ownership, to acquire just a usufruct, or to use it only temporarily. As a corollary, the verification efforts required to inspect the true intentions of the controller are certainly significant, and introduce an undesirable level of unpredictability in the analysis imposed to the interpreter.[122]

Those concerns were duly taken into account and evaluated by the drafters of the Italian Civil Code. This is perfectly demonstrated by the fact that the discussions during the preparatory works and the normative solutions adopted have been inspired more by policy considerations concerning the practical difficulties in providing courts with proof of the constitutive element of possession than by purely theoretical arguments inspired by the history of legal concepts.[123] On these very grounds, the legislative committee has eventually set aside the original proposal of the royal commission, which contained a legislative definition of possession based on the previous version of the code (dated 1865), and thus explicitly based on a subjective intention of the controller of keeping the thing as if s/he were the owner.[124]

Moving on from these premises, and given the absence of any formal reference to an intentional status in the current version of the Italian Civil Code

[120] See above, Section IV.4.a.

[121] In general, H.E. Smith, n 69 above, 69.

[122] Explicitly, Y. Chang, n 6 above, 115-117; and also Id, 'The Problematic Concept of Possession in the DCFR: Lessons from Law and Economics of Possession' 5 *European Property Law Journal*, 4 (2016).

[123] Cf among others F. Alcaro, n 45 above, 21-22; L. Barassi, n 40 above, § 157.

[124] See Commissione Reale, proposal for Art 533 Civil Code: '*Il possesso è il potere di fatto che alcuno ha sopra una cosa con la volontà di avere per sé tale potere in un modo corrispondente al diritto di proprietà o ad altro diritto reale*' ('Possession is the factual power that someone has on a thing, with the intention of keeping that power as corresponding to the right of ownership or to a different real right').

(Art 1140 Civil Code),[125] one may legitimately question why the interpreter should add further complication to the analysis by hermeneutically introducing a possessory requirement that has been positively erased from the legislative texts.[126] When applied to the field of acquisitive prescription, this interpretative solution inevitably adds significant ambiguity in the administration of litigation procedures, thus conflicting with the very rationale of legal certainty commonly attached to this doctrine.[127]

This conclusion receives further support if one examines the concrete ways through which Italian judges tend to impose a subjective requirement in the evaluation of possession. It has been already stressed that this result is commonly achieved through a peculiar interpretation of Art 1141 Civil Code, intended as a norm introducing a presumption of *animus domini* (and not of plain possession, as blackletters would seem to suggest) in favour of the physical controller of a good.[128] In operational terms, a logical corollary of this premise should lead to the direct application of the abstract intention theory, which imposes on the counter-party the burden of providing evidence that the exercise of *de facto* powers on a good was not accompanied by the concrete intention of behaving as the legitimate right-holder.[129] Apart from the obvious difficulties implied in this processual requirement, it is necessary to stress that only in few cases have courts consistently applied this line of reasoning to its logical conclusions.[130] With an ambivalent implementation of the rule, in a series of circumstances the proof required to overcome the *animus domini* presumption has not been centred on a subjective status of the controller. Courts have instead considered sufficient for the defendant to give proof that the counter-party started exercising his/her power on the basis of a legal title.[131]

It can thus be surmised that the subjective requirement adds unnecessary operational unpredictability and technical inconsistencies to the acquisitive prescription regime in a way that is in contrast to the fundamental rationale supporting this doctrine as a facilitator of legal certainty in the system of property transactions. On the contrary, if *possessio ad usucapionem* is merely based on the exercise of exclusive powers of enjoyment of immovables, then, in the presence of all the other conditions set by the law, a successful acquisition by prescription would operate more easily. This would avoid time-consuming, and inevitably

[125] See Section II.2.

[126] Cf E. Carbone, *Animus. Elemento soggettivo e imputazione legale degli effetti* (Napoli: Jovene, 2010), 160.

[127] See S. Patti, n 45 above, 88-92.

[128] See Section II.2.a.

[129] See Section II.1.

[130] Eg, Corte di Cassazione 29 July 2004 no 14395, *Foro italiano, Repertorio 'Locazione'*, no 87 (2004).

[131] Eg, Corte di Cassazione 10 November 1998 no 11286, *Foro italiano, Repertorio 'Possesso'*, no 24 (1998); Corte di Cassazione 6 June 1990 no 5415, *Foro italiano, Repertorio 'Possesso'*, no 16 (1990).

uncertain, inquiries into the subjective status of who exercises factual control over goods.

2. Possession Requirements and Redistribution

Further arguments in favour of an objective notion of possession can be based, both from a systematic and policy perspective, upon the notion that redistribution issues may (or *should*) be of some relevance to the proper understanding of Italian rules of acquisitive prescription. Indeed, looking at the position of bad faith controllers such as squatters, this hermeneutic approach limits the possibility of having their position as possessor challenged on the ground of material demeanours allegedly incompatible with an inner intention to behave as formal right-holders, thus promoting successful acquisitions by prescription.

To better explain, it is useful to consider the substantial interrelation that links together the conditions of good (or bad) faith in possession with the element of *animus domini*. On a theoretical level, while the former requirement implies the ignorance of controlling the good to the detriment of a legitimate owner,[132] the latter refers to the intention to behave (and to be considered by third parties) as the exclusive right-holder.[133] The conceptual autonomy of these subjective situations is thence undisputed, so that *animus domini* is univocally considered compatible not only with the position of a good faith possessor, but also with that of a bad faith one (ie: s/he who, though aware of the legitimate right of a different owner, is nonetheless motivated to keep the object as her/his own).[134] At the same time, such clear cut dogmatic categorisations tend to blur when a subjective approach to possession is applied in concrete litigation involving acquisitive prescription conflicts, where inner states of mind are inevitably deduced from material, external facts, according to the abstract intention theory. In these contexts, behaviour commonly exhibited by long-term possessors in bad faith may end up being evaluated as factual elements capable of showing the absence of the subjective status of *animus domini*, qualifying the *de facto* controller as a mere detentor, who (at least implicitly) acknowledged the presence of a different right-holder.[135]

To better illustrate this point, let us picture a basic hypothetical situation. Imagine the case of Andrea, a homeless beggar, who moves into an uninhabited house at the outskirts of the city. As years pass without any reaction from the legitimate owner, the control of the good becomes more and more stable,

[132] See L. Mengoni, n 98 above, 320.

[133] Corte di Cassazione 23 July 2014 no 9671 n 60 above; Corte di Cassazione 9 September 2002 no 13082 n 60 above.

[134] See C.M. Bianca, n 10 above, 584.

[135] The risk of a possible overlap between an *animus*-based notion of possession and the concretization of the standard of good/bad faith derives from the fact that this latter element is undoubtedly defined by Art 1147 Civil Code in subjective terms: cf B. Troisi and C. Cicero, n 47 above, 126, 129.

materialized through various activities such as the enjoyment of the premises, the maintenance of the building and the care of the garden, the replacement of the locks and the fencing of the property borders. As an occupier with no formal title to the immovable, Andrea does not engage in bureaucratic acts, such as the performance of the various administrative and fiscal duties related to the property. Suppose now a subsequent litigation pending before an Italian court, filed by the formal owner (claiming back the house after three decades of complete absence) against Andrea (objecting on the basis of the elapse of a successful acquisitive prescription period).

In a similar case, though the presence of the *corpus* requirement appears hardly disputable (exclusive powers corresponding to those of the owner have been certainly exercised), a subjectivist approach to possession would most probably lead the judge to consider Andrea as a mere detentor, on the ground of a lack of *animus domini* inferable from the disregard of the rates and taxes pertaining to the immovable. Indeed, the non-fulfilment of this kind of burden has been frequently regarded in case law as a valid indicator of the inner recognition by the controller of the presence of a different right-holder of the good.[136]

As controversial as it may appear when transposed to the concrete outcome of our case-study, one must admit that this line of reasoning represents a rigid, but coherent application of a theoretical approach which includes *animus* among the constitutive elements of possession. At the same time, this conclusion shows that, if brought to its logic corollaries, the element of intention may end up depriving acquisitive prescription of potential and sensible practical applications.

Significantly, these concerns seem shared also by authoritative subjectivist theorists who have proposed to better qualify the position of the controller. In particular, it has been suggested to distinguish between breach of duties that represent essential contents of the property right (from which the absence of *animus domini* could legitimately be inferred), and the mere non-fulfilment of obligations that do not directly pertain to the private law substance of the right of ownership (which should not be taken into account in the assessment of the intention to possess).[137]

In contrast, the analysis conducted in this article leads to submit that the risks of practical outcomes such as those emphasised through our case-study could be more effectively avoided by changing the hermeneutic orientation, with the adoption of an objective understanding of the elements of possession and the abandonment of an intentional requirement that appears to lack a solid basis in the Italian legal system. This solution seems not only apt to remove uncertainties and, possibly, inconsistencies in the assessment of the possession

[136] See Corte di Cassazione 30 April 9530 no 2014, *Foro italiano, Repertorio 'Usucapione'*, no 24 (2014).

[137] R. Sacco and R. Caterina, n 11 above, 94.

requirement, but, if considered in light of the redistribution justifications of acquisitive prescription, it may also contribute to increasing the number of proprietary conflicts solved in favour of the actual use – and, possibly, the concrete need – of resources.[138]

VI. Conclusions

A functional theory of possession cannot realistically hope to assess which of the different ways of protecting factual control of goods is *per se* 'correct', but should instead confine itself to showing the advantages and disadvantages connected to each of the hermeneutic solutions abstractly available to the interpreter.[139]

Moving on from this methodological suggestion, the aim of this paper was to possibly shed some new light on the classical inquiry into the constitutive elements of possession. The cultural diatribe that originated with the juxtaposed views of Savigny and Jhering does not seem to have resulted, at least in Italy, in settled positions in the current academic landscape, with subjectivist and objectivist scholars still advocating their preferred interpretation relying on different literal, historical, comparative or systematic arguments.

The issue has been here considered under a normative approach, widening the scope of the analysis in order to evaluate which among the different theories better suits the rationales that support the application of acquisitive prescription – one of the most important juridical effects of possession. It is surmised that an objective interpretation of possession, deprived of the traditional element of *animus domini* and merely based on the physical control of a good, is not only more consistent with the Italian legislative provisions, but also more effective in supporting the goals generally attributed to acquisitive prescription in the legal system.

In particular, it can be surmised that by relaxing the requirements for a successful occurrence of *usucapione*, an objectivist approach to possession may also effectively preserve a concrete sphere of application for the doctrine. This is particularly clear in light of a social justice-oriented interpretation of acquisitive prescription, which could prevent the risk of it being (at least partially) supplanted in its practical relevance by other evolving legal principles proposed, primarily by academics, as ways of addressing redistributive issues in property law.

As an effective example, one may consider the cultural development of a

[138] See S. Stern, 'David Against Goliath: The Distributive Justification for the Adverse Possession Doctrine', in B. Hoops and E. Marais eds, n 116 above, who provides a series of case law proxies apt to prevent a confrontation between redistribution arguments and the rule of law.

[139] For a clear illustration, cf J. Gordley and U. Mattei, 'Protecting Possession' 44 *American Journal of Comparative Law*, 293, 334 (1996).

juridical notion of 'commons',[140] resources that intrinsically express utilities functional to the exercise of fundamental rights as well as to the free development of the individual, and that, irrespective of their formal holders (public or private legal entities), should be regulated through norms capable of guaranteeing their constant collective enjoyment.[141] Though it would be impossible to discuss the point in depth here, the potential functional equivalence between such innovative regulatory techniques and more traditional institutions and rules, such as those defining acquisitive prescription, has been already emphasised by several scholars,[142] and it has more recently found practical confirmation in some notable examples of jurisprudential argumentation.[143]

Revisiting old doctrines through a modern lens is an effective way to preserve their relevance in evolving legal systems. Adopting an objective notion of possession as a constitutive element of acquisitive prescription represents an effective step in that direction.

[140] Obviously departing from the social and economical insights provided by E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), 29.

[141] Among others, cf S. Rodotà, *Il terribile diritto. Studi sulla proprietà e i beni comuni* (Bologna: il Mulino, 3rd ed, 2013), 459; U. Mattei, 'Protecting the Commons: Water, Culture and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance' 112 *The South Atlantic Quarterly*, 366 (2013).

[142] See M.R. Marella, n 113 above, 70; A. Quarta, 'Towards an Access-Based Paradigm of Ownership. A Plea for Inclusion in Property Law', in B. Hoops et al eds, *Property Law Perspectives V* (The Hague: Eleven International Publishing, 2017), 202; F. Viglione, n 95 above, 477.

[143] A significant, recent, example is provided by the judgement issued by Tribunale amministrativo regionale Veneto-Venezia 8 March 2018 no 273, available at www.giustizia-amministrativa.it, which has declared unlawful the administrative refusal of a temporarily grant concerning the island of Poveglia (Venice) in favour of a no lucrative association of citizens aiming at retraining it from its state of abandonment. The justification of the opinion does not refer in any way to the fact that the members of the association have during time exercised factual control over the island, but rather focuses on the 'purposes of undisputable social and collective importance' implied in the activities aimed at administering its land as a 'common good'. For further details and case law examples, see A. Quarta and T. Ferrando, 'Italian Property Outlaws: From the Theory of the Commons to the *Praxis* of Occupation' 15 *Global Jurist*, 261 (2015).

Essays

The Allegation and Proof of Foreign Law in Spain After the New International Legal Cooperation Act

Alfonso Ortega Gimenez*

Abstract

The purpose of this paper is to explain the 'new' regime of allegation and proof of foreign law in the Spanish courts following the International Legal Cooperation in Civil Matters Act.[1] As foreign law has historically been considered by our case law as a 'procedural fact', the International Legal Cooperation Act comes to enshrine this system in Art 33.

I. Previous Considerations

The new *Ley de Cooperación Jurídica Internacional*[2] (International Legal Cooperation Act) (hereinafter LCJI) seeks to influence one of the most controversial aspects of the Spanish system of allegation and proof of foreign law. The Spanish system is characterized as a mixed system that combines the principle of accusation and evidence, that is, the party must prove in its application of accusation the foreign law that is requested to apply, but there is also the possibility that the court completes said proof, in case it is not sufficiently proven, using whatever means of research it deems necessary. To date, it has not been specified what has to be done in those cases in which foreign law could not be proved. In the forensic practice, two solutions had essentially been proposed, the dismissal of the claim or the application of the *lex fori*. Art 33 of the LCJI opts for the latter solution, which is the traditional one in our system and in the majority of systems of private international law of our neighboring countries. It is also the solution that best suits the constitutional case law, from which it follows that the dismissal of the claim would violate, in certain cases, the right to effective judicial protection.

It should be understood that the lack of proof of foreign law in a judicial process is an exceptional situation that will only happen when the parties fail to prove the foreign law, although the possibility of the court cooperating in the accreditation of said content should not be forgotten. In addition, specific systems in which special laws provide for the same or different solutions should be

* Professor of International Private Law, Miguel Hernández University.

[1] Ley 30 July 2015 no 29 de cooperación jurídica internacional en materia civil (Law of international legal cooperation in civil matters) BOE-A-2015-8564.

[2] BOE (Boletín Oficial del Estado) July 2015 no 182.

respected, as regards, for example, consumer protection regulations, as well as civil registration.

In addition, Art 33 of the LCJI clarifies the interpretation of the probative value of the evidence taken according to the criteria of sound judgment (*la sana crítica*) and determines the value of the expert reports on the subject.

Up until now, it was not legally specified what procedural consequences ensued from the impossibility of proving the foreign law by the interested parties. The doctrine and the forensic practice were divided between two possible solutions: the dismissal of the claim and the application of the so-called *lex fori* or domestic law. The doubt is now resolved: *lex fori* will apply (Art 33 of the LCJI). It should be understood, however, that the lack of proof of foreign law in judicial proceedings is quite exceptional and will only happen when the parties fail to prove the foreign law, without forgetting the possibility of the Court cooperating in the accreditation of said content.

Moreover, Art 33 merely establishes that the Spanish courts will determine the value of proof of the foreign law in accordance with the rules of healthy critical awareness (Art 33, para 2, of the LCJI), and that no report or opinion on foreign law will be binding for those courts (Art 33, para 4, of the LCJI).

The Spanish and Italian legal systems are very similar, perhaps because of the proximity of both countries and because both are inspired by Roman law. This similarity is further evidenced by the fact that both countries belong to the European Union, a fact that brings the two legal systems closer together due to the legal harmonization work carried out by the EU.

Currently, the Spanish courts deal with the application of foreign law to a specific case as a procedural fact. This is not a trivial matter, since this consideration entails a series of very important consequences at the moment of resolving a controversy. Accordingly, we must be clear about this legal concept, treating foreign law as a procedural fact, and the specific alternative that Spanish legislation offers, which strikes a more equitable balance between domestic and foreign law.

Events that are independent of the human will, to which the objective right attributes legal consequences, are considered procedural facts. This implies that, in court, the fact must be alleged and proven by the parties. Otherwise, the fact will not be taken into account by the court in its resolution of a given case. The consideration of the foreign law as a procedural fact entails a series of legal consequences that will be analyzed later.

In opposition to the legal treatment of the application of foreign law in the Spanish system, we bring up the system established in Italy where the application of foreign law is governed by the principle *iura novit curia*, that is, the Italian judge must know the foreign law that must apply, in addition to the most important jurisprudential sources of the controversy in question. For this reason, the foreign law is not considered a procedural fact but a real right. However, in

the Spanish system the principle of *iura novit curia* regarding foreign law has no application. Thus, the parties have to prove the foreign law. Although, both systems agree that a constitutional control of the foreign law must be legally present and applied to the concrete case.[3]

In the Italian law, we find the conflict rule applicable to the case in legge 31 May 1995 no 218 – Reforming the Italian system of private international law, and to be more specific in Art 14. In its drafting, the system of allegation and proof of foreign law has the same mechanisms established in Art 33 of the LCJI, even the precept is very similar, that is, 1) it establishes that the review must be done *ex officio*, 2) that the judge can use the necessary means to verify it, 3) that the parties must collaborate in your contribution, and 4) finally, if the foreign law is not determined, the Italian law will be applied. For this reason, the analysis made of the Spanish legal system can serve to help the understanding of the Italian legal system regarding the subject at hand.

In practice, this means that the foreign law is applied according to its own criteria of interpretation and application over time. It follows that the foreign law operates in the Italian legal system according to the rules of private international law.[4] This must be applied by the Italian judge making use of all the interpretation tools set by the foreign law, without thereby implying an obligation for the judge to acquire jurisprudential or doctrinal sources that corroborate one or another of the possible readings of the normative text.

The Italian judge must judge as the foreign judge would do, deeply understanding the purpose of the norm. As Filippo Corbetta[5] expresses it, the judge,

> 'applying the general interpretative canons existing in that system, and in particular the hermeneutical criteria, rules on the hierarchy of sources and on the effectiveness of the law over time dictated by foreign legislation'.

An example of this is found in the judgement of Corte di Cassazione 26 February 2002 no 2791, in which a resolution on an international food issue is invoked as a violation of law.

It also imposes the impossibility of treating foreign law as a procedural fact since it is proclaimed as an obligation for the judge to know the foreign law, thus proclaiming the *ex officio* application of foreign law as a fundamental element of the Italian legal system. In Italian private international law, the rule outside the forum is the one that solves the controversy.

[3] See G. Zarra, 'Constitutionality Review of Foreign Law: The Relevance of Substantive Concerns' *Rivista di diritto internazionale privato e processuale*, IV, 940 (2017).

[4] See S.M. Carbone, 'La conoscenza del diritto straniero e il giudice straniero' *Il diritto del commercio internazionale*, 193 (2009).

[5] F. Corbetta, 'La Cassazione e l'interpretazione del diritto straniero richiamato dalle norme di conflitto' *Il corriere giuridico*, III, 396 (2003).

In addition to the obligation to know the foreign law, the judge is also obliged to evaluate and know the circumstances that justify its application. This is essential to the correct functioning of the law in accordance with the intent of the lawgiver. The judge thus determines the correct legal basis for his or her decision, including matters determined on the basis of foreign law.

Once the judge has decided autonomously to introduce the foreign law into the legal process, he or she must communicate it to the parties so as not to violate their right of defense or otherwise prejudice their ability to assert their legal rights. On the other hand, the parties can also collaborate with the judge and help him to know the foreign law which must apply. In addition to the means available to the judge, as in Spain, there are the expert opinions, which strive to interpret the foreign law as interpreted by the judge of the forum to which the law belongs.

Given all this, there is an exception in which the foreign right does not have to be applied. More specifically, when there is reciprocity between the foreign law and the domestic law, that is, when the right is equal or similar between the two legal systems, the foreign right does not have to applied as long as there is no discrimination due to the application of Italian law.

Finally, we must conclude this introduction by saying that the Italian judge does not always apply the foreign law. He or she finds a limit in Art 16 of the law, which establishes the public order as a limit to the application of foreign law, that is, if the law as a foreign policy is contrary to public order and the basic principles of the Italian legal system, it cannot be applied by the Italian judge.

II. What Is Foreign Law?

Foreign law is any norm outside the forum from which we observe. Within such a definition, it is of crucial importance to delimit the consideration of foreign law. The possibility of considering foreign law as law in itself, that is to say, as a legal system applicable in a State, has been discussed doctrinally. For example, parts of the US and Italian doctrine do not consider foreign law as a law in itself applicable in these countries, but rather, the application of that right has to be incorporated into their national legal system, since American and Italian judges can only apply their national legislation. The foreign law is not, in other words, self-executing. Another part of the doctrine is set in the opposite direction, that is, they consider foreign law as their own. The factual nature of foreign law has also been discussed, considering the fact that, to be applicable in the process, foreign law must be alleged.

The consideration of foreign law as a procedural fact has been the traditional position in the vast majority of legal systems in the world. Since the 19th century, that position argues that foreign law is a mere 'procedural fact' and is not 'law'. As Horatia Muir-Watt explains, foreign law cannot be considered as 'law', since if that were the case, the 'sovereign mandates' issued by another country would

be applied in a different country, which would entail an intolerable damage to the state sovereignty of the country whose courts are dealing with the case.[6] 1) Since foreign law is a 'procedural fact', it must be proved by the interested parties. 2) 'Foreign' law is 'foreign'. That is why it cannot be treated as 'equal' to the law of the country whose courts are hearing the matter. As a consequence, the principle of *iura novit curia* should only apply to national law and never to foreign law. 3) In most cases, the application of foreign law benefits exclusively 'particular interests' and not 'general interests', which is why the interested parties must prove the foreign law. If the parties do not prove the foreign law, the domestic law will apply, which may be more harmful to their interests.

This doctrinal opinion[7] derives from Common Law.[8] And, as is customary in Spanish Law, such a primitive doctrine was adopted by the Supreme Court (*Tribunal Supremo*) (SSTS 'judgments' 21 June 1864,[9] 13 January 1885,[10] 26 May 1887[11] and 7 November 1896)[12] on the basis of arguments related to intrusion against Spanish sovereignty, because that foreign law aims to solve problems related to the sovereignty of the States from which such legislative mandates emanate.[13] It is admitted that occasionally this law must be applied, but it is not convenient to do so in an intrusive way because it would attack that foreign sovereignty. This then is the reason why such law is considered a procedural fact, and as a procedural fact it is up to the parties to allege and prove the law. The principle *iura novit curia* does not apply because it only reaches domestic law. The court does not bear the cost of proof and if the parties do not allege or prove the foreign law, it cannot be applied.

The Spanish case-law doctrine is based on three propositions:

Firstly, foreign law is not treated as law, as this would be an attack against Spanish sovereignty, since it would mean accepting in Spain 'mandates of foreign sovereigns'. Therefore, for the Supreme Court (TS), foreign law is treated as a 'procedural fact'. As such, foreign law must be invoked and proved 'at the request of a party' (among others, SSTS of 21 June 1864, 20 March 1877,[14] 13 January

[6] H. Muir Watt, *Loi étrangère* (Paris: Dalloz Droit international, 1998), II, 2.

[7] See A. Muñoz Aranguren, 'Bodum USA, Inc. v La Cafetière, Inc.' *Revista para el Análisis del Derecho*, II, 1-39 (2012).

[8] *Mostyn* v *Fabregas* (1773) 20 St Tr 82, [1775] 1 Copp 161, [1775] 98 ER 1021 and *Church* v *Hubbart*, 6 US (2 Cranch) 187, 1804.

[9] Tribunal Supremo 21 June 1864, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[10] Tribunal Supremo 13 January 1885, ibid.

[11] Tribunal Supremo 26 May 1887, ibid.

[12] Tribunal Supremo 7 November 1896, ibid.

[13] See A.L. Calvo Caravaca and J. Carrascosa González, 'Aplicación del Derecho extranjero y la nueva Ley de Enjuiciamiento Civil' *Anales de Derecho*, XVII, 285, 286 (1999); J.C. Fernández Rozas, 'Artículo 12, apartado 6 del Código Civil: Aplicación judicial y extrajudicial del Derecho extranjero', in M. Albaladejo and S. Díaz eds, *Comentarios al Código Civil y Compilaciones forales* (Madrid: Edersa, 1995), II, 994.

[14] Tribunal Supremo 20 March 1877, available at https://tinyurl.com/y7x5y578 (last visited

1885, 26 May 1887, 28 January 1896, 7 November 1896, 19 November 1904,[15] 1 February 1934,[16] 9 January 1936,[17] 17 July 1937,[18] 29 September 1956,[19] 16 December 1960,[20] 30 June 1962,[21] 6 June 1969[22] or 5 November 1971).[23] [24]

Secondly, the judge has the power, but not the obligation, to 'intervene' in the proof of foreign law. But great care must be taken: never did the TS indicate when the judge 'may intervene' in the proof of foreign law, so it was discretionary ('technical discretion' was the expression used), but the truth is that, rather than discretionary, the intervention of the court to that effect was truly arbitrary (among others, SSTS 26 May 1887, 13 January 1885, 30 January 1930, 21 February 1935, 16 June 1935, 16 October 1940, or of 14 December 1940).

Thirdly, if foreign law is not proved by the interested party, the Spanish court should rule in accordance with Spanish substantive Law.

The TS position changed after the turning point established by the Constitutional Court (*Tribunal Constitucional*, hereinafter TC) from the year 2000 with its new doctrine[25] regarding the violation of the right to effective judicial protection and the consideration of the proof of foreign law as 'law' in itself, not as a 'fact', although the law of the forum should be applied, in a subsidiary way, when foreign law cannot be proved.

This doctrine suffered a back-and-forth process due to the position taken by the TS in the SSTS of May 22,[26] 2001 and of May 25,[27] 2001 in the *Sala de lo Social* (Social Chamber), whose origin is in the STS of February 19, 1990,[28] also of the *Sala de lo Social*, which held that there was another result of the non-allegation of foreign law in the corresponding proceedings: the dismissal of the claim.

The mentioned position originated in the *Sala de lo Social* of the TS, stating that the dismissal occurs because the one who has the burden of proving the

27 December 2018).

[15] Tribunal Supremo 19 November 1904, ibid.

[16] Tribunal Supremo 1 February 1934, ibid.

[17] Tribunal Supremo 9 January 1936, ibid.

[18] Tribunal Supremo 17 July 1937, ibid.

[19] Tribunal Supremo 29 September 1956, ibid.

[20] Tribunal Supremo 16 December 1960, ibid.

[21] Tribunal Supremo 30 June 1962, ibid.

[22] Tribunal Supremo 6 June 1969, ibid.

[23] Tribunal Supremo 5 November 1971, ibid.

[24] F.J. Garcimartín Alférez, 'Nota a STS 17 diciembre 1991' *REDI*, XLIV, 239-243 (1992).

[25] Tribunal Constitucional 8 February 2000 no 10, available at https://tinyurl.com/y9dtbdxg (last visited 27 December 2018). Tribunal Constitucional, sentencia 26 July 2001 no 155, available at https://tinyurl.com/y9vd5atq (last visited 27 December 2018) and Tribunal Constitucional, Sentencia 11 February 2002 no 33, available at https://tinyurl.com/y8zyh3xc (last visited 27 December 2018).

[26] Tribunal Supremo 22 May 2001, available https://tinyurl.com/y7x5y578 (last visited 27 December 2018) (Recurso de casación para unificación de doctrina 2507/2000.lo Social).

[27] Tribunal Supremo 25 January 1999, ibid.

[28] Tribunal Supremo 19 February 1990, ibid.

legal norm must provide a basis for its claim, according to the conflict rule, and has not done so, for which that party must withstand the consequences of lack of proof. The claim would also be dismissed when the foreign rule which must be alleged and proved is not alleged or proved, thus provoking the application of the law of the forum when it is more beneficial. As we have seen, it violates the doctrine that the TC was defending. This case-law criterion was eliminated by STS 1056/2005,[29] which provoked the retroactivity of the doctrine dictated by the TC.[30]

Art 33 of the LCJI complements Arts 281 and 282 of the LEC[31] (Civil Procedural Act, *Ley de Enjuiciamiento Civil*) insofar as it delegates in the latter the means of proof of foreign law. It is the legal corroboration of the doctrine maintained by the Supreme Court and the Constitutional Court, since it establishes as *ultima ratio* the application of Spanish Law when the contents of foreign law cannot be proved, although the proof of foreign law is a priority over the subsidiary application of the Spanish Law, and the regime of proof of foreign law is subject to the same rules as any other evidence. It strengthens the thesis of the proof at the request of a party.

III. Proof of Foreign Law

We must remember that foreign law is a 'procedural fact' with special characteristics, but, in any case, it is a fact and, as such, must be alleged and proved by the parties.

Art 33, para 1, of the LCJI determines that the proof of the content and validity of foreign law will be subject to the rules of the Civil Procedure Act[32] (hereinafter LEC) and other provisions on the subject. This statement must be understood in two ways.

Firstly, the regulation of the LEC in relation to the allegation and proof of foreign law is a regulation 'of general lines'. That is, it can be said that Art 281, para 2, of the LEC contains a system of 'open texture' in relation to the proof of foreign law.[33] This means that the Spanish system does not enforce an exhaustive and detailed regulation of the proof of foreign law in the LEC. The Spanish system could have determined what the means of proof of foreign law are, as well as the procedural timing relative to the application of such law. The Spanish system could have rigidly established the obligation of the court and/or parties to prove foreign law in all or some cases and it did not. Another way was

[29] Tribunal Supremo 4 November 2004 no 1056, ibid.

[30] See M.V. Cuartero Rubio, 'Prueba del derecho extranjero y tutela judicial efectiva' *Derecho Privado y Constitución*, XIV, 21 (2000).

[31] Ley 7 January 2000 no 1 De Enjuiciamiento Civil (Of Civil Lawying) BOE-A-2000-323.

[32] BOE 8 January 2000 no 7.

[33] See F.J. Garcimartín Alférez, n 24 above, 239-243.

established: to provide the 'guidelines' of the legal regime of proof of foreign law, which intentionally left to the courts the task of elaborating answers to questions not regulated in the LEC. For this reason, the Spanish regulation on the proof of foreign law is a combination of 'basic legal regulation' and 'case-law development regulation'. This option in favor of a 'flexible system' should be valued very positively. In effect, this allows the traditional rigidity of the rules of private international law to give way to an 'intelligent' legal regime, capable of adapting itself to international private situations in the changing context of twenty-first century globalization.[34] Rigid systems and prescriptive regulations governing the proof of foreign law are inconvenient, although certain authors, such as Álvarez González, defend such regulations in the name of 'legal certainty'.[35]

This flexible system has two variables: 1) the type of referral made by the conflict rule. There are conflict rules that require an *ex officio* accreditation of foreign law, such as the rules of materially oriented conflicts. Other rules of conflict provide judicial protection to the claimant provided that he proves the foreign law. In these cases, it is the claimant who decides if he wants a judicial protection based on such law. 2) There is also the attitude observed by the parties at the time of the proof of foreign law. There are cases in which the parties can perfectly allege foreign law. In other occasions, the parties cannot allege it, so they will need legal aid. The court must cooperate in this proof because conflict rules are mandatory, thus preventing the parties from playing with the applicable law.

This duality allows for cases in which the proof is applied either at the request of a party or *ex officio*, because Art 33 of the LCJI does not resolve this matter, although the three (or four) guiding principles of the proof of foreign law (mandatory rules, operative nature of the norm, open texture system and flexible regime) allow for the solution of different assumptions in practice. The duality is that which is inferred from Art 281 LEC, since the general rule is evidence at the request of a party, and the exception is the *ex officio* application by the court, when it widely knows the applicable law. This can be seen when a court has heard a case where foreign law should be applied, and subsequently, the same court must hear a case whose law related to the former. Here we find a situation in which the court knew in advance the applicable law and, therefore, the principle *iura novit curia* is applicable to it.

Getting down to details, the LEC merely states that 1) foreign law must be proved (but it does not indicate whether foreign law must be proved 'action by action', that is, each time some foreign law is applicable). 2) The content and validity of foreign law must be proved (nothing is said about 'other questions'

[34] See J. Carrascosa González, *Desarrollo judicial y Derecho Internacional Privado* (Granada: Comares, 2004), 205-211.

[35] See S. Álvarez González, 'Aplicación judicial del Derecho extranjero: la desconcertante práctica judicial, los estériles esfuerzos doctrinales y la necesaria reforma legislativa' *Diario La Ley*, no 6287, 1, 1-5 (2004).

related to foreign law whose proof had been required by the traditional case law of the TS, such as 'applicability to the case of foreign law', its 'interpretation', etc). 3) As a general rule, the proof of foreign law is carried out 'at the request of a party' (Art 282 LEC, all proof shall be made at the request of a party, not only the proof of 'facts'), but it is true that 'exceptions' to that rule are possible (Art 281, para 2, LEC, although it is also true that the LEC does not indicate 'in which cases the court may and/or must intervene in the proof of foreign law'). 4) 'Foreign law' is something completely different from 'procedural facts': procedural facts are subject to certain rules of proof that are not applicable *tout court* to foreign law.

Following the reasons given above, I considered that 'facts' must be alleged to the action in terms of Art 399 LEC. But foreign law is not a 'procedural fact': Art 281, para 2, LEC clearly separates facts and foreign law. This distinction involves several consequences:

1) Foreign law should not be alleged by the parties as if it were only another 'procedural fact'. The application of foreign law to a specific case does not depend on whether the parties allege it or not: it derives directly from the Spanish conflict rule. Foreign law in a specific case does neither depend nor can depend on the parties alleging it or not. Foreign law is applied to a case because it is so ordered by the Spanish conflict rule. Therefore, no party has to 'allege' foreign law to the action. Indeed, foreign law 'is already in the action' immediately after the Spanish conflict rule orders to apply a foreign legal system. This is because, as stated in Art 12, para 6, Civil Code,[36] conflict rules are 'imperative' and, consequently, the application of foreign law designated by said rule is not disposable by the parties. Foreign law 'is in the action' because this is indicated by the Spanish conflict rule, which is an imperative norm. Consequently, if a party or both parties do not allege the foreign law, it neither disappears nor ceases existing in the proceedings, because it still is the law applicable to the case, whether or not the parties want it, since the Spanish conflict rule so provides.

2) If the party does not allege a 'fact', that fact is not taken into account by the court to rule on the case; the fact 'disappears from the proceedings', the fact does not exist (*quod non est actis non est in mundo*). But if a party does not allege the foreign law, that law does not 'disappear' from the proceedings, because it remains the law applicable to the case, whether the parties want it or not, whether the parties say it or not, whether the parties allege it or not.

3) Foreign law is not a notorious fact, which would exempt it from proof, and neither is it an admitted fact, that is, not disputed by the parties in the cases governed by the operative principle (Art 281, para 3, LEC). This provision does not comprise foreign law, but only procedural acts in the strict sense. And the foreign law does not have that character, constituting a kind of *tertium genus*,

[36] BOE 25 July 1889 no 206 Real Decreto 24 July 1889 por el que se publica el Código Civil (royal decree of July 24 1889 why the Civil Code is published) BOE-1889-4763.

since, without being a procedural fact, it will have to be proved, generally by the parties. Since it is law, it is not possible to require its knowledge by the judicial body, since the presumption *iura novit curia* is not applicable in this case.

4) Legal foundation of the claims of the parties is always 'objective'. There is a correct legal foundation for each claim. It must be that basis and not a different one. Therefore, if an assumption is governed by foreign law, the parties must base their claims on such foreign law, and if they do not do so but, on the contrary, base their claims on Spanish Law, the claim must be dismissed. And it must be dismissed because in such a case, the legal basis of the claim of the parties is incorrect. The court should not do the counsels' work as they are professionals in the technical defense of the parties. If the legal basis is incorrect, the claim, or the statement of defense, is dismissed: the legal claim is rejected because it is not well founded.

In order to arrive at this understanding, it is has been necessary to get around the centenary case-law of the TS that maintained the following in relation to the allegation of foreign law: a) foreign law must always be alleged by the interested parties; b) the lack of allegation of foreign law by the parties leads to the 'non-application' of foreign law to the case; c) the correct procedural time for the allegation of foreign law is the court of first instance and not the appeal or cassation court; d) foreign law must be alleged in the phases of the action suitable for the provision of 'facts': nowadays, in the claim and the statement of defense.

Secondly, there are many omissions in the LEC on the proof of foreign law, which the LCJI has hardly solved.

IV. Object of Proof of Foreign Law

We turn back to Art 33, para 1, of the LCJI where it says that the 'content and validity' must be proved, as established in Art 281, para 2, LEC.

By 'foreign law', we must understand the entire foreign legal system, including all types of legal norms which integrate it and which are applicable to the specific case: written rules, custom and other rules that are substantive law as case law or general principles.

The following aspects must be proved: a) the content of foreign law: the wording of the foreign rules; b) the validity and existence of foreign law, which is important in relation to newly created countries and in cases of possible contradiction between the laws of a particular country and the constitution of that country; c) the specific interpretation of the rules of foreign law, this includes, where appropriate, proof of foreign case law which applies and interprets foreign law; and d) the applicability of foreign law to the specific case. As a result, if foreign law is proved in detail, such foreign law will not give rise to 'the least reasonable doubt in the Spanish courts', as the Supreme Court stated (SSTS of

11 May 1989,[37] 25 January 1999 and 17 July 2001).[38]

In the United States, we find more discrepancies in this sense: we find cases in which it is sufficient to allege the validity and the content of the law, besides an opinion of an expert.[39] On the contrary, the Court of Appeals for the Second Circuit[40] rejected the use of an opinion prepared by a foreign lawyer on the interpretation of the applicable foreign norm as a means of proof-specifically, of Spanish Law – because of the lack of references in his opinion to the Spanish interpretative case Law on that norm, which prevented the US court from having an accurate picture of the way in which it was interpreted by the Spanish judges.

A strict view was maintained regarding the proof, of which it was only necessary to prove 'the content and the validity' based on the rule *inclusius unius exclusio alterius*: 'the inclusion of one excludes the other'. Following this view could give rise to inadequate results by the Spanish courts as they fail to know the interpretative criteria that the foreign courts apply. The court of the forum must rule as a foreign court would do.[41] From this latter interpretation, we get several ideas: a) in principle, all foreign rules are applicable. The referral made by the Spanish conflict rule to foreign law is complete and not only the rules of domestic law are included, but the special rules of foreign law by extension are also included. But the Spanish judge will not apply the Spanish conflict rule unless the return referral and the second-degree referral are allowed. b) Any foreign source from which laws emanate, including legal institutions of foreign origin, must be applied. c) Foreign law must be applied with the interpretation given by its courts. d) The rules of public or private law will be applied whenever they have an effect on individuals.

V. Means of Proof

If we consider foreign law as a procedural fact, it is necessary to use the means of proof that the LEC provides, since procedural issues of this type consider the procedural law of the forum which hears the case.

Art 281, para 2, LEC refers to the proof of foreign law. However, foreign law, rather than being 'proved' must be 'accredited'.[42] Proof is an activity designed for 'procedural events'. Foreign law is not a mere 'procedural fact'. Therefore, its accreditation does not strictly follow the rules on rigorous proof of

[37] Tribunal Supremo 11 May 1989, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[38] Tribunal Supremo 17 July 2001, ibid.

[39] *Universe Sales co.* v *Silver Castel*, LTD, 182 F.3d 1036 (9th Cir. 1999) and *Curely* v *Amr Corp*, 153 F.3d 5, 11 (2nd Cir. 1998).

[40] *Carlisle Ventures* v *Banco Espanol de Credito*, 176 F.3d 601, 608 (2nd Cir. 1999).

[41] Tribunal Supremo 24 June 2010 no 390, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[42] STS 157/1997.

procedural facts.

The system of accreditation of foreign law is a flexible system, based on the freedom of means of evidence or 'free evidence'.[43] Thus, the accreditation of foreign law is facilitated and its correct application is enhanced.

There is no closed list of appropriate means to accredit foreign law. The legislator did not intend to formulate that 'closed list', precisely to facilitate the accreditation of foreign law.

Therefore, all means, instruments, and technical tools, by their very nature, are suitable to prove the content of foreign law, whether or not they are means of evidence included in those admitted by the LEC (Art 299, para 3, LEC, by analogy). Examples: the examination or opinion of an 'expert in foreign law' (*Expert Witness*) is appropriate to accredit foreign law, although Art 299 LEC does not include it as a 'means of evidence'.

In the case of authentic evidentiary means, such as expert or documentary evidence, they do not need to strictly conform to the requirements that the LEC establishes to such means, as the TS allows some flexibility.[44]

a) Proof through public documents. The means of evidence most commonly used by individuals to prove foreign law is proof by means of public documents (Art 317 LEC). For example, certificates issued by the General Subdirectorate of International Legal Cooperation of the Spanish Ministry of Justice on the content of foreign law are public documents. These certificates can only be requested by the courts, not by the parties. Certificates issued by foreign diplomatic or consular officials accredited in Spain are also public documents and they must be legalized and translated into Spanish as the official language (Arts 323, para 3, and 144 LEC), as well as certificates issued by Spanish diplomatic or consular officials accredited in the state whose legal system is sought to be proved.

b) Photocopies. In Spanish courts, it is common for the parties to provide 'simple photocopies of various isolated rules'.[45] Such documents are not public documents. In addition, such photocopies do not offer the possibility to prove the foreign law with certainty, and for that reason they should not be admitted to that effect.

c) Private documents. Other non-public documents, such as private collections

[43] Audiencia Provincial de Huesca, Sentencia December 2005 no 297, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[44] STA 390/2010. In this sense, see A. Ortega Giménez and P. Heredia Ortiz, 'Cuestiones prácticas acerca del régimen de alegación y prueba del derecho extranjero en España. ¿Por qué debe probarse, qué debe probarse y cómo debe probarse el derecho extranjero en España?' *Revista Economist & Jurist*, CLXVIII, 80-85, 80 (2013); A. Ortega Giménez, 'Aplicación del derecho extranjero por los tribunales españoles para conocer de un supuesto de resolución unilateral de un contrato de agencia comercial internacional. Comentario a la SAP Madrid núm. 17/2013, de 18 de enero' *Revista Boliviana del Derecho*, XVIII, 514-523, 514 (2014).

[45] Audiencia Provincial de Tenerife 13 April 2004 no 132; Audiencia Provincial de Alicante 12 May 2004 no 265; Audiencia Provincial de Baleares 26 April 2005 no 171, all available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

of laws or the doctrinal works of foreign authors have a greater probative value than 'simple photocopies'. Although for years the TS case law has been reluctant to admit these documents to prove foreign law, there is no reason to eliminate them radically as 'means of accrediting foreign law'. It will be necessary to decide in each specific case whether a particular private document, such as an authorized foreign doctrinal text, may serve to accredit foreign law 'with certainty'.

d) Expert evidence. It is also possible to prove foreign law through 'expert evidence' exclusively (Art 335 of the LEC). Such expert opinion may consist of a report requested by the parties drawn up by 'experts in foreign law'. It is not necessary that such 'experts' be subjects of the foreign nationality of the country whose law is sought to be proved. However, the so-called 'party's report', a report drafted by legal experts at the request of one party, is not a permissible means of evidence, as the expert 'takes sides' in favor of the specific claims of that party.[46]

e) Expert Witness. As has been already said in relation to the 3 March 1997 STS,[47] foreign law, rather than needing to be 'proved', must be 'accredited'. This entails that 'means of accrediting foreign law' other than, technically speaking, 'means of evidence' admitted as such in the procedural laws, may be used. For this reason, the examination of 'expert witnesses in foreign law' (*Expert Witness*), a mechanism widely used in other countries, but little used until now in Spain, can be accepted as a means of accreditation of the foreign law. According to the TS case law, two legal consultants with expert's knowledge in foreign law of the country of origin are needed (SSTS of 28 October 1968, and of 3 February 1975, although the one of 9 November 1984 held that the opinions of those legal consultants are not binding).

f) 'Accepted facts' are not operative. The proof of foreign law cannot be accepted through the 'doctrine of accepted facts'. In general, as is well known, in civil proceedings, the facts admitted by both parties do not need to be proved. However, it is not permissible for the parties to 'agree' that foreign law does not need to be proved, so that the content of foreign law is fixed 'by agreement between the parties'. Art 281, para 3, LEC only applies to 'facts', not to 'foreign law'.

The general regime established by the TS admits that foreign law must be proved through 'public documents' and, moreover, through 'Expert evidence', a joint report, legalized and translated, carried out by two legal experts of the foreign country whose law must be proved (among others, SSTS of 13 January 1885, 19 November 1904, 25 February 1926; of 30 March 1928, 12 December 1935, 6 December 1961, 29 September 1961, 30 June 1962, 28 October 1968,[48] 6 June

[46] Audiencia Provincial de Alicante 28 April 2005 no 154, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[47] Tribunal Supremo 3 March 1997, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[48] Tribunal Supremo 28 October 1968, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

1969, 5 November 1971, 12 March 1973,[49] 3 February 1975,[50] 12 November 1976,[51] 27 April 1978,[52] 9 November 1984[53] and 23 October 1992).[54] Now, this case law must be reviewed very deeply, since at the present time, and after the entry into force of the LEC, it can be affirmed that a) 'cumulative proof' of foreign law by documentary evidence and expert evidence is not required. b) Proof of foreign law may be admitted by public and private documents, or by other means of evidence, such as the examination of an *Expert Witness*, provided that such means permit the 'foreign law' to be proved 'with certainty'. We must also point out that Art 33, para 4, LCJI indicates that no opinion will be binding on international judicial bodies, as had already been indicated in case law.

The solution that must be provided by the case-law process should limit the evidence to the mere knowledge of the case by the judge with respect to the validity, content, and interpretation of foreign law.

Art 33, para 2, LCJI determines that the courts will determine the probative value of the evidence taken in accordance with the Laws of 'sound judgment'. This precept highlights an advance regarding the hard line that represents the case law, providing a reason why the judge will be free to verify the accreditation of the foreign law, without needing to demand all means that the TS requests, although it is possible that the judge asks for even more evidence if he is not convinced.

VI. The Sound Judgment

The 'sound judgment' allows us to adjust to the 'changing local and temporal circumstances and to the particularities of the concrete case'. As reiterated case law has established, 'sound judgment' is not encompassed by legal rules nor is it defined in any normative text, hence its adaptability. It is often identified with the maxims of experience which, as STEIN[55] points out,

> 'are definitions or hypothetical judgments of general content, detached from the concrete facts that are judged in the proceedings, but which are independent of the particular cases from which they have been deduced and which, above those cases, seek to be valid for new ones'.[56]

Case law has offered a plurality of notions 'but ultimately links them to logical

[49] Tribunal Supremo 12 March 1973, ibid.
[50] Tribunal Supremo 3 February 1975, ibid.
[51] Tribunal Supremo 12 November 1976, ibid.
[52] Tribunal Supremo 27 April 1978, ibid.
[53] Tribunal Supremo 9 November 1984, ibid.
[54] Tribunal Supremo 23 October 1992, ibid.
[55] See F. Stein, *El Conocimiento Privado del Juez* (Bogotá: Editorial Temis, 1999), 21.
[56] See X. Abel Lluch, *Valoración de los medios de prueba en el proceso civil* (Madrid: La Ley, 2014), 4.

principles, or to rules born of experience',[57] Such principles or rules constitute 'the path of human discourse that must be followed to value(,) without voluntarism or arbitrariness(,) the data provided by evidence'.[58]

The 'sound judgment' is a system of motivated free valuation. The free valuation of evidence should not be confused with judicial discretion, since, as has rightly been said, 'the principle of free belief has freed the judge from the rules of legal proof, but has not dissociated him from the rules of reason'. A free valuation must be a reasoned valuation, and the judge must explain how and why he gives credibility to the testimony, the expert or the party, in observance of the duty to motivate judicial decisions (Art 120, para 3, Spanish Constitution,[59] and Art 218 LEC). The rules of healthy critical awareness constitute the record that rationalizes judicial discretion in the valuation of testimony. It has been said with precision that

> 'in contrast to other legal systems in which, as a reaction to the legal evidence, the accent is placed on the freedom of the judge, the Spanish system puts the emphasis on the rationality that must be at the base of the valuation'.

This rationality 'necessarily demands that the decision be explained and subject, in turn, to the criticism of a higher court' and also demands the 'primacy of factual assessment in the motivation of the judicial decision', because judicial discretion is only prevented by the correct formation of the factual assessment.[60]

The 'sound judgment' supposes an approach of the valuation of evidence from the perspective of the means and not of the end. It has been rightly said that 'sound judgment' is a means; free belief is an end or an outcome'. Perhaps the success and persistence of the centenarian expression of healthy critical awareness consists in having displaced the notion of probative value from the perspective of the result to that of the means, because with it the motivational instrument is pointed out and emphasized.

So what do the rules of healthy critical awareness consist in? Because having acted in the indicated way means that the concept has not been delimited and, with that, that valuation is: a) not subject to criteria of rationality; b) finally, not subject to the control of a higher instance. The expression of valuation in conscience of the evidence, joint valuation of the evidence, valuation of the expert evidence in agreement with the other evidence taken, and others of similar type, are not sufficient to comply with the right of the parties to a judicial decision

[57] Audiencia Provincial de Madrid 28 November 2006 no 681, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[58] Audiencia Provincial de Guipúzcoa 15 May 2006 no 147, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[59] BOE 29 December 1978 no 311 Constitución Española de 1978 Spanish Constitution of 1978) boe-a-1978-31229.

[60] See B. Barrios González, 'Teoría de la sana crítica', available at https://tinyurl.com/yb2ykdwc (last visited 27 December 2018), 1-53, 44-46 (2006).

well founded and do not make it possible to review the decision by the corresponding higher body, since the latter can evaluate the irrationality of the argument when it is explicit, but such valuation is impossible in cases where terms of pure generality have been used.

VII. Consequences of Non-Allegation or Proof of Foreign Law

It is common enough that one of the parties neither can allege nor prove foreign law in the case presented. The LEC does not offer solutions to such situations, so both doctrine and case law have established different alternatives to solve the question. Before the enactment of the LCJI, these have been the most minority theses, but the following three have been the most argued:

a) Application *ex officio* of foreign law: it has been defended by several authors[61] that foreign law must be applied *ex officio* due to the imperative nature of the Spanish conflict rules provided by Art 12.6 of the Civil Code,[62] but such an argument is not enough because the Spanish system of allegation and proof of foreign law is designed so that the burden of proof falls on the parties according to Art 282 LEC, which applies to Art 281, para 2, LEC when it is determined that the court can use any means of evidence necessary for its application. Although explicitly stated as 'the burden of proof', there may be a broad interpretation, which may be extended to the allegation of law. In this way, we can think that the court does the work of the parties by correcting their mistakes. Such a thesis should not be applied because it goes against the principle of consistency of the judgment, the operative principle, and that of party disposition.

b) Dismissal of the claim: it is one of the most defended theses. If a dispute is to be governed by foreign law, and one party alleges on the basis of Spanish Law, such party should have its claims dismissed. Arguments in favor are based on the impossibility of an application *ex officio* of foreign law, but which also forbids to directly apply Spanish Law, in addition to the fact that the court has no obligation to apply foreign law because such an obligation falls on the parties. In addition, the court must not do the work that has been incorrectly done by the counsel of a party, or even by the counsels of the two parties, who try to frame a case through the application of Spanish Law when foreign law should be applied. It reinforces the legal certainty, because the case will not be solved with another law except the one indicated in the norm. Justice is not denied, so it does not amount to a *non liquet*, and the principle of effective judicial protection is not violated since the claim has been valued as such and a response to the claim requested by the corresponding party has been given. It also produces a limited

[61] See S. Álvarez González, 'La aplicación judicial del Derecho extranjero bajo la lupa constitucional' *REDI*, I, 205, 205-223 (2002); B. Barrios González, n 60 above, 483-503.

[62] See J.C. Fernández Rozas, n 13 above, 973-1082.

effect of '*res judicata*' because once dismissed – without entering into a dispute on the merits of the case – the party whose claim has been dismissed can file its claim again arguing with a different cause of action.

Following the enactment of the LCJI, Art 33, para 3, provides that, exceptionally, Spanish substantive Law will apply when foreign law has not been proved. Therefore, this latter thesis has been legally recognized. It argues that Spanish substantive Law should be applied when there is a lack of allegation or proof of foreign law, thus avoiding the denial of justice and infringement of Art 24 CE. In this way, it enshrines foreign law as a 'procedural fact', so if it is not alleged or proved, it disappears from the proceedings but, as we have already explained, it is not a mere procedural fact. Apart from that, it has particularities that make it more than a fact. This thesis has been widely followed since the beginning of the problem of the application of foreign law in the nineteenth century. But against this thesis we must affirm that, contrary to the thesis of the dismissal of the claim, this theory 1) violates the imperative nature of the Spanish conflict rules, 2) brings legal insecurity because it is not known from the outset which law is to be applied, and 3) favors strategic behaviors when choosing the applicable law (gaming the system).

Essays

Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court

Giovanni Perlingieri*

Abstract

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

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

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

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

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

* Full Professor of Private Law, University of Campania 'Luigi Vanvitelli'. This essay, with the addition of the footnotes, constitutes further elaboration of the paper presented at the 12th National Conference of the *Società Italiana degli Studiosi del Diritto Civile (S.I.S.Di.C.)* on the topic 'I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016', which took place in Naples on 11, 12 and 13 May 2017. The paper is dedicated to Loris Lonardo.

[1] Available at www.cortecostituzionale.it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Scientifiche Italiane, 2016), 31.

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

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

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

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

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

II. Reasonableness, Equality and Parity of Treatment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This determines

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

Such provision

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

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

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

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

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

leading author, who states that

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

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

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

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

III. Reasonableness in the Diachronic Perspective

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. *Follows*. The Cryopreservation of Supernumerary Embryos

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Acknowledgement of a Foreigner's Rights

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

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

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

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

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

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

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

VI. Reasonableness in the Case of Clear and Timely Provisions

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

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

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

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

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

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

[59] ibid.

the 'common judge'.[60]

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

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

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

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

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

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

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

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

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

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

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

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

VII. Reasonableness and Correct Remedy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Therefore,

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

according to criteria of adequacy, proportionality and reasonableness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IX. The Relativity of the Concept of Reasonableness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[101] ibid 123.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Otherwise, it would be possible to affirm

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

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

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

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

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

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

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

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

[121] ibid.

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

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

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

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

XI. Reasonableness, Historical Significance and Relativity of Normative Values

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

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

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

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

[122] ibid 292.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XII. Concluding Remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[158] ibid also spoke recently of fundamental benefits.

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

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

Essays

Responsible Credit in European Law

Udo Reifner*

Abstract

Responsible Credit has been the lesson G20 drew from the world financial crisis in 2008. The crisis had indeed started with subprime credit in the USA. Its toxic contents contaminated all other financial products which are all based on a credit relation. This principle has conquered not only bank supervision but also contract law and seems to be able to prevent exploitation of States by private enterprises. But a closer look reveals that its meaning has changed. In its EU-codification at least it is no longer the usurious gambling financial product which the suppliers are blamed for. It is now the consumer who is blamed for his or her irresponsible borrowing. The ignorance and good faith of the victims of irresponsible banking are the target of responsible credit regulation. Banks are turned into guardians of decent consumer behaviour. They should watch out that credit-unworthy clients do not ask for a loan. This will achieve the opposite and help further deregulate banking law. The Consumer Credit and Mortgage Directives of 2008 and 2014, which replaced the promising 2002 draft, can be taken as an example. This essay provides an alternative historic path. Responsible Credit is part of the 2000 years of usury and gambling regulation. It is and has always been intended to prevent overindebtedness without excluding its victims from further credit.

I. Irresponsible Credit

'Towards an interdiction of usury and gambling' is the subtitle of my analysis of the 2008 financial crisis.[1] These ancient legal principles summarise and explain the remedies we need for the development of sustainable finance in the future. They are still in force for private activities but should be extended to the whole financial system. The legal principle of usury remedies the basic tendency of all markets to cream the rich at the detriment of the poor and weak. Without usury ceilings, markets would reflect the law of the jungle, which is admissible where it stands for economic success, but becomes inacceptable where human development is at stake.

Usury law makes contracts not only unenforceable but also void and criminal. Unlike the regulation on betting, the finance industry has not been exempted from usury law. Anatocism, which creates an autonomously growing capital with no productive investments, is one side of usury, while the other side is extortionate

* Emeritus Professor of Commercial Law, University of Hamburg.

[1] U. Reifner, *Die Finanzkrise. Für ein Wucher- und Glücksspielverbot* (Wiesbaden: Springer VS, 2017).

credit: instead of providing participation in the surplus created by the borrowers' investment, it exploits their weakness and diminishes their well-being.

The law should have set limits to it but the crisis revealed the ways how to circumvent the law. Instalment credit paid back with the help of an overdraft facility charges interest on interest. It is not seen as anatocism since from a legal perspective both are independent contracts. Another type of circumvention occurs after credit cancellation. Disguised as an indemnity the bank is allowed to transform interest into interest-bearing capital. Products are offered where the borrowed capital is artificially reduced by deducting future interest in a lump sum.

Other circumventions define interest as fee, rent or price for linked services. When usury laws do not cover these developments, they lose their teeth. Kick-back provisions in Payment Protection Insurance (PPI) are up to six times more expensive than ordinary life insurance. In the case of death of people with no liquid assets, PPI secures the bank, and not the debtor's family. Risk-based pricing lures customers into credit with low interest advertisements. In the end the poorest pay up to five times more than what rich people are asked to pay. Variable interest rates increase but fail to follow falling market rates. Lack of money is a risk for which the poor must bear the cost.

The explosion of usurious credit is commonly attributed to the incapability of consumers to buy suitable and cheap financial services for themselves. Empirical data does not support that. Overindebtedness is no logical consequence of poverty. It is its exploitation. Default is the result of unforeseen changes in the social and economic conditions of credit households. They are chained to an inflexible credit system, whose mechanism of regular instalments is not designed to adapt payments to changes in income and expenditure. While this fate is mentioned in the recitals of the Directive 14/17/EU (Mortgage Credit Directive, MCD),[2] its binding articles follow instead the ideology of 'borrower beware!'.

The following credit example stems from Citibank Germany, which recently has been overtaken by Credit Mutuel and renamed Targobank. Regularly, at prime time, they advertise their suitable, adapted and cheap instalment credit.

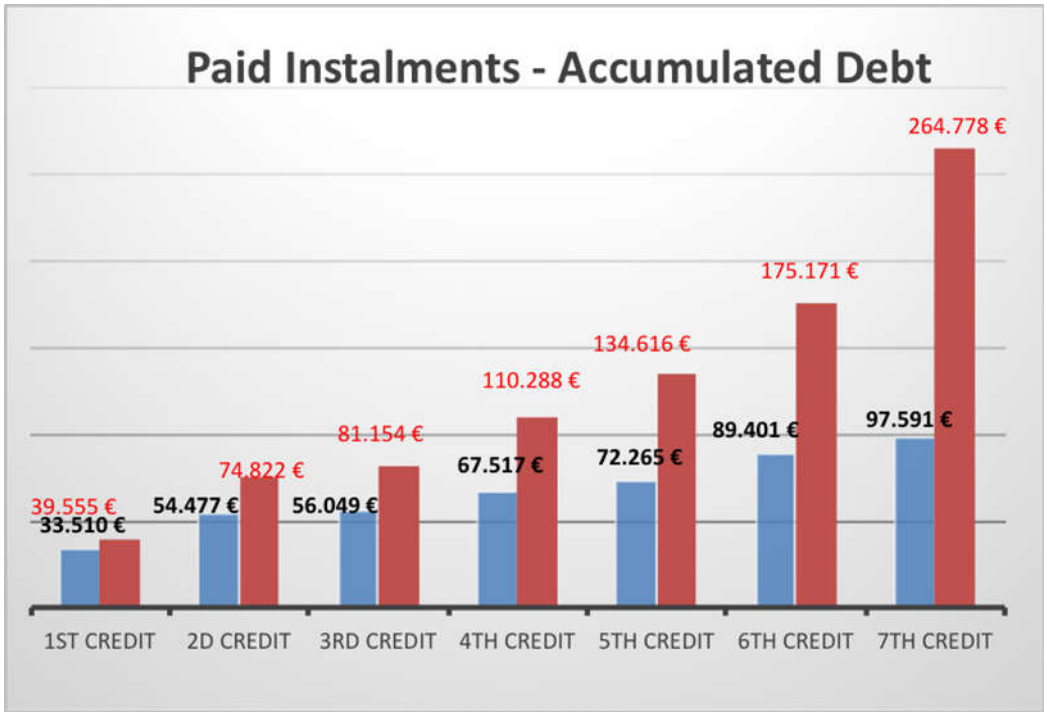
In a case, provided by an attorney, a single woman started her debt career with a credit contract in 2003 worth forty thousand euros. Whenever her situation changed her credit contract was refinanced, provided with a new and usuriously financed insurance agreement with extremely high kick-back provisions with more than fifty per cent of the premium serving as a commission for the bank. After her seventh contract, her debt had accrued to two-hundred and sixty thousand euros. The judge who decided on the foundations of the bank's claim refrained from examining the issue of usury. It would have made extensive recalculations necessary. For our one hundred pages of expertise on the subject the judge gave it – as her Honour put it – only a glance.

[2] European Parliament and Council Directive 14/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property (2014) OJ L60/34.

The judge preferred to dismiss the bank's claim on the grounds that the statute of limitation thereof had elapsed, rather than on the merit. Targobank did not appeal the case, perhaps afraid that their system would finally be judged at its roots by a higher court. This rendered our expertise as well as the campaign of the anti-usury coalition led by consumer centrals, trade unions, debt advice and welfare organisations, ineffective. As a recurring player in court, the bank could sacrifice this case to retain its unjustified advantage in all others.

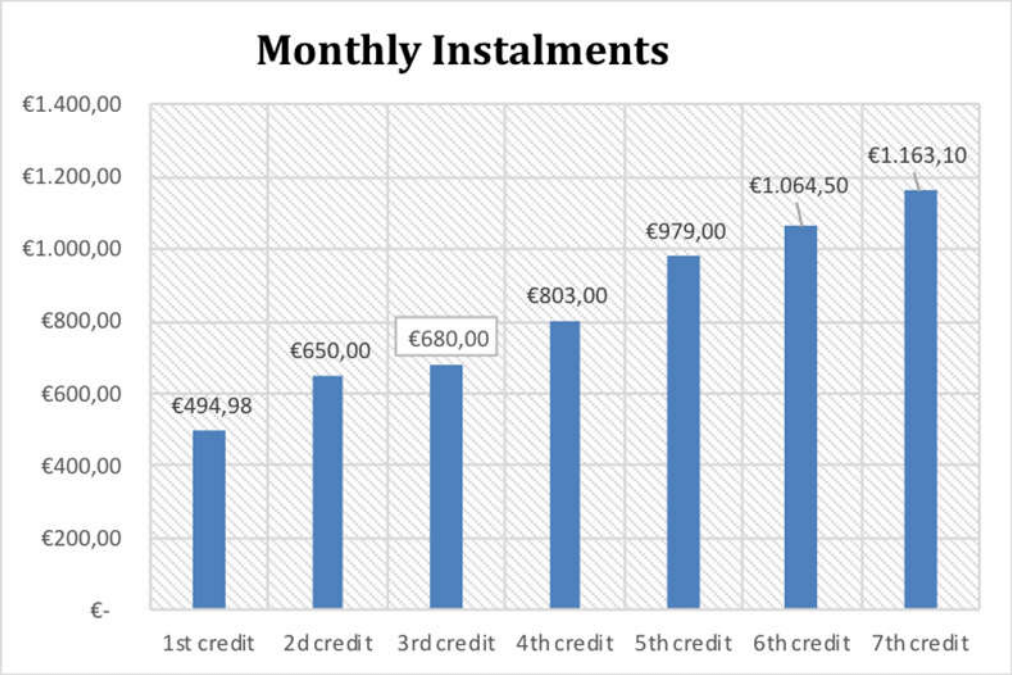
The following chart shows the growing disproportion between payments and accumulated debt.

Graph 1



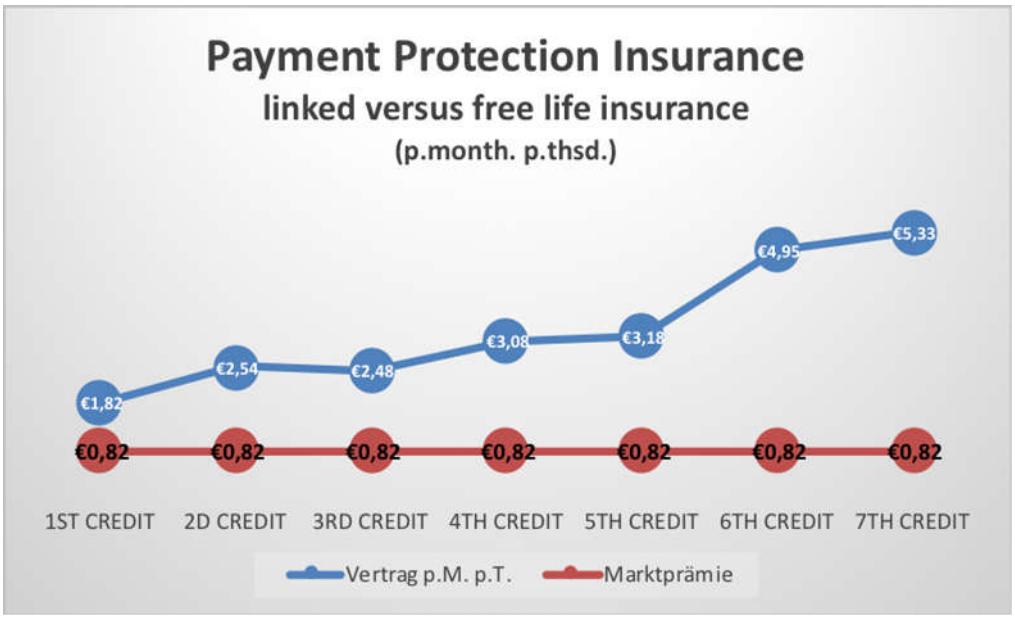
The next graph indicates that the increasing amount of each single instalment exhausted the liquidity of the borrower.

Graph 2



The core problem of the contract is shown in *Graph 3*. At each refinancing, the bank cancelled the ongoing insurance contract and concluded a new one, with ever growing usurious premiums for basically the same risk.

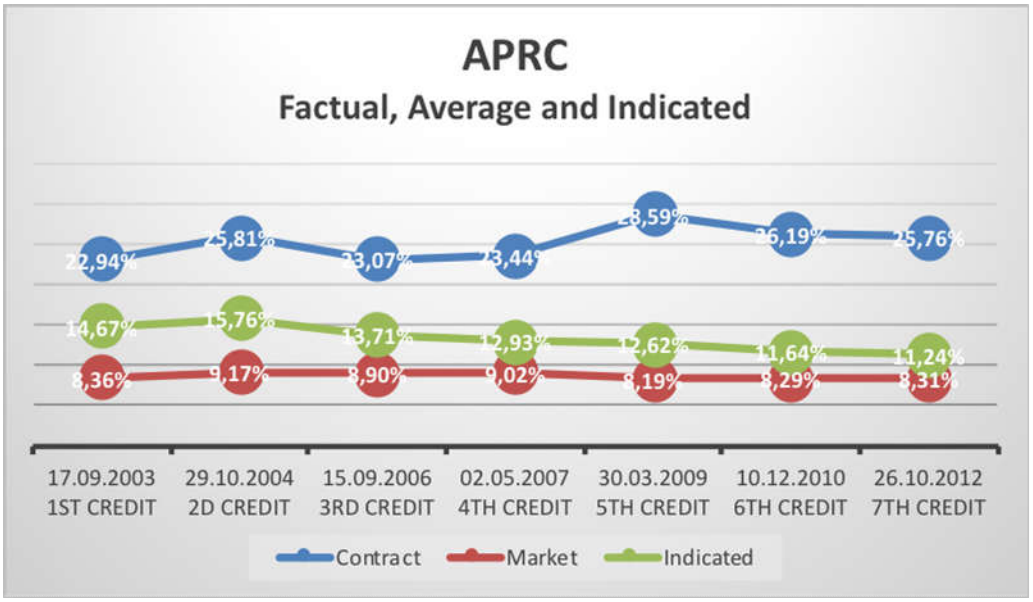
Graph 3



Such a mechanism helped the bank to keep the true Annual Percentage Rate of Charge (APRC) of the credit contract stable at ten per cent above the market rate for consumer credit. But it remained invisible to the consumer. While the Commission's 2002 draft of the Consumer Credit Directive[3] made inclusion of insurance costs obligatory, the 2004 draft assumed the opposite.[4]

The solution envisaged in the Consumer Credit Directive 08/48/EC[5] (CCD) is that usurious insurance may not be comprised within the 'total cost of the credit' if voluntarily concluded. National courts and administrative authorities of the Members States in charge of usury ceilings have adopted this view although the Directive expressively excludes usury ceiling from its scope. The practical result can be seen below: twenty-five point sixteen per cent appears as eleven point twenty-four percent per annum.

Graph 4



[3] European Commission proposal COM(2002)443 final of 11 September 2002 for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (2002) OJ C331E/200.

[4] European Parliament position of 20 April 2004 with a view to the adoption of Directive 04/.../EC of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (2004) OJ C104E/233.

[5] European Parliament and Council Directive 08/48/EC of 23 April 2008 on credit agreements for consumers and (2008) OJ L133/66.

II. Responsible Borrowing

1. Irresponsible Borrowing in Disguise

None of the phenomena illustrated above in para I have been considered yet in EU regulation. With its total harmonisation approach, the 2008 CCD has in fact deregulated the usury prohibitions in national law. National legislators and courts used the EU disclosure law as a blue print for their usury assessments. Lack of expertise and lobbyism made them apply the APRC as usury ceiling. To compensate for this failure the EU invented a principle derived from bank supervisory law: responsible lending. It pretends to take up the thread of usury legislation, transforming it into a modern tool against overindebtedness and exploitation.

Commission, Parliament and Council correctly assessed that irresponsible credit extension and circulation of empty claims had ruined the financial system and needed taxpayers' intervention in order to recover. Recital 26 of the 2008 CCD required legal barriers for irresponsible lending which would compensate for the then still favoured abolition of historical usury laws in financial services:

> 'It is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so'.

The European institutions seemed to be ready to ban irresponsible bank behaviour that exploits the poor, using tricky constructions of combined credit with insurance and multiplying their gains through intentional and repeated refinancing mechanisms. Instead, the Directives did not target the supplier side but only consumer behaviour. The recital continues by summarising bankers' responsibility as an assessment of consumers' responsibility:

> 'Creditors should bear the responsibility of checking individually the creditworthiness of the consumer'.

We find this reiterated in Art 8 CCD as well as in Arts 18-21 of the MCD. It supposes that the responsibility for poor credit performance lies with a borrower who wants to take up credit without being able to repay it properly. Leaving aside the liberal achievements of capitalism using the paternalistic feudal tradition, credit extension is identified as a generous donation to unworthy borrowers. Usurious creditors instead are promoted to guardians of responsible borrowing. This amounts to victim bashing, well-known in labour and housing policies where unemployed are blamed for their laziness and homeless for their incapability to find an adequate offer.

2. The Unworthy Consumer

Art 8 CCD provides an 'obligation to assess the creditworthiness of the consumer'. Art 9 requires a secure database accessible to all lenders also in other Members States. Art 1 MCD creates an

> 'obligation to carry out a creditworthiness assessment before granting a credit, as a basis for the development of effective underwriting standards'.

It has been promoted into a general goal of the whole regulation. Arts 18-21 regulate to what extent and in which way this request must be fulfilled.

The nature of this principle is unclear. Should it protect the safety of banks or consumers from becoming overindebted? If its aim is to save banks from unsafe behaviour, its weak sanction – the prospect of a reduced interest rate in the single credit contract – then turns into a similarly weak incentive to act more responsibly. Risky behaviour usually promises high profits which will compensate for losses and sanctions, while prevention through cautious and responsible lending totally misses these opportunities.

A regulation for bank safety already exists where it belongs. The European Banking Authority (EBA) issued guidelines for the assessment of creditworthiness in accordance with Art 16 of Regulation (EU) no 1093/2010. They are mandatory for all banks. These standards are assumed to play an important role in the interpretation of civil law. But the goals of bank safety and consumer protection can contradict each other. For example, a usurious product sold to a solvent consumer may be regarded as responsible in terms of bank safety but irresponsible in the sense of good faith in contracts. Irresponsible lending may be the fruit of irresponsible bank behaviour itself or just a way whereby a banker reacts to irresponsible consumer behaviour.

This ambiguity is also seen in Art 8 CCD, entitled *obligation to assess*. Assessment is retrospective. Its enforcement depends on consumers taking legal action. Implicitly it forces them to blame themselves for irresponsible borrowing since it was them who applied for the credit. Arts 8 and 18 of the 2014 Mortgage Credit Directive are more cautious than the CCD: A Member State 'shall ensure' responsible lending. In any case, credit without a prior check of creditworthiness seems to be forbidden. This would mean that the contract will be unenforceable. § 505a (1) sentence 2 of the German Civil Code in fact *forbids* the conclusion of such contracts without assessment. This wording is repeated in § 18a of the *Kreditwesengesetz* (KWG, German Banking Act). But this is not what the Directives (and national laws implementing them) provide. Such contracts are not void: the interest rate will only be lowered to market standards. On the extreme, consider that § 18a KWG provides even no sanctions at all.

There is also uncertainty as to what extent the creditworthiness has to be evaluated. Art 8 CCD wants the lender to 'assess the consumer's creditworthiness'. Art 18 (1) MCD provides that 'the creditor makes a *thorough* assessment of the

consumer's creditworthiness'. Art 18 (5)(a) MCD wants the lender to assess whether the obligations 'are likely to be met in the manner required under that agreement'. The German legislation differentiates between the 'feasibility' (*Wahrscheinlichkeit*) of repayments in mortgage loans and the CCD standard whereby the lender should have 'no significant doubts' with regard to this ability (*keine erheblichen Zweifel*). Neither notion fits into civil law. They transform the impartial judge into a bank supervisor who has to examine and even replace the banker's decision with his own estimations.

Recital 55 MCD discloses the philosophy behind all this, which relates lending as a form of tutelage:

> 'It is essential that the consumer's ability and propensity to repay the credit is assessed and verified before a credit agreement is concluded'.

'Propensity', which the German version of the Directive translates as *Neigung*, considers the inability to repay as a specific feature of a consumer's personality. Certain groups of consumers, known from the insolvency statistics, are suspected to be lazy debtors. This qualification refers to more to guilt and sin than to rational economic behaviour. But only the latter is covered by the regulatory power of the EU.

The difference between 'no significant doubts' and 'feasibility' relates to the political process after the subprime crisis and its impact on mortgage loans. The subprime crisis changed the historic view that mortgage loans could be left to self-regulation while instalment credit should be embedded into stricter rules. The 2004 draft unlike its 2002 predecessor left mortgage loans unregulated, offering only a recommendation for self-regulation which our study for the Commission revealed as insufficient and ineffective.

The assumed difference between mortgage loans and consumer credit underlying the Directives is artificial. US mortgage loans, which had been held responsible for the 2008 crisis, had to a large degree been used before to refinance the cost of credit card debt. The second mortgage market is in fact a consumer credit market in disguise. On the other hand, consumer credit is significantly used to fill the gap where the equity from a mortgage is not sufficient to cover the total price of the home. In addition, homes and flats are developing into simple consumption goods where the necessity for continuous investments reflects their consumability, which has an impact on their price just as the depreciation of other durable goods. The situation in Germany and Switzerland with low homeownership rates differs from that in other states with a higher rate of mortgage loans than instalment credit.

3. Scale for Assessment

Creditworthiness is a dazzling term carrying hierarchical pre-democratic values. Linguistically the lender slips into the role of the Lord, who provides the

debtor (vassal) benefits for which he must prove to be 'worthy'. The language in the 2014 MCD is more rational. It does not use the word 'worthiness'. Art 4 (17) MCD requires 'the assessment of the prospect that the obligations under the loan agreement will be fulfilled'. This is correct. A reference to personal characteristics would have been erroneous.

Neither dignity nor fidelity, but only solvency and liquidity are rational requirements in a capitalist economy. The term *loan* (lien) still contains feudal traces. A lender should anyhow not be confounded with the historic landlord, who entrusts his land to others in the fief. The only question is how much money will be available in the future when predefined obligations are due.

a) Crash Value

Historically a person was overindebted when his balance sheet showed more debt than assets. If this definition were adopted for creditworthiness, poor consumers could never borrow responsibly if they were not rich enough to provide a balanced account.

Not only in mortgage loans did this view prevail until today. German legislation allowed credit up to sixty per cent of the equity. The credit for a car should never equal its price. Cars and real estate were seen as the main security. A loan seemed to be safe as long as the amount of money received through liquidation of the financed item ('crash value') promised full repayment of the debt.

In business loans the extension of credit is seen as an investment. It should itself create the values that enable the repayment of debt with interest. This view should also prevail in consumer credit. The crash value, obtained through disadvantageous foreclosures and forced sales artificially kept low, does not mirror the economic value of the investment. Its assessment is done at a time where the productivity of the credit has not yet been proved. This leads also to overstating where the financed items are still difficult to liquidate.

Traces of this insight can be found in Art 18 (3) MCD:

> 'The assessment of creditworthiness shall not rely predominantly on the value of the residential immovable property exceeding the amount of the credit or the assumption that the residential immovable property will increase in value (…)'.

The subprime crisis has shown that linking the market value of a home to the amount of credit extended for its acquisition led to a vicious circle. It was the artificially increased demand created by the extension of more credit based on rising house prices which also increased the volume of credit. Owner-occupied homes are atypical commodities. Offer as well as demand is limited. Kept empty, the prices of such homes are exposed to speculation. The doubling of the prices of homes between 2000 and 2008 in the US at a time when no significant increase in home repair and investment took place showed that the increase in

credit volume was not a function of the value but rather of the creation of empty claims and usury. Only a system where house prices are kept within legally defined limits of interest rates could stop the vicious circle of credit volume and sales prices.

The idea of crash value strongly related to lending on securities has motivated different regulations for mortgage and consumer loans. It is outdated. Buying a home as well as acquiring durables like a car is not different from any other investment into a consumer's future. Both create profit, income and increase of well-being which justify as well as secure credit extension.

b) Cash Flow

The prevailing philosophy on responsible consumer and mortgage credit regulation is moving towards the cash flow approach in the evaluation of business loans. Liquidity replaces liquidation. The relation between labour or labour-related income and expenditures for living, rent, regular fees and taxes is calculated monthly.

All expenditures are gradually transformed into monthly contributions to services. Property is replaced by access. Rent replaces the sales price just as credit did before. With stable income, credit could thus become superfluous. But while expenditures turn into stable contributions, income becomes more and more instable or flexible by time and volume.

The EU regulation on credit did not pay attention to it. Instead it created the average consumer, whose stable income would be the basis of creditworthiness. In this it followed the paternalistic philosophy. Swiss law defined responsible lending by a mathematical procedure. Each consumer credit contract has to be recalculated and its debt transformed into thirty-six equal instalments. The size of these instalments then shall not account for more than thirty per cent of the monthly income. Such limit without the thirty-six instalments rule can also be found in French bank supervisory law and in the practice of a number of lenders in Germany.[6] Since a similar limit is seen in the price for renting a house, the rule is absurd for those who depend on both: credit and rent.

It is a simplification of social differences in income and expenditure. Warren Buffet would be creditworthy even with an instalment representing more than ninety-nine per cent of his monthly income. The remaining one percent would provide him with three million dollars per month. The respective allowance for a low-income household would be seven hundred euros if thirty per cent of his assumed income of one thousand euros per month had to be paid for an instalment.

Modern societies are composed out of rich and poor people, unstable and stable income, high and low needs. They face different situations in their life cycles.

[6] For its functioning see D. Henseler, 'Kreditfähigkeitsprüfung nach Konsumkreditgesetz' *Aktuelle juristische Praxis*, 487-492 (2015).

Their fate is marked by accidents and illnesses, heritage and donations. It has winners and losers.

Switzerland, Luxembourg or the Cayman Islands and its citizens are not average. Women between twenty-five and forty have volatile income and expenditures. Under the age of thirty people start their income career with negative fortune and cash flow. Figures from overindebted households reveal that the number of adults per household is linked to their ability to repay. Single mothers are therefore up to six times more exposed to overindebtedness than couples without children. The social composition of society decides on how risks influence their well-being.

c) Productive Investment

EU legislation restricts the consumer role to the demand side in a profit-driven market economy. It ignores that demand can only serve needs if it is based on liquid assets. Those without money do not count. This provides credit with high importance. It can bridge the gap and provide liquidity based on the income that may derive from the use of credit. Law has not yet reacted to this. Consumer protection is primarily restricted to the idea of sale and property but not to that of rent and use. In sales law the 'caveat emptor' principle has gradually developed from a duty of the seller to deliver a good or service into a duty to provide the use for the needs that motivated the purchase. Warranties for defective and unsuitable goods last for at least two years. In credit law there still is a principle of 'caveat debitor'. The borrower must care for the usefulness of the credit, in terms of investment, for its productivity. He is the one to blame in case of overindebtedness, arguably due to him having ignored the imperatives of *responsible borrowing*. The purpose of the credit and sources for its repayment and interest are allocated outside the contractual synallagma.

Such an approach discriminates especially against the most vulnerable consumers. They take out the credit to compensate for unsteady expenses and income. The loan contract assumes an average 'normal' consumer whose living conditions resemble steady income and expenditures, while durables are financed through savings. It is the fault of the vulnerable consumer if he or she can not cope with such conditions: if they become abnormal, then the consumer has to compensate the lender for his sufferings from unsteady income and lack of savings.

The principle of responsible credit is at least a legal quest to change this ideology. It targets the supplier's behaviour. Lenders' responsibility is more than just providing safe banking. The best protection of savers is to care for the productivity of the credit investment on the borrower's side.

Historically, productiveness has been considered totally alien to consumer credit. In the early 1950s, food industries financed public campaigns against what they called 'pre-eaten bread'. Low income consumers should not use their monthly income for durables but stay with food and services that could be paid

out of the monthly budget. They wanted to keep income available only for short-term expenditures. This was economically unfounded. Statistical evidence proved that consumer credit had an overall productive effect on the economy. The extension of consumer credit to low income families provided flexibility with jobs and income. It also created additional demand for the most advanced forms of consumption. Affordable and productively invested consumer credit added significantly to the welfare of the modern state.

But this insight does not seem to reflect bankers' view. They do not praise the contribution to general welfare when overindebtedness is discussed but focus on the advantages each individual borrower seems to draw from the opportunity of having liquid assets. This has political advantages. The less the common good is evoked, the less their responsibility has to confront a social dimension beyond individual profit seeking. Banks even use the false ideology of unproductive consumer finance in their marketing strategies. Instead of explaining the 2008 US subprime crisis with unproductive investment of usurious credit, against all statistical evidence they blame consumers. They are supposed to have bought too many homes at prices they could not afford. The same ideology is used to allocate a higher risk to vulnerable consumers justifying higher profits in risk-based pricing. High debt-collection costs are also attributed to consumers' (de)*fault*.

Even in 1963 David Caplovitz entitled his famous empirical survey 'The Poor Pay More'. His research showed that consumer credit in lower Manhattan had not been designed to create productive effects for consumers and their families but just to exploit public subsidies, the needs of poor consumers for furniture and their weak bargaining position. This subprime credit intentionally created needs for further credit, which facilitated usurious refinancing deals. Instead of access to goods and services, the additional costs and insolvency rules forced these debtors out of the market and out of well-being. Ill-designed consumer credit became the driving force in social discrimination and impoverishment. Caplovitz' studies were confirmed by similar studies by Janet Ford on 'The Indebted Society' in the UK. In Germany Günther Hörmann followed with '*Die Praxis des Konsumentenkredits*'. Many others reported on similar research in their contributions to the second volume of 'Banking for People'. These efforts were terminated when overindebtedness out of irresponsible credit grew. Sponsors preferred it the opposite way: instead of credit, what had to be studied was the consumer. The focus on the reasons for default shifted from the offer to the demand side, which finally led to the philosophy of the EU Credit Directives.

With respect to the 2008 financial crisis, the name 'subprime crisis' indicated at first that usurious, unproductive, unsuitable and irresponsible credit had destabilized the world financial system with empty claims. This perspective was quickly changed. Instead of subprime, the crisis turned into an investor' crisis, then into a banking crisis (eg Lehman had been deprived of their usual refinancing resources) and finally into a crisis of public debt where states had been unable

to shoulder the deficits of their banking together with their usuriously inflated own debts. 'Consumers in Trouble – A Study of Debtors in Default' was Caplovitz' second study in 1972. It would be a perfect title for an independent study on the 2008 crisis.

The 'faulty debtor' instead characterises the consumer's image in both the 2008 CCD and the 2014 MCD. The CCD adapted European law to the US situation before 2008. It even monopolised this approach with maximum harmonisation. National product regulations were replaced by information rights. The duty to inform about the lack of suitability replaced the quest for suitability. The way was thus paved for the next crisis.

Since then, special systems and institutions only for the poor have been spreading. 'Payday loans', a usurious small credit called 'Crazy George', specialised instalment banks and finance companies, loan sharks disguised as credit brokers, churning of 'credit card credit', redefinition of defaulting debts from overdraft facilities into high priced voluntary agreements for so-called 'overrunning' of its limits, as well as 'subprime mortgages' threaten social cohesion. Fintechs with hidden bank licences like Wirecard, which recently replaced Commerzbank in the German DAX, use loopholes in the Directive 15/2366/EU (Payment Services Directive).[7] Small credit up to one hundred ninety-nine euros extended by non-banks are exempted from consumer protection. Dostoevsky would have unlimited evidence for many more novels on the question of fault in default.

Banks participated in this race to the bottom. Risk-based pricing, obligatory PPI with kick-back provisions of more than fifty per cent combined with costly refinancing mechanisms and savings-into-loan constructions have flooded the market. These products are concentrated where there is no choice. Social discrimination is legitimately incorporated into the principles of civil law. Those who have less pay more and get less. Poverty, as a personally attributable risk, has a price that is eventually paid by those who are supposed to carry it.

Credit is an indispensable tool to render any economic activity productive. Economy is efficient 'cooperation' for reaching what Aristotle called 'good life'.[8] Credit that links past with future work revolutionized cooperation for poor people. Providing access to cars, houses or washing machines makes borrowers part of intertemporal cooperation. Providing stable liquidity through flexible credit like overdraft, variable rate or credit card credit at reasonable prices allows borrowers to join customer networks that require equal monthly contributions to a service economy. Telecommunication, utilities, fitness, housing, even the use of bicycles and cars or the search for a future partner are paid through equal and regular contributions in a shared economy at a time labour markets go into the other

[7] European Parliament and Council Directive 15/2366/EU of 25 November 2015 on payment services in the internal market [2015] OJ L337/35.

[8] See U. Reifner, *Das Geld. 1. Ökonomie des Geldes - Kooperation und Akkumulation* (Wiesbaden: Springer VS, 2017), 91.

direction.

In a credit relationship the important person is not the investor. This notion, as well as the notion of 'creditor', is misleading. The only one who invests is the debtor. He or she transforms money into real value. His or her role as a debtor is secondary *vis-à-vis* this productive function of borrowers in the credit society. Without borrowers the money owners would suffer out of it.

CCD and MCD have not adopted the cooperative approach. With the word 'creditworthiness', they resurrected feudal statuses. In former times, when accumulation of property was preferred to accumulation of money, the extension of credit was only a means to overcome mishaps, death, illness and accidents. A loan (Latin *mutuum*, English *mutual*) had its roots in a moral obligation to donate ('credit'). Providing money to her or him was sharing and caring, not investing. In modern societies, not the person but the investment is the benefit. Data reflecting the debtor's past borrowing behaviour may help substantiate a prognosis but it cannot replace it.

The most advanced models of responsible credit are student loans. Investment into students learning efforts and their future serves the whole of society. This insight drives its regulation. This is why the credit history of a student is not even mentioned in the law.[9] The student loan model has been extended to all who learn in the educational sector. Some states have adopted it for credit to new families and newly arrived immigrants. Housing loans in slum areas of the cities of Los Angeles and Chicago are similarly structured. Also loans for energy efficient repair are defined by their investment goals.

Art 2 (2) (l) CCD[10] exempts them from ordinary consumer credit. They are supposed to lie outside these models, not requiring the same level of protection entrusted to consumers. The truth is quite the opposite. Student loans are the right models for future regulation of productive consumer credit. Superfluous information rules for general consumer credit could be compared with substantive rules that regulate the efficient use of it.

Overindebtedness is not the effect of unworthy borrowers, lazy debtors and incapable customers. It is the effect of individually unpredictable events with high collective feasibility. Lenders could use their data to provide adjusted products and services. But social research for responsible credit products is inexistent. The flood

[9] The German law for educational loans (BAFÖG) starts with the purposes (Arts 2-7) followed by three personal conditions (nationality, suitability of the purpose, age) enumerating the kind of loans and subsidies available to students. Personal conditions as to creditworthiness are not even mentioned.

[10] It excludes 'credit agreements which relate to loans granted to a restricted public under a statutory provision with a general interest purpose, and at lower interest rates than those prevailing on the market or free of interest or on other terms which are more favourable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market.' But as to the other exemptions the neo-liberal view prevails that exempted credit should be such credit which offers lower rates while the purpose is only once addressed in the fluid notion of a 'general interest purpose'.

of studies on *behavioural finance*, *financial capability*, *consumer morals, irrational decision making* and *unconscius use* of credit can be summarized into one single ideology: 'Who is in default is faulty'.

III. Responsible Lending

1. Responsibility in Financial Services

Overindebtedness has grown into a major problem for millions of families. Many are excluded from general welfare in modern society. It has weakened their ability to service existing debt. This has rendered the financial system unstable. The Credit Directives have replaced the two traditional goals: prevention of overindebtedness and promotion of consumer protection by legal harmonization and facilitation of internal markets. Regulation is now governed by two assumptions: (1) only the borrower can guarantee the repayment of the debt; (2) the fate of the debt is finalized at the time of the conclusion of the credit agreement. Lenders have to classify customers into admitted solvent and excluded insolvent borrowers.

Sociological research produces a different picture. Insolvency is strongly related to price, form and servicing of credit as well as to certain suppliers. The supplier side can choose between different forms of a loan, advise how to use sustainable credit with regard to the statistically known threats and especially change the conditions with regard to the social situation of the borrower at a later stage. But a credit contract, just like a labour or tenancy contract, is a long-term 'life-time'[11] relation between two partners who under uncertain circumstances must cooperate to find ways out of unforeseen problems.

When investigating the problems of failed mortgage loans, we found that the core of insolvency cases related to a few specialized suppliers and products. They offered combined savings with credit. Endowment insurance and financed investment in home mortgage agreements loaded consumer credit contracts up front with unsupportable high instalments in order to be able to make higher profit through in refinancing at a higher price.[12] Other studies on the credit relations that led to the subprime crisis in the US revealed that customers had been lured into costly financing in a form of a snowball system where the initial interest was to be paid by future credit.[13] From surveys on insolvent small businesses,[14]

[11] L. Nogler and U. Reifner eds, *Life time contracts. Social long-term contracts in labour, tenancy and consumer credit law* (The Hague: Eleven International Publishing, 2014); L. Ratti ed, *Embedding the Principles of Life Time Contracts. A Research Agenda for Contract Law* (The Hague: Eleven International Publishing, 2018).

[12] U. Reifner and R. Keich, *Risiko Baufinanzierung* (Kriftel: Luchterhand, 2nd ed, 1996).

[13] D. Immergluck, *Foreclosed. High-risk lending, deregulation, and the undermining of America's mortgage market* (Ithaca: Cornell University Press, 2009).

[14] U. Reifner et al, *Kleinunternehmen und Banken in der Krise. Produktive Konfliktbeilegung durch Recht* (Baden-Baden: Nomos, 2003).

we learned that banks profit from the harsh legal situation of debtors in default. They can exercise illegitimate power seemingly in reaction to the outbreak of untamed rage of desperate entrepreneurs who try to escape insolvency with increased worktime. At this stage, a bank occupied only with the fate of its own credit may be heavily disturbing for the continuation of business. In fact, small arrears were used to justify blocking a business' bank account, which caused the final closure of the business at a time when it had enough work and opportunities, but not time and liquidity, to employ its workforce. The bank had its own false picture of the debtor's behaviour, along the general ideology of lazy debtors who try to cheat their creditors. Since no objective information was available, the bank was unable to ascertain whether the crisis was structural or temporary.

In consumer instalment credit the situation is even worse and resembles the fate of developing countries. The only difference lies in the form of credit: loan contracts versus bonds.[15] With consumers, specialized credit institutions acting like loan sharks have developed a revolving credit system. Its core elements are long-term relations with growing debt and growing profitability as shown above in para I. Given the possibility to securitize such credit and sell it on the market, they are no longer hit by the breakdown.

Extra profit is achieved through refinancing, flipping between overdraft, overrunning, payday loans and instalment credit. Small loans refinance instalments creating factual anatocism. Second mortgages allow the refinancing of interest. Securitization turns the production of risky claims into an opportunity. Debt explodes just after its investment has proved to be unproductive and the refinancing spread goes up. The development of Greek and Italian public debt since 2008 is a good example.[16] Nominal debt promises higher profits than true debts provided that the *showdown* is postponed to the general crisis when state help is inevitable.

Most defaulting credit relationships start with reasonable credit.[17] The problem did not lie with the amount of debt but the relationship of its instalments to future liquidity and opportunities for productive use. Besides, overindebtedness is the consequence of profound changes in the debt due, which occur at the initiative of the lender, not of the borrower. The lender has the legal power to

[15] U. Reifner, 'Die Sittenwidrigkeit von Konsumentenkrediten nach der höchstrichterlichen Rechtsprechung' *Der Betrieb*, 2178 (1984); U. Reifner and M. Volkmer, *Ratenkredite an Konsumenten: Rechtsprobleme, Hintergründe und Strategien zum Verbraucherschutz gegnüber Banken* (Hamburg: Verbraucher-Zentrale, 1984); U. Reifner, 'Die neue Sittenwidrigkeit von Ratenkrediten' *Zeitschrift für Bank- und Kapitalmarktrecht*, 51 (2009).

[16] Italy just as Greece increased their debt load significantly after the 2008 crisis although in the wording of the Directive they were already 'unworthy for credit'. Nobody has since revealed what kind of credit they could accrue under the supervision of the EU. Credit unworthiness is a commodity that sells well.

[17] See the annual iff report on data from about eighty thousand overindebted households in Germany: D. Ulbricht et al, *iff-Überschuldungsreport 2016. Überschuldung in Deutschland* (Hamburg: Institut für Finanzdienstleistungen, 2016).

turn any credit relationship from an adequate monthly debt into an unsurmountable immediate debt. Defaulting with two instalments reaching a threshold of five per cent (less than thirty-six instalments), ten per cent (thirty-six and more instalments) or two point five per cent (mortgage loans)[18] provides the power to make the total residual debt come due irrespective of whether it is still in use and necessary to continue the overall productive investment process. Protection against early termination as in labour and tenancy law does not exist in credit law. Where the credit has been invested into houses and cars (fixed capital) the sum due is now transformed into a claim on liquid assets. Bankers are aware of this, since it was the different degree of liquidity between assets and debt that made them bankrupt in 2008.

Cancellation instead of adaptation is justified by an outdated view that creditors in default compete for the rest and need to be faster than any other in order to secure their claims. In practice they destroy the debtors' economy to the detriment of all. Debtors are also burdened with debt collection practices the costs of which pile up on top of the residual debt. Consumer bankruptcy procedures try to heal this evil, retransforming the residual debt into monthly instalments adapted to the liquidity of the debtor with the prospect of discharge in the future.

But before discharge can occur, the insolvency laws require a total destruction of household finance even where the items seized do not have a significant market value. For most households giving up all the things they need is not an option. This is why only five per cent of overindebted families in Germany use this procedure.

Ideologically, it is again the feudal reminiscence of fault that provides legitimacy for this destruction. 'Default' implicates that the arrears are the result of faulty consumer behaviour. But low-income consumers have little influence on their future financial situation. It is the creditors' perspective that leads to the acceleration of an outstanding debt favoured by the advantages the legal order offers in such cases.

The Directives allow, without regard to its effects on the productivity of the loan, to turn a long-term relationship into a short time debt at a time when the user of this capital is not even able to pay the next instalments.[19] Legal protection against early termination has not even been discussed. Instead, it could make credit relationships much more responsible than the retrospective assessment of the debtor's creditworthiness targeted at what the Directives recognize as responsible lending.

[18] See § 498 German Civil Code; Art 8 CCD.

[19] With regard to early cancellation at an unsuitable time see Bundesgerichtshof 20 May 2003, XI ZR 50/02.

2. From Responsible Lending to the Prevention of Overindebtedness[20]

CCD and MCD are similar. Consumers are primarily supposed to be the victims of their own behaviour. But it has some contradictory traces that can be used for future development of this principle. These traces point to an alternative model of credit responsibility that aims to adapt the creditors' profit-driven behaviour to the needs of consumers in trouble.

a) The 2002 CCD Draft

Such an alternative model was even dominant in the 2002 draft of the CCD by the consumer department of the EU Commission. But it was replaced in the EU Parliament. Lobbyism finally led to the illegal neo-liberal draft of 2004 that dictated the final version of the CCD.[21] Responsible credit, as a leading principle in the 2002 draft, was eradicated from the rules in the final version of 2008.[22]

A glimpse into legal history may unveil how the EU lost its social competence in consumer credit regulation. It started with Directive 1987/102/EEC,[23] which respected national laws with its minimum harmonization principle but harmonized the national information rights as in use in France, Benelux, Germany and Great Britain. The EU Commission started its work for further reformation at an early stage. The persons in charge were enflamed to ameliorate the social image of the common market. In the public eye the EU was primarily seen as an organisation to satisfy the needs of the industry and especially transnational banks. A socio-economic directive engaged in preventing overindebtedness could have strengthened the position of consumers against almighty banks, provided adequate remedies and even delivered a clear pro-European social message. To this aim, harmonization could have profited from the skills acquired by nations that had already a long experience in consumer credit.

Twelve years of research into consumer markets, including its problems

[20] Earlier drafts and reactions can be found under https://tinyurl.com/y8m9yq5k (last visited 27 December 2018).

[21] For a comparison see P. Carillo et al, 'The EU Consumer Credit Directive 2008 in the light of the EuSoCo Principles', in L. Nogler and U. Reifner eds, n 11 above, 321-339.

[22] The 2008 CCD uses this notion only three times appealing in recital 26 to the member states to seek: 'responsible procedures', not to be 'irresponsible in credit extension' and to assess 'creditworthiness responsibly'. In the 2014 MCD this notion is used quite often ie in recital 3: 'responsible action of market participants'; recital 4: 'irresponsible lending and borrowing'; recital 5: 'act professionally and responsible'. Recital 29 even requires 'responsible debt management', which in Art 6 includes the quest for financial education of consumers. In general, Art 45 opens up the floor for new activities when it says that after 21 March 2019 further initiatives for responsible lending and borrowing will be announced, in order to master the 'challenges posed by private overindebtedness, directly related to credit'.

[23] European Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions oft he Member States concerning consumer credit (1987) OJ L42/48.

like usury, early termination, refinancing, pay-day loans, linked products, intermediaries etc led to the 2002 draft.[24] Dieter Hoffmann, Thierry Vissol, Jens Ring, van Lisebetten were the experts in charge of this reform. They were obsessed with the idea that consumer credit could be extended fairly and responsibly. They used the social elements of the national consumer credit codes like the one in Germany from 1991 and especially socially minded rules in Belgian and French law. The information rights were copied from the Anglo-American regulatory model.

The draft reflected the experience of many EU Member States. With the emergence of credit-driven overindebtedness they had developed new bankruptcy schemes for consumers but refrained from consumer credit legislation because of the pending EU harmonisation process. Instead of the creditor related perspective of bankruptcy or *Konkurs*, the new codes overtook a debtor perspective already in their titles: insolvency code, rehabilitation or debt rescheduling code, were their denominations. Adaptation of debt was preferred to the liquidation of consumer assets. They mostly provided a choice between a cooperative prolongation with an insolvency plan, on the one hand, and straight bankruptcy, on the other. This path towards prolonged and adapted credit relations – to prevent the crash of the debtor's ability to reinstate a productive use of resources – also flourished in the new commercial bankruptcy schemes.[25]

The draft of the new CCD[26] was presented on 11 September 2002 by the General Department in charge of consumer protection. Para 2.4 of its reasoning reads:

> The directive will improve stability by putting in place a draft of provisions on responsible lending, on providing information and protection both when the credit agreement is concluded and during its performance (or in

[24] The following studies are cited in the draft: M.J. Lea et al, 'Study on the mortgage credit in the European Economic Area. Structure of the sector and application of the rules in the directives 87/102 and 90/88' Final Report for Contract no XXIV/96/U6/21; R. Seckelmann, 'Methods of calculation, in the European Economic Area, of the annual percentage rate of charge' Final Report 31 October 1995, Contract no AO 2600/94/00101; U. Reifner, 'Harmonisation of cost elements of the annual percentage rate of charge, APR' Project no AO-2600/97/000169 (Hamburg, 1998); F. Domont-Naert and A.C. Lacoste, 'Etude sur le problème de l'usure dans certains états membres de l'espace économique européen' Contract no AO-2600/96/000260 (Louvain-la-Neuve, 1997); F. Domont-Naert and P. Dejemeppe, 'Etude sur le rôle et les activités des intermédiaires de crédit aux consommateurs', Contract no AO-2600/95/000254 (1996); E. Balate and P. Dejemeppe, 'Conséquences de l'inexécution des contrats de crédit à la consommation' Studie AO-2600/95/000270 EU-Commission Final Report.

[25] J. Pulgar Ezquerra, *Preconcursalidad y acuerdos de refinanciación. Adaptado a la Ley 38/2011, de 10 de octubre, de reforma de la Ley concursal* (Madrid: La Ley, 2012); Id, 'Ambito delle soluzioni negoziali alla crisi d'impresa e abuso del diritto nel confronto tra sistema spagnolo ed italiano', in A. Caiafa and S. Romeo eds, *Il fallimento e le altre procedure concorsuali* (Padova: CEDAM, 2014), III, 142; Id, 'A Contractual Approach to Overindebtedness: *rebus sic stantibus* instead of Bankruptcy', in L. Nogler and U. Reifner eds, n 11 above, 365-377.

[26] n 3 above.

> the event of its possible non-performance) that will reduce the probability of a creditor or credit intermediary being able to mislead consumers in another Member State or jeopardise their financial situation or even of acting irresponsibly. The directive being proposed, and in particular its provisions relating to the prevention of overindebtedness, together with the rules on consulting central databases, will further improve the quality of loans and lessen the risk of consumers falling victim to disproportionate commitments that they are unable to meet, resulting in their economic exclusion and costly action on the part of Member States' social services.

It focused on lender behaviour, dangerous products, credit intermediaries and the quality of the credit relationship. This is why it did not become EU law. The way the 2002 draft was transformed into the 2004 draft, finally replaced by the Commission's 2005 draft,[27] justifies a few comments. Its development coincided with the deregulation of financial services to achieve lighter standards for banks in Europe like those in the US.[28] The 2002 draft did not fit into this pattern because it assumed correctly that responsible lending was necessary not only to get public support for the European project but also because bad debt would undermine the stability of the financial system. But this was opposed by the bankers' associations that had worked on their own draft, presented by the rapporteur in the EU economic committee Joachim Wuermeling.[29]

The committee did not care for the fact that the European Parliament had no legal power to provide an own draft. It had to be instructed likewise by the president of the Parliament who rejected it. But this did not pose an obstacle. Within a few days the whole draft was transformed into more than 100 'amendments' to the initial text. Pending European elections in June 2005, the deputies took little notice neither of this procedure nor of its contents in its first reading in the old Parliament. The second reading with new uniformed deputies took place in the new Parliament. The Commission also revised its own legislative team and overtook the new version of the Parliament. Efforts within the European Council under the presidency of Austria and Finland to rescue at least a minimum of responsible credit ideas failed. Germany, UK, Ireland and

[27] European Commission proposal COM(2005)443 final of 7 October 2005 for a Directive of the European Parliament and of the Council on credit agreements for consumers (2006) OJ C49/45. See the changes notified by the Commission in its presentation from 7 October 2005.

[28] In Germany the respective legislation was launched in five consecutive laws entitled 'Financial markets development laws 1-5' (*Finanzmarktfördergesetze*).

[29] Mr Wuermeling is a member of the Bavarian Christian Socialist Party. His draft reflected the ideas of Eurofinas to whom he had close contacts during this procedure. He was known for his lobbyist activities which in January 2008 led to his dismissal as joint state secretary by the minister of economics Michael Glos (CSU). His lobbyism for software industries had been too much. After this he moved into private practice and lobbied for the finance industry; first for the insurance industry then for Sparda banks in Germany. He was appointed to the Presidency of Deutsche Bundesbank. Since 2018 he is the Head of Bank Supervisor at Deutsche Bank.

the Netherlands were the pillars of an ongoing deregulatory process well-disguised under hundreds of rules.[30]

b) The 2004 Draft and CCD 2008/48/EU

The 2004 draft and its implementation into the CCD of 2008 assumed that overindebtedness could be defeated through consumer information and consumer selection. Recital 26, referring literally to responsible credit, shows through its specifications the opposite. Lenders only had to assess whether the consumer alone was creditworthy:

> 'Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. (…) Creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long-standing commercial relationship. (…) Consumers should also act with prudence and respect their contractual obligations'.

The 2002 draft limited possible effects of chain-credit-contracts, open-end-credit, linked credit agreements, add-on products sold under the threat of insolvency. It also promoted an inclusive APRC that would have defined a European-wide method of calculation with regard to existing usury ceilings. It incorporated all cost including Payment Protection Insurance if they had been convened at the same time the loan was taken out. It also required banks to hand out a comprehensive payment plan before conclusion of the contract, so that the impact on future liquidity would have been visible early enough for changes.

Nothing of it was saved in the CCD of 2008. It limited itself to information, cooling off periods, a right of withdrawal within the first 10 days including

[30] For the whole procedure including the illegal form of the second reading which was done in a newly elected Parliament by deputies who had not been there for the first reading see U. Reifner, 'Die weitere Deregulierung des Verbraucherkredites - eine merkwürdige Antwort auf die Kreditkrise' *Kritische Justiz*, 132 (2009).

misleading information on a so-called 'borrowing rate'. This legitimized a rate that can be increased or reduced through the use of mathematically incorrect formulas and arbitrary definitions of cost elements as interest or fees. The borrowing rate competes with the APRC but is preferred to it in German law where sanctions, refund of interest or recalculation are required. A truly comprehensive APRC including annexed service fees should allow for comparison of the contract with other offers irrespective how these offers are construed. Such APRC is also needed to find out whether the offer is usurious. A non-inclusive APRC, as allowed in the Directives, has become a major permission for misselling.

The same is true with regard to the payment plan. It would allow a consumer to compare future income developments with the instalment to be paid and the residual debt on each. But the Directive built it into the borrowing rate, allowed incorrect calculation and offers it only upon request after the contract has already been concluded. In any case, consumer credit protection should prevent overindebtedness through responsible lending practices during the lifetime of the credit.

The information model instead implies that overindebtedness is a fruit of erroneous credit decisions on the part of the consumer. The provision of a right of withdrawal should give the vulnerable consumer time to reflect. In practice, about half of loan agreements incorporate refinancing which usually ties the client to the old creditor.

But judges were confronted with real problems of overindebted defendants who sought to escape this trap. With the new EU driven law they could not easily apply old usury laws. The 2008 CCD had excluded 'non-mandatory' PPI from the APRC. Lenders had hence shifted usurious costs to these products, which cost up to eight times more than an ordinary life insurance. In order to find a way to react to this situation, judges 'found' that the required information on the right of withdrawal lacked a comma, the correct postal code, was one day shorter than required or not printed big enough, etc. In case of flawed information concerning the right of withdrawal, EU law provided an unlimited period for its execution. This led to an 'eternal right of withdrawal' or – as the bank lawyers called it – a 'withdrawal joker'. At the stage of insolvency, it still could transform the usurious contractual debt into a reduced debt based on restitutions for undue enrichment, with interest rates drawn from the average market rate. This misuse of two bad laws had acceptable effects but disguised the structural problem even further.

Information rights offer stones instead of bread. In addition, they provide mostly confusing, unnecessary and even false information up to five times in the same contract, which inflated the length from two to sixteen pages. These rights contain information about an embarrassing 'Borrowing rate' (Art 4 (16) MCD) that is allowed to reflect arbitrary decisions by the lender: they want to be included in it and how it should be calculated even if mathematically this

calculation is incorrect. Questionable is also the 'total amount of credit' which destroys the idea of the APRC. It omits the time dimension of credit and misleads comparison.

c) Some Reactions to the 2008 Financial Crisis

In reaction to the memorable way responsible credit lost its advocates in Brussels in 2004, a worldwide group of consumer and debt advice organizations created a network together with the US Coalition for Community Reinvestment. It summarized the idea of responsible credit in seven principles.[31]

Principle 3 reads:

> Lending has at all times to be cautious, responsible and fair. a) Credit and its servicing must be productive for the borrower. b) Responsible lending requires the provision of all necessary information and advice to consumers and liability for missing and incorrect information. c) No lender should be allowed to exploit the weakness, need or naivety of borrowers. d) Early repayment, without penalty, must be possible. e) The conditions under which consumers can refinance or reschedule their debt should be regulated.

This idea became more famous in 2008 when the banks themselves asked for state help deploring the lack of comprehensive product regulation. State agencies supported this view. The Board of the US Federal Reserve deplored irresponsible credit products, procedures, contractual forms, credit bundling and sales practices as well as unconscious debt collection practices.[32] The special G20 summit on the financial crisis held in Washington DC on November 2008 mandated the creation of principles on responsible lending from the OECD. The 'Ten High Level Principles on Financial Consumer Protection' were passed by G20 in 2011, taking much of what had been previously demanded. Its principle no 3 required 'Equitable and Fair Treatment of Consumers (…)'. This should not be limited to the conclusion of the contract but persists throughout its execution:

> 'All financial consumers should be treated equitably, honestly and fairly at all stages of their relationship with financial service providers. Treating consumers fairly should be an integral part of the good governance and corporate culture of all financial services providers and authorized agents. Special attention should be dedicated to the needs of vulnerable groups'.

Principle six calls for 'Responsible Business Conduct of Financial Services Providers and Authorised Agents'. It should be executed in the best interest of all financial consumers with regards to the social 'situation and needs' of customers.

[31] Reprinted in U. Reifner, *Das Geld. 3. Recht des Geldes - Regulierung und Gerechtigkeit* (Wiesbaden: Springer VS, 2017), 318.

[32] ibid 16.

d) MCD 2014/17/EU

The 2014 MCD has profited from this development. It pays some tribute to the idea of responsible products and services. Recital 48, first sentence, requires a bank to consider

> 'which credit agreement, within the range of products proposed, is the most appropriate for his (the consumer's) needs and financial situation'.

More of this we can find in its rhetoric. The informational duty of Art 5 (6) CCD developed into a general regulatory concept. Since the lender has to inform 'whether the proposed credit agreement is adapted to his needs and to his financial situation', they also have to inform the consumer about 'the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer'. Is this still an informational duty?

Would a bank get away with the information that all their products are inadequate, usurious and not adapted to consumers' needs? If a bank offers usurious products, speculates with chain credit and the opportunity to sell bad credit before default, it is hard to imagine that this bank is able to provide responsible advice. Best advice is worst advice if the offer can only harm the borrower. Historically, usury has never been excused due to the free decision of an informed victim. If the contract is usurious, then such information would have no effect.

Long-term experience in labour and tenancy law, the sister relations to credit within lifetime contracts, reveals the error. If employers and landlords only had to inform workers and tenants about future intolerable conditions, such a law would not be taken seriously.

At least recital 27 MCD refers to overindebtedness. It evokes the possibility of protection against early termination and asks banks to refrain from enforcement procedures when a credit relation in default could still be repaired. Also changing needs and circumstances have to be taken into account by means of adaptation. It calls for a more substantive regulation of the principle of responsible lending, which should not be reduced to assessing the actual creditworthiness of consumers.

> 'Given the significant consequences for creditors, consumers and potentially financial stability of foreclosure, it is appropriate to encourage creditors to deal proactively with emerging credit risk at an early stage and that the necessary measures are in place to ensure that creditors exercise reasonable forbearance and make reasonable attempts to resolve the situation through other means before foreclosure proceedings are initiated. Where possible, solutions should be found which take account of the practical circumstances and reasonable need for living expenses of the consumer.

> Where after foreclosure proceedings outstanding debt remains, Member States should ensure the protection of minimum living conditions and put in place measures to facilitate repayment while avoiding long-term over-indebtedness. At least where the price obtained for the immovable property affects the amount owed by the consumer, Member States should encourage creditors to take reasonable steps to obtain the best efforts price for the foreclosed immovable property in the context of market conditions. Member States should not prevent the parties to a credit agreement from expressly agreeing that the transfer of the security to the creditor is sufficient to repay the credit'.

Recital 55 enumerates credit products having a negative effect on future solvency, especially the increase of instalments or negative amortization.

> 'That assessment of creditworthiness should take into consideration all necessary and relevant factors that could influence a consumer's ability to repay the credit over its lifetime. In particular, the consumer's ability to service and fully repay the credit should include consideration of future payments or payment increases needed due to negative amortisation or deferred payments of principal or interest and should be considered in the light of other regular expenditure, debts and other financial commitments as well as income, savings and assets. Reasonable allowance should be made for future events'.

These deliberations have not yet triggered actual regulation. Due to the failure of the EU Commission[33] to propose a significant reform, it is up to the national

[33] Art 27 (2) CCD has mandated the EU Commission to report to the Parliament every five years about its implementation and especially the implementation of the APRC and the choices national legislators could make. For the first Report 2013 a tender was written out for which only one consortium of renown experts in consumer credit protection delivered a bid. The Commission rejected this bid, then reopened it. But this time again the consortium was rejected in favour of a newly emerging second bid. The consortium had to learn that its concept had been too much concerned with consumer protection. The report carefully omits the problems enumerated in this essay. See Risk & Policy Analysts Ltd, 'Framework Contract on Evaluation, Impact Assessment and Related Services. Study on the Impact of the Legal Choices of the Member States and other Aspects of Implementing the Directive 2008/48/EC on the Functioning of the Consumer Credit Market in the European Union', released on 22 October 2013, available at https://tinyurl.com/yad69hco (last visited 27 December 2018).

The next report of CCD is due in 2019. For this the Commission has preselected five bidders in an earlier framework contract. Detailed questions narrow down what can be researched and should be answered. Unwanted problems are not asked for (see the tender 'Framework contract no JUST/2015/PR/01/0003 on Supply of Impact Assessment, Evaluation and Evaluation related services in the policy areas under the responsibility of DG Justice and Consumers – Lot 1 Request for service number – Just/2017/Cons/Fw/C001/0176 Evaluation of the Directive 2008/48/EC on Credit Agreements for Consumers').

legislators to turn this concept into law. The MCD, with its minimum harmonization design, invites national legislators to provide a better model than the one that already failed in 2008. But also the total harmonisation approach, pursued by the CCD in 2008, is not an obstacle. It does not restrict national regulation in the areas that (like product regulation) are not covered by it.

IV. Responsible Lending and Usury

Responsible lending is a vague principle in EU law. In its present form, as provided by CCD and MCD, it turns civil courts into administrative bodies. Instead of justice and the constitutional right of access also to credit, the judge has become a watchdog on bank safety. But this depends on economic decisions that are not even expected to be efficiently controlled by banking authorities, which prefer to sanction the effects. Whether the extension of a credit to a certain person for a defined purpose will lead to a default in future is a complex socio-economic decision which combines productivity, history, individual and collective data with the present liquidity expectations. For this, bankers use models, statistical evidence, experience and intuition.

Its wording creates legal insecurity. The probability of future insolvency based on data reflecting the borrowers former payment behaviour shall be used to assess average risks. It presupposes that the sustainability of a credit is mirrored by the character of a person to whom the credit is entrusted. This implies that those who most need it should be excluded. But exclusion is not the answer in practice. Banks – or, in countries without bank monopoly, financial institutions – will use the argument of a higher risk for risk-adjusted pricing. Weak customers will be burdened with additional demand of securities, will be sold additional linked products and charged higher prices. It is a self-fulfilling prophecy towards systemic insolvency. People with less money will have to pay more so that they have ever less money.

At least some recitals that according to the European Court have a binding effect for the interpretation of the rules do not favour such effects. Responsible lending as defined in the G20 statements could be interpreted in a broader way.

The German history of strict consumer protection gives some hints as to how information duties can lead to responsible product regulation. German courts have built their usury ceilings on the assumption that usuriously overpriced credit is the manifestation of bad advice (*culpa in contrahendo*). The bad advice is

The EU Parliamentary Committee on internal market and consumer protection (IMCO) delivered an own report of a few pages based on the informational model (IMCO, 'Report on the Implementation of the Consumer Credit Directive 2008/48/EC', released on 19 October 2012).

According to Art 44 MCD also this Directive mandates the Commission to provide an evaluation report by 21 March 2019. The question is quite general and regards the 'effectiveness and appropriateness' of the regulation. Twelve special questions follow. It is interesting to see how this will be introduced into a tender and how the selection process of experts will be organised.

refutably assumed to be causally linked to the usurious contract. This damage has to be compensated. Since the contract itself is the damage, it leads to the abolition of the contract and thus of the usurious credit. In the end, such products have no chance of legal enforcement. Good advice cannot turn bad products into good products. Responsible lending requires responsible credit. Also the use of the substantive notion of responsibility instead of the procedural notion of fairness underlines that lending is measured according to its social and productive effects and not only by the way it has been organized.

Consumer organizations, attorneys and legal scientists in Germany have recently founded a movement entitled '#StopWucher'. It is based on the ancient principle[34] that exploitation of needs and poverty should be prohibited by law. § 138, para 2 of the German Civil Code summarizes this principle:

> '(2) (Usury) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance'.

Other anti-usury principles of general civil law, like the interdiction of anatocism, default interest rate ceilings, protection against early termination or insolvency protection can be added. But they have lost their teeth. Usury is seen as a mere market failure that can be cured by rational consumer behaviour.

In 1981, the then third chamber of the German Supreme Court took a different road. It adapted the old usury principle to the modern forms of systemic usury. Average interest rates in consumer credit had fallen sharply between 1976 and 1979. The court found that the rates for poor people remained at the same level. But the old usury principle cited above was inapplicable. There was no 'exploitation' in its traditional meaning. The usurer would have to act intentionally in reaction to the individual situation of the debtor and not driven by a system exploiting the situation of a whole class of borrowers. Anyhow, the effects are even worse, because people are caught in a trap and blamed for their ignorance, without the law that historically claimed to shelter the weak.

The courts reacted. They argued that a bank selling such loans to poor people exploits its monopolistic position in relation to such a class. The double of the average interest would provide an irrefutable assumption of systemic exploitation. The eleventh chamber in charge of bank law abandoned this view and followed the neo-liberal EU regulation.

Usury was hence reduced to a faulty consumer decision. Cost could be allocated to different products. Chain credit was no longer a usurious system

[34] H.P. Benöhr, 'Zweitausend Jahre Kampf gegen den Wucher (usura)' *Roma e America. Diritto romano comune*, 109 (2009).

but a number of separate contracts which had nothing to do with each other. In usury law, the creditor's perspective overruled that of the borrower.

The principle of responsible lending, although reduced to the assessment of creditworthiness, obviously targets the lenders again. It is their behaviour that should be responsible. This provides some hope that the usury principle, which for thousands of years protected the poor, could finally be resurrected in the form of the principle of responsible credit.

Essays

'Ties that Bind': Maintenance Order After Divorce in Italy

Giulia Terlizzi*

Abstract

This article aims to describe the changes and uncertainties among judges and interpreters concerning the rules on after-divorce maintenance from when they were first introduced up to the most recent judgement by Italian Court of Cassation Joint Divisions.

Since the first statute on divorce, back in 1970, maintenance has been the object of heated debate due to the difficulty of balancing two opposing needs: recognising party autonomy in the post-marriage phase on one hand, and protecting the weaker spouse, on the other.

The courts' fluctuating approach towards the issue, as well as the debate about the nature and application of maintenance allowance, seems to have finally come to a happy ending with the intervention of the Joint Divisions. This decision has been welcomed by most legal scholars as a guiding light in a controversial issue – at least until now.

I. Divorce in Italy: A Brief *Excursus*

The traditional legal framework of family law has significantly changed since the enactment of legge 1 December 1970 no 898 (as amended by legge 6 March 1987 no 74), concerning marriage dissolution through divorce, and the broad reform enacted by legge 19 May 1975 no 151, which amended the family law provisions contained in the 1942 Italian Civil Code.[1] More recently, the enactment of legge 10 November 2014 no 162 (Arts 6 and 12) on consensual resolution of litigation related to separation and divorce, and enactment of the so called 'fast track divorce' statute (legge 6 May 2015 no 55) led to a considerable increase in the number of divorces.[2] Lastly, worth mentioning is the recognition of same

* Research Fellow in Private Comparative Law, University of Torino.

[1] The ground to obtain divorce in Italy are listed in Art 3 of legge 1 December 1970 no 898. However, despite the exhaustive list of hypothesis contemplated by Art 3, the most frequent basis for divorce is the one specified in para 2, lett b), which refers to a situation of continuous personal separation lasting for one year, or six months in the case of consensual separation (terms innovated by legge 6 May 2015 no 55 on fast-track divorce). See among legal scholarship, C. Rimini, 'Il nuovo divorzio', in A. Cicu et al eds, *Trattato di diritto civile e commerciale, La crisi della famiglia* (Milano: Giuffrè, 2015), II, 1-46.

[2] The last Report on marriages, separations and divorces of the National Institute of Statistics shows an increase of divorces, which reflects the impact of recent changes in regulations. In particular, the introduction of the so-called 'fast track divorce' caused a considerable increase of the number of divorces (eighty-two thousand four hundred sixty-nine in 2015 compared to fifty-two thousand three hundred fifty-five of the previous year with an increase of fifty-seven

sex partnerships, by legge 20 May 2016 no 76.

Such statutes deeply reshaped the contours of Italian family law that were no longer capable of reflecting the contemporary pluralistic conception of families.

Although it is not possible to go into detail here about how divorce law has evolved and the stages it has gone through, it seems useful to briefly highlight the chronological *excursus* that led to the current discipline of divorce and its consequences.

Under the Civil Code of 1865, family law followed a 'patriarchal' structure, where the husband had authority over his wife and children on any aspects of family life. Italian law recognized the possibility of personal separation, but not divorce.[3]

The new Civil Code of 1942 did not change the discipline of family law; but the family's social function was emphasized. It was necessary to wait for the Republican Constitution of 1948 to see substantial changes in family law. The basis of family law was reshaped (at least in theory) following its enactment, with regard to different issues. The relationships between men and women changed thanks to the recognition of the principle of equality in multiple contexts.[4]

Despite the affirmation of such constitutional principles, it was necessary to wait until 1970 to achieve a comprehensive reform in matters of family law.

The introduction of legge 1 December 1970 no 898 provided the dissolution of marriage, or termination of the civil effects of marriage,[5] only for objective causes.[6] The legislator also provided for a maintenance order after divorce,

percent). See ISTAT, Report on *Marriages, Separations and Divorces* 14 November 2016, available at https://tinyurl.com/y76nu5lv (last visited 27 December 2018).

[3] See Arts 148-150 of Italian Civil Code of 1865, entitled 'The dissolution of marriage and spousal separation'.

[4] Art 3 of the Italian Constitution states that 'all citizens have equal social dignity and are equal in front of the law, regardless of differences of sex, race, language, religion, or political opinions'. The principle of equality appears also in Art 29 of the Constitution, which explicitly recognizes the value of family in society: marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.

[5] It is worth noting that within the Italian legal system two types of marriage coexist: civil marriage and '*matrimonio concordatario*'. The latter, is a marriage celebrated by means of a religious rite according to the rules of Canon law (and is as such considered to be a *sacramentum*), but if it is recorded in the register of acts of Italian marital status, it acquires also civil effects. The concordatory marriage was recognized by the Laterans Agreement (*Patti Lateranensi*) signed in 1929 between the Kingdom of Italy and the Holy See. In 1947, the Laterans Pacts were recognized in the Italian Constitution as regulating the relations between the State and the Catholic Church.

[6] Art 3 of legge 1 December 1970 no 898: 'Application for dissolution of the marriage or termination of the civil effects of the marriage may be made by one of the spouses if, after celebration of the marriage, the other spouse has been sentenced by final judgment for offences, including offences committed previously:

a) to life imprisonment or to a term of imprisonment exceeding fifteen years, including cumulative terms imposed by various judgments for one or more crimes committed without malice aforethought, with the exception of political crimes and crimes committed for particular moral or social beliefs;

when a party 'lacks financial means' or 'is unable to procure them for objective reasons'.

After a few years, in 1975, the legislator enacted a comprehensive reform of family law with legge 19 May 1975 no 151, finally giving effectiveness to the provisions of Art 29 of the Constitution. The reform promoted egalitarianism in matrimonial relations, abandoning the traditional position of supremacy occupied by the husband, placing greater emphasis on the principle of solidarity within the family and allowing both spouses to be involved in guiding the life of the marriage.

Some changes then innovated the divorce discipline in 1987. Legge 6 March

b) to any term of imprisonment for a crime defined in Art 564 of the Criminal Code or one of the crimes defined in Arts 519, 521, 523 and 524 of the Criminal Code or for induction, coercion, exploitation or the aiding and abetting of prostitution;

c) to any judgment for the wilful murder of one's child or for attempted murder of one's spouse or of the child;

d) to any term of imprisonment imposed by two or more judgments for the crimes defined in Art 582, if there are aggravating circumstances to the detriment of the spouse or the child in the sense of the second paragraph of Art 583 and Arts 570, 572 and 643 of the Criminal Code.

In the cases mentioned at (d) the competent judge who pronounces the dissolution of marriage or the ending of the civil effects of marriage shall verify that there is no prospect of the family continuing to live together or resuming living together, taking into consideration the future behaviour of the spouse.

With respect to all possibilities mentioned in para 1 of the present Art the petition may not be presented by the spouse who has been sentenced for complicity in a crime when married life is resumed;

2) if:

a) the other spouse has been acquitted of one of the crimes mentioned at (b) and (c) of para 1 of the present Art due to total defect of reason and the judge who pronounces the dissolution of marriage or the ending of the civil effects of marriage verifies that there is no prospect of the family continuing to live together or resuming living together, taking into consideration the future behaviour of the spouse;

b) the judicial separation of the couple has been pronounced by final judgment or the separation by mutual consent has been homologated or a *de facto* separation intervenes and itself begins at least two years before 18 December 1970. In order to present a petition for dissolution or the ending of the civil effects of marriage it is necessary in the aforementioned cases that the separation should have been continuous and lasted for at least three years from the time the couple appeared before the court for the judicial separation proceedings, even if the judgment concerned is effected by mutual consent. The eventual interruption of separation has to be pleaded by the respondent.

c) The penal proceedings held in respect of the crimes mentioned at (b) and (c) of para 1 of the current Art ended with a judgment that proceedings should be discontinued because they are statute-barred, if the competent judge who pronounces the dissolution or the ending of the civil effects of the marriage verifies that the committed offences contained the basic elements and the conditions for liability to punishment in respect of the crimes;

d) penal proceedings for incest ended with an acquittal or discharge on the grounds that the offence should not be punished in order to avoid a public scandal;

e) the other spouse who is a foreign citizen obtained the annulment or dissolution of the marriage abroad or has contracted a new marriage abroad;

f) the marriage has not been consummated'.

See S. Patti et al, 'Grounds for divorce and maintenance between former spouses, Italian Report', in K. Boele-Woelki et al eds, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp-Oxford: Intersentia, 2004), VII, 13-14, 1-42.

1987 no 74 introduced detailed provisions of a short period to get a divorce, a shorter term for separation (three rather than five years), and a clearer definition of maintenance after divorce and its automatic indexing, in order to reduce judges' discretionary powers, as specifically illustrated in the Report of the Draft Law.[7]

II. The Introduction of Maintenance After Divorce in Italy: Nature of and Indexes for the Allowance

As already mentioned, the maintenance order after divorce appeared for the first time in 1970.[8] The original text of Art 5, para 6, of legge 1 December 1970 no 898 provided that when granting the divorce, the court awards one of the spouses, at the expense of the other, regular payment of maintenance, whenever the claimant lacks '*financial means*' or is unable to procure them for objective reasons. The obligation to pay maintenance ceases if the beneficiary remarries. When deciding on maintenance, the court has to take into account the '*financial position of the spouses*' and the '*reasons for the decision*'. When determining the amount, the provision established that the judge has to take into account the '*personal and financial contribution made by each of the spouses to the welfare of the family and the creation of their joint assets*'.[9]

In the past, according to the original text of Art 5, para 6, of legge 1 December 1970 no 898, the courts formulated the theory that maintenance had three functions, ie, welfare, compensation and 'refund'.[10] In particular, the welfare function was connected to the ex-spouse's deteriorated condition following the divorce, while the compensation function was linked to the personal and economic commitment of one of the ex-spouses to caring for the family. Lastly, the refund

[7] See N. Lipari, *Report of the Draft Law*, *Parliamentary Acts and stenographic report of the afternoon session of the Senate Assembly on 17.2.1987*, no 561, available at https://tinyurl.com/y9c4xjlx (last visited 27 December 2018). See also C. Rimini, 'Il nuovo divorzio', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale, La crisi della famiglia* (Milano: Giuffrè, 2015), II, 1-46; F. Cipriani and E. Quadri, *La nuova legge sul divorzio* (Napoli: Jovene, 1988), II.

[8] Compare C. Rimini, 'Il nuovo divorzio' n 7 above; L. Barbiera, 'Divorzio', *sub* Art 1, legge 1 December 1970 no 898, in G. Cian and G. Oppo eds, *Commentario al diritto italiano della famiglia* (Padova: CEDAM, 1993), VI, 101; E. Quadri, 'I presupposti del divorzio', in F. Cipriani and E. Quadri eds, *La nuova legge sul divorzio* n 7 above, 1.

[9] Italics used here to emphasise. Art 5, para 6, legge 1 December 1970 no 898, 'Disciplina dei casi di scioglimento del matrimonio' *Gazzetta Ufficiale Serie Generale* 3 December 1970 no 306 (with the judgment dissolving the marriage or terminating the civil effects of this latter, the tribunal, taking into account the financial position of the spouses and the the grounds for the decision, orders one of the spouses to pay periodical maintenance to the other proportionally to its assets and income. In the determination of the amount of maintenance, the judge takes into consideration each of the spouses' personal and financial contribution to the welfare of the family and the creation of their joint assets).

[10] See Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335-1336, 1339-1340, and 1343-1344 (1974).

function was related to the reasons behind the decision to divorce.[11] The 'refund' component had to be intended in its broad meaning because of the implication of not merely economical profiles.[12] In this sense, this function has been defined as 'a form of reimbursement half-way between consideration and indemnification'.[13] Both judges and legal scholars recognized the multiple functions of maintenance, and gave equal weight to the three functions (welfare, compensation and 'refund').[14]

However, over time, both scholars and judges criticized the composite function of maintenance, particularly because of the risk of excessive discretionary power given to the judge.[15] As observed, a peculiarity of this system was in fact

[11] See reference to the '*funzione risarcitoria*' (refund) of maintenance, linked to the reasons for the decision, in the opinion of M. Marinucci (Senate), to the *Draft Law, stenographic report of the afternoon session of the Senate Assembly on 17.2.1987* no 561, available at https://tinyurl.com/y6uc3muk (last visited 27 December 2018). See also E. Quadri, *Rapporti patrimoniali nel divorzio* (Napoli: Jovene, 1986), 26. See, among, the consolidated trend in case law, Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335-1336 and 1343-1344 (1974); Corte di Cassazione 9 July 1974 no 2008, *Foro italiano Repertorio*, 'Matrimonio', no 271 (1974); Corte di Cassazione 12 July 1984, no 4107, *Foro italiano Repertorio*, 'Matrimonio', no 131 (1984); Corte di Cassazione 2 June 1981 no 3549, *Foro italiano Repertorio* 'Matrimonio', no 165 (1981); Corte di Cassazione 10 January 1986, no 72, *Foro italiano Repertorio* 'Matrimonio', no 205 (1986).

[12] See Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1340, 1335-1336 and 1343-1344 (1974), which implies a balanced evaluation of the reciprocal culpability linked to the decision of divorce.

[13] S. Patti et al, 'Grounds for divorce' n 6 above, 18. This function was defined by M. Bin as a criterion 'intended to stabilize the economic positions of the spouses at the moment of divorce', see M. Bin, 'Italy: Reform of Maintenance after Divorce' 28 *Journal of Family Law*, 542-550, 543 (1989). See also, A. Lamorgese, 'L'assegno divorzile e il dogma della conservazione del tenore di vita matrimoniale' *questionegiustizia.it*, 11 March 2016.

[14] See Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335-1336 and 1343-1344 (1974); Corte di Cassazione 9 July 1974 no 2008, *Foro italiano Repertorio* 'Matrimonio', no 271 (1974); Corte di Cassazione 12 July 1984, no 4107, *Foro italiano Repertorio* 'Matrimonio', no 131 (1984); Corte di Cassazione 2 June 1981 no 3549, *Foro italiano Repertorio* 'Matrimonio', no 165 (1981); Corte di Cassazione 10 January 1986, no 72, *Foro italiano Repertorio* 'Matrimonio', no 205 (1986). Among scholarship, see R. Tommasini, 'Il diritto all'assegno di divorzio: criteri di determinazione', in E. Quadri ed, *La riforma del divorzio: atti del Convegno di Napoli*, 22 maggio 1987 (Napoli: Jovene, 1989), 283; S. Sangiorgi, 'Il passato e il futuro nella determinazione dell'assegno di divorzio' *Rivista di diritto civile*, II, 563-575 (1988); E. Quadri, *La nuova legge sul divorzio* n 7 above, 31.

[15] See Corte di Cassazione 2 June 1981 no 3549, *Foro italiano Repertorio* 'Matrimonio', no 165 (1981); E. Quadri, 'La riforma del divorzio' *Foro italiano* 148, 141-142 and 155-156 (1985); Corte di Cassazione-Sezioni Unite 29 November 1990 no 11489; Corte di Cassazione-Sezioni Unite 29 November 1990 no 11490 with comments of E. Quadri, 'Assegno di divorzio: la mediazione delle Sezioni unite' and Vincenzo Carbone, '*Urteildämmerung*: una decisione crepuscolare sull'assegno di divorzio' *Foro italiano,* I, 67-68, 91-92 (1991); Corte di Cassazione-Sezioni unite 29 November 1990 no 11491; Corte di Cassazione-Sezioni unite 29 November 1990 no 11492, *Vita Notarile*, 161 (1991); E. Quadri ed, 'Divorzio: verso quale riforma?' *Foro italiano*, 68, 63-64 and 73-74 (1987). For an overview of legal literature and legal practice before 1987 Reform, see E. Quadri, *Rapporti patrimoniali nel divorzio. Esperienze giurisprudenziali e prospettive di riforma* (Napoli: Jovene, 1986), 28.

the extreme discretion given to the judge, not only in determining the amount of maintenance, but also in its assignment, which did not require a specific assessment of the 'state of need' or 'inadequate means'.[16] Maintenance was 'automatically' assured, as a rule, to the woman, since it was believed that she had invested all her energy into a marriage structured as a perpetual relationship and, therefore, considered as a 'set-up for life'.[17]

With the enactment of legge no 74 of 1987, the new text of Art 5, para 6, presented some innovation. In particular, maintenance would be paid to the spouse 'when the latter does not have *adequate means* or is *unable to provide for himself/herself for objective reasons*'.[18] Compared to the original text of the provision, the 1987 reform dropped the adjective 'financial'. This wording, as observed 'clearly emphasises that maintenance is provided first and foremost as support'.[19]

It is worth noticing that the replacement of the composite nature of maintenance with an exclusively assistance function is confirmed by the Report of the draft statute modifying the law on divorce (legge 1 December 1970 no 898). In the words of the Rapporteur Lipari,

> 'particular attention shall be made with regard to the function of maintenance after divorce, which is to provide assistance to the spouse in state of need, compared to the refund and compensatory functions'.[20]

This was explicitly reaffirmed in the first judgement of legitimacy after the amendment of the legge 6 March 1987 no 74. In that decision, the court firmly established that by enacting the law, the legislator had abandoned the theory of the composite nature of maintenance, favouring only the welfare criterion.[21]

According to the prevailing opinion among legal scholars, the new legal rule

[16] See E. Quadri, 'La riforma del divorzio' n 15 above; A. Lamorgese, 'L'assegno divorzile e il dogma della conservazione del tenore di vita matrimoniale' n 13 above.

[17] See A. Lamorgese, n 13 above.

[18] Art 5, para 6, legge 1 December 1970 no 898 as amended by legge 6 March 1987 no 74: 'In the judgment dissolving the marriage or ending the civil effects of the marriage, the tribunal, after taking account of the position of the spouses, the reasons for the decision and the personal and financial contribution made by each of the spouses to the welfare of the family and the creation of their joint assets, orders a spouse to pay periodical maintenance to the other spouse if the latter has no appropriate means or is unable to provide for himself/herself for objective reasons'.

[19] S. Patti et al, 'Grounds for divorce' n 6 above, 18.

[20] Professor N. Lipari was the rapporteur of legge 6 March 1987 no 74 at the Senate of the Republic, which introduced the sixth paragraph of Art 5 of the legge 1 December 1970 no 898, which still regulates the divorce allowance for the former spouse. He declared: 'This provision, was one of the articles that most committed and tormented the Commission. The same formulation, is probably a little cumbersome and redundant, but the text currently submitted to the Parliament reflects the difficult work of mediation that we had to carry out' *Atti Parlamentari*, Senato 7 February 1987, see n 7 above.

[21] Corte di Cassazione 17 March 1989 no 1322, *Foro italiano*, I, 2522-2523, 2511-2512 and 2525-2526 (1989).

maintained only one of the aforementioned criteria, ie welfare, as a parameter to allow or deny the right to a financial provision order. Other parameters only play a role at a subsequent stage, the determination (the *quantum*) of the maintenance order.[22]

In this perspective, it is worth noting that the argument used by the court in proclaiming the mere assistance function of the rule is connected to the principle of post-conjugal solidarity.[23] As observed, maintenance is tailored to the previous relationship, and specifically refers to rebalancing the ex-spouses' positions. In this sense, the duty of solidarity is an obligation between persons that were bound so deeply as in a marriage. The welfare function of maintenance after divorce represents the projection of marriage obligations, as a result of solidarity bonds, which can even survive after marriage.[24] By consequence, an economic bond, originally connected to the personal one, survives to its dissolution. Even after a marriage dissolving, this economic obligation still remains and implies a duty of assistance, free of any moral implications, simply based on the previous marriage.[25]

When referring to the indexes to allow maintenance, the new text establishes that the judge may consider the 'circumstances of the spouses', the 'reasons for the decision', the 'personal and financial contribution made by each spouse to the welfare of the family and the creation of personal and joint assets', as well as 'the income of both spouses'. Lastly, the judge might also assess all the above-mentioned elements 'in the light of the duration of the marriage' in order to establish the amount of the maintenance.

III. Standard of Living *Versus* Economic Independence. The Debate in the Case Law

Maintenance allowance (Art 5, para 6 of legge 1 December 1970 no 898) has been the object of divergent interpretations in case law [26] since its enactment.

[22] See M. Bin, 'Italy: Reform of Maintenance after Divorce' n 13 above, 542. In the same direction, see L. Barbiera, *Il divorzio dopo la seconda riforma* (Bologna: Zanichelli, 1988), 96; M. Dogliotti, *Separazione e divorzio* (Torino: UTET, 1988), 173; A. Trabucchi, 'Un nuovo divorzio. Il contenuto e il senso della riforma' *Rivista diritto civile*, II, 125-142, 131 (1987).

[23] C.M. Bianca, 'Conseguenze personali e patrimoniali', in E. Quadri ed, *La riforma del divorzio* (Napoli: Jovene, 1989), 58, 49-69.

[24] ibid.

[25] See in case law, Corte di Cassazione 2 March 1990 no 1652, *Foro italiano*, I, 1165-1166 and 1173-1174 (1990). See also, M. De Robertis, 'Assegno di divorzio ed adeguatezza dei mezzi economici tra tenore di vita in costanza di matrimonio e modello di vita autonoma e dignitosa' *Diritto di famiglia e delle persone*, 891-899, (1998).

[26] See E. Quadri, 'Divorzio: Verso quale riforma?' n 15 above, 68. See also the first series of judgements regarding maintenance after divorce, Corte di Cassazione 1 February 1974 no 263, *Foro italiano*, I, 1246 (1974); Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335 (1974).

In fact, two alternative approaches emerged in early case law. According to the first one, maintenance after divorce should guarantee to the ex-spouse the couple's *standard of living* during the marriage.[27]

It is interesting to note that this approach arose from the connection that interpreters made between the discipline of maintenance after separation and the rules governing maintenance after divorce.

In fact, Art 156 of the Civil Code provides the recognition of maintenance in favour of the separated spouse

> 'if he has no autonomous income on his own'. The amount of financial support has to be measured 'to the circumstances and income of the spouse obliged to give it'.[28]

Following case law interpretation, maintenance order on separation was introduced to guarantee the economically weaker spouse a continuation of the lifestyle enjoyed during marriage.[29] According to this interpretation, the right to financial support for ex-spouses clearly shows a *continuum* with the provision of order of maintenance on separation both in its nature as well as in content and terminology.[30] There was no difference between the concept of

> 'inadequacy of means' used by the amended Art 5, para 6 of legge 1 December 1970 no 898 (on divorce), and the parameter provided by Art 156 of the Civil Code regarding the recognition of maintenance in favour of the separated spouse 'if he has no autonomous income'.[31]

As observed, this meant a sort of protraction of marriage bonds after its dissolution, in order to affirm, also in this case, the principle of indissolubility of the marriage bond.[32]

[27] Corte di Cassazione 17 March 1989 no 1322, *Foro italiano*, I, 2512, 2511-2512 and 2525-2526 (1989).

[28] See Art 156 of the Italian Civil Code.

[29] See Corte di Cassazione 17 March 1989 no 1322, with comments of E. Quadri, 'La natura dell'assegno dopo la riforma' *Foro italiano,* 2511-2512 and 2525-2526 (1989); Corte di Cassazione 18 August 1994 no 7437; Corte di Cassazione 4 February 2009 no 2707, Corte di Cassazione 9 October 2007 no 21097 and most recently Corte di Cassazione 13 June 2014 no 13423; Corte di Cassazione 18 January 2017 no 1162 and 16 May 2017 no 12196, available at www.dejure.it. Among scholars see G. Gabrielli, 'L'assegno di divorzio in una recente sentenza della Cassazione' *Rivista di diritto civile*, II, 537-545 (1990); C. Rimini, 'Assegno di mantenimento e assegno divorzile: l'agonia del fondamento assistenziale' *Giurisprudenza italiana*, 1799, 1799-1806 (2017); C. Rimini, 'Verso una nuova stagione per l'assegno divorzile dopo il crepuscolo del fondamento assistenziale' *Nuova giurisprudenza civile commentata*, 1275, 1274-1282 (2017); B.M. Colangelo, 'Assegno divorzile: la *vexata quaestio* del rilievo da attribuire al tenore di vita matrimoniale' *Famiglia e diritto*, 274-275, 272-278 (2018).

[30] See Corte di Cassazione 17 March 1989 no 1322, ibid, 2525; G. Ceccherini, 'Natura e funzione dell'assegno al coniuge divorziato' *Foro italiano*, 235-236 and 245-246 (1977).

[31] Corte di Cassazione, ibid.

[32] See G. Ceccherini, 'Natura e funzione dell'assegno al coniuge divorziato' n 30 above; C.

The only difference, as noted by an authoritative scholar, is that in the separation discipline the reference to the tenor of life enjoyed during marriage is mandatory in favour of the spouse not responsible for separation. While in the divorce discipline, the judge's discretionary power may operate in granting the maintenance between a maximum measure – represented by the tenor of life criterion – and a minimum – represented by the state of need (alimony), taking a multitude of elements into account.[33] This was the interpretation followed by the Supreme Court until recent time. In fact, the consolidated trend of the Supreme Court acknowledged the parameter of standard of living in order to determine the maximum measure of the amount of maintenance, using it as a virtual evaluation. While, in the practical determination of the amount of maintenance the standard of living parameter should be evaluated and balanced with all other criteria indicated in Art 5 (conditions and income of spouses, personal and economic contribution to the formation of family assets, duration of marriage and grounds for the decision). This means that the evaluation of these criteria might also lead the judges to moderate, decrease and even completely annul the amount of maintenance recognized.[34]

According to scholarship and case law, the trend that referred to the concept of adequateness of means to living standards during the marriage was based on the argument that the role of marriage can continue after its termination.[35] In practice, it was a sort of extension of the principle of 'conjugal solidarity'. Therefore, the principle of solidarity survived between ex-spouses, too.[36]

By contrast, according to the second approach of case law, encouraged by

Rimini, 'Verso una nuova stagione per l'assegno divorzile dopo il crepuscolo del fondamento assistenziale' n 29 above, 1277. The exasperated distinction affirmed by judges between separated spouses 'ties (where the relationship still exists) compared to divorce (where the relationship is definitely terminated) was criticized by G. Casaburi, 'Tenore di vita e assegno divorzile (e di separazione): c'è qualcosa di nuovo oggi in Cassazione, anzi d'antico' *Foro italiano*, I, 1897, 1895-1890 (2017). This is especially true after the enactment of the Law on fast-track divorce that approached separation and divorce.

[33] See G. Gabrielli, 'L'assegno di divorzio in una recente sentenza della Cassazione' n 29 above: 'The only difference is that in the separation discipline the reference to the tenor of life enjoyed during marriage is mandatory in favour of the spouse not responsible for separation. While in the divorce discipline, the judge's discretionary power may operate in granting the maintenance between a maximum measure - represented by the tenor of life criterion - and a minimum - represented by the state of need (alimony), taking a multitude of elements into account'. See in case law, Corte di Cassazione 15 May 2013 no 11686 and Corte di Cassazione 9 June 2015 no 11870, available at www.dejure.it.

[34] Corte di Cassazione 29 November 1990 no 1490, with comments of E. Quadri and V. Carbone, *Foro italiano*, I, 67-68 and 91-92 (1991); Corte di Cassazione 19 March 2003 no 4040, Corte di Cassazione 22 August 2006 no 18241, Corte di Cassazione 12 July 2007 no 15611, Corte di Cassazione 28 October 2013 no 24252, Corte di Cassazione 21 October 2013 no 23797 and Corte di Cassazione 5 February 2014 no 2546, available at www.dejure.it.

[35] See, in the recent legal theory, C. Rimini, 'Verso una nuova stagione per l'assegno divorzile dopo il crepuscolo del fondamento assistenziale' n 29 above.

[36] Critical opinion in C. Rimini, ibid.

some legal scholars,[37] the term '*adequate means*' should be interpreted in the sense of protecting a *free and dignified life*, with the exclusion of the right of the beneficiary spouse to maintain the previous standard of living.[38] Emphasis is placed on the end of the relationship in this latter perspective. Except for conjugal solidarity, no other links must be considered or fostered.[39] Following this orientation, the spousal maintenance, therefore, should be 'neither blocked at the threshold of pure survival, nor exceeding the level of normality'.[40]

Following this orientation, the Supreme Court clearly affirmed that 'maintenance after divorce has an eminently welfare nature', and then declared that its attribution depended on 'the economic autonomy of the applicant', in the sense that the other spouse is required to 'help the other' only if he (or she) is not economically independent and within the limits in which the aid is necessary because of the lack of resources resulting from the dissolution of marriage.[41] Judges therefore have to evaluate this requirement through the lens of 'the principle of 'post-conjugal' solidarity, which represents the ethical and juridical foundation of assigning the divorce allowance'.[42] Therefore,

> 'the assessment of the appropriateness of the applicant's economic means must be made with reference not to the standard of living enjoyed during marriage, but to an economically autonomous and dignified life model, as configured by the conscience of society'.[43]

However, the following judgements of the Supreme Court did not adhere to the economic independence criterion. In the same year, judgements nos 11489 and 11492 held by the joint divisions of the Court of Cassation, preached the exclusively welfare function of maintenance and applied it as a means of assuring the spouses the preservation of the *standard of living* during marriage. Following these decisions, the 'tenor of life' criterion represented the guiding principle for the next twenty-seven years. Accordingly, the criterion on which to grant the right of spousal maintenance on divorce is

[37] See, A. Spadafora, 'Il presupposto fondamentale per l'attribuzione dell'assegno divorzile nell'ottica assistenzialistica della riforma del 1987' *Giustizia Civile*, I, 2390 (1990); M. Bin, 'Italy: Reform of Maintenance after Divorce' n 13 above, 546 and 548; M. Bin, 'I rapporti di famiglia. Sentenze d'un anno' *Rivista Trimestrale Diritto e Procedura Civile*, 323-333 (1989); L. Barbiera, *Il divorzio dopo la seconda riforma* n 22 above, 97.

[38] In the case law, see Corte di Cassazione 2 March 1990 no 1652, with comments of E. Quadri and F. Macario, *Foro Italiano*, I, 1165-1166 and 1173-1174 (1990).

[39] See, F. Lobasso, 'Il mantenimento del tenore di vita matrimoniale: un controsenso rispetto alla cessazione degli effetti civili del matrimonio' *Giurisprudenza italiana*, 3 (2000).

[40] See Corte di Cassazione n 38 above.

[41] See Corte di Cassazione n 38 above; Corte di Cassazione 17 April 1991 no 4098, *Foro italiano,* 1411-1412 and 1413-1414 (1991).

[42] See Corte di Cassazione n 38 above.

[43] See ibid.

> 'the inadequacy of the means of the applicant spouse to maintain a *tenor of life* similar to that enjoyed during marriage, without any need to prove the claimant's state of need and who could also be economically self-sufficient'.[44]

Following this argument, if the ex-spouses do not have adequate income to maintain the same lifestyle they enjoyed during the marriage and there is an imbalance between the income and overall wealth of the economically weaker and wealthier spouse, judges allow the former the right to receive financial support.

Both legal scholars and judges justified this duty considering it an inherent and long-lasting feature of the marital relationship, called 'post-conjugal solidarity'.[45]

Case law has generally interpreted this requirement since 1990s as the claimant's inability to maintain the standard of living to which he or she was accustomed during the marriage. Along these lines, for over twenty-five years, the spouse who lacked adequate assets and income (and has little or no earning capacity) was granted by the court the same economic standard of living enjoyed during marriage.

IV. The Parameters for Calculating the Amount of Maintenance: 'Circumstances', 'Reasons' and 'Personal Contribution' in Case Law Interpretation

The parameters for assessing the lack of 'adequate means' caused significant problems among interpreters. In fact, as observed, the choice of this ambiguous concept demonstrates a lack of political agreement on how to strike a balance between two opposing demands: on one hand, the need to protect the spouse in the weaker financial position, and on the other the need to minimise the adverse effect of divorce on the parties' assets.[46]

Under Art 5, para 6 of legge 1 December 1970 no 898, the judge is required to take into consideration the grounds for the divorce, the personal and economic contribution given by each of the spouses to the marriage, the income of both spouses, also evaluating all these elements in relation to the length of marriage. With regard to the indexes provided for Art 5, para 6, of the law, indeed, it was not clear whether these indexes should be used by the judges both in the phase of the recognition (the *an* in Latin), and in the phase of real determination (the *quantum* in Latin) of the maintenance amount. Or, on the contrary, if they should just be used in the second phase of determining the amount.

In fact, case law only used the indexes contained in the article, in this second

[44] Corte di Cassazione-Sezioni unite 29 November 1990 nos 11489 and 11490, available at www.cortedicassazione.it; Corte di Cassazione-Sezioni unite n 15 above.

[45] See, C. M. Bianca, 'Conseguenze personali e patrimoniali' n 23 above, 56, 58.

[46] See S. Patti et al, n 6 above, 19.

phase,[47] until the 2018 judgement of the Court of Cassation.

As affirmed,[48] the welfare purpose of maintenance allowance emerged from the clear-cut distinction of the two phases of *an* (recognising the right) and *quantum* (determining the allowance). The first phase requires the judge to compare the claimant's economic conditions before the termination of the marriage with the one after divorce and establish the amount needed to protect the claimant from suffering a deterioration of his/her standard of living. The second phase requires the judge to calculate the amount in abstract as the maximum limit of the maintenance amount, then measure it against the indexes provided in the Art 5, para 6 of the legge 1 December 1970 no 898 (the 'circumstances of the spouses'; the 'reasons for the decision'; the 'personal and financial contribution made by each spouse to the welfare of the family and the creation of personal and joint assets'; the 'income of both spouses' and 'the duration of marriage'), with the purpose of its concrete determination.[49] It should be noticed that this criterion usually operates to moderate or decrease (and not increase) the amount due by the obliged spouse.[50]

It is easy to guess that this criterion also caused significant interpretation problems for judges.

In general, the reference to the 'circumstances of the spouses' has been read as a judge's discretionary power, who may take personal and specific circumstances of the spouses into account such as age, illness, social conditions, professional qualifications and length of the marriage, because all these factors can in practice

[47] This trend started with the paramount judgments of the joint divisions of the Corte di Cassazione in 1990s, see n 15 above. As a result, the next decisions followed constantly this interpretation: Corte di Cassazione 13 October 2014 no 21597, available at www.dejure.it; Corte di Cassazione 5 February 2014 no 2546, with comments of A. Paganini, 'L'ex coniuge ha deciso di non lavorare più? Il giudice deve tenerne conto nel determinare l'assegno divorzile' *Diritto e Giustizia*, 67 (2014); Corte di Cassazione 3 July 2013 no 5177, *Guida al diritto*, 25, 65 (2012); Corte di Cassazione 27 December 2011 no 28892, *Famiglia e diritto*, 304 (2012); Corte di Cassazione 24 March 2010 no 7145, *Famiglia e diritto*, 606 (2010); Corte di Cassazione 12 July 2007 no 15611, *Famiglia e diritto*, 1092 (2007); Corte di Cassazione 2 July 2007 no 14965, *Guida al diritto*, 38, 54 (2007); Corte di Cassazione 12 February 2003 no 2076, *Famiglia e diritto*, 344 (2003); Corte di Cassazione 1 December 1993 no 11860, with comments of V. Carbone, 'L'evoluzione giurisprudenziale in tema di assegno di divorzio' *Famiglia e diritto*, 15 (1994).

[48] See Corte di Cassazione 17 April 1991 no 4098, *Foro italiano*, 1411-1412 and 1413-1414 (1991).

[49] See, in the legal scholarship, M. Bin, 'I rapporti di famiglia' n 37 above, 323 (1989). In contrast with this approach see the comment of E. Quadri, 'Assegno di divorzio: la mediazione delle Sezioni unite' n 15 above, 70-72; S. Sangiorgi, 'Il passato e il futuro nella determinazione dell'assegno di divorzio' n 14 above, 569. See more recently, E. Al Mureden, 'Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità' *Famiglia e diritto*, 537-552 (2015). In case law, see Corte di Cassazione n 48 above; Corte di Cassazione 2 March 1990 no 1652, *Foro italiano*, I, 1165-1166, 1173-1174 (1990); Corte di Cassazione Cassazione, 17 March 1989 no 1322, *Foro italiano*, I, 2512, 2511-2512, 2525-2526 (1989).

[50] See Corte di Cassazione-Sezioni unite 29 November 1990 no 11490 n 15 above. The Constitutional Court also affirmed the mentioned interpretation in 2015, see Corte costituzionale 11 February 2015 no 11, with comments of E. Al Mureden n 49 above.

affect the claimant's ability to obtain appropriate means. As observed, this leads to the conclusion that the determination of maintenance, being made strictly on the facts of the specific case, is a matter of discretion for the judge, who applies the rules in Art 5, para 6 of legge 1 December 1970 no 898.[51]

It is worth noting that Courts were uncertain in the past about 'income of both spouses' and whether judges should only consider the effective income or all assessable assets, like real estate and capital assets. This latter view was the one taken by the Supreme Court,[52] which provided that not only the current income has to be taken into account but also all assets capable of evaluation and any assets by which income can be earned, including real estate and even assets that are temporarily unproductive.[53]

The criterion of the 'reasons for the decision' may be taken into account, but only in the phase of determination of the maintenance amount. The reasons that led to the decision shall be relevant for judges together with all the other elements indicated in the provision, only in the phase of the concrete determination, as a criterion to moderate the amount and not in the phase of recognising the right. In this sense, the acknowledgement of their relevance could even be superfluous when the ex-spouse has adequate means.[54] Following this argument, judges never considered the claimant's new stable relationship a reason to exclude the right to maintenance.[55]

As regards the personal and financial contribution made by each spouse to the family and the creation of personal and joint assets, case law established that every kind of contribution must be taken into account, including domestic work, care taken of the other spouse, children and the home,[56] including any contribution made during the period of personal separation.[57] Recent cases have considered the disorderly behaviour of one of the spouses during the marriage as grounds to reduce maintenance (in the light of the parameter of contribution given to family life).[58]

Another parameter indicated in the first part of the provision is of utmost importance: the duration of marriage. In fact, a Supreme Court judgement in 2013 pointed out that the 'duration of marriage' should only be taken into consideration

[51] See S. Patti et al, n 6 above, 23.

[52] See Corte di Cassazione 20 March 1998 no 2955, available at www.dejure.it

[53] See Corte di Cassazione, n 52 above. More recently, see Corte di Cassazione 4 April 2011 no 7618; Corte di Cassazione 4 February 2011 no 2741, available at www.dejure.it.

[54] See Corte di Cassazione 24 March 1994 no 2872, available at www.dejure.it.

[55] See Corte di Cassazione 10 November 2006 no 24056 and more recently see Corte di Cassazione 12 February 2013 no 3398, available at www.dejure.it.

[56] Corte di Cassazione-Sezioni unite 29 November 1990 no 11490 n 15 above.

[57] Corte di Cassazione 2 April 1985 no 2261, *Giurisprudenza italiana*, I, 1320 (1985); Corte di Cassazione 27 December 2011 no 28892, with comments of M. Rinaldo, 'L'assegno divorzile: natura, criteri di determinazione e profili problematici' *Il Diritto di Famiglia e delle Persone*, 666-681 (2012).

[58] See Corte di Cassazione 27 December 2011 no 28892, ibid, 672.

for the second phase, ie, the determination of the amount of the maintenance;[59] however, in another case, the Supreme Court rejected the claim for the right of maintenance because the cohabitation only lasted ten days.[60]

In any case, the criterion to concede or deny maintenance payments until 2017 was assessed on the basis that ex-spouses have a right to retain the same 'tenor of life' after divorce.[61]

It is worth noting that, in the case law approach, the standard of living does not coincide with 'lifestyle'. This means that the assessment of '*appropriate means*' must be made following the 'tenor of life' criterion, even though the ex-spouses conducted a sober life style during their marriage.[62]

The second requirement for recognising the right for maintenance on divorce is the impossibility to provide appropriate means for *objective reasons*. Old age and the need to take care of children fall into this category.

However, as observed by the case law, the tenor of life standard should not be interpreted in a rigid, but an elastic way. In fact, it is a determinant factor only in the phase of attributing maintenance, which is the phase aimed at determining if there is a right for maintenance (the *an* in Latin). This is, therefore, a 'virtual'

[59] Corte di Cassazione 22 March 2013 no 7295, available at www.dejure.it.

[60] Corte di Cassazione 26 March 2015 no 6164, available at www.dejure.it. See, in the opposite sense, the debated decision of Corte di Cassazione 4 February 2009 no 2721, *Famiglia e diritto*, 682-683 (2009), which allowed the right of maintenance to a marriage lasted only one week. See the comment of E. Al Mureden, 'L'assegno divorzile viene attribuito dopo un matrimonio durato una settimana. Configurabilità e limiti della funzione assistenziale riabilitativa' *Famiglia e diritto*, 683-693 (2009).

[61] See Corte di Cassazione 23 May 2014 no 11517, Corte di Cassazione 28 October 2013 no 24252 and Corte di Cassazione 14 November 2011 no 23776, available at www.dejure.it.

It is interesting that except for sporadic judgements occurred immediately after the decision of the joint divisions of the Supreme Court (Corte di Cassazione 2 March 1990 no 1652), the trend expressed by the following judgements (Corte di Cassazione- Sezioni unite 29 November 1990 nos 11490, 11489, and others), has been followed by numerous judgements. See among many Corte di Cassazione 16 June 2000 no 8225, *Giurisprudenza italiana*, I, 462 (2001), with comments of O.B. Castagnaro, 'La Cassazione si ostina a far sopravvivere uno status economico connesso ad un rapporto definitivamente estinto e a non riconoscere il carattere alimentare dell'assegno'; Corte di Cassazione 17 January 2002 no 432, *Nuova giurisprudenza civile commentata*, I, 38 (2003), with comments of E. Al Mureden, 'In tema di adeguatezza dei redditi del coniuge divorziato'; Corte di Cassazione 27 September 2002 no 14004, *Famiglia e diritto*, 14 (2003) with comments of G. De Marzo, 'Revisione dell'assegno divorzile e conservazione del tenore di vita matrimoniale'.

The tenor of life argument has represented the decision-making criterion even in recent case law. See, Corte di Cassazione 9 April 2017 no 9945, Corte di Cassazione 28 February 2017 no 5062, Corte di Cassazione 23 February 2017 no 4703, Corte di Cassazione 8 February 2017 no 3316 and Corte di Cassazione 7 January 2017 no 975, available at www.dejure.it; Corte di Cassazione 29 September 2016 no 19339, *Foro italiano*, *Massimario*, 721 (2016); Corte di Cassazione 11 January 2016 no 223, *Foro italiano*, *Massimario*, 12 (2016); Corte di Cassazione 9 June 2015 no 11870, *Foro italiano Repertorio*, no 173 (2015); Corte di Cassazione 3 April 2015 no 6864, *Foro italiano Repertorio*, no 175 (2015); Corte di Cassazione 10 February 2015 no 2574, *Foro italiano Repertorio*, no 220 (2016), *Famiglia e diritto*, 259 (2016).

[62] See Corte di Cassazione 16 October 2013 no 23442, *Corriere Giuridico*, 1349 (2014), with comments of V. Amendolagine; see Corte di Cassazione 4 November 2010 no 22501 and Corte di Cassazione 24 March 2010 no 7145, available at www.dejure.it

determination, which only becomes concrete in the second phase, where the judge proceeds to the effective determination of the amount of maintenance. Therefore, the tenor of life concurs (and must be balanced) with the other criteria mentioned in the provision of Art 5, on the basis of a thoughtful case-by-case evaluation. The interdependence of the two phases of recognition and determination was thus confirmed and followed until the recent decision of the joint divisions of the Corte di Cassazione 11 July 2018 no 18287.

V. The Tenor of Life's Debate Between Autonomy and Reasonableness

The 'standard of living' criterion has been the object of important debate among scholarship.[63] Some legal scholars raised criticisms of the tenor of life criterion, sometimes considered 'anachronistic'.[64] However, other scholars recognize a basis of the tenor of life criterion in its practical dimension. In a specific kind of marriage, where one of the spouses represents the main source of family income, and the other contributes to the family needs mainly with housework, the tenor if life parameter should be applied on the basis of a planned contributions asset.[65] Obviously, this situation lasts for a significant period, and may induce the spouse dedicated to housekeeping to forsake working outside the home, or to choose a less demanding or profitable job. In such situations, the parameter of 'tenor of life' in case of divorce is the expression of the principle of 'conjugal solidarity' and must be taken into account, considering the importance of the distributive (and not purely compensatory) component.[66] As has been noted, it is extremely important to ensure protection, which has a constitutional basis in Arts 2, 3 and 29 of the Constitution, 'to the ex-spouse who has invested his energy and sacrificed his own professional aspiration to care for the family'.[67] For marriages that reflect this situation, the tenor of life will be applied as an

[63] For a general overview about the tenor of life approach on maintenance after divorce and separation, see A. Finessi, 'Commento all'art. 5, 6° comma l. div.', in A. Zaccaria ed, *Commentario breve al diritto della famiglia* (Padova: CEDAM, 2016), 1387; with specific reference to the *criteria* in cases of separation, see G. Ballarani, 'Commento all'art. 156 c.c.', in A. Zaccaria ed, *Commentario breve al diritto della famiglia* (Padova: CEDAM, 2016), 371; G. Bonilini and C. Coppola, 'Commento all'art. 5 l. div.', in G. F. Basini et al eds, *Codice di famiglia, minori, soggetti deboli* (Assago: UTET, 2014), II, 4241; For a useful and updated analisys of the different trend in the case law, see E. Bargelli, 'Assegno di divorzio e tenore di vita matrimoniale' *Giurisprudenza italiana*, I, 219-228 (2017).

[64] In this sense, see E. Bargelli, ibid.

[65] Of this opinion, E. Quadri, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': 'persone singole' senza passato?' *Corriere Giuridico*, 885-901 (2017); E. Al Mureden, 'Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità' n 49 above, especially at 543; E. Al Mureden, 'La solidarietà post-coniugale a quaranta anni dalla riforma del 75' *Famiglia e diritto,* 991-1007 (2015).

[66] Of this opinion, E. Al Mureden, 'La solidarietà post-coniugale' n 65 above.

[67] ibid.

expression of the preeminent principle of *reasonableness*, once an income balance has been established. As mentioned before, this criterion is obviously valid in cases of long-lasting marriages or marriages with dependent children, whose custody is entrusted to the spouse dedicated to the family. Whereas, in cases of economically weaker but younger spouses, or without any dependent family members, the principle of self-responsibility will prevail, especially in cases of short marriages.

However, other legal scholars consider the requisite of adequacy of means - even if generic and susceptible to excessive judicial discretion - should be related to the possibility of leading *a free and dignified life*, whereby recalling judgement no 1652 of 1990.[68] Thus, the spouse who is unable to obtain adequate resources for objective reasons has the right to a contribution sufficient for the realization of his or her personality. This minority view openly criticises the prevailing opinion, considering the 'tenor of life' criterion an obstacle to promoting equality of social dignity, and reaching economic independence. Marriage should not be considered a source of a right to a post-conjugal income, measured by the economic level enjoyed during marriage. As observed, the tenor of life criterion, if used as a lifelong insurance to enjoy a standard of living which is extended to a period of time that is subsequent to the marriage relationship, is in open contrast with the aim of the divorce, as definitive termination of marriage relationship.[69] In fact, criticism of this trend has a rational basis as it inevitably leads to indefinitely postponing the moment for interrupting economic relations between the spouses (following the twin-judgements of the Supreme Court in 1990). As observed,[70] applying this criterion represents an obstacle for the obliged spouse to create a new family and in fact violates his/her fundamental rights. This is recognized by Art 12 of European Convention of Human Rights (ECHR)[71] and Art 9 of the European Union's Charter of Fundamental Rights.[72]

VI. The Adoption of the 'Clean Break' Solution (Court of Cassation 10 May 2017 No 11504)

With judgement no 11504 of 10 May 2017, the Supreme Court of Cassation reversed the stable trend of the courts based on the 'tenor of life' parameter.

The case concerned an ex-spouse of a former Italian politician, who initiated Milan's court of first instance to obtain very high monthly spousal maintenance

[68] Corte di Cassazione 2 March 1990 no 1652, *Foro italiano*, I, 1165-1166 and 1173-1174 (1990)

[69] See M. Palazzo, 'Il diritto della crisi coniugale. Antichi dogmi e prospettive evolutive' *Rivista diritto civile*, II, 575-642 (2015).

[70] Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017). See also A. Lamorgese, 'L'assegno divorzile e il dogma della conservazione del tenore di vita matrimoniale' n 13 above.

[71] Art 12 European Convention of Human Rights, available at www.echr.coe.int.

[72] Charter of Fundamental Rights of the European Union, *OJ* C 202, 7 June 2016, 389-405.

for the remainder of her life. In the first instance and at appeal, the judges denied the right of maintenance because of an unjustified allegation of the inadequacy of the claimant's means. The claimant filed an appeal to the Supreme Court that in turn rejected the claim, stating that the courts in Italy should be guided by whether ex-spouses can achieve *economic independence* following a divorce. In other words, if the spouse has sufficient economic independence, including sufficient income and housing, the court should not interfere by addressing or providing for any further financial support.

The Supreme Court's decision came like an earthquake, suddenly and unexpectedly. Its effects were more deflagrating than expected,[73] establishing a judicial departure from the traditional interpretation of the court of maintenance upon divorce based on the preservation of the ex-spouse's standard of living. The court found that if a former spouse is capable of work and deemed self-autonomous or capable of being so, he or she will no longer be awarded an automatic right to claim spousal maintenance.

The court was aware of the stable trend that has been adhered to for several decades. In its own words, 'it is known that both before and after the fundamental judgments of the Supreme Court (joint divisions) in 1990, the reference point for evaluating a claimant's 'adequate means' has been permanently recognised by this court as the 'tenor of life' enjoyed during the marriage'.[74] However, 'after almost twenty-seven years, this court considers such orientation, (…), no longer current'.

With judgement no 11504 of 2017, the Supreme Court identified a new parameter to relate the notion of adequacy/inadequacy of the means of the former spouse for maintenance allowance: the achievement of economic independence, understood as equivalent to economic self-sufficiency.

In other words, spousal maintenance shall be considered as an instrument aimed at granting economic independence.

It is worth pointing out that in this particular decision, involving very rich ex-spouses used to a luxurious 'standard of living', the overruling of the 'tenor of life' parameter can certainly represent an attempt to stop the allowance of disproportionate financial support. In this scenario, it is not difficult to imagine the negative effects that could be provoked by applying the 'standard of living' to the letter. It has been broadly recognized that the 'tenor of life' argument can

[73] See, F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' *Famiglia e diritto*, 51-64 (2018); E. Quadri, 'L'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': gli ex coniugi 'persone singole' di fronte al loro passato comune' *Nuova giurisprudenza civile commentata*, 1261 (2017); Id, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': 'persone singole' senza passato?' n 65 above; E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' *Famiglia e diritto*, 636-654, (2017).

[74] See Corte di Cassazione-Sezioni unite 29 November 1990 no 11489, no 11490, no 11491, no 11492, n 15 above.

be used as a weapon designed to enrich the 'weaker' ex-spouse (normally the woman) and to literally take revenge against the wealthier spouse (normally the man), obliging him to pay disproportionate maintenance support. This way, the allowance of financial support is closer to – as stated by the court in this case – a 'set-up for life' solution, and not to real 'support'. Far from these unusual situations, most cases do not involve ex-partners of politicians or billionaires, but ex-spouses with normal standards of living. On one hand, it is true that in extraordinary situations the allowance of spousal maintenance based on the 'tenor of life' criterion often led to the allowance of parasitic income and to an unjustified extension of an already finished relationship. On the other hand, most ex-spouses conduct a 'normal life' with 'normal' standards. In this sense, the risk of such exorbitant financial support is inexistent.[75]

It is still undeniable that this judgement is part of a noticeable worldwide trend to shorten, reduce or extinguish spousal support to the economically weaker spouse following divorce. This is aimed at stopping the tendency of an 'automatic right to hefty maintenance payments', as well as recognising the parties' autonomy once a relationship has ended.

According to the Supreme Court's judges,[76] once the civil marriage has been dissolved or the civil effects resulting from the transcription of the religious marriage ceased, the marriage relationship is definitively terminated on both personal and economic levels. Spouses must, therefore, be considered thereafter 'individual persons', with regard to both their economic and personal relations (Art 191 of the Civil Code, para 1) and, in particular, with regard to the reciprocal duty of moral and material assistance (Art 143 of the Civil Code, para 2).

Because of the extinction of the marital relationship, the right to maintenance – provided for by Legge no 898 of 1970, Art 5, para 6, amended by legge no 74 of 1987, Art 10 – is conditioned to the prior judicial assessment of the lack of 'adequate means' of the former spouse requesting the allowance and, in any case, the impossibility of 'obtaining them for objective reasons'. The motivation alleged by the court derived from the assumption that the right to maintenance based on the economic interdependence of marriage living clashes with the real nature of divorce, which involves the definitive breakdown of the marriage bond.

Divorce (unlike separation) operates as a permanent break: like marriage, it is based on a free choice, and therefore it no longer corresponds to a 'definitive arrangement'. Consequently, the marriage relationship must be considered definitively extinct, and this is true not only for the spouses' personal status, but also for their economic-patrimonial relationships, in particular referring to their mutual duty of moral and material assistance. Therefore, the person is intended

[75] See data in C. Rimini, 'Assegno di mantenimento e assegno divorzile' n 29 above. A standard maintenance amount in Italy does not normally exceed five hundred and thirty point forty euro gross monthly.

[76] Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017).

as being single, no longer as part of a marriage relationship that is now extinct.[77] It follows that preserving the standard of living creates undue extra pressure on an already extinct relationship,[78] and an obstacle to the right – already widely accepted – to give life to a new family, after the breakup of the previous marriage.[79]

This change of view is clearly connected to the progressive disappearance of 'traditional' models of marriage and the profound change in its function and social perception as an institution.

The court emphasized more radically the 'two phase-evaluation' of maintenance allowance: the attribution of maintenance (*an*) and the determination of the amount (*quantum*). The first phase will be dedicated to acknowledging the claimant's self-sufficiency, and based on the principle of self-responsibility. If a former spouse is capable of working and deemed self-autonomous, or capable of being so, she (or he) will no longer be awarded an automatic right to claim spousal maintenance. The second phase is directed at quantification (*quantum debeatur*), and governed by the principle of solidarity, according to the traditional parameters in the first part of Art 5, para 6. It is only at this stage that comparisons can be made between the economic positions of former spouses. Such an interpretation leads to the conclusion that if the claimant has 'adequate means', his or her income (regardless of their source) may influence the amount of maintenance even to the point of excluding entitlement.

As observed, ex-spouses have to be considered as single persons,[80] but their life spent together must also be taken into consideration.[81]

Most legal scholars strongly criticized the overruling made by a single division of the Supreme Court of a stable trend (since 1990!) in the case law.[82] Indeed, it is undeniable that objections raised by scholars regarding the method have reasonable grounds. It is worth recalling that even though precedents are not binding in Italy, Art 374, para 3 of Code of Civil Procedure establishes that if the simple division does not agree with the joint divisions' opinions, it shall refer to them, by reasoned order. In other words, the risk is that such a delicate matter could give rise to an imposing dispute, leaving no fixed or univocal principle for judges to apply, and so materialise as a threat to legal certainty and predictability

[77] See M. Fortino, 'Il divorzio, l' "autoresponsabilità" degli ex coniugi e il nuovo volto della donna e della famiglia' *Nuova giurisprudenza civile commentata*, 1254-1260 (2017).

[78] Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017). See among scholars, E. Al Mureden, 'L'assegno divorzile' n 73 above, 642.

[79] See the comment to the judgement of E. Al Mureden, 'L'assegno divorzile' n 73 above.

[80] See M. Fortino, n 77 above.

[81] See others who share the same opinion, E. Quadri, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': 'persone singole' senza passato?' n 65 above.

[82] See among others, D. Piantanida, 'L'assegno di divorzio dopo la svolta della Cassazione: orientamenti (e disorientamenti) nella giurisprudenza di merito' *Famiglia e diritto*, 65-77 (2018); F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above. *Contra*, see M. Fortino, n 77 above, 1254.

of decisions.[83] Nevertheless, most of the following judgements openly welcomed the 'new' parameter of self-sufficiency affirmed by the Supreme Court in the decision no 11504 of 10 of May 2017.[84]

Subsequent case law, though, did not offer a univocal interpretation of the 'self-sufficiency' principle.[85] In fact, the notion risks being the object of conflicting interpretations. In particular, it is not clear whether the notion should have an objective and abstract valence, which is the same for everyone, or whether it should have a relative and personalized valence, with reference to the concrete needs of the ex-spouses and their particular life background.[86] It is also not clear if the indexes contained in para 6 of Art 5 of legge 898 of 1970 in order to evaluate the economic independence of the claimant have to be interpreted as alternatives, or analyzed overall.[87]

On one hand, the so-called 'clean break' solution adopted by the courts clearly represents a pragmatic way to solve 'pathological' consequences of maintenance orders; but it is also true that it starts a long debate on how this trend fits in to developing legal and social trends, which cannot be ignored.[88] In particular, the debate concerns the role that one of the spouse invested in the family, and focuses on the gender equality issue, in a social scenario characterized by increasingly fast divorce processes,[89] and the permanence of different roles between men and women in the family. By adopting a 'clean break' solution, the ex-spouse who has a monthly income of (more or less) one thousand euro, will not be entitled to maintenance allowance, regardless of the family's financial conditions, and,

[83] The opportunity to refer the question to the joint divisions of the Court of Cassation has been opportunely mentioned in the critical comment of the judgement (no 11504 of 2017) by F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above; E. Al Mureden, 'L'assegno divorzile' n 73 above; F. Danovi, 'Assegno di divorzio e irrilevanza del tenore di vita matrimoniale: il valore del precedente per i giudizi futuri e l'impatto sui divorzi già definiti' *Famiglia e diritto*, 655-668 (2017); B.M. Colangelo, 'Assegno divorzile: la *vexata quaestio* del rilievo da attribuire al tenore di vita matrimoniale' n 29 above, 278.

[84] See Corte di Cassazione 11 May 2017 no 11538; Corte di Cassazione 22 June 2017 no 15481; Corte di Cassazione 29 August 2017 no 20525; Corte di Cassazione 9 October 2017 no 23602; Corte di Cassazione 25 October 2017 no 25327, available at www.dejure.it.

[85] See Tribunale di Udine 1 June 2017, *Famiglia e diritto*, 272 (2018). Among scholars, see F. Danovi, 'Assegno di divorzio e irrilevanza del tenore di vita matrimoniale' n 83 above; Id, 'Verso una nuova stagione per l'assegno divorzile' n 29 above.

[86] See, in favour of a practical interpretation of the principle, Corte di Cassazione 26 January 2018 no 2042, available at https://tinyurl.com/y7owmfqt (last visited 27 December 2018).

[87] See, among others, F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above; U. Roma, 'Assegno di divorzio: dal tenore di vita all'indipendenza economica' *Nuova giurisprudenza civile commentata*, I, 1001-1016 (2017); E. Al Mureden, 'Il parametro del tenore di vita coniugale nel diritto vivente' *Famiglia e diritto*, 690-703 (2014).

[88] See F. Danovi, 'La Cassazione e l'assegno di divorzio' n 73 above.

[89] The enactment of legge 10 November 2014 no 162 (Arts 6 and 12) on consensual resolution of litigation related to separation and divorce, and enactment of the so called 'fast track divorce' (legge no 55 of 2015) led to a considerable increase in the number of divorces.

above all, the commitments made in favour of the other spouse or child care.[90]

Moving on from a crystallized family model, based on a paternalistic perspective and mostly disfavouring the spousal parties' autonomy after the marriage break down, the court opted for a 'clean break' model that recognizes spouses' contractual autonomy. Family law provisions are generally moving towards this new perspective. The self-sufficiency principle is at the core of the EU harmonization process in family law. This is particularly evident in the works of the Commission of European Family Law (CEFL), which elaborated the Principles of European Family Law. According to these Principles, 'each spouse should provide for his or her own support after divorce'.[91]

The principle of self-sufficiency revitalises the dilemma between the need to better define what might be object of private agreement between spouses, and what, on the other hand, must remain outside the private autonomy of the spouses.[92] With this in mind, it is essential to balance the two opposing needs, ie, the protection of the weaker party,[93] and the need to limit a permanent bond between ex-spouses, in favour of recognising the principle of self-responsibility. Faced with this challenge, the affirmation of only the welfare function of maintenance does not seem a balanced and satisfying solution to define the post conjugal conflict.[94]

VII. Maintenance Order and Gender Asymmetry in a Comparative Overview

The connection between maintenance discipline after divorce and gender asymmetry is self-evident. In particular, a much-debated question is whether the commitments and sacrifices made during a marriage have to be reflected in the financial support or not.

In fact, it is common in contemporary marriages or partnerships that one of the spouses/partner dedicates energy and time to increase his or her earning capacity (usually the man), while the other invests time and effort in rearing

[90] See C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above, 1279.

[91] K. Boele-Woelki et al, 'Principles of European Family Law, Chapter I, General Principles', Principle 2:2 'Self-sufficiency', in K. Boele-Woelki et al eds, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp-Oxford: Intersentia, 2004), VII, 137.

[92] See M.R. Marella, 'The privatization of Family Law: limits, gaps, backlashes' *Familia*, 615, 611-633 (2017). See also in this *Journal*, R. Montinaro, 'Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective' 1 *The Italian Law Journal*, 75-90, 80 (2017).

[93] See among legal scholarship, C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above; R. Tommasini, 'Il diritto all'assegno di divorzio' n 14 above, 276; E. Quadri, 'Divorzio verso quale riforma' n 15 above, 68.

[94] See the critics and proposals offered by C. Rimini, 'Assegno di mantenimento e assegno divorzile' n 29 above, 1806.

children and doing domestic work, (usually the woman).[95]

The 'clean break' view is based on the idea that individuals will be better off in the long run if they establish their independence immediately after divorce. From the feminist point of view, enforcing the self-sufficiency principle could inspire a new family model, in which spouses are equally engaged in managing the family, and ex-spouses should work towards the goal of being independent from each other after divorce. Some scholars maintain this model may finally lead to the abandonment of a model of family where one of the spouses (the woman) is still seen as the 'angel of the hearth'. According to this view, it could represent a small but significant step towards a new family model based on effective gender equality.[96] However, the self-sufficiency principle represents a double-edged sword because, in a realistic analysis, some spouses' (typically women) provide long lasting devotion to work within the home, abandoning their job's perspectives, making self-sufficiency an unachievable goal. So, the disproportion that existed during marriage will continue after divorce, placing many women at a substantial disadvantage in the labour force. This model then shows a persistent gender asymmetry, notably because women invest more in domestic work and childcare during the marriage and because, in most cases, the children live with their mother after the divorce. The new criterion risks, therefore, creating a huge prejudice in favour of the weaker party. For example, if the objective and standardized interpretation of this notion prevails, most ex-wives with a modest income and integrating economic self-sufficiency will not be entitled to divorce maintenance. Or, at most, they will only receive an extremely modest one, taking into account the other partner's position. This is in spite of a life dedicated to the family, and in spite of her ex-husband's richer conditions – which are in part due to those same wives' domestic commitment.[97]

Therefore, the risk of an unequal distribution between the spouses is clear.[98] So, how can we restore gender equality at a time when women still perform most of the domestic and parenting tasks?

In search of a solution, the comparative analysis offers some models that are able to compensate for the inequalities resulting from women's investment in family life.[99] It is worth noting that in many legal systems, the principle of

[95] See C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above.

[96] See, more on this opinion, M. Fortino, n 77 above.

[97] See C. Rimini, 'Assegno di mantenimento e assegno divorzile' n 29 above, 1803.

[98] See ibid 1804.

[99] For a comparative analysis see the contributions of C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above; E. Quadri, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità' ' n 65 above, 13; S. Patti, 'I rapporti patrimoniali tra coniugi. Modelli europei a confronto', in G. Ferrando ed, *Il nuovo trattato di diritto di famiglia* (Bologna: Zanichelli, 2008), II, 229; see also, E. Al Mureden, 'Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità' n 49 above, 543; K. Boele-Woelki et al, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp-Oxford: Intersentia, 2004).

self-responsibility – widely recognized and applied – leading to 'clean break' solutions, is equally combined with a balanced policy of distribution of family resources, in order to guard the value of dignity within domestic and non-domestic employment and protect gender justice.[100]

French law has opted for a system of redistributive justice designed to compensate for the economic inequalities created by a gendered division of labour in the family.[101]

French divorce law provides that 'a spouse may be required to pay the other spouse an allowance to *compensate*, as far as possible, the disparity that the breakdown of the marriage creates in their respective living conditions'.[102] In fact, in fixing the amount of the compensatory allowance, the judge takes into account

> 'the consequences of the professional choices made by a spouse during the couple's union either for the sake of their children's education (and the time that this responsibility would continue to require), or to promote the career of the other spouse at the expense of his or her own career'.

The other parameters taken into consideration are the length of marriage, age, health status, qualification and employment status, assets and pension rights.[103]

[100] See E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

[101] See Arts 270 and 271 of the French Civil Code, available at www.legifrance.gouv.fr. The solution adopted by French legislator has been recognised as a good example for the Italian Legal system by C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above, 1279 and by E. Quadri, 'L'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità'' n 73 above, 1261.

[102] Art 270 of the French Civil Code: '*Le divorce met fin au devoir de secours entre époux.*

L'un des époux peut être tenu de verser à l'autre une prestation destinée à compenser, autant qu'il est possible, la disparité que la rupture du mariage crée dans les conditions de vie respectives. Cette prestation a un caractère forfaitaire. Elle prend la forme d'un capital dont le montant est fixé par le juge.

Toutefois, le juge peut refuser d'accorder une telle prestation si l'équité le commande, soit en considération des critères prévus à l'article 271, soit lorsque le divorce est prononcé aux torts exclusifs de l'époux qui demande le bénéfice de cette prestation, au regard des circonstances particulières de la rupture' (Divorce puts an end to the duty of support between spouses. One of the spouses may be compelled to pay the other an allowance intended to compensate, as far as possible, for the disparity that the breakdown of the marriage creates in the respective ways of living. This allowance shall be in the nature of a lump sum. It shall take the form of a capital the amount of which must be fixed by the judge. However, the judge may refuse to grant such an allowance where equity so demands, either taking into account the criteria set out in Art 271, or when the divorce is declared on account of the blame lying wholly upon the spouse who requests the advantage of this allowance, considering the particular circumstances of the breakdown).

[103] Art 271 of the French Civil Code : '*La prestation compensatoire est fixée selon les besoins de l'époux à qui elle est versée et les ressources de l'autre en tenant compte de la situation au moment du divorce et de l'évolution de celle-ci dans un avenir prévisible.*

A cet effet, le juge prend en considération notamment:

It has been remarked that

> 'this redistributive justice underlies the French community property regime, under which both partners' earnings, wages and goods bought during the marriage go into a common pot'.[104]

Some commentators, however, criticize the ambivalence of these measures. In fact, they may seem to favour women by giving them a degree of financial independence that enables them to divorce. But, at the same time, from a feminist perspective it has been underlined that

> 'they penalize women because, being merely compensatory, such measures perpetuate or mask women's over-investment in the family compared to men'.[105]

In other words, the adoption of a purely compensatory principle, 'taking domestic labour and childcare into account is a factor both for equity and for maintaining inequalities' because of men and women's persistently different roles.[106] Consequently, some scholars have suggested applying compensatory

- la durée du mariage;
- l'âge et l'état de santé des époux;
- leur qualification et leur situation professionnelles;
- les conséquences des choix professionnels faits par l'un des époux pendant la vie commune pour l'éducation des enfants et du temps qu'il faudra encore y consacrer ou pour favoriser la carrière de son conjoint au détriment de la sienne;
- le patrimoine estimé ou prévisible des époux, tant en capital qu'en revenu, après la liquidation du régime matrimonial;
- leurs droits existants et prévisibles;
- leur situation respective en matière de pensions de retraite en ayant estimé, autant qu'il est possible, la diminution des droits à retraite qui aura pu être causée, pour l'époux créancier de la prestation compensatoire, par les circonstances visées au sixième alinéa' (A compensatory allowance must be fixed according to the needs of the spouse to whom it is paid and to the means of the other, account being taken of the situation at the time of divorce and of its evolution in a foreseeable future. For this purpose, the judge shall have regard in particular to: - the duration of the marriage; - the ages and states of health of the spouses; - their professional qualifications and occupations; - the consequences of the professional choices made by one spouse during their living together for educating the children and the time which must still be devoted to this education, or for favoring his or her spouse's career to the detriment of his or her own; - the estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial regime; - their existing and foreseeable rights; - their respective situations as to retirement pensions, having estimated, as much as possible, the reduction of the retirement rights that circumstances mentioned in the sixth paragraph above might cause for the spouse creditor of the compensatory allowance).

[104] A.M. Leroyer, 'Reducing Gender Asymmetries Due to Divorce' 3 *Population*, 498-499 (2016).

[105] See M. Pichard, 'Genre et rapport patrimoniaux entre époux', in S. Hennette-Vauchez, M. Pichard and D. Roman eds, *La loi et le genre* (Paris: CNRS, 2014), 799; A. Revillard, 'Protection humiliante ou source de droit ? Prestation compensatoire, pensions alimentaires et luttes feministes' *Jurisprudence, Revue critique*, 217-230 (2011).

[106] A. M. Leroyer, 'Reducing Gender Asymmetries Due to Divorce' n 104 above.

measures to eliminate the cost of the difference between men and women. As observed, 'the aim is to place a value upon the caregiver's work by equitably rewarding their investment in the family'.[107] This model is based on a 'genuinely egalitarian policy (which,) would give an incentive to share childcare equally'. Beyond compensatory measures, such a model includes 'men have incentives to take an equal share in domestic and parental work'.[108] According to this feminist view, such a model 'would involve a set of measures to change the perception of men's and women's roles both at work and in the family'.[109] This means that, for example, parental leave and benefits are paid equally to both parents on condition that they both spend the same amount of time with the children.

In recent years, German case law has also significantly revalued the compensatory needs when determining maintenance after divorce.[110] After a first reform in 2008 that was criticized because of its massively disadvantageous treatment of the weaker spouse, on the basis of the 'self-responsibility' principle,[111] a following amendment introduced forms of compensation for disadvantages arising from the marriage in the discipline of maintenance. The relevant provisions in the Civil Code are § 1570 - § 1573, § 1575 and § 1576.[112]

Another interesting example is offered by the US. Some US jurisdictions introduced an 'equitable distribution system', providing an equal distribution of family incomes at the moment of marriage breakdown. For example, the New York's statute requires the judges to distribute assets 'equitably between the parties, considering the circumstances of the case and of the respective parties'.[113] To achieve equity, the legislator has provided a list of thirteen different elements that together take account of spousal need, resources, contribution to the marriage, and economic misconduct.[114] Because of the existence of a 'catch-all clause', this provision considers 'any other factor which the court shall expressly find to be just and proper',[115] and leads to an increase of the judges' discretionary

[107] ibid 498.

[108] ibid.

[109] ibid.

[110] See, among legal scholarship, G.M. Cubeddu, 'Lo scioglimento del matrimonio e la riforma del mantenimento tra ex coniugi in Germania', in S. Patti and G.M. Cubeddu eds, *Introduzione al diritto della famiglia in Europa* (Milano: Giuffrè, 2008), 300.

[111] Under the Reform of 2008 the alimony payments were 'automatically' limited by the courts in the case of the absence of disadvantages as a result of the marriage without due consideration of other aspects in individual cases, especially marriage duration.

[112] References to the German model of maintenance in E. Quadri, 'L'assegno di divorzio tra conservazione del "tenore di vita" e "autoresponsabilità" ' n 73 above; S. Patti, 'I rapporti patrimoniali tra coniugi' n 99 above, 229; G.M. Cubeddu, 'Lo scioglimento del matrimonio e la riforma del mantenimento tra ex coniugi in Germania' n 110 above.

[113] N.Y. DOM. REL. L. § 236B(5)(c), MAINTENANCE Domestic Relations Law § 236-B(5-a) & (6); see in the legal scholarship, M. Garrison, 'What's Fair in Divorce Property Distribution: Cross-national Perspectives from Survey Evidence' 72 *Louisiana Law Review*, 69 (2011).

[114] See N.Y. DOM. REL. L. § 236B(5)(c) n 113 above.

[115] ibid (14).

power. As observed,

> 'basically, the statute directs the judge to base the distributional decision on an appraisal of the parties' past conduct, present needs, and future life circumstances, but leaves the scope, methodology, and application of that appraisal to judicial discretion'.[116]

VIII. The Re-Affirmation of the Composite Nature of Maintenance After Divorce. The End of the Story?

In the above-illustrated highly controversial scenario, the recent decision no 18287 of 11 July 2018 held by the joint divisions of the Supreme Court was expected and warmly welcomed by most legal scholars.[117]

Firstly, the court points out that the parameter to ascertain the right of maintenance allowance has a composite nature, since 'the adequateness of means or the impossibility to obtain them for objective reasons' must be evaluated through the indexes contained in the provision of Art 5, para 6,[118] which all have equal weight, representing the expression of the solidarity principle. Therefore, the criterion of 'adequateness of means' has a compensatory content, and cannot be limited either to the welfare level or to the comparison between the economic conditions of the parties.[119]

The maintenance order, both as to its nature and its amount, originates from the choices and decisions adopted by the spouses in the planning of their family life. These choices also imply the division of the tasks and duties derived from marriage (Art 143 Civil Code). It follows that, when deciding for maintenance, judges must give importance to the choices and roles on which the conjugal relation and family life was based. Consequently, maintenance after divorce does

[116] See, M. Garrison, 'What's Fair in Divorce Property Distribution' n 113 above.

[117] See Corte di Cassazione-Sezioni unite 11 July 2018 no 18287. See among scholars, F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above; B.M. Colangelo, 'Assegno divorzile: la *vexata quaestio* del rilievo da attribuire al tenore di vita matrimoniale' n 29 above; D. Piantanida, 'L'assegno di divorzio dopo la svolta della Cassazione: orientamenti (e disorientamenti) nella giurisprudenza di merito' n 82 above, 65; C. Rimini, 'Assegno di mantenimento e Assegno divorzile' n 29 above; E. Quadri, 'L'assegno di divorzio tra conservazione del "tenore di vita" e "autoresponsabilità" ' n 73 above; E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

[118] Conditions and income of spouses, personal and economic contribution to the formation of family asset, duration of marriage and grounds for the decision. See Art 5, para 6, legge 898 of 1970.

[119] See scholars' contributions that suggested the adoption of compensatory solutions prior to the Court of Cassation judgement no 18287 of 2018, C. Rimini, 'Assegno di mantenimento e Assegno divorzile' n 29 above, 1806; E. Al Mureden, 'Il parametro del tenore di vita coniugale nel diritto vivente' n 87 above; E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above, 653.

not have an assistance function because it is no longer based on the spouses' economic disproportion (following the standard of living approach) or on the claimant's subjective condition (self-sufficiency approach). It is in fact based on the equalising and compensatory functions, which are directly based on the Constitution. According to the court, only the adoption of all the criteria listed in Art 5, para 6 of the legge 898 of 1970 at issue will give effectiveness to the parameter of 'adequateness of means', in compliance with the constitutional principles involved: equality between spouses (Art 29 Constitution), dignity (Art 3 Constitution) and self-determination.

In other words, assessing whether one's means are adequate must also satisfy a prognostic function regarding the effective and practical determination of the prejudice suffered by the claimant both economically and professionally, as a result of their efforts and commitments for the benefit of the family. Consequently, the claimant's age is undoubtedly of utmost importance for the assessment of the real possibility of finding a job with regard to the 'impossibility to obtain adequate means for objective reasons'. It is therefore possible for the court to determine maintenance without being bound by a 'maximum limit' (which corresponds to the economic self-sufficiency), taking into account, of course, the other spouse's contribution to the family. In this perspective, the amount may be higher for the applicant who, for example, has spent a lot of time on family needs, domestic work, or childcare and education. The decision held by the joint divisions reaffirms that maintenance after divorce has a composite nature: welfare-oriented and compensatory. In this regard, the Court underlines that the compensatory nature of maintenance is not supposed to re-create the previous standard of living, but rather to recognize the weaker spouse's role and contribution to the family income. In order to achieve this result, the court strongly rejects the adoption of a biphasic process (although emphasized by the precedents) in order to assess the right of maintenance. The criteria listed in the provision constitute the parameters both for the attribution and determination of maintenance, in light of the comparative analysis of the 'economic and personal conditions' of the parties. The contribution offered by the claimant to family life must be taken into account, with particular focus on the length of the marriage and age of the ex-spouse entitled to maintenance.[120] The court underlines that the compensatory nature of maintenance is not supposed to re-create the previous standard of living, but rather to recognize the role and the contribution of the weaker spouse to the family income.

With this judgement, the joint divisions of the Court of cassation have finally innovated and modernized the criteria listed in Art 5, para 6 of Legge 898 of 1970, in order to align our system with other European Countries and protect both the breadwinner and home carer.

[120] See E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

As already mentioned,[121] the clean break solution coexists in many legal systems with other instruments aimed at guaranteeing adequate protection to the ex-spouse who dedicated time and effort in favour of the family during the marriage. All those instruments have a compensatory rather than welfare basis.[122] This way any risk of 'long-life arrangement' or, on the contrary, undue responsibility on the shoulders of the economically weaker party, is eliminated, reaching a real 'clean break'.[123]

Only by applying the parameters indicated in Art 5, para 6, in its compensatory function, does the tenor of life concept gain real meaning and a right place. The court upholds neither self-sufficiency nor the standard of living parameter, but an integrated evaluation of the criteria contained in the provision, in order to award the weaker spouse compensation for the effort and sacrifices made during the marriage, in the exercise of a free and shared choice of life, on the basis of the primary principle of equality.[124] The relevance of the involvement of the weaker spouse into the family is strictly connected to the fact that people can neither change nor modify the past, regardless of any possible risk of ultra-activism.[125]

The compensatory function of maintenance is, therefore, affirmed to value the practical commitment of both ex-spouses in the family and the woman's role in the family, which otherwise would remain hidden and submerged.

The Court of cassation's decision has gone back to the past (saving the composite nature of maintenance) to look toward the future - departing from a maintenance order exclusively measured on the tenor of life of the ex-spouses during the marriage, and from the growing idea of the indissolubility of the relationship).[126] Apparently, the court put an end to the story, re-balancing the stages of a hard debate. In this new perspective, marriage ties still bind.

[121] See section VII above.

[122] A characteristic of this model is that maintenance allowance is made in a unique solution. Consequently, any undue extension of the marriage bond is excluded, reaching a real 'clean break'.

[123] See C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above, 1277.

[124] See E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

[125] See, E. Quadri, 'L'assegno di divorzio tra conservazione del "tenore di vita" e 'autoresponsabilità" ' n 73 above; see also G. Casaburi, n 32 above.

[126] A. Simeone, 'Il nuovo assegno di divorzio dopo le sezioni unite: ritorno al futuro?' *il familiarista.it*, 17 July 2018.

Essays

Old and New Trends in School Liability

Emanuele Tuccari*

Abstract

The paper investigates the double 'contractual relationship' (due to the enrollment of minors in school and to the 'social contact' between teachers and pupils), reflecting on the liability of the educational institutes in cases of damage inflicted by pupils on themselves and damage caused to a pupil by a third party.

In particular, the regulation of the school's liability for damage caused by a third party outside the school has been significantly modified, giving parents the possibility of authorizing schools attended by their children to allow them to leave school premises freely at the end of lessons. This authorization exempts educational institutes from any liability connected with the performance of their supervisory obligation.

I. Introduction

A series of recent decisions by the *Corte di Cassazione*[1] seems to have rekindled discussions (never completely settled) in the Italian legal system on the fundamental characteristics of civil liability of educational institutes for any damage suffered by students.[2]

The paper aims to investigate the liability of the school, critically reflecting on the passive legitimacy of the Ministry of Education, University and Research (MIUR) (§ II), on the cases (and on the nature) of the school's responsibility (§ III) and on the compensable loss (§ IV), without neglecting the probable

* Postdoctoral Research Fellow in Private Law, University of Piemonte Orientale.

[1] Corte di Cassazione 19 September 2017 no 21593, *Responsabilità civile e previdenza*, 159 (2018), with note by C. Murgo (and E. Tuccari, 'Riflessioni sulla responsabilità civile dell'istituto scolastico prima e dopo la legge 4 dicembre 2017, n. 172: lo "scandalo" della normale applicazione dei criteri legislativi nella giurisprudenza di legittimità', in C. Granelli ed, *I nuovi orientamenti della Cassazione civile* (Milano: Giuffrè, 2018), 689-704); Corte di Cassazione 28 April 2017 no 10516, *Diritto e giustizia*, 2 May 2017, with note by E. Mattioli; Corte di Cassazione 19 July 2016 no 14701, *Diritto e giustizia*, 20 July 2016; Corte di Cassazione 25 February 2016 no 3695, *Foro italiano*, I, 2858 (2016), with note by F.A.R. Ferrara. In the same sense, see the recent case law of merits courts: Tribunale di Asti, 1 August 2017 no 671, available at www.dejure.it.

[2] Previously, see Corte di Cassazione 11 November 2003 no 16947, *Enti pubblici*, 627 (2005); Corte di Cassazione 20 April 2010 no 9325, *Massimario di Giustizia civile*, 569 (2010); Corte di Cassazione 26 April 2010 no 9606, available at www.dejure.it; Corte di Cassazione 15 February 2011 no 3680, *Guida al diritto*, 47 (2011), *Responsabilità civile e previdenza*, 1562 (2011), with note by A. Cocchi; and, more recently, Corte di Cassazione 15 May 2013 no 11751, *Responsabilità civile e previdenza*, 1005 (2013).

consequences attributable to the changes recently introduced by the Italian legge 4 December 2017 no 172 (§ V).

II. The Passive Legitimacy of the MIUR

The passive legitimacy of MIUR for behaviour of teachers and of the entire staff of public schools, as well as that of students subject to their supervision, is set out in Art 61 of the Italian legge 11 July 1980 no 312:

> '(1) the patrimonial responsibility of the managerial, teaching, educational and non-teaching staff of primary, secondary and artistic public schools and of public educational institutions for damages caused directly to the administration in connection with the behaviour of students, is limited only to cases of willful misconduct or gross negligence in supervising pupils. (2) The limitation of the preceding paragraph also applies to the liability of the aforementioned personnel towards the administration that compensates a third party for the damages suffered as a result of the behaviour of the pupils subject to supervision. (3) Except for recourse in cases of willful misconduct or gross negligence, the administration subrogates the said personnel in the civil responsibilities deriving from judicial actions promoted by third parties (3)'.

This regulation – considered of a predominantly (though not exclusively) procedural nature –[3] is aimed at supporting, in full respect of the constitutional charter,[4] the position of each teacher and (more generally) of the entire staff (teachers or not) employed by public schools.[5]

[3] See – albeit with nuances that are sometimes partially different (about, precisely, the substantive and/or procedural nature of Art 61 of the legge 11 July 1980 no 312) – Corte di Cassazione 3 March 1995 no 2463, *Giustizia civile*, I, 2093 (1995), with note by F. Casini; Corte di Cassazione-Sezioni unite 11 August 1997 no 7454, *Danno e responsabilità*, 260 (1998), with note by M. Rossetti, *Responsabilità civile e previdenza*, 1071 (1998), with note by R. Settesoldi; Corte di Cassazione 21 September 2000 no 12501, *Responsabilità civile e previdenza*, 73 (2001), with note by R. Settesoldi, *Danno e responsabilità*, 257 (2001), with note by F. Di Ciommo; Corte di Cassazione-Sezioni unite 27 June 2002 no 9346, *Responsabilità civile e previdenza*, 1012 (2002), with note by G. Facci, *Nuova giurisprudenza civile commentata*, I, 264 (2003), with note by R. Barbanera, *Foro italiano*, I, 2635 (2002), with note by F. Di Ciommo; Corte di Cassazione 11 February 2005 no 2839, *Guida al diritto*, 18, 70 (2005); Corte di Cassazione 10 May 2005 no 9758, *Giurisprudenza italiana*, 396 (2006); Corte di Cassazione 29 April 2006 no 10042, *Massimario di Giustizia civile*, 4 (2006); Corte di Cassazione 10 October 2010 no 24997, *Massimario di Giustizia civile*, 1469 (2008); Corte di Cassazione 3 March 2010 no 5067, *Giustizia civile*, I, 2931 (2011), with note by M. Cocuccio; Corte di Cassazione 6 November 2012 no 19158, *Diritto e giustizia online*, 7 (2012), with note by A. Villa.

[4] See Corte Costituzionale 24 February 1992 no 64, *Giurisprudenza italiana*, I, 1618 (1992), with note by M. Comba, *Foro Amministrativo*, 1220 (1993), with note by F. Staderini. On this item, more recently, see C. Rusconi, 'Minore età e responsabilità dei genitori e degli insegnanti' *Ius Civile*, 122, fn 88 (2014).

[5] In literature, with express reference to the only partial nature of reimbursement (limited

The school administration, because of the organic relationship 'administration-dependent staff', is therefore considered liable for damage caused to minors during the time which they are subject to the supervision of the institute's personnel.[6]

III. The Hypothesis and the Nature of the Institute's Responsibility

In the context of damage suffered by pupils, it is appropriate to distinguish – in addition to the case of damage caused to a pupil by another pupil – the hypothesis of damage inflicted by a pupil on himself and damage caused to a pupil by a third party.[7]

Whereas the damage done to a pupil by the actions of another pupil triggers, according to a well-established orientation,[8] the extra-contractual liability of the teacher (pursuant to Art 2048 of the Italian Civil Code),[9] the two remaining

to the hypothesis of wilful misconduct and gross negligence), see M. Comporti, 'Fatti illeciti: le responsabilità presunte', in P. Schlesinger ed, *Il Codice Civile. Commentario*, *Artt. 2044-2048* (Milano: Giuffrè, 2nd ed, 2012), 291-299; A. Ferrante, *La responsabilità civile dell'insegnante, del genitore e del tutore* (Milano: Giuffrè, 2008), 320; D. Chindemi, 'La responsabilità dell'insegnante per i danni subiti dall'alunno' *Responsabilità civile e previdenza*, 2137 (2011).

[6] Corte di Cassazione 7 November 2000 no 14484, *Foro italiano*, I, 3288 (2001), with note by M.P. Giracca; Corte di Cassazione 26 June 1998 no 6331, *Foro italiano*, I, 1574 (1999), with note by F. Di Ciommo. In literature, see, among others, D. Chindemi, n 5 above, 2137.

[7] We can find other similar situations represented, for example, by the case of damage suffered by the pupil as a result of his/her interaction with something (cf Corte di Cassazione 8 February 2012 no 1769, *Responsabilità civile e previdenza*, 1538 (2012), with note by A. Cocchi, *Foro italiano*, I, 1040 (2012)) and by the case of damage caused to a student by an animal (cf Corte di Cassazione 15 February 2011 no 3680, *Responsabilità civile e previdenza*, 1560 (2011), with note by A. Cocchi, *Giurisprudenza italiana*, 590 (2012), with note by E. Petrone). For a complete analysis of the different cases, cf, *ex multis*, M. Ferrari, 'La responsabilità civile di scuola e insegnanti in Italia e Francia: un'analisi comparata' *Responsabilità civile e previdenza*, 1377 (2014).

[8] This judicial interpretation seems to be shared also in the context of the so-called 'European soft law'. In particular, although in the absence of an express regulation on the responsibility of the staff and the educational institution, they provide for cases of (extra-contractual) liability for damage caused by the children or supervised persons the Art 6:101 of the 'Principles of European Tort Law' (PETL) and the Art VI. – 3:104 of the 'Draft Common Frame of Reference' (DCFR). In general, on the different characteristics of these two 'soft law' projects (PETL and DCFR) as well as on the difficulties of harmonization of the continental rules of civil liability; see, for all, G. Alpa, M. Andenas, 'Fondamenti del diritto privato europeo', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2005), 525-527.

[9] On the archaic terminology as well as on the evolution and extensive interpretation of Art 2048 of the Italian Civil Code, cf, *ex multis*, L. Rossi Carleo, 'La responsabilità dei genitori *ex* art. 2048' *Rivista di diritto civile*, II, 125-151 (1979); A. Venchiarutti, 'La responsabilità dei genitori, dei tutori, dei precettori e dei maestri d'arte', in P. Cendon ed, *La responsabilità extracontrattuale. Le nuove figure di risarcimento del danno nella giurisprudenza* (Milano: Giuffrè, 1994), 414; Id, 'Il minore e il danno. Riflessioni sulla responsabilità dei genitori in Francia e in Italia' *Rivista di diritto civile*, 219-240, 233 (2005); C. Salvi, 'La responsabilità civile', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2nd ed, 2005), 187-188; E. Carbone 'La responsabilità aquiliana del genitore tra rischio tipico e colpe fittizie' *Rivista di diritto civile*, 1-12 (2008); A. Ferrante, 'Illecito del figlio minore: nuove prospettive'

cases raise distinct problems and suggest distinct solutions.

In particular, the hypothesis of damage inflicted by a pupil on himself (so-called 'self-perpetrated damage')[10] cannot fall within the scope of Art 2048, para 2, of the Italian Civil Code. Indeed, this provision refers to damage caused by the conduct of a pupil supervised by a teacher, assuming a necessary alterity between the party causing damage and the party suffering damage. Having excluded application of Art 2048, para 2, of the Italian Civil Code, the trend that seems to prevail, also thanks to endorsement by the *Corte di Cassazione-Sezioni unite*, it is that of liability for non-performance, pursuant to Art 1218 of the Italian Civil Code, of the teacher and of the school.[11] This liability for non-performance follows the establishment not only of a binding legal relationship, concluded by student enrollment, between the educational institute and the student (*rectius*, his parents), but also of a 'social contact' between the teacher and the student.[12] The latter part of this reconstruction allows, according to part

Danno e responsabilità, 585-602 (2009); and, for a more recent examination (especially from the perspective of case law), see A. Anceschi, *Rapporti tra genitori e figli. Profili di responsabilità* (Milano: Giuffrè, 2nd ed, 2014). This extra-contractual liability pursuant to Art 2048 of the Italian Civil Code (in addition to the constant interference with the responsibility under Art 2047, which, however, refers to the hypothesis of 'natural' incapacity) it can also contribute to the responsibility for breach pursuant to Art 1218 of the Italian Civil Code of educational institutes (which finds its source in the enrolment of the student and in the consequent obligation of supervision placed on the school staff). See, for all, Corte di Cassazione 19 July 2016 no 14701, n 1 above.

[10] Or, in Italian, '*danno autocagionato*'.

[11] See Corte di Cassazione-Sezioni unite 27 June 2002 no 9346, n 3 above; Corte di Cassazione 18 July 2003 no 11245, *Nuova giurisprudenza civile commentata*, 491 (2004), with note by I. Carassale; Corte di Cassazione 26 April 2010 no 9906, *Responsabilità civile e previdenza*, 2288 (2010), with note by C. Menga, *Nuova giurisprudenza civile commentata*, I, 1160 (2010), with note by A. Querci.

[12] This responsibility arises, in extreme synthesis, from a 'qualified contact' between a subject endowed with a particular *status* and another person injured: this generates, according to a part of the literature, a commitment and a duty of protection without a primary obligation of performance. In this paper, it is not possible to retrace all the origins, reasons and systematic profiles of 'social contact'. Therefore we refer – in addition to the studies of the German literature (see, among others, the work, recently translated into Italian, of G. Haupt, *Sui rapporti contrattuali di fatto* (Torino: Giappichelli, 2012) and the study, from a critical perspective, of C.-W. Canaris, 'Il "contatto sociale" nell'ordinamento giuridico tedesco' *Rivista di diritto civile*, 1-9 (2017)) – to our national debate: C. Castronovo, 'Obblighi di protezione' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXI, 1-9; Id, 'Il diritto civile della legislazione nuova. La legge sulla intermediazione mobiliare' *Banca borsa e titoli di credito*, 300-329, 319 (1993); Id, 'L'obbligazione senza prestazione. Ai confini tra contratto e torto', in G. Alpa et al, *Le ragioni del diritto. Scritti in onore di Luigi Mengoni* (Milano: Giuffrè, 1995), I, 147; propose a partially different reconstruction A. di Majo, 'L'obbligazione senza prestazione approda in Cassazione' *Corriere giuridico*, 446 (1999); Id, 'Contratto e torto. La responsabilità per il pagamento di assegni non trasferibili' *Corriere giuridico*, 1710 (2007); and, with specific reference to the liability of the medical doctor (subsequently, as known, reformed by the recent legge 8 March 2017 no 24, so-called 'legge Bianco-Gelli'), S. Mazzamuto, 'Note in tema di responsabilità civile del medico' *Europa e diritto privato*, 501-512 (2000). For an overview of the juridical problems raised by the so-called 'social contact' and by the so-called 'obligation without performance' in our legal system, please refer to, without any claims for completeness, M. Franzoni, 'Il contatto sociale

of the literature, avoidance of significant discrimination between students who suffer damage through the conduct of a third party and students who self-inflict damage, because the rule of Art 1218 of the Italian Civil Code (unlike that of Art 2043)[13] is very similar to the probative system of Art 2048, para 2, of the Italian Civil Code.[14]

The same solution is outlined with reference to damage caused to a student by a third party:[15] the inapplicability of Art 2048, para 2, Italian Civil Code (due to the absence of illicit activity by the student) and the existence of the double 'contractual relationship' (arising, as mentioned above, because of the enrolment of a minor in school and the already mentioned 'social contact' between teacher and pupil) again lead commentators (and the courts) to consider liability for non-performance of the scholastic institute, pursuant to Art 1218 of the Italian Civil Code (with all the related outcomes on the evidential burden).[16]

non vale solo per il medico' *Responsabilità civile e previdenza*, 1693-1702 (2011); S. Faillace, *La responsabilità da contatto sociale* (Padova: CEDAM, 2004); I. Sarica, 'Il contatto sociale tra le fonti della responsabilità civile: recenti equivoci nella giurisprudenza di merito' *Contratto e impresa*, 97-102 (2005); A. Thiene, 'Inadempimento delle obbligazioni senza prestazione', in G. Visintini ed, *Trattato della responsabilità contrattuale* (Padova: CEDAM, 2009), I, 345; L. Manna, 'Le obbligazioni senza prestazione', in L. Garofalo and M. Talamanca eds, *Trattato delle obbligazioni* (Padova: CEDAM, 2010), III, 29.

On the contractual nature of the teacher's liability, see, for all, C. Castronovo, 'Ritorno all'obbligazione senza prestazione' *Europa e diritto privato*, 679-717, 681 (2009); Id, *Responsabilità civile* (Milano: Giuffrè, 2018), 573; in a critical perspective, see A. Zaccaria, '*Der Aufhaltsame Aufstieg des Sozialen Kontakts* (La resistibile ascesa del «contatto sociale»)' *Rivista di diritto civile*, 77-108, 98 (2013).

[13] Indeed, the risk – ventilated by the literature and the courts – would be represented by the option to configure the hypothesis of damage inflicted by a pupil on himself (so-called 'self-perpetuated damage') as a case of extra-contractual liability pursuant to Art 2043 of the Italian Civil Code, thus penalizing the injured, forced to prove (unlike the case of damage suffered by another pupil) the fault of teachers and of educational institutes. On this item, see, among others, M. Ferrari, n 7 above, 1378-1379.

[14] On the contrary, the other distinctions persist due to the different nature between contractual, pursuant to Art 1218 of the Italian Civil Code, and extra-contractual liability, pursuant to Arts 2043 e 2048 of the Italian Civil Code. In the case law, see, *ex multis*, Corte di Cassazione 18 November 2005 no 24456, *Danno e responsabilità*, 1081 (2006), with notes by V.V. Cuocci and T. Perna; more recently, Corte di Cassazione 21 September 2012 no 16056, *Nuova giurisprudenza civile commentata*, 163 (2013), with note by V. Montani (who gives an overview of different types of damage suffered by the pupil).

[15] See Corte di Cassazione 19 September 2017 no 21593 n 1 above; Corte di Cassazione 28 April 2017 no 10516 n 1 above. The courts often consider the case of a student who suffers an accident resulting from the conduct of a third party (for example, the driver of the school bus) upon leaving the school premises.

[16] In particular, according to the Corte di Cassazione, the evidential burden of the injured person, in this case, is exhausted in the demonstration that the fact occurred in the time when the child is entrusted to the school, being sufficient to make presumption operative of guilt for the non performance of the obligation of surveillance, while it is up to the school administration the proof that the supervision has been exercised on the students with a diligence suitable to prevent the fact (Corte di Cassazione 7 November 2000 no 14484 n 6 above). Numerous others judgments also detract from the distinction between liability for non performance and non-contractual liability precisely from the practical point of view of the evidential burden

There follows a progressive 'contractualization' of the liability of the educational institute in the context of so-called 'self-perpetrated damage' and in the context of damage caused to a student by a third party.[17]

This majoritarian trend seems to be reinforced by (more and more) forecasts within internal institute regulations, where there are often specific obligations for school staff to pick up and drop pupils from transport vehicles in front of the school and to supervise the hypothesis of a possible delay of the means. These regulations seem to regulate in more detail the benefits deriving from the agreement – perfected through enrollment of the pupil – between the pupil's parents, on the one hand, and the educational institution, on the other.[18]

The obligation of supervision by teachers – and, more generally, by school staff – is derived from the enrolment agreement. This obligation must be exercised with due diligence and with the attention required *by the age and physical and mental development* of the child and *by the current conditions of the specific case*.[19]

Therefore, the age and development of the child are considered on a case by case basis to evaluate the liability of the educational institute: the lower the age and development of the student, the more stringent the obligation of surveillance. This obligation is then adapted differently in the light of the circumstances of the specific case (consider, for example, an accident occurring inside or outside the

incumbent on the injured party: who acts to obtain compensation must prove that the harmful event occurred over time in which the pupil was subjected to the supervision of teachers, remaining indifferent that invokes the contractual responsibility for negligent fulfilment of the surveillance obligation or extra-contractual responsibility for omission of the necessary precautions, suggested by ordinary prudence, in relation to the specific circumstances of time and place, so that the safety of minor learners is safeguarded (cf Corte di Cassazione 4 February 2005 no 2272, *Repertorio Foro italiano*, '*Responsabilità civile*' no 339 (2005)).

[17] This phenomenon of 'contractualization', as we have already tried to underline (see n 9 above), is not unknown – even if (sometimes) together with the responsibility of teachers pursuant to Arts 2047 and 2048 of the Italian Civil Code – also in the context of the recent decisions on the damage occurred to a pupil for the fact of another pupil.

[18] Nor can doubts arise about the compensation of non-pecuniary loss due to non performance for the protection of inviolable rights of constitutional importance (among which certainly the right to life and health of the pupils). On the compensation for non-pecuniary loss, please refer to the 'twin pronunciations of San Martino' of 2008: Corte di Cassazione-Sezioni unite 11 November 2008 nos 26972, 26973, 26974 and 26975, *Responsabilità civile e previdenza*, 38 (2009), with notes by P. G. Monateri and D. Poletti, *Foro italiano*, 1, I, 120 (2009), with notes by A. Palmieri, R. Pardolesi, R. Simone, G. Ponzanelli, and E. Navarretta, *Rassegna di diritto civile*, 499 (2009), with notes by P. Perlingieri and F. Tescione. This profile was then resumed (and confirmed) by scholars and courts (see, with an explicit reference to the cases of liability of educational institutes, D. Chindemi, n 5 above, 2157).

[19] See Corte di Cassazione 5 September 1986 no 542, *Repertorio Foro italiano*, '*Responsabilità civile*' no 97 (1987). There are several reflections on extending the 'subjective' sphere of surveillance activity which can now be referred not only to public or private school teachers, but also to post-school teachers, catechism teachers, driving teachers and sports teachers. Cf, among others, M.L. Chiarella, 'Minore danneggiante e responsabilità vicaria' *Danno e responsabilità*, 973-987 (2009).

school premises, or inside or outside school hours).[20]

In any case – regardless of the widespread trend in the courts regarding the obligation of surveillance as well as 'corrective measures' represented by the age of the child and the specific circumstances of the case – internal school rules must always be taken into serious consideration because these regulations, as discussed above, often clarify the practical characteristics of the duty to supervise.[21]

IV. The Compensable Loss

In order to determine the extent of the compensable loss, after having verified the liability of the educational institute, the argumentative procedure of mainstream courts is developed mainly on three 'cornerstones'.

Firstly, the compensation of non-pecuniary loss can only be based on the analysis (and, in the case of second-instance judges, on the possible re-analysis) of the concrete data of the case at issue. Thus, it is necessary to identify not only the behaviour of the subjects involved, but also the characteristics of the prejudice actually suffered by the student.

Secondly, the compensation of non-pecuniary loss always comes from the use of the Court of Milan Tables 'for the compensation of non-pecuniary loss'.[22]

Finally, an important role in the compensation proceedings is performed, due to the often very complex activity of the practical evaluation, by the liquidation of losses on an equitable basis. This assessment – in addition to not being evaluated by the Court of Cassation – can only take place residually if the existence of the damage (so-called '*an*') has already been proven, but significant difficulties remain in the exact determination of the compensable losses (so-called '*quantum*').[23]

[20] In literature, see, for all, C. Murgo, n 1 above, 167. The impossibility to predetermine exactly the content of the supervisory obligation has long been consolidated in the case-law (Corte di Cassazione 15 December 1980 no 369, *Giurisprudenza italiana*, I, 1593 (1980), *Responsabilità civile e previdenza*, 55 (1981)).

[21] However, according to a rather consolidated approach, the obligation of surveillance, despite finding its source in the contract-enrolment between the school and the parents of minors, does not end with the finish of the lessons but continues beyond, ceasing only with the effective passage of the children under another sphere of protection (that of the parents or other people). See Corte di Cassazione 30 March 1999 no 3074, *Danno e responsabilità*, 916 (1999), *Diritto ed economia dell'assicurazione*, 632 (2000), with note by D. de Strobel.

[22] The 'Tables for the compensation of non-pecuniary loss' are drawn up by the Court of Milan and recently republished, as every year, on its website (2018 edition). These Tables available at https://tinyurl.com/yb55swd3 (last visited 27 December 2018).

[23] Cf, among others, Corte di Cassazione 8 November 2016 no 22638, *Diritto e giustizia*, 9 November 2016, with note by K. Mascia; Corte di Cassazione 16 March 2016 no 5252, *Diritto e giustizia*, 17 March 2016, with note by R. Savoia.

V. Criticisms and the Recent Legislative Reform on Children Under Fourteen Leaving School Premises

Confirming the process of 'contracting' the liability of the teachers and of the school,[24] the argumentative process of the courts seems to follow carefully, as demonstrated above, not only the main rules (legal and judicial) concerning the assessment of responsibilities (often supported by specific provisions contained, from time to time, in the various internal institutional regulations),[25] but also on quantification of the loss (with appropriate reference to the Milan Court's Tables for compensation for biological damage as well as to the non-recoverability, and residual, judicial assessment according to fairness of the compensable damage).

The result is an appreciable controllability of the logical procedure of the rulings and an appropriate reduction in the uncertainty of the judicial outcome.

This solution does not seem to be distorted by the doctrinal perplexities on the so-called 'social contact' because, although wishing to accept the (significant)

[24] This process of 'contracting' the responsibility of teachers and of educational institutes for the damages suffered by the pupil does not seem so clear in the other European legal systems. It is possible to consider, for example, the French legal system. On the evolution of the liability of teachers and of educational institutes in the French literature (from extra-contractual responsibility for fault to responsibility – always extracontractual but – strict), see G. Viney, P. Jourdain, S. Carval, *Les conditions de la responsabilité* (Paris: Dalloz, 2013), 1227-1228; Ph. Le Tourneau, *Droit de la responsabilité et des contrats* (Paris: Dalloz, 2012), 1867; A.-M. Galliou-Scanvion, *L'enfant dans le droit de la responsabilité délictuelle* (Villeneuve d'Ascq: Presses universitaires du Septentrion, 1999), 283-286; F. Alt-Maes, 'Le nouveaux droits reconnus à la victime d'un mineur' *La Semaine Juridique*, 3627 (1992); G. Viney, 'Vers un élargissement de la catégorie des «personnes dont on doit répondre»: la porte entrouverte à une nouvelle interprétation de l'article 1384, alinéa 1re du Code civil' *Recueil Dalloz*, 157 (1991); Ead, 'La réparation du dommage causés sous l'empire d'un mineur' *La Semaine Juridique*, 3189 (1985); B. Puill, 'Vers une réforme de la responsabilité des père et mère du fait de leur enfants' *Recueil Dalloz*, 185 (1988); Ch. Lapoyade Deschamps, 'Les petits responsables (Responsabilité civile et responsabilité pénale de l'enfant)' *Recueil Dalloz*, 299-305 (1988); P.D. Ollier, *La responsabilité civile des père et mère. Étude critique de son régime légale* (Paris: Dalloz, 1961), 138-155; R. Savatier, *Traité de la responsabilité civile en droit français* (Paris: Dalloz, 2nd ed, 1951), I, 279; and, in the case law, see Cour de Cassation 11 March 1981, *Recueil Dalloz*, 320 (1981), with note by Ch. Larroumet; Cour de Cassation-Assemblée plénière 9 May 1984, *La Semaine Juridique*, 20255 (1984), with note by N. Dejean de la Batie, *La Semaine Juridique*, 20291 (1984), *Revue trimestrielle de droit civil*, 123 (1984), with note by J. Huet; Cour de Cassation 3 March 1988, *Revue trimestrielle de droit civil*, 772 (1988), with note by P. Jourdain; Cour de Cassation-Assemblée plénière 17 January 2003, *Recueil Dalloz*, 591 (2003), with note by P. Jourdain.

However, no specific rule seems to regulate today the extra-contractual responsibility (for fault? strict?) of school staff and of educational institutes in the current 'Projet de réforme de la responsabilité civile'. See G. Alpa, 'Sulla riforma della disciplina della responsabilità civile in Francia' *Contratto e impresa*, 1-9 (2018); M. Machart, 'Le fait d'autrui dans l'avant projet de réforme de la responsabilité civile' *Village de la Justice*, available at https://tinyurl.com/y7xc77kc (last visited 27 December 2018).

[25] These provisions – as already noted – further specify the extent of the supervisory obligation imposed on the school staff up to the delivery of the pupils to other responsible subjects.

critical observations raised,[26] it is difficult to exclude liability for non-performance of the educational institute in the case of harm suffered by the student. In particular, according to the orientation of the courts, a 'double contractual relationship' is established: exoneration from responsibility for non-fulfilment of the educational institute therefore requires not only the exclusion of duties resulting from the alleged social contact between the child and teacher, but also of the general obligation of surveillance deriving from the enrolment of the pupil in school (often set out, as we have seen, in the specific regulations of the institute).

The current orientation is not even slightly affected by the reflection, although abstractly acceptable, based on the need to reconcile the obligation of supervision by the school with the educational and training duties of parents (notable aimed, firstly, at the enhancement of skills and, then, the correct construction of the young child's personality, with a view of achieving full autonomy).[27]

This argument is often reduced – precluding the scholar to deviate significantly from the position taken by the courts in condemning the educational institution to compensation for harm – from the young age of the student, from the rarity of 'anomalous' (unpredictable or very dangerous) conducts by the minor and from the numerous specifications of the supervisory obligation contained also in the internal regulations of each institute.

The recent rulings of the *Corte di Cassazione* therefore seem to represent the outcome of the clear and consistent application of the criteria for loss compensation in the civil responsibility of educational institutes.

Thus, no particular 'case-law revolution' emerges, but, at most, a '(widely) predicted judicial scandal', and without the premises for a quick *revirement* on the horizon.

These positions – despite being inserted, as pointed out above, in a consolidated trend – have sown concerns among school leaders who, frightened by the practical consequences of the rulings, have begun to request significant sacrifices to parents and teachers, forcing the former to pick up children directly at school and the latter to extend, if necessary, their presence on the school premises beyond the normal school hours.

Following these reactions by school leaders and various other debates (no longer technical-legal, but mainly political) raised by the rulings,[28] it was decided

[26] See, among others, A. Zaccaria, n 12 above, 98.

[27] See, C. Murgo, n 1 above, 170.

[28] On the public polemics (political more than legal) triggered by the judgments of the Corte di Cassazione on the civil liability of educational institutes, we can refer to the numerous articles published in some of the most important national newspapers: 'Genitori all'uscita da scuola, Renzi: «Cambiamo la legge»' *Il Messaggero*, available at https://tinyurl.com/ya4bjhpb (last visited 27 December 2018); G. Fregonara, 'Fedeli: cari genitori, alle medie dovete prendere i figli. Lo dice la legge' *Il Corriere della Sera*, available at https://tinyurl.com/yclessqx (last visited 27 December 2018); 'Scuole medie, Renzi: subito una legge per consentire ai ragazzi di tornare a casa da soli' *La Repubblica*, available at https://tinyurl.com/yacmwpdf (last visited 27

to run for cover with an '*ad hoc*' regulatory intervention.[29]

The regulation of the school's liability for damage caused to a pupil by a third party outside the school premises was significantly modified with the introduction, under the recent legge 4 December 2017 no 172, of Art 19-*bis* ('Provisions on children under fourteen years old leaving school premises') as part of the conversion into law of the decreto-legge 16 October 2017 no 148 ('Urgent provisions on financial matters and for non-transferable needs').

In particular, according to Art 19-*bis*,

> '(1) parents exercising parental responsibility, guardians and recipients pursuant to the legge 4 May 1983 no 184, over children under the age of fourteen years old, considering the age of the minors, their degree of autonomy and the specific context, in a process aimed at their self-responsibility, may authorize the institutes of the national education system to allow children under fourteen years to leave the school autonomously at the end of lessons. The authorization exempts the school staff from liability related to the performance of the supervisory obligation. (2) The authorization to autonomously use the school transport service, issued by parents exercising parental responsibility, guardians and recipients of those under the age of fourteen years old to the local service managers, exonerates staff from liability related to the performance of the obligation of vigilance in entering and leaving the vehicle and during the time at the bus stop, also after the end of school activities'.

Thus, parents – according to a (subsequent) note from MIUR–[30] can authorize, from year to year,[31] schools attended by their children to allow them to leave the school premises autonomously at the end of the lessons, considering

December 2018); 'Scuola, obbligo di andare a prendere i minori. Fedeli: "È la legge". E Renzi si intesta la campagna per cambiarla' *Il Fatto Quotidiano*, available at https://tinyurl.com/ybrfgeug (last visited 27 December 2018); A. Corlazzoli, 'Scuola, obbligo di andare a prendere i minori. Il salvagente Malpezzi pronto per la Manovra. Moige: "Ma non basterà"' *Il Fatto Quotidiano*, available at https://tinyurl.com/y9cb5v5o (last visited 27 December 2018).

[29] This reconstruction has been textually confirmed by the Ministry of Education, University and Research in a note dated 1 December 2017 (available at https://tinyurl.com/yagdev85 (last visited 27 December 2018)). The legislative intervention, rather than denying the judicial trend so far consolidated, seems to constitute therefore the confirmation of the school's liability for omitted supervision in the case of damage caused to a student by a third party outside the school premises.

[30] See Circolare 12 December 2017 no 2379 by the Ministry of Education, University and Research (availale at https://tinyurl.com/yd2zd5vf (last visited 27 December 2018)).

[31] On the annual duration of the authorization, see C. Tucci, 'Le autorizzazioni per l'uscita da scuola dei minori saranno valide per tutto l'anno' *Il Sole 24 Ore*, available at https://tinyurl.com/y7tmuw27 (last visited 27 December 2018).

Neither the law nor the note of MIUR specify that the authorization must be issued in writing. This form, however, seems necessary in order to guarantee the evidence of the parental consent.

the *age*, *degree of autonomy* and *specific context*.[32] This authorization must be issued by the parents only after a careful assessment of the circumstances of the case because it involves – as can be seen from the text of Art 19-*bis* and from the forms prepared by the operators – the effect of completely exempting the school from any liability connected with performance of the supervisory obligation.

VI. Final Remarks

The Italian legislator – after having taken note of the state of the art of case law – significantly modified regulation of the responsibility of educational institutes, seeking a different balance from the past between the protection of the safety of minors and risk assessment by families.

In the (rather specific) case considered by legislation, indeed, preference is given to significantly enhancing the position of parents (or whoever in their place) in order to overcome the *impasse* resulting from the attribution of responsibility, according to the rules of case law, to the head of the school.

However, the new provision only partially solves – with a sort of 'emergency approach' – the problems raised by the liability of the educational institute.[33]

The legislative destiny of children under fourteen who are not authorized to leave, for example, remains unknown.[34]

Nothing seems to have changed after the introduction of Art 19-*bis* with the educational institute expected to comply with the supervisory obligation (paying particular attention, as was pointed out by the *Corte di Cassazione*, to the formulation of the regulations of the institute, approved pursuant to Art 10, para 3, letter a), of the decreto legislativo 16 April 1994 no 297).[35] The obligation

[32] The maximum age limit for minors is set by the law at fourteen years old. There are legal reasons – of a civilistic (such as the debate aroused, especially in the 'civil law' systems, from the so-called '*grandi minori*') and criminal nature (deduced mostly from Arts 97 and 591 of the Italian Criminal Code) – but also practical and organizational reasons (as it is well-known, the lower secondary schools usually end up just in coincidence with the completion of fourteen years old).

[33] Furthermore, it seems appropriate to start a general reflection (already partially recalled) on the need to strengthen not only the items traditionally delegated to the attention of parents (such as education and child growth), but also the autonomous evaluation of situations of danger by minors (especially if '*grandi minori*'). This assessment may (perhaps) allow a better risk management. On the ineluctable increase of the risks in our society, see, among others, U. Beck, *La società del rischio. Verso una seconda modernità* (Bari: Carocci, 2000).

[34] Nor does it seem much clearer what happens – after the approval of the legge 4 December 2017 no 172 – in the case of damage suffered by the student in the phase following the material entry into the school building but immediately preceding the beginning of the lessons. On this item, before the legge 4 December 2017 no 172, see Corte di Cassazione 19 July 2016 no 14701 n 1 above.

[35] It is mostly up to the school managers to communicate to the entire staff the new rules and to review, using the help of the school council, the provisions of the internal institute regulations with a view to providing for an effective integration of the new provisions of the Art 19-*bis*, paras 1 and 2.

to supervise children without a release – required to remain in the classroom to await the arrival of their parents or of other persons obliged by legge 4 May 1983 no 184 to provide parental care – threatens to force some of the staff to stay at school beyond normal school hours.

Further reflection is therefore required, especially from the Government and the Ministry of Education, about the reconsideration of at least the prolonged hours of teachers as well as extra-remuneration for the supplementary supervision service in the case of children under fourteen years of age not authorized to leave.

The dialogue between legislators and the courts on the civil liability of educational institutes (especially for damages caused to a student by a third party) seems to be more open than ever today...

Hard Cases

Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?

Giulia Ciliberto*

Abstract

In the aftermath of the migration crisis, the European Union and its member states adopted a series of policies aimed at reducing migratory pressure. A sample of these measures is the Italy-Libya Memorandum of Understanding of 2 February 2017. Under this commitment, Libya agreed to perform interception and return of boat migrants on high seas, an operation known as pull-back or push-back by proxy. Among the episodes falling within this label, the most relevant is the one which occurred on 6 November 2017, which was carried out by the Libyan Coast Guard under the coordination of the Italian authorities. Seventeen of the survivors lodged an application before the European Court of Human Rights, claiming that Italy had violated various provisions of the European Convention of Human Rights. The present paper examines the challenges posed by pull-backs from the standpoint of the Law of the Sea and the International Human Rights Law, as well as the issues specifically concerning the proceeding before the Strasbourg Court.

I. Introduction

Throughout recent years, frontline European Union (EU) member states have faced a high migratory pressure due to the lack of a fair burden-sharing system in force among European countries. The massive flow to Europe proved the weakness of the Common European Asylum System (CEAS) and, more specifically, of the mechanism enshrined under the Dublin III Regulation in order to avoid 'asylum shopping'.[1] This regulation establishes the principle that only one EU member state is responsible for examining an application for

* PhD Candidate in Economic Law, University of Naples (Federico II).

[1] For an overview of the situation concerning the sea route through the Aegean and Mediterranean seas, see the data provided by the United Nation High Commissioner for Refugees (UNHCR), available at https://tinyurl.com/y9l4lhrs (last visited 27 December 2018). The CEAS, also known as the 'Dublin System', aims at managing the migratory flow to Europe. The CEAS involves both primary and secondary EU law. The EU secondary legislative elements of the current CEAS are two regulations and four directives, among which there is also the Dublin III Regulation (European Parliament and Council Regulation (EU) 2013/604 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJL 180/31).

international protection.[2] The identification of the country responsible for this evaluation is carried out according to several hierarchical criteria set forth in this instrument, among which the most frequently applied is the 'first country of irregular entry'.[3] As a result, certain states at the external borders of the EU - namely, Greece and Italy - have experienced unprecedented difficulties.

In the aftermath of the increase of arrivals during 2015,[4] the EU and its member states adopted a plurality of tools aimed at lowering the entrance of migrants via the Aegean and the Mediterranean seas. Among other policies, these measures encompass the externalization of the management of migratory movements through bilateral agreements between would-be destination states and countries of departure.[5] These commitments aim at entrusting these latter countries with various containment-flow practices, such as pull-backs (also known as push-backs by proxy). According to these schemes, the authorities of the countries of departure perform interceptions and returns of the boat migrants which are interdicted in their territorial waters or on the high seas.[6]

A sample of this kind of cooperation agreements meant to outsource the border-crossing control is the Italy-Libya Memorandum of Understanding (MoU) of 2 February 2017, which constitutes the legal basis for several pull-backs carried out during the last months.[7] One of the most relevant of these episodes is the one which occurred on 6 November 2017. The event consisted in a search and rescue (SAR) operation performed by both a Libyan Coast Guard unit and the private vessel Sea-Watch 3, under the coordination of Italian authorities. The interception of the boat migrants in distress ended with the death of twenty persons, the return of forty-seven people to Libya and the disembarkation of other fifty-nine individuals in Italy. The case is quite significant, since seventeen of the survivors lodged an application against Italy before the European Court

[2] Dublin III Regulation, ibid Art 3.

[3] Dublin III Regulation, ibid Art 13.

[4] During 2015, more than a million of migrants arrived reached EU by sea. See the data provided by UNHCR, n 1 above.

[5] D. Ghezelbash et al, 'Securitization of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia' 67(2) *International & Comparative Law Quarterly*, 315, 342-344 (2018); M. Giuffré, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-Backs to Libya?' 24(4) *International Journal of Refugee Law*, 692, 713-716 (2012); C. Hathaway and T. Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' 53 *Columbia Journal of Transnational Law*, 235, 241-243 (2015); M.L. Basilien-Gainche, 'Leave and Let Die: The EU Banopticon Approach to Migrants at Sea', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Leida: Brill-Martinus Nijhoff, 2016), 327, 336-338.

[6] N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' 27(3) *European Journal of International Law*, 591, 602, 613 (2016).

[7] For a detailed overview of the operations carried out in the Mediterranean Sea by the LCG, under the coordination of the Italian RCC, from May 2017 to March 2018, see eg Forensic Oceanography, 'Mare Clausum - Italy and the EU's undeclared operation to stem migration across the Mediterranean' (May 2018), available at https://tinyurl.com/y72ex226 (last visited 27 December 2018).

of Human Rights (ECtHR), claiming the violation of several provisions of the European Convention on Human Rights (ECHR).[8]

This episode illustrates the tension between state sovereignty and state obligations under international law in the context of the management of migratory flows. On the one hand, countries are entitled to regulate the entry, residency and expulsion of aliens.[9] On the other hand, obligations stemming from different branches of international law narrow down this power, among which the duty to assist people in distress and the duty to perform SAR operations under the law of the sea (LOS), and the guarantees provided under international human rights law (IHRL), such as the right to life, the principle of *non-refoulement*, the right to leave a country, and the prohibition of collective expulsion.

The conclusion of bilateral agreements aimed at entrusting third countries with – among other policies – pull-back practices intensifies this tension and tips the scale in favour of national interests. Specifically, these cooperation agreements cause an accountability gap with regard to the chances of triggering the responsibility of would-be destination states for the violation of obligations owed toward migrants under international treaty law. Indeed, assigning preventive-departure tasks to third countries, in addition to the legal uncertainty surrounding the extent of states' responsibility for extraterritorial activities, reduces the chances of submitting a victorious claim before treaty-based bodies.

The purpose of the present paper is to analyse this accountability gap in the light of the pull-back of 6 November 2017 - namely, the jurisdictional challenges concerning the possibility of lodging a successful application against Italy before the ECtHR. The analysis begins with a general overview of the policies employed to achieve the lowering of arrivals through the Mediterranean Sea, with a focus on the outsourcing of border-crossing controls and its main features. The Italy-Libya MoU is considered as a sample of these practices, and the push-back by proxy of 6 November 2017 is deemed as a case study to analyse the criticalities characterizing such mechanisms under international law (Section 2). Since the states involved in the performing of this scheme usually defined it as a SAR operation, the paper briefly outlines the different and overlapping legal frameworks regulating these activities. Specific attention is paid to the interplay between the duties enshrined under LOS (Section 3) and IHRL (Section 4), and their application to the episode of 6 November 2017. Lastly, this pull-back is analysed against the background of the ECHR. Due to the preliminary stage of the proceeding against Italy, the paper examines the preliminary issue concerning the extraterritorial exercise of jurisdiction (Section 5). Section 6 concludes.

[8] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (4 November 1950, entry into force 3 September 1953) ETS 5 (ECHR).

[9] B. Conforti, *Diritto internazionale* (Napoli: Editoriale Scientifica, 11th ed, 2018), 253.

II. 'Fortress Europe', the Securitization of SAR Operations in the Mediterranean Sea and the Pull-Back of 6 November 2017

Although the implementation of policies intended to reduce the number of arrivals is not a tactic which emerged during the recent migration flow to Europe, the migratory pressure on Greece and Italy has represented an opportunity to render these mechanisms more severe. A brief outline of the evolution of these strategies, as well as of the increasing securitization of the SAR operations in the Mediterranean Sea, may be useful in order to have a better understanding of the specific issues stemming from the pull-back of 6 November 2017, which was performed under the Italy-Libya MoU of 2 February 2017.

1. A Brief Overview of the Evolution of the Tactics of *Non-entrée*

Far from representing a novelty in the field of migratory management, tactics of *non-entrée* have long been a feature of states' strategies intended to prevent migrants from accessing their territories. The ground underlying these schemes is the perception of migrants as a threat to the possible destination states and their society.[10] These measures have evolved over the years in order to improve their effectiveness while simultaneously shielding putative destination countries from responsibility.[11]

The first generation of *non-entrée* polices was based on a unilateral model of deterrence – ie they were carried out by the receiving states, and consisted of three main tools: (i) the denial of visas for the purpose of seeking international protection, combined with the sanctions issued against carriers who crossed frontiers transporting persons without a valid entry permit; (ii) the establishment of international zones within the states' territories (eg airports), in which the country concerned claimed the inapplicability of some international obligations; (iii) interceptions on the high seas by destination states. However, these measures proved either scantly effective in lowering the onward flux of migrants, or inadequate to screen states from legal responsibility.[12]

States have tried to remedy the weaknesses of these methods by implementing a different *non-entrée* approach based on cooperation with third countries. With a view to significantly reducing the number of arrivals, this set of policies is meant not only to deter, but also to actively restrain migratory movements by

[10] N. Klein, 'A Maritime Security Framework for the Legal Dimension of Irregular Migration by Sea', in V. Moreno-Lax and E. Papastvridis eds, '*Boat Refugees' and Migrants at Sea* n 5 above, 35, 39-40.

[11] C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 243-248.

[12] ibid; V. Moreno-Lax and M. Giuffré, 'The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows', in S. Juss ed, *Research Handbook on International Refugee Law* (Cheltenham: Edward Elgar, forthcoming), 3-4, available at https://tinyurl.com/y8zxy2w4 (last visited 27 December 2018).

actions performed by countries of origin or transit. As a means to avoid states' responsibility for breaching migrants' rights, this containment-regime is performed outside the territory of receiving states and under the authority of third countries.[13] Among other polices, states have enacted cooperation agreements aimed at preventing arrivals of migrants by sea. These forms of collaboration have been adopted in different geographical areas by several countries, among which Australia, the United States of America, Greece, Italy, and Spain.[14] The response to maritime migration has focused on securitization and deterrence by means of – among other tools – interceptions of boat migrants outside states' territorial waters.[15] The implementation of these measures has altered the core of SAR operations, which has shifted from the original humanitarian purpose to ensuring the security of the likely destination states.[16]

2. The Securitization of the Mediterranean Sea

The securitization regime has been employed also with reference to the sea routes to Greece and Italy, in order to curtail the migratory flow through the Aegean and Mediterranean seas. With the intention to achieve the securitization of SAR operations carried out therein, three main tools have been deployed: (i) the militarization of on-water responses to maritime flow; (ii) the criminalization of non-governmental organizations (NGOs) performing private rescues; (iii) the externalization of the management of migratory movements. These strict border-crossing control measures have proved so highly effective in lowering the arrivals to Greece and Italy as to lead someone to label all these migratory management policies with the term 'Fortress Europe'.[17]

As for the militarization of the Mediterranean Sea, this scheme has risen from the ashes of *Mare Nostrum* Operation, launched by the Italian government on 18 October 2013 as a response to the humanitarian emergency in the Strait of Sicily.[18] This Italian-run military operation had a two-fold aim: the fighting

[13] V. Moreno-Lax and M. Giuffré, ibid. For a general overview of this set of policies, see C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 248-257.

[14] D. Ghezelbash et al, n 5 above, 327-330; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 244-257.

[15] C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 245. On the issue of securitization, see also A. Di Pascale, 'Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations', in R. Rubio-Marín ed, *Human Rights and Immigration* (Oxford: Oxford University Press, 2014), 278.

[16] D. Ghezelbash et al, n 5 above, 317, 330-331.

[17] Oxfram Briefing Paper, 'Beyond 'Fortress Europe' - Principles for a Humane EU Migration Policy' (2017), available at https://tinyurl.com/y9wth2eq (last visited 27 December 2018); M. Welander, 'Migration, Human Rights and Fortress Europe: How Far Will European Leaders Go to Protect the EU's Borders?' (2018), available at https://tinyurl.com/y89lk2v6 (last visited 27 December 2018).

[18] Ministero della Difesa, '*Mare Nostrum* Operation, available at https://tinyurl.com/ocgchts (last visited 27 December 2018). As for the militarization of the Aegean Sea through *Operation Poseidon* (2006-2015), *Operation Poseidon Rapid Intervention* (2015-present), and the

against trafficking and smuggling, and the safeguarding of human lives at sea.[19] Deemed as a pull factor for migrants to cross the Mediterranean, it was replaced by *Triton Operation* on the 31 October 2014, coordinated by the EU agency FRONTEX. The mandate of this operation is to conduct border control and surveillance, and not SAR operations.[20]

Due to the increasing number of boat tragedies, on 20 April 2015 the EU launched a Ten Point Action Plan on Migration, which confirmed the military nature of the EU response to migratory movements through sea routes.[21] For the purpose of the present paper, two aspects of this strategy deserve attention: (i) the reinforcement of *Operation Triton*, by the increase of financial resources and number of assets, alongside the extension of the operational area – so-called *Operation Triton Plus*; (ii) the intention to launch a mission meant to capture and destroy vessels used by the smugglers.[22] The latter feature has been pursued by the establishment of EUNAVFOR Med on 22 June 2015,[23] a

involvement of NATO in controlling this route, see FRONTEX, 'Frontex and Greece agree on operational plan for Poseidon Rapid Intervention' (17 December 2015), available at https://tinyurl.com/yb8ctpcw (last visited 27 December 2018); B. Miltner, 'The Mediterranean Migration Crisis: A Clash of the Titans' Obligations' 22 *Brown Journal of World Affairs*, 213, 215, 223-224 (2015); D. Ghezelbash et al, n 5 above, 335-336.

[19] Ministero della Difesa, '*Mare Nostrum* Operation', ibid; J.P. Gaucci and P. Malilla, 'The migrant Smuggling Protocol and the Need for a Multi-faceted Approach: Inter-sectionality and Multi-actor Cooperation', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 119, 140. The operation, which lasted one year and covered an area of around twenty-seven thousand square miles, saved around one hundred and sixty thousand lives at sea. In Italy around nine million euro a month.

[20] European Commission, 'Frontex Joint Operation 'Triton' - Concerted Efforts for managing migrator flows in the Central Mediterranean' (Memo, 31 October 2014), available at https://tinyurl.com/ybbgwcb4 (last visited 27 December 2018). The EU regulation establishing FRONTEX in 2004 was amended in 2016, and the current agency name is European Border and Coast Guard (EBCG): European Parliament and Council Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard and amending European Parliament and Council Regulation (EU) 2016/399 of 9 March 2016 and repealing European Parliament and Council Regulation (EC) 2007/863, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1. The original *Operation Triton* patrolled waters thirty miles off Italian coast, with a budget of two point nine million euro a month.

[21] European Commission, 'Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration' (Press Release, 20 April 2015), available at https://tinyurl.com/y7r5aqou (last visited 27 December 2018).

[22] ibid.

[23] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122/31; Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 157/51; Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) [2016] OJ L 162/18; Council Decision (CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) [2017] OJ L 194/61; Council Decision (CFSP) 2018/717 of 14 May 2018 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR

> 'military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean',

whose mandate was later extended to train the Libyan Coast Guard and the Navy.[24]

To the end of fighting smuggling and trafficking activities, on 7 October 2015 the EU instituted *Operation Sophia*, whose specific mandate to enforce action on the high seas was strengthened by the UN Security Council Resolution 2240 (2015), adopted under Chapter VII of the UN Charter.[25] This instrument authorised, for one year after its adoption, UN member states 'to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking' from that country, as well as to seize those vessels that are confirmed as being used for this illicit purpose, and 'to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers'.[26] Since this set of activities may be performed also by UN member states acting through regional organizations,[27] its scope also covers conducts carried out by the EU via *Operation Sophia*.

The wording of the EU Council Decisions launching EUNAVFOR, as well the resorting to a UN Security Council resolution under Chapter VII of the UN Charter, confirms the military nature of the EU response to the maritime migratory flow through the Mediterranean Sea. The securitization purpose of these policies is also confirmed by other elements. Firstly, the references both to the duties to assist people in distress and to conduct actions in accordance with human rights obligations are solely in the preamble of the EU Council Decision on EUNAVFOR Med, whilst none of the operative provisions of this legal instrument provides for such a commitment.[28] Secondly, it is worth underlining that the 2014 Maritime Surveillance Regulation, whose Art 4 sets forth the prohibition to disembark rescued persons in a country where there is a real risk of being subjected to serious violations of human rights, applies exclusively to FRONTEX coordinated-operations – ie to *Operation Triton* and *Operation Triton Plus*, not to the most

MED operation SOPHIA) [2018] OJ L 120/10. See also D. Guilfoyle, 'Transnational Crime and the Rule of Law at Sea: Reponses to Maritime Migration and Piracy Compared', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 169, 183-187. On 22 January 2019, Germany decided to suspend its participation in Operation Sophia: see eg *Deutschland setzt Beteiligung an Sophia-Mission im Mittelmeer aus* (Germany suspends participation in Operation Sophia in the Mediterranean sea), available at https://tinyurl.com/y94gyt8u (last visited 23 January 2019).

[24] Council Decision (CFSP) 2015/778, ibid, Art 1; Council Decision (CFSP) 2016/993, ibid, Art 1.

[25] UN Security Council, Resolution 2240 (2015), 9 October 2015, UN Doc S/Res/2240.

[26] ibid, paras 7, 8 and 10.

[27] ibid.

[28] Council Decision (CFSP) 2015/778, n 23 above, whereas 6.

recent *Operation Sophia*.[29] Thirdly, smuggling and trafficking are addressed merely as a crime, taking into consideration neither the urgency to provide protection to victims, nor the demand of safe passages to reach Europe.[30] Hence, it is quite evident that the reason underpinning the militarization of maritime operation in the Mediterranean Sea is the need to satisfy the security concerns of would-be destination states.

The criminalization of civil society organizations involved in private rescues – ie the second tool meant to implement the securitization of SAR operations – pursues the same aim. Since 2015, several NGOs (non-governmental organizations) have tried to fill the gap affecting rescue missions, which was a direct consequence of the increasing militarization of maritime activities in both the Mediterranean and the Aegean seas.[31] These NGOs' activities have been deemed as a pull factor which migrants, smugglers and traffickers could rely upon,[32] in the same way as on the previous *Mare Nostrum* Operation. The response of national authorities to SAR operations performed by these organizations has been two-fold. On the one hand, domestic judicial authorities have accused NGOs' staff of criminal practices, such as facilitation of illegal migration.[33] On the other hand, national governments, in order to hinder NGOs performing such activities, either enacted legislative measures sanctioning the non-adherence to a series of requirements with the (possible) refusal to authorize the access to national ports to NGOs vessels;[34] or revoked the flag to boats

[29] European Parliament and Council Regulation (EU) 2014/656 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014], OJ L 189/93, Arts 1 and 4. See D. Ghezelbash et al, n 5 above, 336-338.

[30] J.P. Gaucci and P. Malilla, n 19 above, 143.

[31] D. Ghezelbash et al, n 5 above, 347.

[32] European Council - EEAS, 'EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 January - 31 October 2016', Council Doc 14978/16 (30 November 2016), 3, 7 and 8, available at https://tinyurl.com/y8ekdbdz (last visited 27 December 2018); D. Ghezelbash et al, ibid.

[33] E. Nicosia, 'Massive immigration flows management in Italy between the fight against illegal immigration and human rights protection' 5 *Questions of International Law*, 24, 35-38 (2014). As samples: on the 24 April 2018, the Italian Court of Cassation uphold the decision to seize the vessel Iuventa, belonging to the German NGO Jugend Rettet, on which see ECRE, 'Italy's Supreme Court rejects appeal against the seizure of NGO rescue vessel the Iuventa' (27 April 2018), available at https://tinyurl.com/yarp33kr (last visited 27 December 2018); the judicial decision to release the vessel belonging to the Spanish NGO Proactiva Open Arms on 16 April 2018, pending the investigation against the crew, on which see ECRE, 'Proactiva rescue ship released, crew members remain under investigation' (20 April 2018), available at https://tinyurl.com/yaa5ck35 (last visited 27 December 2018); the criminal trial against Sea-Watch, which recently ended with the decision to uphold the motion to dismiss on 28 May 2018, decision available at https://tinyurl.com/y7l2djkf (last visited 27 December 2018).

[34] Ministero dell'Interno, Codice di condotta per le ONG impegnate nel salvataggio dei migranti in mare (7 August 2017), available at https://tinyurl.com/yb4sslne (last visited 27 December 2018). The unofficial translation is available at https://tinyurl.com/ybrprwsb (last visited 27 December 2018). For a critical point of view, see eg ASGI, 'Position Paper on the

belonging to such organizations.[35] These policies of deterrence proved highly effective in reducing the number of NGO ships operating in the Mediterranean Sea.[36]

The last mechanism implemented to achieve the securitization of SAR operations is the outsourcing of the management of migratory movements to countries of departure. This tool is based on various bilateral agreements, which, on one side, share common features and, on the other, differ for several aspects. As for the mutual elements, firstly these cooperation commitments pursue the same aim, which is to prevent migrants from accessing would-be receiving states territories.[37] Secondly, they are based on a costs-benefits evaluation. From the perspective of countries of departure, they agree to enact measures of border-crossing controls (and to assume the burden of thousands of migrants in their territories) in exchange for inducements - such as technical, logistical, or financial support. From the standpoint of putative destination states, they provide such benefits in order to achieve two advantages: on the one hand, to avoid migratory pressure; on the other hand, to relieve themselves of international obligations concerning the protection of migrants' rights by allocating the task of performing flow-containment to neighbouring countries.[38] However, the strategies of pre-

Proposed 'Code of Conduct for NGOs Involved in Migrants' Rescue at Sea', available at https://tinyurl.com/y7u54wro (last visited 27 December 2018). On the denial of access domestic ports, see the refusal to allow Aquarius (a vessel belonging to the NGO Doctors Without Borders and SOS Mediterranee) to disembark more than six hundred persons in Italy: E. Papastavridis, 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?' (27 June 2018), available at https://tinyurl.com/y9ohmx8h (last visited 27 December 2018).

The criminalization of NGOs activities has been pursued also by Hungary via the amending of the crime of facilitation of illegal migration, with the purpose of broadening its scope of application: Hungary, Bill no T/333 'amending certain laws relating to measures to combat illegal immigration', 20 June 2018, whose unofficial translation is available at https://tinyurl.com/y7hgca5u (last visited 27 December 2018). The bill is also known as the 'Stop Soros Bill' and has been severely criticised: Council of Europe, Venice Commission Opinion no 919/2018, 'Hungary - Joint Opinion on the Provisions of the so-called 'Stop Soros' draft Legislative Package which directly affect NGOs (in particular Draft Art 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018) CDL-AD(2018)013, available at https://tinyurl.com/ybqwp7tv (last visited 27 December 2018); Amnesty International, 'Hungary - New Laws That Violate Human Rights, Threaten Civil Society And Undermine The Rule Of Law Should Be Shelved' (2018), available at https://tinyurl.com/y744r9c2 (last visited 27 December 2018).

[35] This is the case of Aquarius, the vessel belonging to the NGOs Doctors Without Borders and SOS Mediterranee. See Doctors Without Borders, 'Mediterranean: MSF protests decision to revoke registration for rescue ship Aquarius' (23 September 2018), available at https://tinyurl.com/ydfkd7tw (last visited 27 December 2018).

[36] At the time of writing, there was only one boat performing SAR operations in the Mediterranean Sea. It is the *Mare Ionio* vessel, flying an Italian flag and belonging to the NGO Mediterranea.

[37] C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 241.

[38] ibid 241-243; D. Ghezelbash et al, n 5 above, 342-344; M.L. Basilien-Gainche, n 5

emptive containment performed by countries of departure and the incentives granted by possible destination states vary from case to case. For the purpose of the present paper, the Italy-Libya MoU is taken into account as an example of this kind of cooperation agreement.[39]

3. The Italy-Libya Memorandum of Understanding of 2 February 2017

First and foremost, it is worth noting that the Italy-Libya partnership is inscribed in a wider framework involving EU actions meant to reinforce relationships with third countries.[40] In particular, under the Malta Declaration, the EU priority is training, equipping and supporting the Libyan Coast Guard[41] and, as mentioned above, the mandate of EUNAVFOR Med was extended so as to include this activity. Besides the EU involvement, the 2017 MoU is the latest in a long line of bilateral deals between Italy and Libya, whose partnership on migration issues began in 2000.[42] According to the preamble of this treaty, the parties are

> 'determined to work in order to face all the challenges that have negative repercussions on peace, security and stability within the two countries. More specifically, the two states aim to achieve a solution to illegal border-crossings of the Mediterranean Sea and to human trafficking by implementing policies which are in compliance with the international law obligations respectively binding the two countries'.[43]

above, 336-338; M. Giuffré, 'State Responsibility' n 5 above, 713-716.

[39] 'Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana', 2 February 2017, available at https://tinyurl.com/ycr3d5gl (last visited 27 December 2018). The unofficial English translation is available at https://tinyurl.com/ya8c56ea (last visited 27 December 2018). On the issue of whether the adoption of international agreement concerning migration policy under the so-called simplified procedure is in compliance with the Italian Constitution, see eg F.M. Palombino, 'Sui pretesi limiti costituzionali al potere del Governo di stipulare accordi in forma semplificata', in *Rivista di Diritto Internazionale*, 870 (2018).

[40] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration, COM (2016) 385 final, 7 June 2017; European Council, European Council Conclusions, EUCO 26/16, 28 June 2016.

[41] European Council, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, para 6 (c), available at https://tinyurl.com/y96jfuzw (last visited 27 December 2018).

[42] For an overview of the several bilateral agreements governing the Italy-Libya partnership on migration issues from 2000 to 2009, see M. Giuffré, 'State Responsibility' n 5 above, 700-703. As for judgment of the ECtHR concerning the implementation of the 2009 Treaty, see below Section IV.

[43] 'Memorandum d'intesa' n 39 above, Preamble.

As for the inducements to Libya, the operative provisions of the agreement establish that Italy provides several incentives. Firstly, it grants 'support and financing' to development programs in the Libyan regions affected by migration flows.[44] Secondly, Italy offers 'technical and technologic support' to the Libyan authorities in charge of fighting against border-crossing. These authorities are 'the border guard and the coast guard' under the Ministry of Defence,[45] and this support has included the handing over of four military patrol boats, training, expert advice and capacity building.[46] Thirdly, Italy provides 'training of the Libyan personnel' working in the reception centres within Libyan territory and under the exclusive control of Libyan authorities.[47]

With regard to the means to reduce the migrant movements to Italy, the MoU set forth two tools: reception centres within Libyan territory to the end of obstructing departure, and the improvement of the Libyan capacity to control its land and sea borders in order to impede both arrivals to and departures from its frontiers.[48] The measures aimed at restraining the number of people leaving the country include also SAR operations performed by the Libyan Coast Guard in Libyan territorial waters or on high seas,[49] operations that fall within the notion of pull-back, also known as push-back by proxy.

As a general remark, pull-backs aim at preventing migrants from accessing would-be receiving states territories through pre-arrival returns carried out either in the territorial waters of the departure countries or on the high seas. The difference between this scheme and the push-backs in international waters, which was one of the first-generation measures of *non-entrée*, lies on the actor carrying out the interdictions and the returns: in previous years, these activities were implemented directly by the organs of the would-be receiving states, which led to the attribution of such conducts to the latter and, hence, to the possibility of triggering its international responsibility for the violation of migrants' rights; the current cooperation arrangements provide for the interceptions and returns being performed by the authorities of the country of departure, in the interest of the putative destination states. Therefore, these activities are directly attributable to the country of departure.[50] This circumstance, alongside the legal uncertainty surrounding the extent of states' accountability for extraterritorial actions,

[44] ibid Art 1(b).

[45] ibid Art 1(c).

[46] Senato della Repubblica, 'Relazione Analitica sulle Missioni Internazionali in Corso e sullo Stato degli Interventi di Cooperazione allo Sviluppo a Sostegno dei Processi di Pace e di Stabilizzazione', deliberata dal Consiglio dei Ministri il 28 dicembre 2017, 101, 367, 368, available at https://tinyurl.com/yaw2lsw4 (last visited 27 December 2018).

[47] 'Memorandum d'intesa' n 39 above, Arts 2 (2) and (3).

[48] ibid Preamble, Arts 1 (c), 2 (2) and (3).

[49] Senato della Repubblica, 'Relazione Analitica sulle Missioni Internazionali in Corso' n 46 above, 101.

[50] N. Markard, n 6 above, 602, 613; V. Moreno-Lax and M. Giuffré, n 12 above, 2-4; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 244-249.

challenges the possibility of triggering the responsibility of possible destination states for the violation of international obligations owed toward migrants under conventional human rights law.

The Italy-Libya MoU of 2 February 2017 has proved highly effective in reducing the number of arrivals to Italy.[51] The several interdictions and returns performed by the Libyan Coast Guard under this cooperation agreement have significantly contributed to this goal,[52] and the Italian government has actively contributed to the improvement of this agency's operational capability by means of funding, equipping, and training. The reinforcement of the Libyan Coast Guard operational capacity of preventing departure was meant to outsource responsibilities for internationally wrongful acts from Italy to Libya.[53] Pull-back practices, and the purpose underlying these tools, confirm also the aforementioned shift from the core humanitarian object of SAR operations to their securitization, with the view of ensuring 'peace, security and stability' of Italy against migrant flow, which are perceived as a threat.[54]

4. The Pull-Back of 6 November 2017

One of the most relevant pull-backs performed under the Italy-Libya MoU is the one which occurred on 6 November 2017. First and foremost, at the time of the episode the migrant boat in distress was located in a maritime zone that was not within an officially designated SAR region. As explained in detail below, this led to legal uncertainty regarding which (if any) state was responsible for complying with the duties enshrined in LOS provisions.[55] Moving to the narrative of facts, according to the evidence gathered, in the late evening of 5 November 2017 a migrant boat left the port of Tripoli, with around one hundred and thirty people onboard. In the early morning of the following day, the NGO vessel Sea-Watch 3, which was navigating outside the Libyan contiguous zone, received a distress signal from the Italian Rescue Coordination Centre. The communication was addressed to all ships in the area and to the Libyan Coast Guard, which sent the message to its unit patrolling off the coast of Tripoli (specifically, one of the navy ships donated by Italy during the previous months). A few minutes later, the Italian Rescue Coordination Centre indicated the specific coordinates of the

[51] For an overview of the data concerning arrivals by sea to Italy, see UNHCR, Situation: Mediterranean - Italy, available at https://tinyurl.com/y92lfes2 (last visited 27 December 2018). As a consequence of the *non-entrée* policies under the Italy-Libya MoU, the number of arrivals to Spain has increased significantly: see UNHCR, Situation: Mediterranean - Spain, available at https://tinyurl.com/yatdjx2o (last visited 27 December 2018).

[52] For a detailed overview of the operations carried out in the Mediterranean Sea by the LCG, under the coordination of the Italian RCC, from May 2017 to March 2018, see eg Forensic Oceanography, n 7 above.

[53] M. Giuffré, 'State Responsibility' n 5 above, 729.

[54] 'Memorandum d'intesa' n 39 above, Preamble; D. Ghezelbash et al, n 5 above, 330-331.

[55] See Section III below.

boat in distress to Sea-Watch 3, warning the crew about the presence of the Libyan Coast Guard and inviting it to proceed to the rescue with caution. This communication was followed by the Italian Rescue Coordination Centre delivering a request of assistance to all the ships near the position of the one in distress. Meanwhile, the Libyan Coast Guard called Sea-Watch 3 and ordered the NGO vessel not to come near the scene of the incident. Sea-Watch 3 informed the Libyan Coast Guard that it would proceed towards the migrant boat, as requested by the Italian Rescue Coordination Centre. Close to the position of the ship in distress there was also a French military warship taking part in the EUNAVFOR Med operation and a Portuguese patrol aircraft, later joined by an Italian Navy helicopter and by a FRONTEX surveillance aircraft. Sea-Watch 3 informed the Italian Rescue Coordination Centre about the presence of these vessels, alongside the unit of the Lybian Coast Guard. Despite this circumstance, the Italian authority renewed its instruction to the NGO vessel to proceed towards the boat in distress. Having seen the position, both Sea-Watch 3 and the Libyan Coast Guard ship tried to arrive there first. It is unclear which vessel was the on-scene commander responsible to perform the rescue. On the one hand, Sea-Watch 3 started fulfilling some of the tasks associated with this role – eg communication with other ships, coordination of the rescue operation. On the other hand, the Libyan Coast Guard unit was appointed as on-scene commander by the Libyan authorities, a designation that was notified to the Italian Rescue Coordination Centre, which accepted this assignment but did not communicate it to Sea-Watch 3. Meanwhile, the latter was also instructed to assist the boat in distress by the Italian helicopter on the scene. Due to this chaotic situation, the NGO vessel and the Libyan Coast Guard unit were left to discuss which of them was responsible for performing the SAR operation. According to the information collected, the Libyan Coast Guard unit used dangerous manoeuvres, mistreated the retrieved migrants, threatened the NGO crew, and voluntarily and actively obstructed their rescue activities. Aside from the fifty-nine persons saved by Sea-Watch 3, more than twenty migrants died before and during the operation, and forty-seven people were returned to Libya – at least two of whom were later transferred to their countries of origin.[56] Among the survivors, seventeen lodged an application before the ECtHR, claiming that Italy violated the right to life (Art 2 ECHR), the principle of *non-refoulement* (Art 3 ECHR), and the prohibition of collective expulsion (Art 4, Protocol 4 ECHR).[57]

[56] For a detailed description of the event, see Forensic Oceanography, n 7 above, 87-97. See also HRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya, including on the effectiveness of technical assistance and capacity-building measures received by the Government of Libya', 21 February 2018, A/HRC/37/46, para 46.

[57] See eg ECRE, 'Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard' (2018), available at https://tinyurl.com/y7sd2bme (last visited 27 December 2018); L. Riemer, 'From push-backs to pull-backs: The EU's new

As illustrated by this episode, entrusting third countries with containment-flow policies, such as pull-backs, raises the issue of the protection of migrants' rights at EU external borders,[58] as well as EU member states responsibility for a direct or indirect breach of international obligations enshrined in a plurality of overlapping legal regimes safeguarding persons in distress at sea, provisions that states are bound to interpret and perform in good faith.[59] Law of the sea, human rights law, refugee law, anti-smuggling and anti-trafficking provisions are all relevant. These frameworks, of customary or treaty nature, as well as of universal or regional character, may also apply simultaneously.[60]

With specific regard to the externalization of migration management through means of pull-backs by third countries, the most significant branches of international law enshrining duties of states and rights of individuals are the Law of the Sea (LOS) and International Human Rights Law (IHRL). The different objectives and scopes of these fields notwithstanding, these two areas are far from being self-contained regimes: with reference to SAR operations, they are closely related to each other, as shown by the case-law of the adjudicating bodies in charge of settling disputes concerning their interpretation and application.[61] The main treaty and customary obligations stemming from these legal regimes related to pull-back practices are outlined in the following sections, alongside the investigation on the challenges concerning the effective and practical application of these rules to the events of 6 November 2017.

deterrence strategy faces legal challenge' (2018), available at https://tinyurl.com/yas56394 (last visited 27 December 2018). Since at the time of writing the case was not yet communicated to the Italian government, the argumentation beneath the claims were a matter of speculation.

[58] M. Fernandez, 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 381-382.

[59] Vienna Convention on the Law of the Treaties (VCLT), 23 May 1969, entry into force 27 January 1980, 1155 UNTS 331, Art 26 (*Pacta sunt servanda)* - Every treaty in force is binding upon the parties to it and must be performed by them *in good faith*.); Art 31(1) (General Rule of Interpretation) - A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose) (emphasis added). See also N. Markard, n 6 above, 597; D. Ghezelbash et al, n 5 above, 346.

[60] I. Papanicolopulu, 'Human Rights and the Law of the Sea', in D. Attard et al eds, *The IMLI Manual on International Maritime Law - Volume I: The Law of the Sea* (Oxford: Oxford University Press, 2014), 509; V. Moreno-Lax and E. Papastvridis, 'Introduction: Tracing the Bases of an Integrated Paradigm for Maritime Security and Human Rights at Sea', in Id, *'Boat Refugees' and Migrants at Sea* n 5 above, 1 and 5; T. Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 60, 62-63.

[61] T. Treves, 'Human Rights and the Law of the Sea' 28(1) *Berkeley Journal of International Law*, 1, 5 and 6; International Tribunal of the Law of the Sea (ITLOS), *M/V Saiga (no 2) (St.* Vincent v *Guinea)*, ITLOS Reports 1999, 10, 120 I.L.R. 143, para 155; ITLOS, *Juno Trader,* ITLOS Reports 2004, 17, 128 I.L.R. 267, para 77; Eur. Court H.R. (GC), *Hirsi Jamaa and* others v *Italy*, Judgments of 23 February 2012, paras 24-25 and 75-78, available at http://www.hudoc.echr.coe.it.

III. Issues Arising Under the Law of the Sea

The LOS is a broad framework of international law, and its exhaustive and detailed analysis is beyond the purpose of the present paper. Rather, the following lines outline the core duties binding states towards persons in distress at sea as well as investigating the issue arising from their application to the pull-back of 6 November 2017. As a general remark, it is worth recalling that LOS is mainly a state-centred regime, whose specific object is not the protection of human rights.[62] However, there is a batch of provisions directly or indirectly safeguarding fundamental rights, among which the two obligations that are pivotal in the context of SAR operations: the duty to rescue, and the duty to provide adequate and effective SAR services.[63]

Besides being codified in several LOS treaty provisions,[64] the duty to rescue has customary nature.[65] The purpose of the duty is to assist people in distress at sea,[66] and it applies to all persons, regardless of their nationality, legal status, activities they are performing or circumstances in which they are found.[67] As for the territorial scope, it applies to all maritime zones.[68] The duty to rescue is a duty binding two actors: the flag states and the masters of the ships flying its flag. As a general principle of LOS, every ship shall sail under the flag of a state, which exercises jurisdiction over the ships flying its flag.[69] As for the duty to

[62] T. Treves, ibid 3.

[63] N. Markard, n 6 above, 601-602; T. Scovazzi, 'Human Rights and Immigration at Sea', in R. Rubio-Marín ed, *Human Rights and Immigration* (Oxford: Oxford University Press, 2014) 212, 225-234.

[64] United Nations Convention on the Law of the Sea (10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 (UNCLOS), Art 98 (1), according to which: 'Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call'. The duty to rescue is further specified in other treaties: the International Convention for the Safety of Life at Sea, as amended (1 November 1974, entered into force 25 May 1980), 1184 UNTS 278 (SOLAS Convention); International Convention on Maritime Search and Rescue, as amended (27 April 1979, entered into force 22 June 1985), 1405 UNTS 118 (SAR Convention); International Convention on Salvage (28 April 1989, entered into force 14 July 1996), 1953 UNTS 165 (Convention on Salvage).

[65] I. Papanicolopulu, 'The duty to rescue at sea, in peacetime and in war: A general overview' 98(2) *International Review of the Red Cross*, 491, 492, 494 (2016).

[66] For an in-depth analysis of the meaning of the term 'distress', see L.M. Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 222, 232-247.

[67] SOLAS Convention, n 64 above, Chapter V, Regulation 33.1; SAR Convention, n 64 above, Chapter 2.1.10.

[68] UNCLOS, n 64 above, Arts 18(2), 58 and 98; SOLAS Convention, ibid, Chapter V, Regulation 1.1.

[69] UNCLOS, ibid, Arts 92 and 94.

rescue, on the one hand, each country has the duty to require the masters of ships under its jurisdiction to rescue persons in distress at the earliest possible convenience.[70] On the other hand, each master of vessel is bound to assist people in distress at sea with all possible speed.[71]

The duty to rescue is not absolute. Treaty provisions establish four exceptions: (i) the necessity to avoid a serious danger to the rescuing ship, its crew and passengers;[72] (ii) the vessel receiving the distress call is unable to proceed to the rescue; (iii) the shipmaster considers it unreasonable to provide assistance; (iv) the master deems it unnecessary to aid the persons in distress.[73] If none of these grounds is met, the master of the vessel receiving the distress call shall proceed with the rescue. Following the rescue, the shipmaster has two obligations to comply with: the first one is to treat embarked persons with humanity, within the capacity and limitations of the vessel;[74] the second one is to disembark these individuals to a place of safety within a reasonable time,[75] an obligation that is closely related to the duty to provide SAR services.

According to this latter obligation, coastal states parties to the relevant conventions are compelled to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service'.[76] To this end, these countries are required to identify a SAR region under their responsibility by agreements with the other states concerned.[77] In particular, each coastal

[70] ibid Art 98 (1) (b).

[71] SOLAS Convention, n 64 above, Chapter V, Regulation 33.1; Convention on Salvage, n 64 above, Art 10(1).

[72] UNCLOS, n 64 above, Art 98 (1).

[73] SOLAS Convention, n 64 above, Chapter V, Regulation 33.1, which provides that: 'The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.' For an overview of the meaning of 'unable', 'unreasonable' and 'unnecessary' under SOLAS Convention, Chapter V, Regulation 33.1, see I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 497-498.

[74] SOLAS Convention, ibid, Chapter V, Regulation 33.6; Resolution 167(78) of the International Maritime Organization (IMO) Maritime Safety Committee, 'Guidelines on the treatment of persons rescued at sea', IMO Doc. MSC 78/26/Add.2, 20 May 2004 (IMO Rescue Guidelines), para 5.1.2.

[75] SAR Convention, n 64 above, Chapter I, Regulation 1.3.2 and Chapter III, Regulation 3.1.9; SOLAS Convention, ibid, Regulation 4.1.1.

[76] UNCLOS, n 64 above, Art 98(2), according to which: 'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose'.

[77] SAR Convention, n 64 above, Chapter II, Regulation 2.4.

country shall establish a rescue co-ordination centre entrusted with the task to ensure the organization and coordination of the search and rescue services *within* the SAR zone under its responsibility.[78] Among other undertakings, when more than one vessel is about to engage in the rescue operation, the relevant rescue coordination centre 'should designate an on-scene commander' responsible for carrying out the rescue. This choice should be made as early as practicable and, in any case, before arrival within the area of the incident.[79] If the rescue coordination centre does not select the on-scene commander, the latter is either appointed by the rescuing ships via agreement,[80] or the first vessel arriving at the scene of the incident automatically assumes this role (so-called first come, first serve principle).[81] It could also happen that rescue coordination centres receive distress calls launched *beyond* their SAR regions: in this circumstance, the rescue coordination centre involved is under the duty to provide immediate assistance, if in the position to aid, and to inform the rescue coordination centre in whose SAR area the incident took place.[82]

As for the two services to be ensured, searching is aimed at locating persons in distress,[83] whilst rescue is an operation meant to retrieve these individuals, provide for their initial needs, and deliver them to a place of safety as soon as possible.[84] Hence, a SAR operation is considered terminated solely once the rescued people are disembarked in such a location.[85] However, the meaning of the expression 'place of safety' is not clarified in treaty provisions, and neither does LOS regime provide for criteria determining which state is under the duty to allow the entry of rescuing ships in its ports. The lack of this legal obligation illustrates the countries' unwillingness to restrain their right to control (and limit) the entrance into their ports,[86] a right stemming from the principle of states sovereignty over their territories.[87] An attempt to fill this gap was made by the International Maritime Organization (IMO) through the adoption of guidelines. These soft-law instruments outline the meaning of the expression 'place of safety' and establishes the criteria determining which is the state responsible for ensuring or providing such a place. As for the former, a 'place of safety' is a location 'where the survivors' safety or life is no longer threatened and where

[78] ibid Chapter I, Regulation 1.5, Chapter II, Regulation 2.3.1, Chapter VI, Regulation 4.2.1.
[79] ibid Regulation 5.7.1 and Regulation 5.7.2.
[80] ibid Regulation 5.7.2.
[81] ibid Regulation 5.7.3.
[82] ibid Chapter IV, Regulation 4.3.
[83] ibid Chapter I, Regulation 1.3.1.
[84] ibid Regulation 1.3.2 and Chapter III, Regulation 3.1.9; SOLAS Convention, n 64 above, Regulation 4.1.1.
[85] IMO Rescue Guidelines, n 74 above, Guideline 6.12; I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 499.
[86] N. Klein, n 10 above, 46-49.
[87] I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 500; V. Moreno-Lax and M. Giuffré, n 12 above, 13; L.M. Komp, n 66 above, 231.

their basic human needs (such as food, shelter and medical needs) can be met'.[88] As for the latter, the state responsible for the SAR zone within which the rescue is performed is the one charged with the task 'to provide a place of safety, or to ensure that a place of safety is provided'.[89]

Moving to the application of these provisions to the pull-back of 6 November 2017, the first remark concerns the above-mentioned location of the migrant boat in distress outside an officially designated SAR region. In this regard, on 10 July 2017, the Libyan Government of National Accord transmitted an official notification to IMO designating its own SAR region, a declaration that was withdrawn on 10 December 2017. This revocation was provisional, since Libya filed a new official communication to IMO on 14 December.[90] However, the IMO database officially reported the existence of a Libyan SAR zone (and of a Libyan Rescue Coordination Centre) only from 28 June 2018.[91] This turn of events led to legal uncertainty regarding which state was responsible for providing adequate and effective search and rescue services outside Libyan territorial waters until this date.[92]

With reference to the duty to rescue, it applies to all maritime zones, hence also to those zones which are not encompassed in an officially designated SAR region. In the case at hand, the ships that could provide assistance to the vessel in distress were Sea-Watch 3, the Libyan Coast Guard unit and the French military ship taking part in the EUNAVFOR Med operation. While the NGO boat and the Libyan Coast Guard vessel performed the operation, the French military ship stood still. However, it is rather easy to justify the non-intervention of this third ship according to the exceptions to the duty to rescue. Initially, the French vessel might have deemed it 'unnecessary' to proceed, due to the presence of both Sea-Watch 3 and the Libyan Coast Guard unit. Later, in the course of

[88] IMO Rescue Guidelines, n 74 above, Guideline 6.12; International Maritime Organization, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea', 22 January 2009, FAL.3/Circ.194, Principle 2.3. According to some authors, this implies that the state responsible for the SAR zone within which the rescue is performed bare a residual obligation to allow the disembarkation in its ports: see S. Trevisanut, 'Is There a Right to be Rescued at Sea? A Constructive View' 4 *Question of International Law*, 3 and 7 (2014) (last visited 27 December 2018).

[89] IMO Rescue Guidelines, ibid, Guideline 2.5.

[90] Comando Generale del Corpo delle Capitanerie di Porto - Guardia Costiera, Maritime Rescue Coordination Centre Roma, 'Sea Operation in the Mediterranea Sea - 2017 Report', 18 and 20, available at https://tinyurl.com/ydgvx2u5 (last visited 27 December 2018); M. Monroy, 'A seahorse for the Mediterranean: Border surveillance for Libyan search and rescue zone' (3 January 2018), available at https://tinyurl.com/y7uw5os3 (last visited 27 December 2018).

[91] A. Cuddy, 'Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants' (6 July 2018), available at https://tinyurl.com/y8lmmecu (last visited 27 December 2018); A. Cuddy, 'La Libia crea la sua zona SAR e notifica l'IMO (con il sostegno UE)' (9 July 2018), available at https://tinyurl.com/yadzvswt (last visited 27 December 2018).

[92] See eg Tribunal di Ragusa, Ufficio del GIP, Decreto di rigetto di richiesta di sequestro preventivo, nos 1216-1282/18 R.G.N.R., 28 April 2018, 14-15, available at https://tinyurl.com/y73em5vf (last visited 27 December 2018).

the operation, the Libyan Coast Guard crew began using dangerous manoeuvres, as well as threatening the NGO crew and actively obstructing their assistance activities. In view of the foregoing, the French authorities might have deemed that its intervention could cause 'a serious danger' to their vessel and crew and, hence, might have decided to avoid any involvement.

As for the obligations that the shipmaster must comply with after the rescue, the Libyan Coast Guard crew did not treat the embarked persons with humanity, and did not disembark them to a place of safety. According to the evidence gathered, the Libyan authorities beat migrants with a rope as they boarded, a behaviour that infringes the former duty.[93] Subsequently, they returned the retrieved migrants to Libya, a country where, according to several well-known and reliable sources, migrants faced gross human rights violations and abuses which are carried out by both state and non-state actors. This situation highlights that state institutions have been 'unable or unwilling' to ensure effective protection of migrants.[94] Due to these circumstances, Libya did not meet the requirements to be considered as a 'place of safety' under IMO Guidelines.

Turning to the duty to provide adequate and effective SAR services, Libya has attempted to establish its own SAR region since July 2017, and achieved this goal in July 2018. Therefore, the pull-back of 6 November 2017 occurred within an ambiguous framework concerning which state was the one responsible for providing adequate and effective search and rescue services within the maritime zone in which the migrant boat in peril was located. Against this background, according to LOS provisions, the Italian Rescue Coordination Centre, which received the distress call, had the duty to provide immediate assistance, even if the vessel was *beyond* the SAR region under its responsibility. The uncertainty concerns the scope of the duty to design an on-scene commander, an obligation bound the rescue coordination centre responsible for the organization and coordination of search and rescue operation *within* the SAR region of the relevant coastal state. If the duty to appoint an on-scene commander applies also to rescue coordination centre involved in activities beyond the SAR region under their responsibility, then Italy violated this obligation during the pull-back of 6 November 2017. Indeed, the Italian authorities had informed all the ships close to the one in distress about the need to proceed to a SAR operation, but then they simply accepted the designation of the Libyan Coast Guard unit as on-scene commander, a decision taken by the Libyan authorities which, at the time of the episode, could not be classified as an officially recognised rescue coordination centre – since this qualification depends on the establishment of a SAR region under the responsibility of the coastal state. On the contrary, if the

[93] Forensic Oceanographic, n 7 above, 96; HRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya' n 56 above, para 46.

[94] HRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya', ibid, paras 41-45.

duty to design an on-scene commander does not apply to the rescue coordination centre organizing and coordinating SAR operations beyond the SAR region of the relevant coastal state, then Italy did not violate this obligation.

Lastly, the circumstance that the pull-back of 6 November 2017 occurred outside an officially recognised SAR zone affects also the assessment concerning which state was the one responsible for either providing or ensuring that this place is provided. Indeed, according to the IMO Guideline, this obligation should be carried out by the country responsible for the SAR zone within which the rescue is performed. However, the investigation aimed at identifying the state in charge of this assessment is quite theoretical, since this task is set forth in a soft-law instrument.

This final remark is tied to a more general issue concerning the management of migratory flow and the outsourcing of border-crossing control at sea. Indeed, due to the non-binding nature of these provisions, the conclusive phase of SAR operations – ie the disembarkation in a place of safety – is still problematic. As illustrated by practice, countries are often unwilling to allow the entrance of rescuing ships in their ports, in line with their power to control and regulate admission in their territory as a corollary of state sovereignty.[95] Yet, a situation of distress at sea, and the consequent search and rescue activities, triggers the states' obligations under IHRL, which applies also to the maritime environment, regardless of the nature and purpose of the intervention.[96] Hence, on the one hand, the principle of sovereignty implies the freedom of countries to regulate the entry, residency and expulsion of aliens, a power that is not limited by binding provisions of LOS. On the other hand, a fragmentary approach to states' obligations under international law should be rejected in favour of a systemic interpretation of their duties.[97] Therefore, the interaction among LOS and other branches of international law – for the purpose of the present paper, IHRL – may provide a more comprehensive understanding of states' rights and their limits with regard to situations at sea, and more specifically *vis-à-vis* interception of boat

[95] I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 499-500. On this point, see also M. Fink and K. Gombeer, 'The Aquarius incident: Navigating the turbulent waters of international law' (14 June 2004), available at https://tinyurl.com/y73aqhbn (last visited 27 December 2018).

[96] I. Papanicolopulu, 'Human Rights and the Law of the Sea' n 60 above; V. Moreno-Lax and M. Giuffré, n 12 above, 10; N. Markard, n 6 above, 593-594; T. Treves, n 61 above. See also Eur. Court H.R. (GC), *Hirsi Jamaa and* others v *Italy* n 61 above, paras 77-81, and 178. Specifically, the Court stated that: 'Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas' (para 78), and that 'the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction' (para 178).

[97] M. Giuffré, 'State Responsibility' n 5 above, 708; B. Conforti, n 9 above, 194-195, 477; T. Treves, ibid, 1.

migrants.[98]

The relationship between LOS and IHRL is based on rules of treaty interpretation set forth by both general international law and LOS itself.[99] Art 31 (1) (c) VCLT establishes that, in interpreting a treaty, 'there shall be taken into account (…) any relevant rules of international law applicable in the relations between the parties.' This general rule is confirmed by LOS treaty provisions which provide for the application of other international law provisions to the party of a dispute,[100] and that establish a non-prejudice clause concerning rights and obligations stemming from other agreements,[101] or specifically related to the protection of human rights at sea.[102] The interaction between the international obligations stemming from LOS and IHRL has also been taken into account by the courts and tribunals in charge of settling the disputes according to the relevant treaties.[103] From the viewpoint of SAR operations, the consequence of this intertwining is a limitation of states' sovereignty due to its human rights obligations towards persons in distress at sea.

This circumstance has a significant impact on the remedies available to the victims. From their standpoint, it is worth noting that individuals lack standing before the dispute settled mechanisms set forth under the LOS regime. Therefore, any violation of LOS provisions by the states involved – such as the duty to disembark retrieved persons to a place of safety, the duty to provide adequate and effective search and rescue services, the duty to design an on-scene

[98] J. Coppens, 'Interception of Migrant Boats at Sea', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 197, 218-221.

[99] For treaty provisions which directly address human rights, see Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), as amended (10 March 1988, entry into force 28 July 2010), 1678 UNTS 22, and in particular – among other articles – Art 8 *bis* (10)(a)(i) on the safety of life at sea, Art 8 *bis* (10)(a)(ii) on the protection of human dignity, Art 10(2) on the fair treatment to ensure to persons under custody. The SUA Convention is remarkable for the particular attention paid to human rights guarantees to ensure at sea, alongside its non-prejudice clause concerning human rights in general. On this point, see I. Papanicolopulu, 'Human Rights and the Law of the Sea' n 60 above, 519.

[100] UNCLOS, n 64 above, Art 293 (1), according to which: 'A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.' See also T. Treves, n 61 above, 2 and 6.

[101] UNCLOS, ibid, Art 311 (2), which states that: 'This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.' On the relation between LOS and the purposes set forth in the UN Charter, see I. Papanicolopulu, 'Human Rights and the Law of the Sea' n 60 above, 531-532.

[102] SUA Convention, n 99 above, Art 2 *bis* (1), according to which: 'Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law.'

[103] T. Treves, n 61 above, 5 and 6; ITLOS, *M/V Saiga (no 2) (St. Vincent* v *Guinea)*, n 61 above, para 155; ITLOS, *Juno Trader,* n 61 above, para 77; Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, paras 24-25 and 75-78.

commander, the duty to provide immediate assistance beyond the state's SAR zone – cannot be directly claimed by the alleged victims.[104] This notwithstanding, if the breach of these duties results in an infringement of human rights obligations, then alleged victims may claim such a violation before the relevant international treaty bodies or courts. This assumption applies also to the afore-examined pull-back practices,[105] regardless of their formal qualification,[106] as shown by the case-law of the ECtHR, which is examined in detail below.[107]

IV. Issues Arising Under International Human Rights Law

As a preliminary remark, IHRL sets forth both negative and positive obligations towards individuals. As for the former, states are obliged to respect human rights, ie to abstain from illicitly interfering in the exercise of the relevant right.[108] As for the latter, countries are under the duty to protect and fulfil human rights, ie to prevent the breach of these rights as a consequence of the actions performed by other actors – eg third states, non-state actors, or individuals; if a breach occurs, countries should perform a proper official, independent and public investigation and prosecute the wrongdoer.[109] Positive obligations under human rights treaties are not absolute: states are required to exercise due diligence, according to which countries must take all measures *reasonably within their power* to prevent, investigate, punish and redress the harm caused by other actors' activities.[110]

Therefore, the responsibility of states may arise from both commissive and omissive conducts. A country is responsible for committing the wrongdoing, hence for acts of its organs or agents whose actions breach a negative human rights obligation[111] – eg state agents returning a person to a territory where there is a

[104] I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 502.

[105] Section II.

[106] Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, paras 78-81, 178.

[107] Section IV and Section V.

[108] States can interfere with the enjoyment of human rights in accordance with the specific requirements set forth in limitation clauses attached to the article enshrining the right or freedom involved – eg according to International Covenant on Civil and Political Rights (16 December 1966, entry into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 12 (3) the right to leave a country may be subjected solely to restrictions provided by law, necessary to protect one of the aim listed in the provision, and consistent with the other rights recognized in the Covenant. States can also limit the enjoyment of human rights in accordance with the conditions established under general emergency clauses contained in human rights treaty (see eg ICCPR, Art 4, or ECHR, n 8 above, Art 15).

[109] B. Conforti, n 9 above, 217-218; A. Cassese, *I diritti umani oggi* (Bari: Editori Laterza, 2005), 126-130.

[110] On the duty of due diligence, see eg J. Kulesza, *Due Diligence in International Law* (Leida: Brill, 2016).

[111] M. Milanovic, *Extraterritorial Application of Human Rights - Law, Principles and Policy* (Oxford: Oxford University Press, 2011), 46-47, and the case-law analysed therein.

serious risk of being subjected to cruel, inhuman or degrading treatment. Moreover, a country may also be responsible where it does not commit the act that violates human rights: its international responsibility may arise because of the lack of due diligence in preventing or responding to the illicit behaviour of other actors[112] – eg state agents do not prevent a shipwreck which causes a number of deaths, even knowing that the event was going to take place.

As for the territorial scope of obligations under conventional human rights law,[113] states are bound to respect, protect and fulfil rights and freedoms enshrined in treaty provisions to individuals *within their jurisdiction*.[114] Jurisdiction is the precondition to determine whether the country is obliged to comply with conventional duties and, therefore, to qualify its conducts as a violation of such norms – ie an internationally wrongful act.[115] Although the jurisdiction of states is primarily territorial, it may sometimes be exercised outside their borders.[116] Hence, according to the jurisdictional clause contained in human rights' treaties, countries are under the duty to secure human rights within their territory, as well as extraterritorially where they exercise jurisdiction outside their national frontiers.[117]

Concerning the requirements to be met in order to affirm that a country exercises extraterritorial jurisdiction, courts have developed two main models: the spatial model and the personal model.[118] The first model requires the exercise of effective control, ultimate authority and control, or ultimate control over an area outside the national territory;[119] the second model entails the exercise

[112] ibid 209-210, and the case-law examined therein.

[113] On the issue of the (purportedly) different territorial scope of human rights obligations enshrined under conventional law and customary international law, see eg N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) 138-139; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), 232-235; M. Milanovic, *Extraterritorial Application* n 111 above, 3.

[114] For a general overview of the jurisdictional clause, and of the treaties containing such a provision, see M. Milanovic, ibid, 11-18.

[115] ibid 46.

[116] See eg HRC, *Delia Saldias de Lopez* v *Uruguay*, 29 July 1981, CCPR/C/13/D/52/1979, paras 12.1-12.3; Eur. Court H.R. (GC), *Loizidou* v *Turkey (Preliminary Objections)*, Judgment of 23 March 1995, paras 59-64, available at www.hudoc.echr.coe.it; Inter-American Commission HR, *Coard et* al v *United States*, Report no 109/99 of 29 September 1999, paras 36-37; International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, 2004 I.C.J. 131, para 109; ICJ, *Armed Activities of the Territory of the Congo (Dem. Rep.* Congo v *Uganda)*, Judgment of 19 December 2005, 2005 I.C.J. 168, para 216. See also A. Cassese, n 109 above, 45-46.

[117] See eg UNHRC, 'General comment 31 - The nature of the general legal obligation imposed on States Parties to the Covenant" in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) CCPR/C/21/Rev.1/Add.13 (General Comment 31), para 10; Eur. Court H.R. (GC), *Al-Skeini and* others v *the United Kingdom*, Judgment of 7 July 2011, paras 131-132, available at www.hudoc.echr.coe.it.

[118] For an overview of the main features of these models, see M. Milanovic, *Extraterritorial Application* n 111 above, 118-207.

[119] As for scholars, see ibid 127-172; M. Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg'

of authority, power or control over an individual.[120] The issue of whether the grounds required to declare the extraterritorial jurisdiction of the state involved are met is determined on a case-by-case basis, by taking into account the specific circumstances of the episode under inquiry.[121]

In relation to interception of migrant boat at sea, the most challenging question does not regard the determination of the treaty-based rights that risk being violated, but whether the state involved exercises its jurisdiction extraterritorially with regard to situations at sea. Both these aspects are analysed in the following paras.

1. The Treaty-Based Rights at Stake

The implementation of *non-entrée* measures jeopardises several human rights enshrined in treaties and conventions: the right to life, in situations involving shipwrecks and drownings;[122] the principle of *non-refoulement*, where individuals

23 *European Journal of International Law*, 121 (2012); M. Milanovic, 'Jurisdiction, Attribution and Responsibility in *Jaloud*' (2014), available at https://tinyurl.com/y7v5flc6 (last visited 27 December 2018). As for the case law, see eg Eur. Court H.R., *Behrami and* Behrami v *France* and Saramati v *France, Germany and Norway*, Judgment of 2 March 2007, paras 134-135, 140, regarding the criteria of 'ultimate authority and control' and 'effective command'; Eur. Court H.R. (GC), *Al-Skeini and* others v *the United Kingdom* n 117 above, paras 138-139, concerning the criterion of 'effective control'; Eur. Court H.R. (GC), *Al-Jedda and others* v *the United Kingdom*, Judgment of 7 July 2011, para 84, on the criteria of 'effective control' and 'ultimate authority and control'; Eur. Court H.R., *Jaloud* v *the Netherlands*, Judgment of 20 November 2014, paras 143 and 149, regarding the criterion of 'full command'. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

[120] M. Milanovic, *Extraterritorial Application* n 111 above, 173-208. See also Eur. Court H.R., *Banković and others* v *Belgium and others*, Judgment of 12 2001, para 71, concerning the criteria of the exercise of 'power'; Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, para 81, on the criterion of 'exclusive control' over a person; Eur. Court H.R. (GC), *Al-Skeini and* others v *the United Kingdom* n 117 above, para 137, regarding the criterion of 'control and authority over an individual'; Eur. Court H.R., *Jaloud* v *the Netherlands* n 119 above, para 124, on the criteria of 'exclusive physical power and control and actual or purported legal authority over an individual'. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

[121] See eg Eur. Court H.R. (GC), *Al-Skeini and others* v *the United Kingdom* n 117 above, para 132, available at www.hudoc.echr.coe.it. See also eg P. De Sena, *La nozione di giurisdizione nei trattati sui diritti dell'uomo* (Torino: Giappichelli, 2002), 228-229.

[122] See eg UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR), Art 3; ICCPR, n 108 above, Art 6; ECHR, n 8 above, Art 2; Organization of African Unity, African Charter on Human and Peoples' Rights, 'Banjul Charter' (27 June 1981, entry into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (AfCHR), Art 4; Organization of American States, American Convention on Human Rights, 'Pact of San Jose', Costa Rica (22 November 1969, entry into force 18 July 1978) (ACHR) Art 4; League of Arab States, Arab Charter on Human Rights (22 May 2004, entered into force 15 March 2008) (Arab Charter) Art 5.

For a detailed analysis concerning the relations between the duty to rescue and the right to life, see I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 509-513; S. Trevisanut, 'Is There a Right to be Rescued at Sea?' n 88 above; L.M. Komp, n 66 above, 236-242; E.

are disembarked to a country where they risk being subjected to serious human rights violations;[123] the right to leave a country, since they are returned to the state from which they were fleeing;[124] and the prohibition of collective expulsion, since the removal does not follow the individual examination of the particular situation of each of the retrieved persons.[125] These provisions apply also to pull-backs, such as the one which occurred on 6 November 2017, since they are set forth by human rights instruments to which Italy and Libya are parties.[126]

The right to life requires states to refrain from conduct which results in an arbitrary deprivation of lives, and to take 'all reasonable precautionary steps' to protect life and avoid preventable and foreseeable deaths.[127] This right is not

Papastavridis, 'Is there a right to be rescued at sea? A skeptical view' 4 *Question of International Law*, 17 (2014).

[123] The principle of *non-refoulement* has been initially affirmed in the field of the protection of refugees, and was later established in the broader context of IHRL. See eg Sir E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E. Felleret al eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 87. As for the IHRL provisions enshrining this principle, see eg UDHR, n 122 above, Art 5; ICCPR, n 108 above, Art 7 as interpreted in UNHRC, 'General Comment 20' (2008) HRI/HEN/1/Rev.1, para 9; ECHR, n 8 above, Art 3, as interpreted by ECtHR - eg Eur. Court H.R., Soering v *United Kingdom*, Judgment of 15 November 1996, paras 87-88, available at www.hudoc.echr.coe.it; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984; entered into force 26 June 1987), 1465 UNTS 85, Art 3; AfCHR, n 122 above, Art 5; ACHR, n 122 above, Art 22 (8). On the relationship between *non-entrée measures* and the principle of *non-refoulement*, see eg M. Giuffré, 'State Responsibility' n 5 above, 717-720; V. Moreno-Lax and M. Giuffré, n 12 above, 10-12; M. Giuffré, 'Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 248, 252-272; T. Gammeltoft-Hansen, n 60 above, 62; T. Scovazzi, n 63 above, 241-242.

[124] See eg UDHR, n 122 above, Art 13(2); ICCPR, n 108 above, Art 12(2); ECHR, n 8 above, Art 2 (2), Protocol no 4; AfCHR, n 122 above, Art 12 (2); ACHR, n 122 above, Art 22 (2), Arab Charter, n 122 above, Art 27. For a detailed analysis of the relationship between interception of boat migrants and the right to leave, see eg N. Markard, n 6 above; V. Moreno-Lax and M. Giuffré, n 12 above, 12-14. On the right to leave a country as an 'asymmetric right' see eg T. Scovazzi, n 63 above, 212.

[125] See eg ECHR, n 8 above, Art 4, Protocol no 4; AfCHR, n 122 above, Art 12; ACHR, n 122 above, Art 22 (9); Arab Charter, n 122 above, Art 26 (2). See also Eur. Court H.R. (GC), *Hirsi Jamaa and* others v *Italy* n 61 above, paras 166 and 177, available at www.hudoc.echr.coe.it.

[126] Interception at sea gives also rise to concerns regarding the prohibition of arbitrary deprivation of liberty, in cases where the crew and other individuals on board the intercepted vessel are held for days on the rescuing ship. This prohibition is set forth in several human right provisions, as UDHR, n 122 above, Art 3; ICCPR, n 108 above, Art 9; ECHR, n 8 above, Art 5; AfCHR, n 122 above, Art 6; ACHR, n 122 above, Art 7, Arab Charter, n 122 above, Art 14. On this regard, see eg T. Treves, n 61 above, 7-10; J. Coppens, n 98 above, 218-220.

[127] See eg HRC, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary and arbitrary executions, 'Unlawful Death of Refugees and Migrants' 29(4) *International Journal of Refugee Law*, 668, 673; Eur. Court H.R., *Osman* v *The United Kingdom*, Judgment of 28 October 1998, para 116, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Ilhan* v *Turkey*, Judgment of 27 June 2000, paras 75-76, available at www.hudoc.echr.coe.it; HRC, *Chongwe* v *Zambia*, Views of 25 November 2000, para 5.2;

absolute, and the relevant treaties expressly establish the conditions to be met in order to lawfully limit its enjoyment.[128] In the context of SAR operations, this rule provides for states involved in these activities to take all reasonable measures to assist people in distress.[129] However, in cases of interceptions of migrant boat at sea, state agents performing push-backs and pull-backs may endanger the life of the persons in distress, either intentionally or negligently.[130] Any death occurring under this circumstance amounts to an arbitrary deprivation of life, since national authorities involved in these operations did not take all the reasonable measures to protect and avoid the loss of lives of the individuals in distress. With regard to the pull-back of 6 November 2017, according to the evidence gathered, the uncertainty concerning which of the retrieving vessels was the on-scene commander hindered a proper coordination between the rescuing ships, which resulted in the death by drowning of one of the individuals on board the migrant boat in distress.[131] Moreover, the information collected illustrates that the Libyan Coast Guard unit performed dangerous manoeuvres, alongside actively frustrating the attempt of the Sea-Watch 3 crew to carry out the rescue. Due to these conducts, another person in distress died at sea during the operation.[132] Legitimate doubts could arise on whether Italy could be held responsible for the violation of the right to life because the Italian Rescue Coordination Centre did not communicate to the NGO vessel that the Libyan Coast Guard was the on-scene commander – and, hence, for having contributed to the above-mentioned chaotic situation and to the death of one individual. Contrarily, it is unquestionable that the behaviour of the Libyan authorities constitutes a breach of the prohibition of arbitrary deprivation of life, since they intentionally exposed the migrants in distress to a serious danger of losing their

Inter-American Commission of HR, *Rochela Massacre* v *Colombia*, Judgment of 11 May 2007, para 127.

[128] Eg ECHR, n 8 above, Art 2, according to which: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'. See also ICCPR, n 108 above, Art 6, whose para 1 states that: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'; whilst, paras 2, 4, 5 and 6 establishes specific guarantees referred to countries which have not yet abolished the death penalty, in order to ensure that such sentence is applied only 'for the most serious crimes' and under the strict limits.

[129] For different opinion on the relationship between the duty to rescue and the right to life, see E. Papastavridis, 'Is there a right to be rescued at sea?' n 122 above, and S. Trevisanut, 'Is There a Right to be Rescued at Sea?' n 88 above.

[130] HRC, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary and arbitrary executions, n 127 above, 673, 677; L.M. Komp, n 66 above, 239.

[131] Forensic Oceanographic n 7 above, 96.

[132] ibid.

life, as well as causing the death of one of them.

The principle of *non-refoulement* is a *ius cogens* rule of IHRL that provides the prohibition to remove an individual to a state where he or she risks being subjected to serious human rights violations (direct *refoulement*), or to an intermediate country where there is danger of a subsequent transfer of the person to a state where he or she would be at risk of being victim of such breaches (indirect *refoulement*).[133] The assessment of the risk is speculative, and is grounded on a case-by-case basis evaluation according to an objective and a subjective test: in order to determine whether there is a real risk of being subjected to serious human rights violations (or to another transfer) once removed to the country of destination, the sending state must take into account – in a cumulative or alternative way – both the general situation concerning the respect of human rights in the receiving state and the particular situation of the individual concerned.[134] The principle applies to removal of people already in the territory of the country, as well as to rejection at borders, in transit zones (eg airports) and on the high seas.[135] With a specific reference to the pull-back of 6 November 2017, at the end of the operation coordinated by the Italian Rescue Coordination Centre, the Libyan Coast Guard returned to Libya fifty-nine of the retrieved migrants, at least two of which were removed to their countries of origin – from which they were fleeing.[136] If it is determined that Italy exercised jurisdiction, then it would be deemed as responsible for direct *refoulment*, due to the return of individuals to Libya, and indirect *refoulement*, because of the removal of (at least) two of these persons to their countries of origin. Simultaneously, this latter circumstance constitutes also a breach of the prohibition of direct *refoulement* attributable to Libya.

The right to leave a country including one's own is not absolute, and the limits to this entitlement are two. On the one hand, a would-be destination country has the power to regulate the entry, residency and expulsions of aliens as a corollary of state sovereignty over its territory. On the other hand, countries of departure may restrict the enjoyment of this right if this limit is lawful, necessary to achieve one of the legitimate aims listed in the treaty provision, and proportionate.[137] In the case at stake, none of these requirements is met.

[133] See eg Sir E. Lauterpacht and D. Bethlehem, n 123 above, 150-164; UNHRC, 'General Comment 31' n 117 above, para 12; Eur Court H.R., *T.I.* v *United Kingdom*, Judgment of 7 March 2000; Eur. Court H.R., *Abdolkhani and Karimnia* v *Turkey*, Judgment of 22 September 2009, para 88; Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, paras 146-158. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

[134] For a comprehensive analysis on the assessment of the risk, see F. De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (Leiden: Brill, 2016), 232-450.

[135] See eg E. Lauterpacht and D. Bethlehem, n 123 above, 110-111.

[136] Forensic Oceanographic, n 7 above, 98.

[137] Eg ECHR, n 8 above, Arts 12 (2) and (3), according to which: 'Everyone shall be free to

First and foremost, the Italy-Libya MoU does not expressly provide for the Libyan Coast Guard performing pull-backs at sea.[138] Secondly, it is at least doubtful that these measures are meant to pursue one of the legitimate objectives listed in the relevant rules. Thirdly, the principle of proportionality requires a balancing test between the interests at stake – ie the right to leave and the power of states to restrict such entitlement. This balancing test must be carried out on a case-by-case basis, taking into account the specific situation of the individual targeted by the limitation. All pull-backs, included the one performed on 6 November 2017, imply a blanket restriction of the right to leave which does not satisfy the above-mentioned conditions. Therefore, a competent treaty bodies could declare Libya responsible for this breach.[139]

Lastly, the prohibition of collective expulsion forbids states parties to the relevant conventions from compelling aliens, as a group, to leave their territory, unless this measure is a result of a reasonable and objective assessment of the specific case of each member of the group.[140] Similarly to the principle of *non-refoulement*, this prohibition applies to persons within the territory of the state, as well as to land borders and on high seas – hence, interceptions in this maritime zones that prevent migrants from reaching the frontiers of the state are qualified as collective expulsions.[141] With reference to the pull-back of 6 November 2017, the persons on board of the migrant boat were taken back to Libya without an individual assessment of the specific situation of each of them. In this regard, Libya could not be considered responsible for the breach of this provision, since it did not perform an expulsion, but a return - which is the reason underpinning the violation of the right to leave a country. Contrarily, if it is determined that Italy exercised jurisdiction, then it will be held responsible for the infringement of this rule.[142]

Having said that, the application of these guarantees at operations on high

leave any country, including his own. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'; ICCPR, n 108 above, Arts 12 (2) and (3), stating that: 'Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'.

[138] On the Italy-Libya MoU, see Section II above.

[139] For a similar opinion, see eg N. Markard, n 6 above; V. Moreno-Lax and M. Giuffré, n 12 above, 12-14.

[140] See eg Eur. Court H.R., *N.D. and N.T.* v *Spain*, Judgment of 3 October 2017, para 98, available at www.hudoc.echr.coe.it.

[141] See eg ibid paras 99-108; Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, para 180. See also Inter-American Commission HR, *The Haitian Centre for Human Rights et al* v *United States*, Decision of 3 March 1997, paras 156-157, 163 and 188.

[142] Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, paras 181-186.

seas is questionable due to the uncertainty concerning the exercise of extraterritorial jurisdiction. In this context, a clear distinction between, on one side, control over the vessel and, on the other side, control over the crew or other individuals on board is highly problematic, if not impossible.[143] Thereby, the traditional difference between the spatial and personal model of jurisdiction appears to be misleading in the determination of whether the state involved is under the duty to respect, protect and fulfil human rights on the boat concerned. This ambiguity is confirmed by the case-law of the European Court of Human Rights (ECtHR) on applications claiming the violation of the rights enshrined in the European Convention of Human Rights (ECHR) in the context of activities performed outside territorial waters.[144]

2. The Issue of the Extraterritorial Application of Conventional Human Rights Law: The Case-Law of the ECtHR Concerning Activities on the High Seas

The Strasbourg Court had few opportunities to clarify the territorial scope of the ECHR with reference to operations carried out by states parties beyond their territorial waters. Two situations were brought to the Court's attention. The first one concerns the activities of states' agents on ships flying the flag of that country. In this regard, the ECtHR affirmed that the state of the flag exercised *de jure* control over the individuals located on those vessels and, for this reason, they were within its exclusive jurisdiction.[145] It is worth noting that the Court considered the LOS provisions as relevant in the interpretation of the jurisdictional clause set forth in the Convention.[146] The second situation involves states' agents carrying out actions on vessels flying the flag of a third country – ie on which the respondent country does not have a legitimate entitlement to exercise *de jure* control. In such cases, the Strasbourg Court declared that the applicants

[143] M. Milanovic, *Extraterritorial Application* n 111 above, 169. On the application of human rights on the high seas, see also T. Scovazzi, n 63 above, 247-251.

[144] See eg Eur. Court H.R., *Rigopoulos* v *Spain*, Judgment of 1 January 1999; Eur. Court H.R., *Xhavara et Autres* v *Italie et Albanie*, Judgment of 11 January 2001; Eur. Court H.R., *Medvedyev and others* v *France*, Judgment of 10 July 2008; Eur. Court. H.R., *Women on Waves and others* v *Portugal*, Judgment of 3 February 2009; Eur. Court H.R. (GC), *Medvedyev and others* v *France*, Judgment of 29 March 2010; Eur. Court. H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

[145] See eg Eur. Court H.R. (GC), *Medvedyev and others* v *France* n 144 above, para 65; Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, paras 77 and 81. In this regard, see also ITLOS, *M/V Saiga (no 2) (Saint Vincent* v *Guinea)*, n 61 above, para 107, in which the Tribunal stated that 'the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State'.

[146] Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy*, n 61 above, para 77, in which the ECtHR stated that '*by virtue of the relevant provisions of the law of the sea*, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying' (emphasis added).

were within the respondent states' jurisdiction due to the *de facto* control exercised on the boat, the crew and other individuals on board.[147] The most significant judgment on the matter is the *Medvedyev* case. In the context of the fight against drug trafficking, the French authorities suspected that a vessel flying a Cambodian flag was carrying a huge quantity of drugs. For this reason, they requested and obtained the permission from Cambodia to intercept, search and seize the boat, as well as detain the members of the crew. The detention took place on board of the Cambodian ship, under the French military guard, and lasted until the arrival in France, where the members were submitted to criminal proceedings. According to the Grand Chamber, France

> 'exercised full and exclusive control over the vessel and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France'.[148]

When it comes to the externalization of the management of migratory flow, it is necessary to distinguish push-backs from pull-backs. As previously mentioned, the former measure consists of the interdiction of boat migrants performed by the would-be destination state, whilst the latter entails the interception and return of these vessels by departure countries, in the interest or on behalf of the putative receiving state.[149]

The ECtHR had the chance to issue a judgment on push-back practices in the *Hirsi Jamaa* case, in which the Court held Italy responsible for violating the principle of *non-refoulement* (Art 3 ECHR) and the prohibition of collective expulsion (Art 4, Protocol 4 ECHR).[150] The case concerned a group of Eritrean

[147] See eg Eur. Court. H.R., *Medvedyev and others* v *France* n 144 above, paras 50; Eur. Court H.R. (GC), *Medvedyev and others v. France*, n 144 above, para 67; Eur. Court H.R., *Women on Waves and others* v *Portugal* n 144 above. The *Women on Waves* case concerned a Portuguese warship intercepting a vessel in order to prevent its entrance in Portuguese territorial water. The warship did not board the other vessel, but it simply performed tactical manoeuvres aimed at stopping the course of the vessel. The Court did not explicitly consider the issue of the extraterritorial jurisdiction, but directly examined the case on the merit. Hence, it seems that the ECtHR deemed the manoeuvring of the warship as a sufficient ground to determine the exercise of jurisdiction by Portugal.

On the case-law of the ECtHR concerning the protection of human rights within the context of LOS, see also M. Milanovic, *Extraterritorial Application* n 111 above, 161-170; J. Coppens, n 98 above, 218-220. On the use of the criterion of '*de facto* control' see also UN Committee Against Torture (CAT), General Comment no 2: Implementation of Art 2 by States Parties, 24 January 2008, CAT/C/GC/2, para 16; CAT, *J.H.A.* v *Spain,* Decision of 21 November 2008, U.N. Doc. CAT/C/41/D/323/2007, para 8.2.

[148] Eur. Court H.R. (GC), *Medvedyev and others* v *France* n 144 above, para 67. In this regard, M. Milanovic, *Extraterritorial Application* n 111 above, 164, underlined that 'it is unclear whether the Court applies a spatial model (control over the ship) or a personal one (control over the crew).' For an analysis of the *Medvedyev* case, see also T. Treves, n 61 above, 7-9.

[149] Section II above.

[150] Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above. For a more detailed analysis of the judgment, see eg M. Giuffré, 'State Responsibility' n 5 above; F. Lenzerini, 'Il

and Somali nationals that, during an attempt to reach Italy by sea, was intercepted by vessels of the Italian Revenue Police and Coast Guard. These individuals were transferred onto the Italian boats and returned to Libya. Both the interception and the transfer onto the Italian warship occurred on the high seas, and were performed under the cooperation partnership that was then in force between Italy and Libya.[151] As a preliminary issue, the Strasbourg Court examined whether Italy had exercised jurisdiction and, consequently, whether the Court itself had the competence in analysing the merit of the case.

The Grand Chamber declared that, in the case at hand, Italian authorities had exercised a 'continuous and exclusive *de jure* and *de facto* control' over the applicants. This control stems from two elements: the first one regards the location of the events, which 'took entirely place on board ships of the Italian armed force'; the second one attains to the nationality of the members of the crews of these vessels, which 'were composed exclusively of Italian military personnel'.[152] These two aspects represent the grounds on which the Court declared that Italy had exercised extraterritorial jurisdiction on the applicants. The Strasbourg Court also emphasized that the respondent state could not 'circumvent its jurisdiction' under the ECHR by qualifying the activities as SAR operations on the high seas, since it was a mere speculation of the nature and purpose of the intervention which would not have led the Court to any other conclusion.[153]

This latter statement is central in the effort to harmonize LOS and IHRL and, thereby, to avoid states circumventing international obligations alongside their responsibility for the violation of rights towards migrants - a concern raised with regard to pull-backs practices. In this regard, the principle of good faith may prove fundamental. Under this rule, a treaty binding a state must be interpreted and performed in good faith, and its interpretation must be carried out taking into account also the object and purpose of the relevant instrument.[154] According to the International Law Commission (ILC), the interpretation of a treaty according to these criteria is aimed at ensuring that the convention concerned produces appropriate effects (so-called principle of effective interpretation, or rule

principio del non-refoulement dopo la sentenza *Hirsi* della Corte europea dei diritti dell'uomo' *Rivista di Diritto Internazionale*, 721 (2012); C. Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' 12(2) *Human Rights Law Review*, 287 (2012); M. Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case' 25 *International Journal of Refugee Law*, 265 (2013).

[151] Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e La Grande Giamariria Araba Libica Popolare Socialista (23 October 2008, entry in force 6 February 2009).

[152] Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, para 81.

[153] ibid paras 79 and 81.

[154] VCLT, n 59 above, Art 26 (*Pacta sunt servanda*): 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'; Art 31 (1) (General Rule of Interpretation): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

of effectiveness).[155]

The wording of the LOS treaty provisions concerning the duty to rescue and the duty to establish and maintain adequate and effective SAR services indicate that these obligations pursue a humanitarian purpose, and are aimed at safeguarding life at sea.[156] Besides, the objective of IHRL instruments is the enjoyment of rights and fundamental freedoms thereby enshrined, whose core is the protection of human dignity.[157] In addition, the rationale underpinning the extraterritorial application of human rights is the idea that it would be 'unconscionable' to allow a state to circumvent its IHRL obligations by performing actions outside its borders that, if they were implemented within its territory, would constitute a violation of human rights.[158]

These principles have also been affirmed and applied by the ECtHR, according to which

> 'the object and purpose of the (European) Convention (on Human Rights) as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective'.[159]

As a consequence, states parties to the ECHR cannot 'enter into an agreement with another State which conflicts with its obligations under the Convention'.[160]

Therefore, adopting bilateral agreements setting forth *non-entrée* polices in the broader context of the securitization of sea routes raises serious concerns related to possible receiving state *bona fide* compliance with obligations stemming from LOS and IHRL. As outlined above, these measures are aimed at shifting the management of flow and the related responsibility from the would-be destination state to the departure state, as in the case of pull-backs:[161] through

[155] ILC, 'Yearbook of the International Law Commission - Vol II', A/CN.4/SER.A/1966/Add.l (1966), 219, available at https://tinyurl.com/ybu458lz (last visited 27 December 2018).

[156] L.M. Komp, n 66 above, 235.

[157] See eg UDHR, n 122 above, Preamble; ICCPR, n 108 above, Preamble; ECHR, n 8 above, Preamble; AfCHR, n 122 above, Preamble; ACHR, n 122 above, Preamble; Arab Charter, n 122 above, Preamble.

[158] HRC, *Delia Saldias de* Lopez v *Uruguay* n 116 above, para 12.3. See also M. Milanovic, *Extraterritorial Application* n 111 above, 96-98.

[159] See eg Eur. Court H.R., *Soering* v *United Kingdom* n 123 above, para 87; Eur. Court H.R., *Al-Saadoon and Mufdhi* v *The United Kingdom*, Judgment of 2 March 2010, para 126, available at www.hudoc.echr.coe.it.

[160] Eur. Court H.R., *Al-Saadoon and Mufdhi* v *The United Kingdom* n 159 above, para 138. See also Eur. Court H.R., *Hirsi Jamaa and others* v *Italy* n 61 above, para 129, according to which 'Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States'.

[161] N. Markard, n 6 above, 596-597, 616, who specifically referred to the right to leave a

the implementation of these forms of outsourcing, putative destination states seek to abstain from performing operations at sea that would trigger their legal responsibility – ie they try to avoid being held accountable, as happened in the *Hirsi Jamaa* case.[162] Hence, using the words of the Strasbourg Court, this behaviour may hamper the 'practical and effective' application of the LOS and IHRL treaty provisions.

However, the extraterritorial application of IHRL and the principle of effective interpretation may not prove adequate instruments to engage possible destination states' responsibility for an (asserted) violation of migrants' rights in the context of pull-backs practices. Notwithstanding its value-based rationale,[163] the practical and effective application of human rights outsides a state's frontiers is limited by its own scope: if the state does not exercise jurisdiction according to (at least one of) the criteria deemed as adequate ground to this end, then it is not bound to the relevant obligation and, hence, it cannot be held responsible for its violation.[164] As for the principle of effectiveness, it is 'one of the basic principles governing the creation and performance of legal obligations', but not in itself a source of obligations.[165] This rule of interpretation contributes in clarifying the scope of states' duties under international law, but it appears too weak to substantiate all alone a claim lodged by an (alleged) victim of human rights violations before national or international courts: a state action or omission concretely infringing or obstructing the functioning of treaty obligations is needed.[166] Moreover, courts, tribunals and treaty bodies established under LOS and IHRL are not tasked with adjudging and declaring on norm conflicts – ie on whether a bilateral treaty among two states is incompatible with obligations binding one or both these states according to previous agreements concerning, respectively,

country and to the principle of *non-refoulement*.

[162] D. Ghezelbash et al, n 5 above, 346; M. Giuffré, 'State Responsibility' n 5 above, 713-716.

[163] On the value-based approach underpinning the extraterritorial application of human rights, see: HRC, *Delia Saldias de Lopez* v *Uruguay* n 116 above, para 12.3, in which the HRC stated that: 'It would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory' (emphasis added); HRC, *Lilian Celiberti de* Casariego v *Uruguay*, 29 July 1981, CCPR/C/13/D/56/1979, individual opinion of C. Tomuschat, according to which 'excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to *utterly absurd* results' (emphasis added). On the relation among the value-based rationale underpinning the extraterritorial application of IHRL and the universality of human rights, see also: M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel, 2005), 3, 43-44; M. Milanovic, *Extraterritorial Application* n 111 above, 175-177.

[164] M. Milanovic, ibid, 46, 177.

[165] ICJ, *Nuclear Tests Case (Australia* v *France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, 253, para 46; ICJ, *Case Concerning Border and Transborder Armed Actions (Nicaragua* v *Honduras) (Jurisdiction and Admissibility)*, Judgment of 20 December 1988, I.C.J. Reports 1988, 69, para 94.

[166] Eur. Court H.R. (GC), *Hirsi Jamaa and others* v *Italy* n 61 above, Concurring Opinion of Judge Pinto de Albuquerque, 68-69.

the law of the sea or the international protection of human rights. Their task is to assess whether specific events constitute a violation of the relevant instrument under which they are established.

The following section puts to the test the first of these feature – ie the effectiveness of extraterritorial application of human rights – in the context of pull-backs, with reference to the application lodged before the ECtHR concerning the episode of 6 November 2017. Moreover, it explores the interplay between, on the one hand, the secondary rules of international law concerning attribution of conducts and, on the other hand, the doctrine of positive obligations as a mean to trigger state responsibility under IHRL.

V. The Issues Specifically Concerning the Proceeding Before the European Court of Human Rights: Jurisdiction, Attribution and the Doctrine of Positive Obligations

Among the human rights treaty-based bodies, the ECtHR proved to be the most effective in ensuring the protection of fundamental rights.[167] However, lodging a successful application claiming the violation of the ECHR outside the relevant state's borders is quite challenging, since the competence of the Strasbourg Court in reviewing these cases depends on whether the respondent state exercised extraterritorial jurisdiction with reference to the specific event under inquiry.

First and foremost, it has to be noted that this episode is completely different from the one examined in the *Hirsi Jamaa* judgment. In the present case, the interception and returning were performed by a Libyan Coast Guard unit that, although donated by Italy, flew the Libyan flag; moreover, the members of the crew were Libyan. Hence, in the word of the ECtHR, it seems that Libya exercised a 'continuous and exclusive *de jure* and *de facto* control' over the retrieved migrants.[168]

In order to overcome the difficulty in determining whether the state outsourcing the management exercises extraterritorial jurisdiction, it has been

[167] See eg B. Conforti, n 9 above, 481; A. Cassese, n 109 above, 107.

[168] For a different opinion, see S. Trevisanut, 'Is There a Right to be Rescued at Sea?' n 88 above, 12-13; Id, 'Search and Rescue Operations at Sea', in A. Nollkaemper and I. Plakokefalos eds, *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017), 426, 437-438. According to the Author, the distress call launched by the boat migrant on high seas and the state receiving it 'creates a 'factual' relation' between the persons on the vessel and the recipient state. This 'factual relation' could represent the basis of the existence of an 'exclusive long distance *de facto* control that the state, which received the call, exercises on the lives of those people', since their lives depends on the discretion of that state. Therefore, according to the Author, through the 'long distance *de facto* control', the receiving state exercises its jurisdiction over the migrants in distress. However, this interpretation seems to widen excessively the scope of the criteria of effective control and, consequently, the range of situations in which a state exercises jurisdiction extraterritorially. For an analogous assumption, see also E. Papastavridis, 'Is there a right to be rescued at sea?' n 122 above, 28-29.

proposed to refer to secondary rule of customary international law concerning the attribution of unlawful acts.[169] Form this viewpoint, a state can be held accountable if it had supported another country in committing the wrongdoing, although this latter conduct is not attributable to the former state.[170] The rule of complicity has been codified by the ILC in Art 16 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), according to which a state which supports another country committing a wrongdoing directly attributable to the latter can be held responsible for this conduct if three requirements are met: (i) the former state aids or assists the latter country (so-called material element); (ii) the former state acts with the knowledge of the circumstance of the internationally wrongful act (so-called mental element); (iii) the act would be internationally wrongful if committed by that state (so-called opposability element, or communality of obligations).[171] The application of this rule would result in the indirect attribution of the illicit act to the respondent state before the ECtHR and, therefore, to its responsibility for conducts committed within a territory or against persons on which it does not exercise jurisdiction. With reference to the episode of 6 November 2017, Italy would be responsible for the conducts of the Libyan Coast Guard.

As for the material element, a plurality of actions can be encompassed in the notion of 'aid and assistance', among which financing the activity in question, or providing material support to a state that uses it to commit human rights violations.[172] In the case at hand, Italy has funded, trained and equipped the Libyan agency: with reference to the specific episode of 6 November 2017, it is worth noting that the Libyan Coast Guard unit which performed the interception and return was one of the navy ships donated by Italy; moreover, the Italian Rescue Coordination Centre coordinated the SAR operation.[173]

[169] M. Giuffré, 'State Responsibility' n 5 above, 725-732; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 276-282; V. Moreno-Lax and M. Giuffré, n 12 above, 19-21; N. Markard, n 6 above, 615.

[170] For a comprehensive analysis of the legal doctrine of complicity, see eg H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (London: Hart Publishing, 2016).

[171] ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), November 2001, Supplement no 10 (A/56/10), chp.IV.E.1, Art 16, according to which: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.'

[172] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002), 148, 150-151; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, 422.

[173] M. Giuffré, 'State Responsibility' n 5 above, 725-727; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 276-279; V. Moreno-Lax and M. Giuffré, n 12 above, 19-20; N. Markard, n

Regarding the mental element, there are (at least) three possible interpretations. The first one is purpose-based and requires that the aid and assistance must pursue the objective to facilitate the commission of the wrongdoing by the another state.[174] The second one sets a lower threshold, and requires that, although the aiding state *knows* facts demonstrating the breaching of international law obligations by a third country, it still provides a support that contributes significantly to the other state's illicit conduct.[175] The third interpretation of the mental element is called 'wilful blindness' and is defined as a state consciously turning a blind aid to credible information showing illicit acts performed by the other state it is aiding or assisting. Whilst under the second interpretation of the mental element the supporting state is aware of the unlawful behaviour of the other country, under the 'wilful blindness' test the assisting state *should have known* such illicit conducts, but it is not aware of it precisely because it chose to avoid such knowledge.[176]

In the case at stake, the purpose-based interpretation is hard to satisfy. The MoU aims at lowering the flow, hence there is no evidence that Italy intended to facilitate the death of twenty migrants at sea, or the violation of their fundamental rights once returned to Libya; whilst doubts can be raised on whether Italy planned to ease collective expulsions.[177] Conversely, the application of the second and third thresholds allows the satisfaction of the mental element. Primarily, Italy knew (or should have known) that Libya was characterized by widespread and gross human rights violations against migrants, as several well-known and highly reliable sources have reported.[178] Moreover, with specific reference to the episode of 6 November 2017, the information provided to the Libyan counterpart on the position of the migrant boat in distress, and the acceptance of the designation of the Libyan Coast Guard unit as on-scene commander, alongside the above-mentioned support granted to the Libyan authority under the MoU,

6 above, 615.

[174] J. Crawford, 'The International Law Commission's Articles on State Responsibility' n 172 above, 149.

[175] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* n 172 above, 432; M. Giuffré, 'State Responsibility' n 5 above, 727-731; V. Moreno-Lax and M. Giuffré, n 12 above, 21.

[176] Eg M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015), 54, 162; H. Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Research Paper (2016), 14-17, available at https://tinyurl.com/y6wr6frg (last visited 27 December 2018); R. M. Scott, *Torture in Libya and Questions of EU Member State Complicity* (11 January 2018), available at https://tinyurl.com/ycmbkgtj (last visited 27 December 2018); C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 279-281.

[177] For a different opinion, see V. Moreno-Lax and M. Giuffré, n 12 above, 20.

[178] Eg United Nation Support Mission to Libya (UNMSIL) and Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Detained and dehumanized', 13 December 2016; International Criminal Court, 'Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya', 9 May 2017. See also HRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya', n 56 above.

amount to conducts that 'contributed significantly' to the performing of the interception and return to the country of departure.[179]

The last condition under Art 16 ARSIWA is the opposability, or commonality of obligations, according to which 'the conduct in question would have been internationally wrongful if committed by the assisting state'. Yet, the interpretation of this requirement is ambiguous too. The first possible interpretation requires that both countries are bound by obligations laid down in the same norms or sources. The second one demands solely the identity of the content of the relevant obligation, regardless whether or not it is enshrined in the same provision.[180] In the case at hand, Libya is not a party to the ECHR, therefore the adoption of the first interpretation will hamper the possibility to hold Italy responsible for aiding and assisting Libya. Conversely, the second interpretation will lead to the opposite result, since Libya is bound by customary international law and other IHRL treaties of a universal nature – such as the International Covenant on Civil and Political Rights, which sets forth the right to life and the principle of *non-refoulement*, which are among the violations claimed before the ECtHR.[181] As a consequence, Italy could be held responsible (at least) for the violation of Art 2 and Art 3 of the Convention, since it aided and assisted the Libyan Coast Guard in performing the SAR operation which caused the death of at least twenty individuals, and the return of forty-seven persons to Libya – which, as above-mentioned, is a country that systematically violates migrants' fundamental rights.[182]

Although this assessment could be deemed as correct from the standpoint of general international law, the Strasbourg Court had invoked the ILC works on attribution of acts and on state responsibility in only a small number of judgments.[183] Beside this lack of practice, another question is whether or not

[179] See eg V. Moreno-Lax and M. Giuffré, n 12 above, 21; J.P. Gauci, 'Back to Old Tricks? Italian Responsibility for Returning People to Libya' (6 June 2017), available at https://tinyurl.com/ya3oafle (last visited 27 December 2018).

[180] H.P. Aust, n 170 above, 261-266; J. Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), 410.

[181] Section II above.

[182] Eg UNMSIL and OHCHR, n 178 above; International Criminal Court, 'Statement of the ICC Prosecutor' n 178 above; HRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya' n 56 above, para 46.

[183] See eg Eur. Court H.R., *Al Nashiri* v *Poland*, Judgment of 24 July 2014, para 207; Eur. Court H.R., *Husayn (Abu Zubaydah)* v *Poland*, Judgment of 24 July 2014, para 201; Eur. Court H.R. (GC), *El-Masri* v *'The Former Yugoslav Republic of Macedonia'*, Judgment of 13 December 2012, para 97; Eur. Court H.R., *Nasr and Ghali* v *Italy*, Judgment of 23 February 2016, para 187. These judgments are available at www.hudoc.echr.coe.it. It has to be noted that in these cases, the ECtHR simply mentioned Art 16 ARSIWA in the section of the judgment entitled 'Relevant International Law and Other Public Materials', whilst the Court did not refer to this Article in the sections addressing the violation of the Convention and the responsibility of the respondent state. Furthermore, the violations under inquiry either were directly attributable to the organs and agents of the state parties to the Convention, or took place within their territory by agents of a third country not bound by the ECHR. See also M. Evans, 'State

the Monetary Gold Principle could obstruct the assessment concerning the Italian responsibility for aiding and assisting Libya before the ECtHR. This rule concerns the admissibility of claims before international dispute settlement bodies and is meant to prevent these organs from deciding on the international responsibility of a state if, as a prerequisite of this assessment, they would have to rule on the lawfulness of the conduct of another country, which is not a party of the dispute and did not provide its consent.[184]

Under Art 16 ARSIWA, the responsibility of the supporting state relies on the circumstance that the third country had committed an internationally wrongful act by virtue of the former assistance: as a consequence, in order to assess the accountability of the supporting state, the relevant mechanism must preliminarily adjudge on the third country responsibility.[185] However, if this latter is not a party of the dispute (or did not provide its consent for this evaluation), then the claim is inadmissible according to the Monetary Gold Principle. As for the case at hand, Libya is not a party of the ECHR and cannot be sued before the ECtHR, which should declare the case inadmissible.[186]

Therefore, as long as the Strasbourg Court is the dispute settlement mechanism seized by the applicants, the necessity to determine the exercise of jurisdiction is still at issue. A criterion that could be used in order to assert that Italy exercised extraterritorial jurisdiction is the standard of 'decisive influence', which was developed by the ECtHR case-law concerning the various violations perpetrated in the separatist region of the 'Moldovan Transdniestrian Republic' (MRT).[187] This territory is a region of Moldovia that had declared its independence

Responsibility and the European Convention on Human Rights: Role and Realm', in M Fitzmaurice and D Sarooshi eds, *'Issues of State Responsibility before International Judicial Institutions (The Clifford Chance Lectures, Vol VII)'* (London: Hart Publishing, 2004), 139, 159, in which Author affirms that the circumstance that the ECHR is a human rights treaty 'makes the international principle of State responsibility *irrelevant* to its operation, so it is not clear why they should referred to at all' (emphasis added); on the relation between state responsibility under general international law and the ECHR, see also J. Crawoford and A. Keen, 'The Structure of State Responsibility under the European Convention on Human Rights', in A. van Aaken and I. Motoc eds, *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018).

[184] ICJ, *Case of the Monetary Gold Removed from Rome in 1943 (Italy* v *France et al) (Preliminary Question)*, 15 June 1954, ICJ Rep 19, 32; ICJ, *East Timor (Portugal* v *Australia),* Judgment of 30 June 1995, I. C.J. Reports 1995, 90, para 32. The ECtHR had the chance to examine the application of this rule in the *Bankovic* case, but deemed it not necessary in the light of the other grounds of admissibility: Eur. Court H.R., *Banković and others* v *Belgium and others* n 120 above, paras 31, 83.

[185] J. Crawford, 'The International Law Commission's Articles on State Responsibility' n 172 above, 151.

[186] On the different situation stemming from the direct responsibility of the respondent state for the breach of the principle of *non-refoulement* and, hence, on the non-applicability of the Monetary Gold Principle, see M. Den Heijer, 'Refoulement', in A. Nollkaemper and I. Plakokefalos eds, *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017), 481, 496.

[187] Eur. Court H.R. (GC), *Ilaşcu and others* v *Moldova and Russia*, Judgment of 8 July

in 1992-93, with Russian support; this notwithstanding, under general international law the MRT is still recognised as a part of Moldovia's territory.[188] According to the Strasbourg Court, Russia exercised extraterritorial jurisdiction over the region for four reasons: (i) the MRT was created with Russian support; (ii) the MRT was under the effective control or authority, or 'at very least under the decisive influence', of Russia; (iii) in any event, the MRT survived 'by virtue of the military, economic, financial and political support' provided by Russia; (iv) Russia continued to support and collaborate with MRT beyond the date of the illicit conduct, and neither acted 'to prevent' nor attempted 'to put an end' to the violations.[189] This case-law may be interpreted as holding Russia responsible for its failure to comply with its positive obligations under the Convention – and not as attributing to Russia each of the conducts performed by MRT agents.[190]

Putting aside for one moment the differences between the facts of these cases and the event in question, it is worth examining whether these criteria may constitute the basis to determine the exercise of extraterritorial jurisdiction by Italy during the pull-back of 6 November 2017. Firstly, although the Libyan Coast Guard was not created with the Italian support, until 2016 this agency was barely functional due to limited assets, poor equipment and institutional weakness caused by the 2011 civil war. Against this background, Italy provided a fundamental support in reinforcing the Libyan Coast Guard operational capacity.[191] Secondly, while it is true that the Libyan Coast Guard is not under the Italian effective control or authority (since it is within the Libyan Ministry of Defence), it is also true that the circumstances of the several pull-backs performed by the Libyan Coast Guard, and the specific facts of the case at hand, could be read as to suggest that Italy had exercised 'decisive influence' over the Libyan Coast Guard unit that performed the interception and the return to Libya. Thirdly, it is undeniable that the Libyan agency operates thanks to the funding, equipment and training provided by Italy under the MoU. Lastly, Italy

2004; Eur. Court H.R., *Ivanţoc and Others* v *the Republic of Moldova and Russia*, Judgment of 15 November 2015; Eur. Court H.R. (GC), *Catan and others* v *The Republic of Moldova and Russia*, Judgment of 19 October 2012; Eur. Court H.R. (GC), *Mozer* v *the Republic of Moldova and Russia*, Judgment of 23 February 2016; Eur. Court H.R., *Sandu and Others* v *the Republic of Moldova and Russia*, Judgment of 17 July 2018. All these judgments are available at www.hudoc.echr.coe.it.

[188] See eg most recently Eur. Court H.R. (GC), *Mozer* v *the Republic of Moldova and Russia* n 187 above, para 100.

[189] Eur. Court H.R. (GC), *Ilaşcu and others* v *Moldova and Russia* n 187 above, paras 392-393; Eur. Court H.R., *Ivanţoc and Others* v *the Republic of Moldova and Russia* n 187 above, paras 121-122; Eur. Court H.R. (GC), *Mozer* v *the Republic of Moldova and Russia* n 187 above, para 110; Eur. Court H.R., *Sandu and Others* v *the Republic of Moldova and Russia* n 187 above, para 36.

[190] M. Milanovic, *Extraterritorial Application* n 111 above, 140; M. Milanovic, 'Grand Chamber Judgment in Catan and Others' (12 October 2012) available at https://tinyurl.com/y7fekwzn (last visited 27 December 2018).

[191] Forensic Oceanography, n 7 above, 29-33.

continued to support Libya and to cooperate with this beyond 6 November 2017, and did not act to prevent, nor try to cease, the conduct of the Libyan authorities during the episode at hand. If the Strasbourg Court decides to apply this case-law to the pull-back at stake, then Italy could be held responsible for a breach of its positive obligations: more in detail, Italy will be responsible for failing to prevent the Libyan Coast Guard from intercepting and returning migrants to Libya (eg by communicating the position of the boat migrant to this agency), and for not trying to stop the Libyan Coast Guard during the operations (eg by designating Sea-Watch 3 as on-scene commander, rather than accepting the assignment of this role to the Libyan unit).

However, as mentioned above, the applications stemming from the violations perpetrated within MRT significantly differ from the pull-back at stake. The most important dissimilarity concerns the location of the events: the former occurred within MRT, a territory over which Russia exercised 'effective control', while the episode of 6 November 2017 occurred on high seas. This circumstance may jeopardise the application of the 'decisive influence' criterion as a means to determine the Italian extraterritorial jurisdiction with reference to the case at hand. The same jurisprudence of the Strasbourg Court concerning the events within the MRT seems to confirm this weakness. In one of these judgments, the ECtHR declared that, although the Republic of Moldova had no effective control over MRT, persons within this region fell within the Moldovan jurisdiction because the Transdniestrian region was within the territorial state of Moldova. As a consequence, the Court stated that while Moldova was not bound to comply with the negative obligations stemming from the Convention – due to the above-mentioned lack of effective control over MRT, it was still compelled to fulfil its positive obligations under the ECHR.[192] Therefore, it seems that the Strasbourg Court anchored the duty to prevent and cease the violations to the factual circumstance that Moldova was the territorial state within which the violations occurred. Conversely, the pull-back of 6 November 2017 took place on high seas, hence in a space which was not within Italian territory (or its territorial waters).

Quite interestingly, ECtHR upheld a more extensive scope of application of the doctrine of positive obligations in – at least – two decisions, according to which

> '(e)ven in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Art 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to applicants the rights guaranteed by the Convention'.[193]

[192] Eur. Court H.R., *Sandu and Others* v *the Republic of Moldova and Russia* n 187 above, para 34.

[193] Eur. Court H.R., *Manoilescu and Dobrescu* v *Romania and Russia*, Decision of 3

In these cases, the ECtHR seems to breach the link between, on the one hand, the exercise of extraterritorial jurisdiction based on effective control and, on the other hand, the duty to fulfil positive obligations under the Convention, an approach that could result in Italy being held responsible for the pull-back of 6 November 2017. In spite of this reflection, it has to be noted that none of the Strasbourg Court judgments declaring a state responsible for a violation the ECHR has been based on this criterion. The absence of a previous finding grounded on the 'decisive influence' exercised by the respondent country and, simultaneously, on the lack of effective control over a territory (or over the applicants) leaves doubt on whether the ECtHR would ever use this approach in cases concerning pull-backs performed by third countries, as the one at stake.

VI. Conclusion

During the past years, the policies aimed at lowering the migratory pressure on EU frontline member states have been based on the militarization of operations at sea, the criminalization of civil society organizations and the cooperation with third countries. This last tool encompasses also the externalization of the management of migratory movements through bilateral agreements among would-be destination states and countries of departure, a scheme which is highly problematic from the viewpoint of the effective protection of migrants' fundamental rights. Besides reducing the arrivals, the outsourcing of border-crossing control by means of containment-flow policies performed by third countries aims at shielding putative destination states from their responsibility under international human rights law. Against this background, the pull-back practices have proved extremely successful in achieving both these objectives.

As illustrated by the pull-back of 6 November 2017, neither LOS nor treaty-based provisions of IHRL provide a solution to the challenges concerning the possibility of lodging a successful individual application stemming from these types of situations. On the one hand, although LOS provides for several obligations regarding SAR operations whose purpose is safeguarding human lives, this framework is a state-centred regime which does not provide venues for individual-state disputes. On the other hand, although individuals have standing before the bodies established under human rights treaties, the application of the provisions enshrined therein relies on the determination of whether the states involved in the operation exercise extraterritorial jurisdiction. This circumstance constitutes a condition for the obligation to arise and, consequently, for suing the state concerned before the relevant treaty-based mechanism – such as the ECtHR. Indeed, the competence of conventional human rights bodies to examine cases

March 2005; Eur. Court H.R., *Treska* v *Albania and Italy*, Decision of 29 June 2006. These decisions are available at www.hudoc.echr.coe.it.

with an extraterritorial character depends on the exercise of jurisdiction outside the (potential) respondent state's borders.

According to the criteria developed in the case-law of the Strasbourg Court, a state exercises jurisdiction in situations on high sea where the vessel concerned and the persons on board are under its *de jure* or *de facto* control. In the case of pull-backs, neither the boat in distress nor the migrants are under the control of the possible destination state, since the interception and return are performed by a third country. This circumstance jeopardises the possibility to trigger would-be destination state responsibility for the violations of obligations towards migrants before the Strasbourg Court. Furthermore, it is at least doubtful whether general rules of international law concerning attribution of wrongdoings could fill this accountability gap before the ECtHR, due to both the lack of practice and to the Monetary Gold Principle. This query concerns also the application of the standard of 'decisive influence' as the sole ground on which to determine the exercise of extraterritorial jurisdiction.

The application lodged by the seventeen survivors of the episode of 6 November 2017 represents the first occasion for the Strasbourg Court to examine a claim concerning pull-back practices. The outcome of this proceeding will significantly affect the implementation of *non-entrée* measures by states parties of the Convention. If the ECtHR assesses the responsibility of Italy for the violation of the ECHR, this judgment will negatively impact on the adoption and enforcement of bilateral agreements aimed at outsourcing border-crossing controls, since putative destination states will be required to regulate migration policies in a more protection-sensitive manner in order to comply with the ECHR. Conversely, by declaring either the application inadmissible or the conducts at stake in compliance with the Convention, the Strasbourg Court will uphold the employment of these policies, hence definitively tipping the scale in favour of state sovereignty.

Do Adopted Children Have a Right to Know Their Biological Siblings?

Annalisa Cocco*

Abstract

The Court of Cassation, with decision no 6963 of 20 March 2018, ruled on the adoptee's right to know his/her origin. The Court held that when the adoptee asks for information about his/her biological history, he/she has the right to know not only the identity of the parents, but also that of any adult biological sibling. The latter must be consulted and asked to consent to the disclosure of their identity to the petitioner. The procedure must ensure maximum confidentiality and respect for the dignity of the subjects who are involved in the process. This article examines the arguments chosen by the Court to uphold the existence of the right of the adoptee to the knowledge of one's biological origin, with regard as well to kinship with one's siblings. Moreover, the work highlights the constitutional principles related to personal identity and to the full development of personality, as recalled by the Court in the decision.

I. Corte di Cassazione 20 March 2018 no 6963: The Case

The question submitted to the scrutiny of the Supreme Court arises from the petition of a subject who was adopted and then, having reached adulthood, asked to contact his biological sisters, who were adopted by other families. After the Juvenile Court of Turin had rejected two petitions, the Court of Appeal of Turin upheld the decision by the Court of first instance, denying the disclosure of the personal particulars of the sisters. The appellant argued that the International Convention on the Rights of the Child, passed on 20 November 1989 and ratified by Italy on 5 September 1991, required a jurisprudential approach to the matter in which the Juvenile Court balanced the adoptee's right to family bonds and the right to privacy of the biological siblings.

According to the Court of Appeal, however, Italian national legislation (Art 28, paras 4 and 5 of legge 4 May 1983 no 184) states that an adoptee's right to know one's origin is limited to biological parents. In contrast, in the present case, the biological sisters' right to privacy prevails over the adoptee's interest in a relationship with them because the law does not expressly provide for the right of the adoptee to know his/her siblings. The Court of Appeal also pointed to the Italian legislature's introduction of a type of offense (Art 73, legge no

* PhD Candidate in Private Law, University of Molise.

184/1983) for providing undue information suitable for tracing a minor who has been adopted. Therefore, according to the appellate judge, the request for access to the identification information of the biological sisters must be rejected. The Court of Appeal maintained that even a hearing aimed at verifying the consent of the sisters to the disclosure of their identity could be harmful for them, because it would damage the delicate balance that they have built over the years with their adoptive families.

Accordingly, in his appeal to the Court of Cassation, the petitioner set out the terms of the question to be solved. He asked the Court to clarify whether the legislature enshrined the right to family bonds only with reference to the identity of biological parents, or also in relation to any biological brothers and sisters. The question according to the petitioner is, therefore, whether a systematic interpretation of national and supranational rules can be implemented, supported also by the principles developed by jurisprudence, with the purpose of enhancing the family bond in its entirety, including subjects that are not explicitly mentioned in any legislative provision. The supra-national standards referred to are Arts 7 and 8 of the Convention on the Rights of the Child, which provide for the rights of the child to preservation of his/her identity and his/her name and family relationships. For an adoptee, identity may consist mainly of researching his/her origin and gathering information about his/her biological family. Furthermore, Art 30 of the Hague Convention of 29 May 1993 requires that each State must carefully preserve information on the origin of the minor, ensuring access to such information to the extent permitted by law. Regarding domestic law, the petitioner asserted that the Court of Appeal had misinterpreted paras 4 and 5 of Art 28, legge no 184/1983 ('Right of the child to a family'), and that the bonds with the sisters should have been included in the family bonds deserving protection. Finally, concerning the sisters' right to confidentiality and privacy, the petitioner claimed that his right should prevail, having been recognized by constitutional and conventional rules. On the other hand, the prejudice arising from hearing or questioning the sisters was merely hypothetical. Their privacy, moreover, could be protected by means of a preliminary inquiry aimed at ascertaining their reaction to the request of a biological brother, revealing their identity only if they expressly allow it.

The Court of Cassation, answering the question submitted to its judgment, accepted the appeal and returned the case to the Court of Appeal of Turin, instructing the Court of Appeal to give a new judgment on the facts. The appellate judge, in particular, was instructed to abide by the principle of law that the adoptee has the right to know his origin, accessing the relevant information, including not only the identity of his biological parents, but also the identity of any adult sibling. This right can be exercised by means of a judicial procedure suitable to ensure the utmost confidentiality and the utmost respect for the dignity of the persons involved in the process. The exercise of the right of the adoptee is

precluded only if the sibling denies the consent to the disclosure of his/her identity.

II. The Evolution of the Adoptee's Right to Personal Identity

The right to personal identity has been described by the Court of Cassation itself as the interest 'to avoid any alteration, misunderstanding, obfuscation, challenge',[1] coming from the outside, of one's intellectual, political, social, religious, ideological and professional heritage. It is the result of a lively jurisprudential history which began in Italy in the mid-nineteen-seventies[2] and continued over time thanks to the contribution of European judges and lawmakers. Identity, as an essential trait of human personality, is included in the hermeneutic meaning of Art 2 of the Italian Constitution and therefore falls within the set of rights that the State deems inviolable for every person. The interest 'to be oneself'[3] is expressed in a variety of situations of everyday life: from the protection of one's name,[4] to the safeguarding of one's image, of one's pseudonym, of honour and reputation, according to the different circumstances distinguishing any specific actual case.

In the hypothesis of an adopted individual, in particular, personal identity is emphasized mainly as the interest in reconstructing his/her biological history, and is expressed in the desire to know those who formed the original family. With respect to this specific case, the Italian legislature has foreseen (in the law regulating adoption: legge no 184/1983, 'Right of the child to a family') that any adopted person, on reaching twenty-five years of age, can access 'information concerning his/her origin and the identity of his/her biological parents'. If the person is less than twenty-five years old such access is granted only if there are serious and proven reasons that might affect the psychophysical health of the adoptee. While in the first case the right to know one's origin is

[1] Corte di Cassazione 22 June 1985 no 3769, *Foro italiano*, I, 2211 (1985).

[2] Pretura di Roma 6 May 1974, *Foro italiano*, I, 1806 (1974); Tribunale di Roma 27 March 1984, *Foro italiano*, I, 1687 (1984); Corte costituzionale 3 February 1994 no 13, *Foro italiano*, I, 1668-1670 (1994); Corte di Cassazione 7 February 1996 no 978, *Foro italiano*, I, 1253-1255 (1996). See also G. Bavetta, 'Identità personale' *Enciclopedia del diritto* (Milano: Giuffrè, 1970), XIX, 953; G. Natoli, 'Sul diritto all'identità personale. Riflessioni introduttive' *Diritto dell'informazione e dell'informatica*, 560 (1985); A. Scalisi, *Il valore della persona nel sistema e i nuovi diritti della personalità* (Milano: Giuffrè, 1990), 180; A. Cerri, 'Identità personale' *Enciclopedia giuridica* (Roma: Treccani, 1995), XV, 1-7; G. Pino, 'Il diritto all'identità personale ieri e oggi. Informazione, mercato, dati personali', in R. Panetta ed, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006), 258; F.D. Busnelli, 'La persona alla ricerca dell'identità' *Rivista critica di diritto privato*, 7-22 (2010).

[3] Corte costituzionale 3 February 1994 no 13, *Foro italiano*, I, 1668-1671 (1994), stated that the 'right to be oneself, understood as respect for the image of a person participating to associate life, acquiring ideas and experiences, ideological, religious, moral and social opinions and beliefs that differentiate and at the same time qualify the individual'.

[4] L. Tullio, 'The Child's Surname in the Light of Italian Constitutional Legality' 3 *The Italian Law Journal*, 221-236 (2017).

undoubtedly prevalent over the right to privacy of biological parents, in the second case, the Juvenile Court must ascertain that the access to the information does not entail a serious disturbance to the psychophysical balance of the petitioner. The assessment of the judge shall not consist, in any case, in balancing the interests of the adoptee and those of the biological parents. The inquiry shall be limited to the personal sphere of the petitioner, aiming to avoid any damage to a sound development of his/her personality.

The same law on adoption provides, however, an exception to the right of the adoptee to know his/her origins, that is the hypothesis of 'anonymous birth' (Art 28, para 7, legge no 184/1983). Within Italian legislation, although Art 30 of the Constitution states the duty of parents to 'support, teach and educate their children', Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396 allows a woman to give birth to her child in anonymity. Under this decree, when filling in the declaration of birth to be handed over to the registrar for registration of the child in the town where he/she was born, the mother can prevent her personal details from being included in the declaration. The identity of the mother can be revealed only one hundred years after the date of the document (Art 93, decreto legislativo 30 June 2003 no 196).

The provision of the legal institution of anonymous birth was justified by the Italian legislature's desire to counter abandonment of newborns and illegal abortion practices. Therefore, its rationale is based on the principles of protection of life and human health, with regard to both the woman and the yet unborn baby. This decree, however, has been the subject of several jurisprudential interventions aimed at curbing the risk of an absolute obliteration of the right of the adoptee to know his/her origins. The judgment of the European Court of Human Rights (ECtHR) concerning the 'Godelli case'[5] has played a pivotal role. Being first denied access to information by both the Court of Trieste and the Court of Appeal, the petitioner turned to the European Court of Human Rights claiming a violation of Art 8 of the European Convention on Human Rights (ECHR) (Right to respect for private and family life). Eventually, the Court accepted the request.

The ruling of the European Court appeared as a pilot judgment against the Italian State, aimed at pointing out the need to revise the legislation related to maternal anonymity. According to the ECtHR, in particular, Italian regulation

[5] Eur. Court H.R., *Godelli* v *Italia*, Judgment of 25 September 2012, *Famiglia e diritto*, 537-543 (2013), see also G. Currò, 'Diritto della madre all'anonimato e diritto del figlio alla conoscenza delle proprie origini. Verso nuove forme di contemperamento' *Famiglia e diritto*, 544-553 (2013); J. Long, 'La Corte europea dei diritti dell'uomo censura l'Italia per la difesa a oltranza dell'anonimato del parto: una condanna annunciata' *Nuova giurisprudenza civile commentata*, 110-117 (2013); C. Ingenito, 'Il diritto del figlio alla conoscenza delle origini e il diritto della madre al parto anonimo alla luce della recente giurisprudenza della Corte europea dei diritti dell'uomo' *Giustizia civile*, 1608-1619 (2013); A. Margaria, 'Parto anonimo e accesso alle origini: la Corte europea dei diritti dell'uomo condanna la legge italiana' *Minori giustizia*, 340-359 (2013).

of access to information on origin is clearly favourable to the right to anonymity of the mother,[6] while it has sacrificed in an absolute and pre-emptive way the right of the adoptee to retrace his/her biological origins. The ruling includes comparative references to other jurisdictions (Austria, Luxembourg, Russia, Slovakia, Spain, Hungary, etc).

In particular, France was presented as an exemplary model for Italy. The 'Odièvre Case'[7] is an opportunity to analyse the French system, where a National Council for Access to Information about Personal Origin was introduced in 2002. This body has taken on the task of putting in contact, at the request of the parties, the adoptees with their biological mothers. In the opinion of the European Court, France, unlike Italy, was able to balance the interests at stake, because it gave women the right to give birth in anonymity, yet granted as well the adopted children the right to obtain information on their origin. In the 'Odièvre case' the Court held that the French State did not violate Art 8 of the ECHR, because the petitioner had obtained useful information for the reconstruction of biological history in compliance with the mother's desire for anonymity.

With regard to the 'Godelli case', on the other hand, the European Court ruled that Italy had infringed on the right to respect for the petitioner's private and family life. The Strasbourg Court emphasized that Art 8 of the ECHR not only prohibits undue State interference in the private life of citizens, but also aims to oblige the State to enforce any act in a matter that is conducive to the enjoyment of private and family life. The right to personal identity, which gives rise to the right to know one's ancestry, is an integral part of the notion of private life. It is true that States reserve for themselves a discretionary power in the implementation of the principle of protection of the privacy of citizens, but, according to the Court, Italy did not balance the interests at stake (right to privacy of the mother *versus* right to personal identity of the child). On the

[6] Eur. Court H.R., *Godelli* v *Italia* n 5 above, para 39: 'The system did not provide for access to the file, even with the mother's agreement. Accordingly, the child's interest in knowing his or her origins was entirely sacrificed, without any balance being struck between the competing interests and without any possibility of weighing up the interests at stake. Italian law accepted the mother's decision as a blanket ban on any request for information made by the applicant, regardless of the reason for or the legitimacy of that decision. A refusal by the mother was irreversibly and in all circumstances binding on the child, who had no legal means by which to contest her birth mother's unilateral decision. The mother could thus, at her own discretion, bring a suffering child into the world who was condemned, for life, not to know its origins. A blind preference was given to the mother's interests alone'.

[7] Eur. Court H.R., *Odièvre* v *France*, Judgment of 13 February 2003, with note by A. Renda, 'La sentenza Odièvre c. Francia della Corte Europea dei diritti dell'uomo: un passo indietro rispetto all'interesse a conoscere le proprie origini biologiche' *Familia*, 1109 (2004); S. Piccinini, 'La Corte europea dei diritti dell'uomo e il divieto di ricerca della maternità naturale' *Giustizia civile*, I , 2177-2193 (2004); J. Long, 'La Corte europea dei diritti dell'uomo, il parto anonimo e l'accesso alle informazioni sulle proprie origini: il caso Odièvre c. Francia' *Nuova giurisprudenza civile commentata*, II, 283-311 (2004); R. Hernández, 'La constitucionalidad del anonimato del donante de gametos y el derecho de la persona al conocimiento de su origen biológico' *Revista Juridica de Catalunya*, 105-134 (2004).

contrary, it has enacted a decree that disproportionately favours maternal anonymity, stating that the anonymity shall be safeguarded for such a long time (one hundred years) that the petitioner is virtually barred from accessing any information. Italy has not sought to establish a balance between the interests of the parties and has exceeded the discretionary power granted by the Convention.

Following the judgment of the European Court of Human Rights, the Constitutional Court promptly took action to amend the national legislation in a manner consistent with the inviolable rights of the adoptee. With ruling no 278 of 22 November 2013,[8] the Court invalidated Art 28, para 7 of legge no 184/1983, in particular the passage barring the judge from contacting the anonymous mother at the request of the adopted child for a possible withdrawal of anonymity, through a process regulated by law and ensuring maximum confidentiality. With this ruling, the Constitutional Court overturned its previous rulings on the issue.[9]

The Court, for the first time, officially conferred legal dignity on the need of adopted persons to know their biological origin, maintaining that this represents a trait of the human personality which can deeply affect the entire social life of the individual.[10] The unlawfulness was not found in the right to anonymity – which remains an important right of the pregnant mother, protecting her own and the child's health – but in the irreversibility of such anonymity.

Legislation establishing an irrevocable right of anonymity clashes with the inviolable rights of the human being (Art 2 of the Italian Constitution), since it actually and substantially 'expropriates' any future choice from the woman concerned and the any tool for asserting the fundamental right to personal identity from the child. It is therefore necessary to balance the interests between the inviolable right of the child to retrace his/her personal identity and the right to privacy of the mother who has opted to give birth anonymously.[11] This balancing must be carried out by the judge through a confidential hearing of the

[8] Corte costituzionale 22 November 2013 no 278, *Famiglia e diritto*, 11-15 (2014), see also: T. Auletta, 'Sul diritto dell'adottato di conoscere la propria storia: un'occasione per ripensare alla disciplina della materia' *Corriere giuridico*, 473-487 (2014); J. Long, 'Adozione e segreti: costituzionalmente illegittima l'irreversibilità dell'anonimato del parto' *Nuova giurisprudenza civile commentata*, I, 289-296 (2014); A. Ambrosi, 'Interesse dell'adottato a conoscere l'identità della madre biologica *versus* interesse della madre all'anonimato: un nuovo punto di equilibrio' *Studium iuris*, 667-675 (2014); B. Checchini, 'Anonimato materno e diritto dell'adottato alla conoscenza delle proprie origini' *Rivista di diritto civile*, 709-725 (2014); G. Finocchiaro, 'Il segreto sulle origini perde il carattere irreversibile ma la donna può decidere se restare nell'anonimato' *Guida al diritto*, 49-50, 20 (2013); G. Casaburi, 'Il parto anonimo dalla ruota degli esposti al diritto alla conoscenza delle origini' *Foro italiano*, I, 8-19 (2014).

[9] Corte costituzionale 25 November 2005 no 425, with note by S. Marzucchi, 'Dei rapporti tra l'identità dell'adottato e la riservatezza del genitore naturale' *Giurisprudenza italiana*, 1800-1805 (2006). See also L. Balestra, 'Il diritto alla conoscenza delle proprie origini tra tutela dell'identità dell'adottato e protezione del riserbo dei genitori biologici' *Familia*, 161-170 (2006).

[10] V.M. Petrone, *Il diritto dell'adottato alla conoscenza delle proprie origini* (Milano: Giuffrè, 2004), 50-55; M.G. Stanzione, *Identità del figlio e diritto di conoscere le proprie origini* (Torino: Giappichelli, 2015), 67.

[11] Consiglio di Stato 27 October 2006 no 6440, *Foro amministrativo*, 2889 (2006).

biological mother.

Moreover, rejecting an access request filed by an adoptee merely on the basis of an anonymous birth is also an infringement of Art 3 of the Constitution (principle of equality and non-discrimination), because the same application filed by another adoptee not born of an anonymous mother would certainly have been accepted (Art 28, para 5, legge no 184/1983).

With this ruling the Supreme Court has assigned the lawmakers the task of introducing specific provisions aimed at verifying the continued desire for anonymity of the biological mother. After this ruling, however, the 'Godelli case' and other similar cases were settled by the Court, giving prominent value to the right of the adoptee to build their personal identity knowing their biological origin. The hypothesis in which the biological mother was deceased at the time the petition was filed was also addressed.

The Supreme Court upheld the adoptee's right to access to information about his/her origin and the identity of the biological mother, stating that it can be effectively asserted even if the mother is dead and it is impossible to verify her continued desire for anonymity,[12] ignoring the term of one hundred years from the date of the certificate of live birth or the medical record, provided that the processing of personal data is in compliance with privacy laws and does not harm any right of third parties.[13]

However, these rulings concerned only the mother of the adoptee. Therefore, the matter recently submitted to the Supreme Court is a *quid novi* in the discipline of protection of the adopted person, because it extends the range of such protection to the biological brothers and sisters, who belong to the original family, but were never expressly mentioned in any legislative provision.

III. The Legal Argument of the Supreme Court

The question submitted to the Court, as preliminarily described by the petitioner, concerns the interpretation of national and international rules regulating the protection of the bonds related to the adoptee's family of origin. It is unclear, in particular, whether the legislature intended to disclose the whole family composition to the adoptee or to reveal only the identity of the subjects expressly mentioned in the relevant provisions (that is, the parents).

Resolving this issue, the Court referred to the fundamental principles of protection of the human person stated in the Constitution and enhanced by the

[12] T.A. Auletta, *Riservatezza e tutela della personalità* (Milano: Giuffrè, 1978), 217, adfirms that the interest in personal privacy ceases to exist when all the relatives within the fourth degree of kinship die.

[13] Corte di Cassazione 21 July 2016 no 15024 and Corte di Cassazione 9 November 2016 no 22838, with note by E. Andreola, 'Accesso alle informazioni sulla nascita e morte della madre anonima' *Famiglia e diritto*, 15-32 (2017).

most recent jurisprudence on the matter. On the other hand, the Court ascribed very little importance to the literal wording of the legislative provisions, bringing their global meaning back to the values expressed in the general system of regulations.[14] The ruling of the Court is therefore a systematic and axiological interpretation of the rules concerning the protection of the personal identity of the adoptee.

First of all, the Court reasserts that the right to know one's ancestry is an essential expression of the right to personal identity. The balanced development of individual and social personality is achieved above all through the construction of exterior and interior identity. This last trait seems to be more complex, because it may imply the knowledge and acceptance of a biological ancestry which is different from the juridical one. The Joint Sections of the Supreme Court have issued another pronouncement concerning the same question,[15] that is the access to identification information of the biological mother of an adopted person; in that case, the Court clarified the immediate enforceability of ruling no 278/2013 of the Constitutional Court, qualifying it as an 'additive ruling of principle', whose effects are independent of the subsequent intervention of lawmakers aimed at defining more precisely the implementation of the process for the interpellation of the biological mother. The Joint Sections of the Supreme Court, in order to guarantee the immediate effectiveness of the constitutional ruling, stated that it is possible to resort to the procedure normally used to search for the origin of the adult adoptee where the mother did not opt for anonymity. This is a chamber proceeding: a confidential interrogation, which can be performed only once, takes place. The biological mother is asked whether she intends to remain anonymous or to allow her identity to be revealed to the child who asked for it. In any case, the procedure must guarantee both the maximum confidentiality and secrecy of the woman, and the maximum respect for the psychophysical balance of the child.

In light of this ruling of the Joint Sections, the Court considers that the confidential chamber proceeding is a constitutionally and conventionally adequate way to implement the right of the adoptee to know their origins, even in cases which are different from those provided for in Art 28, para 7 of legge no 184/1983. This implies that the same procedure can also be used to disclose the identity of members of the biological family other than the parents. The arguments used to affirm the petitioner's right to know his biological sisters seem to be extrapolated from the wording of Art 28, para 5, legge no 184/1983, a rule complying with the principle of protection of human personality, as stated in the Constitution (Art 2).

The judges questioned whether the wording chosen by the legislature ('origin

[14] P. Perlingieri, 'Interpretazione assiologica e diritto civile' *Corti Salernitane*, 465-495 (2013).

[15] Corte di Cassazione-Sezioni unite 25 January 2017 no 1946, with note by N. Lipari, 'Giudice legislatore' *Foro italiano*, I, 492-493 (2017).

and identity of biological parents') contains an *hendiadys* or expresses two distinct areas of the right to information of the adoptee. In the first case, knowing one's own origin would be satisfied by the knowledge of the biological parents, otherwise, we should assume that the parents are only a part of the 'origin' that the adoptee has the right to know. Therefore, it would also be necessary to protect the adoptee's interest in information about any biological sibling. If we opt for the latter hermeneutical option, this raises the question of whether the legal status of family members other than the biological parents, especially siblings, should be considered in a similar or different way as that of the parents. With regard to the biological mother, the adoptive child has a prevailing right to know his/her identity (Art 28, para 5, legge no 184/1983), if the mother has not opted for anonymity. Does this right apply to biological siblings or is it necessary to balance different interests, as in the case of a mother who has opted for anonymity?

The Joint Sections preferred an interpretation that they have defined as 'extensive', elaborating a broad and inclusive concept of 'origin' of the adoptee. The wording chosen by the lawmakers is interpreted to be highlighting two distinct areas of the right of the adoptee to information. This interpretation is a wider guarantee of the 'personal values' stated by the Constitution: the reference to 'origin' includes, in addition to biological parents, also the closest relatives, such as siblings, even if they are not expressly mentioned in the law. The nature of the right to personal identity and the essential function that is acknowledged of the discovery of personal biological ancestry are thought to be of great value by the judges. It is therefore thought that this hermeneutical interpretation favours the 'full development' of the person, in accordance with the Art 3 of the Constitution.

With regard to the possibility of considering siblings in a similar or different position with respect to biological parents, the Court has ruled that the members of the family other than those expressly considered by law must be treated in a different way from those enumerated in Art 28, para 5, legge no 184/1983. The legislature carried out a general *ex-ante* evaluation of the pre-eminence of the right of the adoptee; but this solution cannot be automatically extended to the right to know the identity of siblings. This is due essentially to the difference of their position compared with that of their parents. Art 30 of the Constitution assigns to the parents both the right and the duty to maintain, teach and educate their children. In addition, with regard to siblings who have been adopted by other families, it cannot be ruled out that complete and unsolicited information about their biological origin may give rise to negative consequences for their personal balance.

Therefore, in the opinion of the Court of Cassation, the right of the adult adoptee has to be considered a prevailing right only with regard to biological parents. Concerning the adoptee's siblings, in contrast, there is a need to balance the interests of the persons involved. Such a balance can be achieved through

the same procedure described by the Constitutional Court (ruling no 278/2013) and the Joint Sections of the Supreme Court (ruling no 1946/2017) as the most suitable for questioning the subjects involved in the process.

Although the legislation does not explicitly bar brothers and sisters of the adoptee from revealing their personal details, as it did for the biological mother who opted for anonymous birth (Art 93, decreto legislativo no 196/2003), they still enjoy a right to be asked permission before allowing access to information regarding their identity. In this case, subjective legal positions of equal rank and homogeneous content are compared, and the lawmakers have not ruled on this matter. Moreover, the personal situation of the petitioner and of his siblings are completely identical, as the latter have also been adopted.

The Court also adds an important clarification concerning the juridical bonds that could arise from the consent of the biological sisters to the disclosure of their identity to the petitioner. No degree of kinship will be established between them. This allows the avoidance of unwanted consequences in the legal sphere of third parties, for instance concerning succession rights in case of a sibling receiving an inheritance from an adoptive parent.

In conclusion, the petitioner's appeal is upheld and the Court states a principle of law: the adopted person has the right to know his/her origin, accessing information concerning himself/herself, including the identity of biological parents and of any adult sibling, provided that the disclosure process is in compliance with a due level of confidentiality.

IV. Comparative Considerations

The case involves various legal aspects because it mixes different existential human needs, concerning the individual as a human being and at the same time as an adopted child.

Within Italian family law, the most recent legislative and jurisprudential interventions have been directed at undermining the old concept of predominance of parents over children. This, indeed, was the legacy of a patriarchal culture in which children were subordinate to their parents, and especially subject to their father. Over time, attention has been focused more on children's needs and rights. This led to important reforms[16] (legge 19 May 1975 no 151; legge 8 February 2006 no 54; legge 10 December 2012 no 219; decreto legislativo 28 December 2013 no 154) diminishing the parental authority and turning it into 'parental responsibility', and abolishing any distinction among children. The emphasis has been placed also on the continuity of emotional relationships for children involved in adoption procedures (legge 19 October 2015 no 173), stating that the

[16] A. Gorassini, 'La famiglia vista dal figlio', in A. Busacca ed, *La famiglia all'imperfetto? Corso di diritto civile 2015-2016* (Napoli: Edizioni Scientifiche Italiane, 2016), 33-38.

judge shall take into account the relationships already established with persons who have been given custody of the child.

In the specific area of adoption, indeed, the main change that has shown a new focus of protection is the change of the title of the legge no 184/1983, from 'Regulation of the adoption and custody of minors' to 'Child's right to a family'. The change was made effective with the legge 28 March 2001 no 149, which also officially established the right of every child to grow up and be educated within his/her family.

The very concept of 'adoption' in Italy has changed over the years. From a 'strong' model of adoption, based on the strictest silence, a 'weak' adoption model has been implemented, expressly recognizing the right to be informed of one's condition (Art 28, para 1, legge no 184/1983). The choice of timing of the so-called disclosure is entrusted to the best judgment of the adoptive parents; in other countries the Anglo-American model of 'open adoption', in which the ties between the adoptee and the family of origin are never completely severed, is in force. The absolute protection of the mother who gives birth anonymously is in force only in a minority of European countries. In Spain, for example, the Tribunal Supremo stated in 1999 that the rules regarding maternal anonymity should be disregarded, as they are contrary to the Constitution, because this clashes with the right of the children to search freely for their origin.[17] This inviolable right can be inferred from both the Spanish Constitution and the UN Convention on the Rights of the Child. In the Netherlands, the fundamental right of the child to develop his/her personality in a full and free way, including knowing the identity of his biological relatives, was decreed in 1994.[18] In Bulgaria and Croatia the children can appeal to the judicial authorities to search for their mother; in Hungary, Latvia and Portugal a minimum age is established for accessing birth certificates.[19] Ireland and the United Kingdom have set up a procedure providing for a rapprochement between the biological mother and the child. In England, the Children's Act of 1989 introduced an Adoption Contact Register to allow contact between the adoptee and the natural parents and, in any case, admitted the child's right, once of age, to access any information on his/her pre-adoptive history.[20] In Germany, § 1591 BGB states that: 'the mother of a child is the woman who gave him/her birth'. The attribution of maternity is thus a legal effect that arises from the mere fact of childbirth, independent of the woman's will. The right of the child to know his origin is not opposed to any right of the mother to give birth in anonymity, because the former is considered a fundamental right of the person, prevailing over the latter. The German legal

[17] R. Hernandez, n 7 above, 105.

[18] Supreme Court of the Netherlands 15 April 1994, *Nederlandse Jurisprudentie*, 608 (1994).

[19] G. Canotilho and V. Moreira, *Costituição de Republica Portuguesa Anotada* (Coimbra: Coimbra Editora, 3rd ed, 1993), 58.

[20] E. Urso, 'L'adozione nel diritto anglo-americano fra problemi attuali e possibili opzioni per una riforma' *Rivista critica di diritto privato*, 745-768 (1996).

system is the only one in which the right to know one's origin has acquired such an unrestricted rank. The Swedish system, on the other hand, presents a further peculiarity because it is based on a compulsory constitution of the *status filiationis*. According to that system, any child born of an unmarried woman is automatically recognized by the State as a child of the woman and her partner. In case of non-recognition by the latter, an administrative procedure is started, with the purpose of identifying the father and establishing, even coercively, the relationship of filiation.

In France and in Italy filiation does not take place directly with birth: it requires an act of recognition, and in both countries women have the right to opt for anonymous birth. However, the procedure for accessing the documents related to the child's origin is different.[21]

From the jurisprudential point of view, the *favor veritatis* concerning filiation seems to be more and more prevailing over the *favor legitimitatis*, which previously appeared untouchable,[22] provided that it includes the maximum protection of the interests of the minor. At the same time, there have been cases in which the biological truth has been sacrificed because it did not meet the existential needs of the child.[23] The decisive criterion for decisions on every case involving children is the so-called 'best interest of the child',[24] enshrined in Art 3 of the Convention on the Rights of the Child and constantly reaffirmed by the judges. By virtue of this principle, the solutions resulting in an improvement of the psychophysical well-being of the child must be favoured; the guarantee of the maximum protection of the right to personal identity also complies with this principle. For the same reason, the stability of family relationships is encouraged as much as possible, because they contribute to strengthening the human personality and building its roots. Moreover, the relationship between grandparents and

[21] Para II above.

[22] Corte di Cassazione 17 August 1998 no 8087, with note by V. Carbone, 'Riaffiora il contrasto tra *favor legitimitatis* e *favor veritatis*' *Famiglia e diritto*, 427 (1998); C. Cossu, 'Filiazione legittima' *Rivista di diritto civile*, II, 177 (1995); Corte di Cassazione 24 March 2000 no 3529, with note by A. Di Sapio, 'L'azione di contestazione dello *status* di figlio legittimo tra verità, giochi interpretativi, prospettiva normativa ed orizzonte della domanda' *Diritto della famiglia e delle persone*, 135-137 (2001); Corte costituzionale ordinanza 12 January 2012 no 7, *Giurisprudenza costituzionale*, 45-47 (2012); G. Casaburi, 'Le azioni di stato alla prova della Consulta. La verità non va (quasi mai) sopravvalutata' *Foro italiano*, I, 21-26 (2018).

[23] Eur. Court H.R., *Paradiso and Campanelli* v *Italia*, Judgment of 27 January 2015, with note by G. Casaburi 'La Corte europea dei diritti dell'uomo e il divieto italiano (e non solo) di maternità surrogata: una occasione mancata' *Foro italiano*, III, 117-126 (2015), in which the judges recognized a 'strong *de facto* relationship between the child and the intended parents, so that to disregard this relationship could jeopardize the best interest of the child'; see also Eur. Court H.R. (GC), *Paradiso and Campanelli* v *Italia*, Judgment of 24 January 2017, with note by E. Falletti, 'Vita familiare e vita privata nel caso Paradiso e Campanelli di fronte alla Grande Camera della Corte di Strasburgo' *Famiglia e diritto*, 729-739 (2017).

[24] E. Lamarque, *Prima i bambini. Il principio del* best interest of the child *nella prospettiva costituzionale* (Milano: Franco Angeli, 2016), 13; V. Scalisi, 'Il superiore interesse del minore ovvero il fatto come diritto' *Rivista di diritto civile*, 405-434 (2018).

grandchildren has recently been attributed great importance, allowing the former the right to take legal action to assert their right to visit and maintain a steady relationship with their grandchildren.[25]

The European Court of Human Rights has recognized that childhood is a crucial age for the individual because it shapes 'the fundamental programming of personality'.[26] Consequently, protecting the correct development and growth of the individual indirectly achieves the main objective of the ECHR, which is guaranteeing respect for human dignity and freedom.[27] Ignorance of one's biological origin, in these terms, becomes an obstacle to 'personal development' because it causes 'mental and psychological suffering'.[28] The knowledge of one's origin cannot be linked just to the best interest of the child because it undoubtedly concerns adult life. It can be considered a part of his/her personal identity.[29]

Within this legal and jurisprudential frame the ruling of the Supreme Court no 6963 of 20 March 2018 represents the epilogue of a path aimed at the maximum enhancement of human personality. The Italian legislature, especially in recent years, has recognized the importance of personal family bonds: thus, denying the petitioner the right to access information about his biological sisters, from whom he had been separated during childhood due to the adoption process, would have been unreasonable. The decision acknowledges the constitutional foundation of the right invoked, relating it to legal principles that have been asserted both in national and international jurisprudence. Therefore, it grants the access to information despite the fact that there is no legal provision expressly providing for it.

V. Conclusion

The case discussed is an illustrative example of what Ronald Dworkin called 'hard case', that is a case not foreseen or regulated specifically by any legal provision. Therefore, it has to be solved by means of the principles of law.[30] This argumentative procedure, grounded on principles, has been indeed used by the Supreme Court of Cassation in the analysis and solution of the question. The

[25] Case C-335/17 *Neli Valcheva* v *Georgios Babanarakis*, Judgment of 31 May 2018, available at www.curia.europa.eu.

[26] Eur. Court H.R., *Maumousseau and Washington* v *France*, Judgment of 6 December 2007, available at www.echr.coe.int.

[27] Eur. Court H.R., *Christine Goodwin* v *United Kingdom*, Judgment of 11 July 2002, available at www.echr.coe.int.

[28] Eur. Court H.R., *Odièvre* v *France* n 7 above; Eur. Court H.R. (GC), *Jäggi* v *Switzerland*, Judgment of 13 July 2006, available at www.echr.coe.int.

[29] S. Trotter, 'The Child in European Human Rights Law' 3 *Modern Law Review*, 461 (2018); J. Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997), 7.

[30] R. Dworkin, 'Hard Cases', in Id, *Taking Rights Seriously* (London-New York: Bloomsbury Academic, 1977, reprinted in 2013), 105.

Court could not enforce in a certain and unambiguous way Art 28, para 5 of legge no 184/1983, because it does not explicitly state that the adoptee can access information concerning his/her siblings. The judges have focused on the legal principles that the law aims at implementing.[31] Therefore, they asked whether these principles could be deemed relevant to the specific case[32] and, having ascertained their enforceability, they decided to accept the appeal of the adoptee.

Indeed, it is true that the rule does not expressly mention any member of the original family other than biological parents; however, the provision undertakes the function, in the legal system, of providing protection to the inviolable rights of the adoptee. By conceding to the adoptee the right to access information about the biological parents, the lawmakers intended to grant the person raised in an adoptive family the possibility to know his/her 'origin'. The principles that stand out in this situation are those concerning the psychophysical health of the individual, personal identity, information, the prohibition of discrimination, and respect for private and family life. All these principles derive both from the Constitution and from other European and international sources that are part of the Italian legal system (ECHR, Nice Charter, Hague Convention, Convention on the Rights of the Child). This demonstrates that the system of rules is not only composed of mere regulations and that the principles are equally binding for those who have to interpret them.[33]

A decision on the case confined within the rigid boundaries of the wording of the law would not have allowed the extension of the right to information to include information regarding the siblings of the adoptee. At the same time, an argument based on the principles that inspire the Italian legal system would not justify such a limitation of the petitioner's right to personal identity. This is how the Court came to a decision deriving from an analogous[34] interpretation of the

[31] See P. Perlingieri, 'Il primato della politica', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 283-291; P. Perlingieri, 'I princípi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali SISDiC*, 1-24 (2017); P. Perlingieri, 'Legal Principles and Values' 1 *The Italian Law Journal*, 125-147, 132 (2017), according to whom legal principles 'express choices, assert value judgments and provide guidelines that are not extraneous to the legal system'.

[32] U. Scarpelli, 'L'educazione del giurista' *Rivista di diritto processuale*, 1-33 (1968); V. Scalisi, 'Per una ermeneutica giuridica "veritativa" orientata a giustizia' *Rivista di diritto civile*, 1249-1271 (2014); P. Veronesi, ' "Valori", "principi" e "regole": tra dimensione positiva e metapositiva della Costituzione' *Ars interpretandi*, 37-40 (2014); L. Alexander, 'Cosa sono i principi? Ed esistono?', in Id and K. Kress, *Una critica dei principi del diritto*, Italian translation by M. La Torre and N. Stamile (Napoli: Edizioni Scientifiche Italiane, 2014), 7; N. Lipari, 'Intorno ai «principi generali del diritto»', in Id, *Il diritto civile tra legge e giudizio* (Milano: Giuffrè, 2017), 83-101.

[33] R. Dworkin, 'The Model of Rules I', in Id, *Taking Rights Seriously* n 30 above, 38; see also P. Femia, Drittwirkung*: principi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018), 53.

[34] G. Zaccaria, 'L'analogia come ragionamento giuridico. Sul fondamento ermeneutico del procedimento analogico' *Rivista italiana di diritto e procedura penale*, 1535-1559 (1989); A. Kaufmann, *Analogie und Natur der Sache: zugleich ein Beitrag zur Lehre vom Typusn*, Italian

rule stated in Art 28, para 5 of legge no 184/1983, which the Court has expressly deemed 'extensive'. The inclusion of subjects other than the parents within the context of the 'origin' of the adoptee was intended to provide the maximum guarantee to the right to develop one's personality, both as an individual and in the social environment where the subject has interests worthy of protection. Likewise, any discrimination in the enjoyment of family bonds between adopted and non-adopted persons has been curbed. However, the 'reflected' and unwanted effects of the information on the psychophysical balance of the other persons involved have been reduced to a minimum. Only their consent, in fact, allows the disclosure of identity and every act involving them must take place guaranteeing the maximum confidentiality and respect.

The role of the interpreter, when fulfilling such a hermeneutical operation, is essential.[35] The discretionary power, which intimately connotes its own function, allows the making of choices that are far from being mechanistic, inspired by the implementation of the values that underlie the legal system. These constitute, at the same time, the source and the limit of the interpretive activity because they give it a certain degree of elasticity, preventing it from turning into an arbitrary act. This way, the principles mark the path of the interpreters without bewildering them.[36] The balancing allows, then, the reconciliation of different competing principles reaching the most reasonable solution for the specific case.[37]

The 'origin' of the adoptee, as stated by law, becomes an autonomous area of information for the adoptee, and it deserves protection from the legal system. Its extension does not seem susceptible to preventive limitations, as there is the need to balance the interests involved from time to time. Thus, the petitioner's interest in knowing the identity of his biological sisters was considered worthy of protection. It cannot be ruled out that, on the basis of the same principles, in the future, efforts to obtain disclosure of the identity of other members of the

translation by G. Carlizzi, *Analogia e natura delle cose* (Napoli: Vivarium, 2003); P. Perlingieri, 'Interpretazione assiologica e diritto civile' *Corti Salernitane*, 477 (2014); L. Tullio, 'Analogia: tra eguaglianza, ragion d'essere e meritevolezza dell'estensione', in G. Perlingieri and M. D'Ambrosio eds, *Fonti, metodo e interpretazione. Primo incontro di studi dell'ADP* (Napoli: Edizioni Scientifiche Italiane, 2017), 101-122.

[35] P. Perlingieri, 'L'interpretazione della legge come sistematica ed assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990-1017 (1985); A. Gentili, 'L'argomentazione nel sistema delle fonti' *Rivista critica di diritto privato*, 471 (2001); L.M. Cruz, 'La dinamicità del sistema giuridico: l'attività dell'interprete tra la norma e il caso' *Rivista internazionale di filosofia del diritto*, 283 (2015).

[36] R. Dworkin, 'The Model of Rules I' n 33 above, 48, compares the judge's discretion to the image of 'the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept'.

[37] G. Perlingieri, 'Ragionevolezza e bilanciamento nell'interpretazione recente della Corte costituzionale', in P. Perlingieri et al eds, *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016*, *Atti del XII Convegno nazionale della SISDiC* (Napoli: Edizioni Scientifiche Italiane, 2018), 283-322.

original family – different from siblings or parents – may be accepted. This would be consistent with the fundamental necessity to allow the free development of human personality, in accordance with the Italian Constitution and European jurisprudence. This recalls, moreover, the words used by Timothy Endicott to assert that the 'vagueness' of the legislative language is not really a defect, because – far from making it indeterminate – it proves that 'there is more to the law than the mere application of words'.[38]

[38] T.A.O. Endicott, 'Law and Language', in J. Coleman et al eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2004), 957.

Malebolge

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

Marcello D'Ambrosio*

Abstract

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

I. Introduction

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

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

* Associate Professor of Private Law, University of Salerno, School of Economics and Statistics.

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

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

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

institutions.[4]

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

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

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

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

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

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

II. Methodological Premise

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

It has recently been stated that

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

It has also been said that

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

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

We shall now be more analytical.

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

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

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

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

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

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

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

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

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

III. Activities and Organisational Models

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

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

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

These elements cannot be underestimated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusions

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

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

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

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

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

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

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

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

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

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

[26] G. Ponzanelli, n 2 above.

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

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

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

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

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

1) the unrecognised association;

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

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

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

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

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

Corporate and Financial Markets Law

State-Appointed Directors, Related-Party Transactions and Corporate Opportunities in 'Open' State-Owned Companies

Monica M. Cossu*

Abstract

State shareholding in Italy has features which are linked both to the quantitative significance of the phenomenon and to the fact that special powers of appointment and removal of directors and members of the board of statutory auditors may be entrusted to the state as well as other public entities, such as municipalities, by means of the articles of association. These special powers have no equal in other legal systems. Among these powers, the power of appointment of directors is the most significant because the particular relationship between the nominating public authority and the director appointed by it may result in a significant influence on the company's interests. In 'closed' public limited companies special powers of direct appointment may be entrusted to the state-shareholder in a proportional manner to the size of its shareholding. In state-owned companies listed on the stock exchange, who resort to the risk capital market (so-called 'open companies'), the powers of appointment must be incorporated into non-equity financial instruments or in a 'particular class of shares'.

However, Art 2380-*bis* of the Italian Civil Code binds all directors to pursue the lucrative interests as the only 'company's interests' common to all shareholders, and confines the public interest among the 'extra-social interests'; therefore state-appointed directors cannot pursue them.

This complex plot of relationships cannot be solely entrusted to the regulation of the conflict of interests, which is designed to govern occasional disagreements between the company's interests and the interests of its directors.

For this reason, as in all European countries, Italian law regulates the particular relationship that some parties called 'related parties' (such as executive directors and the majority shareholder who has the power to appoint directors) maintain with the company (with the particularity that Italian law provides for specific rules on related parties transactions only for listed companies and companies that resort to the risk capital market).

This essay is a first consideration on the topic of the state and other public entities which have the power to appoint directors as the main and most authoritative 'related parties' of the 'open' state-owned companies, which would require a more in-depth investigation.

I. Introduction

* Associate Professor of Commercial Law, University of Sassari, Department of Economics and Management-DiSEA.

It is universally recognized that Italy has, together with France,[1] the highest number of state-owned enterprises.

The figure was particularly conspicuous before the privatization process that dismantled the state shareholding system, but even, at this point, where public economic entities have been converted into public limited companies, the phenomenon remains impressive in the context of state-owned enterprises, and even more in municipally-owned enterprises.

The features of the state shareholding in Italy, however, are linked not only to the singular quantitative significance of the phenomenon, but also to the special powers of appointment and removal of directors and members of the board of statutory auditors that have been always granted to public authorities - primarily the state.

As we will see in para II, according to Italian law, special powers of appointment are differently regulated in 'closed' state-owned companies and in state-owned companies which are listed on the stock exchange, or which resort to the risk capital market (hereinafter 'open' state-owned companies).[2]

More precisely, in the 'closed' state-owned companies, special powers of direct appointment and removal may be entrusted to the state shareholder, in a manner proportional to the size of its shareholding. Conversely, in the 'open' state-owned companies, special powers of appointment must be incorporated into non-equity financial instruments (so-called financial instruments that include administrative rights) pursuant to Art 2346, para 6, Civil Code, or in a 'particular class of shares'.[3]

But before examining Italian rules in detail we have to verify if other states also provide for similar rights.

1. Special Powers of Appointment

With regards to special powers of direct appointment and removal, there are strong similarities among state appointment powers in public limited companies provided for in Art 2449 Civil Code,[4] and those provided for in Art

[1] It is well known that France holds, among the liberal western democracies, the supremacy of the largest number of state-owned enterprises, and that the combination of these two elements – that is the existence of a vast sector of public enterprise along with a traditional political system – has had a deep impact on the control organization of state-owned enterprises: see, among others, G. Ripert, *Les aspects juridiques du capitalisme moderne* (Paris: Librairie Générale de Droit de Jurisprudence, 1951), 322-324; C.A. Colliard, 'Il controllo delle imprese pubbliche in Francia' *Rivista internazionale di scienze sociali*, 199 (1959); Id, *Le régime des entreprises publiques* (Bruxelles: Bruylant, 1969), 27-29; C. Ducouloux-Favard, *Les sociétés d'economie mixte en France et en Italie. Etude comparative* (Paris: Librairie générale de droit et de jurisprudence, 1963), 67.

[2] On 'closed' and 'open' joint stock companies see below, para II.

[3] Although the regulation suggests an alternative between one and the other, nothing actually prevents you from using both options.

[4] On this topic see V. Donativi, 'Esperienze applicative in tema di nomina pubblica "diretta" alle cariche sociali (artt. 2458-2459 c.c.)' *Rivista delle società*, 1258-1259 (1998); Id, 'La nomina pubblica alle cariche sociali nella società per azioni', in R. Costi ed, *Trattato di diritto commerciale*

762[5] of the Swiss *Bundesgesetz über das Obligationenrecht* (OR).

More precisely, Art 762, paras 1 and 2[6] grants powers of direct appointment and removal of directors and statutory auditors in companies owned by the federal government to cantons, districts and communities.

Apart from the Swiss legal system, there are only two other legal systems that include special direct appointment powers reserved to the state, which are however rather marginal.

The first is Russian federal legislation, in which the line ministry may appoint the chief executive officer in state-owned companies without the board of directors' approval.[7] In spite of the fact that the state and municipality shareholding in companies was significantly reduced as a result of the privatisation, this is however a model in which the government influence over the nomination process is still so strong that[8] special appointing powers are in fact unnecessary.

The second is the Egyptian model, in which Art 89, legge 16 January 1954 no 26, regarding public limited companies, partnerships partly limited by shares and limited liability companies, provides for direct non-shareholding powers[9] and states that public officials cannot be nominated as state-appointed directors, allowing the council of ministers to grant exemptions (not generally but on a case-by-case basis) to this prohibition.[10]

However, these cases are rather marginal, so that this is evidence that with reference to special appointment rights the Swiss legal system is the most similar to the Italian system.

(Torino: Giappichelli, 2010), IV, 4-5, 82-83.

[5] More specifically, book V of the federal law, which amends the Swiss Civil Code that sets out the *Bundesgesetz über das Obligationenrecht vom 30 März 1911/18. Dezember 1936* (OR). Regarding Arts 762, 926, see T. Jaag, 'Der Staat als Aktionär', in H.C. Von Der Crone et al eds, *Neuere Tendenzen im Gesellschaftsrecht. Festschrift für Peter Forstmoser* (Zürich: Schulthess, 2003), 379, 394-395; P. Forstmoser and T. Jaag, *Der Staat als Aktionär*: *Haftungsrechtliche Risiken der Vertretung des Staates im Verwaltungsrat von Aktiengesellschaften* (Zürich: Schulthess, 2000), 13-14; M. Stämpfli, *Die gemischtwirtschaftliche Aktiengesellschaft ihre Willensbildung und Organisation* (Bern: Stämpfli Verlag, 1991), 106-107; P. Böckli, *Schweizer Aktienrecht, 4 Auflage* (Zürich: Schulthess, 2009), para 13, no 49 and no 86-87; P. Forstmoser, A. Meier-Hayoz and P. Nobel, *Schweizerisches Aktienrecht* (Bern: Schulthess, 1996), § 27, no 17-18 and § 63, no 14-15; H. Honsell et al eds, *Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht II, Articles 530-964, 5-6 Auflage* (Basel: Helbing Lichtenhahn Verlag, 2016), no 1-2.

[6] See Art 762, abs 1, book V, OR, as amended by the federal law 4 October 1991.

[7] See A. Filatov, V. Tutkevich and D. Cherkaev, 'Board of Directors and State-Owned Enterprises (SOE) in Russia' *OECD Paper*, 18 (2005), available at https://tinyurl.com/y9nmnn7m (last visited 27 December 2018).

[8] ibid 18; I. Iwasaki, 'The Determinants of Board Composition in a transforming economy: Evidence from Russia' 5 *Journal of Corporate Finance*, 532-533 (2008); M. Prokofieva and B. Muniandy, 'Board composition and audit fee. Evidence from Russia' 8 *Corporate Ownership & Control*, 511 (2011).

[9] See Art 89, para 1, legge 16 January 1954 no 26, French text published in *Rivista delle società*, 601-602 (1960).

[10] See Art 95, para 1, legge 16 January 1954 no 26.

2. Appointment Rights Included in Non-Equity Financial Instruments

The second option mentioned above, appointment rights included in non-equity financial instruments, is innovative on the European scene.

Although Art 656, letter e) OR[11] grants rights of directors' appointment to holders of non-equity financial instrument[12] and several north American state legislations entrust holders of debt securities and venture capital with corporate rights, by means of a very loose formula that certainly also includes reserved appointment rights in corporate bodies[13] and provide for preferred shares that include rights of appointment and convertible preferred shares with the deciding voting right (or a right to veto) and the right to appoint one or more directors[14] these financial instruments are not reserved to the state and public entities.

Generally, in no other legal system except Italy, the subscription of non-equity financial instruments with special rights to appoint directors are reserved to – in other words intended exclusively for – the state or other public entities.

3. Appointment Rights Embedded in 'Particular Classes of Shares'

[11] Art 656, letter e) *OR*, with reference to representation in the board of directors ('*Vertretung im Verwaltungsrat*'), with a formula that clearly limits the range of the entitled persons to hold '*Partizipationsscheine*' – a sort of ordinary shareholders without voting rights – provides that '*die Statuten können den Partizipanten einen Anspruch auf einen Vertreter im Verwaltungsrat einräumen*'. And according to Art 656, letter c), para 1, in principle the '*Partizipationsscheine*' do not have the voting right, unless bylaws explicitly grant it to them.

[12] The German '*Genussscheininhaber*' does not have administrative and, in particular, voting rights, and even '*the Genußrecht mit Eigenkapitalcharakter*' – typical expression of '*Mezzanine-Kapital*' – does not grant the voting right: T. Ernst, *Der Genussschein im deutschen und schweizerischen Aktienrecht* (Zürich: Schulthess, 1963), 184-186; H. Hirte, 'Genussscheine mit Eigenkapitalcharakter in der Aktiengesellschaft' *Zeitschrift für Wirtschaftsrecht*, 486-488 (1988); Id, *Kapitalgesellschaftsrecht, 8 Auflage* (Köln: RWS Vlg Kommunikationsforum, 2015), 336-337; U. Hüffer and J. Koch, *Aktiengesetz, 12 Auflage*, (München: Beck, 2016), *§* 221, 1475-1477. Neither the French '*titres participatifs*' have the voting right pursuant to Arts 228-36 and 228-37 *Code de Commerce*, which are primarily issued by state-owned enterprises. The Belgian '*parts bénéficiaires*' have instead the voting right, with the exclusion of reserved appointment rights, pursuant to Art 542 *Code des Sociétés*, even if the wide freedom to conform the bylaws does not exclude that appointment rights may also be conferred on them: on this last aspect see C. Cincotti, 'L'esperienza delle *part bénéficiaires* belghe e gli strumenti finanziari partecipativi di cui all'art. 2346 c.c.' *Banca, borsa, titoli di credito*, 227, (2004).

[13] See, for example, how wide the range of rights that may be granted to bondholders and debenture holders in accordance with Art 221 Delaware General Corporation Law. Among these powers, the rights of reserved appointment in the corporate bodies can certainly be included; similarly Art 703, letter a) New York Business Corporation Law.

[14] Especially with regard to companies where it is necessary to exercise a strong control over the entrepreneurial production process in order to monitor the financial return of the investment see, among many, see W.A. Sahlman, 'The Structure and Governance of Venture-Capital Organisations' *Journal of Financial Economics*, 473, 504-506, (1990); W.W. Bratton, 'Venture Capital on the down-side: Preferred Stock and Corporate Control' 100 *Michigan Law Review*, 914-916, (2002).

In the case of the third above-mentioned option, appointment rights embedded in 'particular classes of shares', the law in several jurisdictions authorizes articles of association to issue special classes of shares with special powers of appointment and removal.

For example, Art L228-11 of the French *Code de Commerce* provides that the company may issue '*actions de préférence*'. The content of the rights of these shares is indefinite, and both shares without voting rights[15] and double voting shares are permitted.[16] Moreover, among the rights that the '*actions de préférence*' may confer are certainly included the rights of appointment and removal of corporate bodies members.

In the German legal system, according to § 101, para 2, *Aktiengesetz* (AktG), the articles of association may grant one or more individual shareholders, or holders of specific registered shares, the right to appoint one or more supervisory board members.[17] The shares thus allocated do not constitute a different class[18] and must not exceed one third of the total share capital.[19] According to § 103, para 2, *AktG,* the right to remove these directors is not necessarily related to the right of appointment and may therefore be granted by the articles of association to a different person,[20] by specifying that if the right is not exercised shareholders may remove this member by simple majority.[21]

This right of appointment lies outside the shareholders' approval,[22] and

[15] See Art L228-11 *Code de Commerce*, in the text amended by the *ordonnance* 6 November 2008 no 2008-1145, '*relative aux actions de préférence, consolidée au 7 septembre 2017*'.

[16] See Artt L225-123 *Code de Commerce*.

[17] According to § 101, para 2, AktG. The right was already provided for by § 88, para 3, AktG 1937.

[18] This is specified in § 101, para 2, satz 1, *AktG*, which identifies two different sub-classes of the right of appointment, the first of which is directly granted to the shareholder ('*aktionärsbezogenen Entsendungsrecht*') the second is granted to the share ('*inhaberbezogenes or Aktienbezogenes Entsendungsrecht*'). However even in the latter case, the right is not included in a special class: T. Drygala, '§ 101. Bestellung der Aufsichtsratsmitglieder', in K. Schmidt and M. Lutter eds, *AktG Kommentar, I. band, §§ 1 - 149, 3 Auflage* (Köln: Schmidt, 2015), 1576. The latter case instead involves '*vinkulierte Namensaktien*'.

[19] As specified in § 101, para 2, satz 4, AktG.

[20] The list of defaults is obviously open: M. Habersack, '§ 103. Abberufung der Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, *Münchener Kommentar zum Aktiengesetz: AktGBand 2: §§ 76-117, MitbestG, DrittelbG, 4 Auflage* (München: Beck, 2014), 1046-1048; G. Spindler, '§ 103', in G. Spindler and E. Stilz eds, *AktienGesetz, Band I, 3 Auflage* (München: Beck, 2015), 36.

[21] As for § 103, para 2, AktG, recorded '*Abberufung der Aufsichtsratsmitglieder*'.

[22] R. Ludwig and J. Zeising, 'Kapitel 13', in R. Büchel and W.G. von Rechenberg eds, *Kölner Handbuch Handels- und Gesellschaftsrecht, 3 Auflage* (Köln: Heymanns, 2015), 1210; M. Habersak, '§ 101. Bestellung der Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, n 20 above, 984-986; T. Drygala, '§ 100. Persönliche Voraussetzungen für Aufsichtsratsmitglieder', in K. Schmidt and M. Lutter eds, n 18 above, 1553; K.J. Hopt and M. Roth, '§ 100. Persönliche Voraussetzungen für Aufsichtsratsmitglieder', in H. Hirte et al eds, *GrossKommentar zum AktienGesetz, Band 5 §§ 95-116, 5 Auflage* (Berlin: De Gruyter, 2017), rz 147.

according to the § 100, para 4, *AktG*, the same requirements and professional qualifications provided for by the articles of association for members appointed by shareholders[23] are not required for the person thus elected. This obviously does not prevent the articles of association to provide for them, or to request more specific requirements for members appointed by shareholders, or to establish a different duration of the term of office for some directors (and in particular a shorter term).[24]

The right of appointment may also be granted to groups of shares or shareholders,[25] but also in this latter case a special class of shares is not involved, because according to § 35 *BGB* the '*Entsendungsrecht*' is not a class right but a '*Sonderrecht*'.[26]

Supervisory board members thus nominated and appointed are bound to take care of the company's interests and are not subject to any orders of the appointing person,[27] although a duty to consult the said appointing person may be provided for.[28]

Under Dutch law, articles of association may provide for special classes of shares including the right to appoint one or more directors and one or more members of the supervisory board.[29] Moreover, the Spanish legal system provides for a special power to remove the board of statutory auditors' members of state-owned enterprises for just cause.[30]

Any analysis of the British law should begin from the premise that the law does not reserve the right to appoint directors either to shareholders or to any other specific classes of stakeholders,[31] even though it is common that the articles of association grant that right to shareholders or holders of a certain class of financial instruments, including bondholders. Moreover, the Companies Act states an almost identical rule with reference to the appointment and removal

[23] T. Drygala, '§ 100' n 22 above, 1553; K.J. Hopt and M. Roth, n 22 above, rz 105; M. Habersack, '§ 100. Persönliche Voraussetzungen für Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, n 20 above, rz 41; M. Lutter, G. Krieger and D.A. Verse, *Rechte und Pflichten des Aufsichtsrats, 6 Auflage* (Köln: Schmidt, 2014), rz 24.

[24] K.J. Hopt and M. Roth, n 22 above, rz 104; M. Habersack, '§ 100' n 23 above, rz 54; T. Drygala, '§ 100' n 22 above, 1553-1554.

[25] See T. Drygala, '§ 101' n 18 above, 1577.

[26] ibid 1574; R. Ludwig and J. Zeising, n 22 above, 1210.

[27] See K.J. Hopt and M. Roth, '§ 101. Bestellung der Aufsichtsratsmitglieder', in H. Hirte et al eds, n 22 above, rz 147.

[28] S. Kalls, '§ 101. Bestellung der Aufsichtsratsmitglieder', in W. Goette and M. Habersack eds, n 20 above, rz 291.

[29] Thus, respectively pursuant to Arts 2:133 and 2:243 *Burgerlijk Wetboek* with reference to the appointment of management board members and Arts 2:142 and 2:252 *Burgerlijk Wetboek* regarding the appointment of supervisory board members.

[30] See Art 266, section 3, *LSA*, with regard to '*revocación del auditor*'.

[31] Arts 154-161 with reference to 'appointment of directors', the Companies Act 6 november 2006 does not contain any information concerning persons entitled to vote for the election of directors, and also Art 168, with regard to their removal. And so it was also in the section 73 of the Companies Act 1985.

of members of the board of statutory auditors, with the difference – suitable to guarantee their stability – that, unlike directors, they may be removed before the end of their office only by means of a shareholders' resolution.[32] The powers of appointment and removal may be therefore conferred on entire classes of shares or on a single shareholding,[33] as well as directly on a single shareholder,[34] or granted by contract to any third party.[35] However, regardless of the appointment and removal procedures, the principle according to which all nominee directors are required to pursue the common interest and therefore to abide by the independent judgment principle,[36] ignoring the interest of the appointing person,[37] is a general rule, even though the doctrine highlights the difficulty to obey this rule in practice.[38]

In some north American state legislation, the incorporation of appointment rights into special classes of shares is allowed. Examples of this incorporation are seen in Art 703, letter a) of New York Business Corporation Law (NYBCL),[39] and in Art 151, letter a) of Delaware General Corporation Law (DGCL), according to which articles of association may provide for the issuance of classes and series of shares[40] whose voting power is freely classifiable and may include designation[41]

[32] With reference to the removal see Art 510, section 4, Companies Act.

[33] See *Eley v Positive Life Assurance co ltd* [1875] 1 Ex D 88.

[34] See *Eley v Positive Life Assurance co ltd* [1875] n 33 above; *Bushell v Faith* [1970] AC 1099, [1970]; *Cumbrian newspapers group ltd v Cumberland & Westmorland Herald newspaper & printing co ltd* [1986] BCLC 286.

[35] See n 23 above.

[36] As well as the director appointed by a particular class of shares or debt instruments: P. Davies and S. Worthington, *Gowers and Davies' Principles of Modern Company Law* (London: Sweet and Maxwell, 2012), 539.

[37] In this respect, *Boulting* v *Association of Cinematograph, Television and Allied Technicians (act)* [1963] 2 QB 606; *Kuwait Asia bank EC* v *National Mutual Life Nominees ltd* [1991] 1 AC 187 PC (NZ). With reference to the second of the two decisions, P. Davies and S. Worthington, n 36 above, 539, fn 140. These authors clarify that the principle for which the nominee must ignore the interest of the appointing person is needed to exclude the liability of this latter in case of a breach of nominee director's duties.

[38] As noted by P. Davies and S. Worthington, *Gowers* n 36 above, 539. This characteristic is common to all western legislations, and in fact the Authors, in order to find a legal rule sufficiently 'realistic' for them, must resort to the Ghana Company Code 1963, no 33 (Act 179), where in section 203, Art 3, with regard to the directors' duties, it is said that 'in considering whether a particular transaction or course of action is in the best interests of the company as a whole a director may have regard to the interests of the employees, as well as the members, of the company, and, when appointed by, or as representative of, a special class of members, employees, or creditors may give special, but not exclusive, consideration to the interests of that class'. The authors also note that this formula 'would not permit the mandating of directors and thus the creation of a fettering problem'.

[39] Art 703, letter a) NYBCL provides, also in favor of debt security holders with voting rights, that 'at each annual meeting of shareholders, directors shall be elected to hold office until the next annual meeting except as authorized by section 704 (Classification of directors). The certificate of incorporation may provide for the election of one or more directors by the holders of the shares of any class or series, or by the holders of bonds entitled to vote in the election of directors pursuant to section 518 (corporate bonds), voting as a class'.

[40] The special right must result from the title, as stated in Art 151, letter f) DGCL.

and preference special rights.[42] Section 141, letter d), DGCL allowed classes and series of shares that grant the right of separate appointment of one or more directors, who generally have the same rights and obligations as other members, unless the articles of association establish otherwise.[43]

However, in no other legal system except Italy special classes of shares with special rights to appoint and remove directors are reserved to – in other words intended exclusively for – the state or other public entities.

4. Features of the 'Italian Case'

This brief analysis confirms that the Italian legal system is a unique and atypical case in today's European and international scene, both for the presence of appointing rights reserved to public shareholders and for the legislator's choice to separate rules for 'open' and 'closed' state-owned companies.

These features are evident, bearing in mind that in the European and international context, there is a high attention to and a very unfavourable opinion on the issue of appointing powers held by the state and other public entities such as municipalities; as well as in the issuance the public golden shares, a harmonisation of regulations has been desired for a very long time.[44]

Particular attention is paid on selection procedures of corporate offices in state-owned enterprises, as already shown in the OECD 2012 report on appointments, which recommends a high level of transparency in the process,[45] and the OECD Report 2015 on corporate governance, which does not hide a certain mistrust towards powers of direct appointment and removal.[46]

Recurring topics include the need to limit the influence of politics on the

[41] See Art 151 DGCL, 85.

[42] Generally, the non-proportional allocation of voting and appointment rights to corporate functions is frequent: S.N. Kaplan and P. Strömberg, 'Financial Contracting Theory Meets the Real World: an Empirical Analysis of Venture Capital Contracts' 70 *Review of Economic Studies*, 281 (2003).

[43] Thus Art 141, letter d) DGCL. And according to Art 141, letter k), a special power of separate removal is normally connected to the special power of separate appointment even without just cause: See Delaware Court of Chancery in re *Vaalco energy stockholder litigation*, CA no 11775-VCL, 21 December 2015.

[44] Obviously, this topic cannot even be touched here, but for some considerations in this perspective, which start from the Italian case as a paradigmatic case also on golden shares regulation, see M. Lamandini, 'Golden share and free movement of capital in Europe and in Italy' *Giurisprudenza commerciale*, 683-689, (2015).

[45] There are many legal systems in which the appointment is not left to the free will of the competent ministry but is accompanied by an inter-ministerial scrutiny, and sometimes by an open and spontaneous competitive candidacy process in which professional pre-requisites are assessed (in particular in Sweden and Finland). On this topic see Oecd, Directorate for Financial and Enterprise Affairs Corporate Governance Committee, *Working Party on State Ownership and Privatisation Practices. Board of Directors of State-Owned Enterprises: An Overview of National Practices* (Paris: Oecd, 2012), 10.

[46] *OECD Guidelines on Corporate Governance of the State-Owned Enterprises* (Paris: Oecd, 2015), 80.

appointment procedure of administrative and supervisory offices in state-owned enterprises,[47] and to ensure that the procedures for election, renewal and removal of directors are previously defined.[48]

In the following pages we will try to highlight how the power to appoint directors conferred on the state and other public entities according to Italian law, deeply influences both the relationship between the company's interests and the public interests, as well as the relationship between state-appointed directors and other directors. We will also try to underline as in listed companies that resort to the risk capital market (so-called 'open'), the relationship between the appointing public entities and the company may be a source of corporate opportunities for both parties.

II. State-Appointed Directors and Directors' Duties under the Italian Company Law Reform

Italian Company Law reform, put into effect by decreto legge 17 January 2003 no 5[49] and no 6,[50] introduced in Art 2325-*bis* Civil Code the distinction between 'closed' public limited company and 'open' public limited company that has financial instruments listed on regulated markets or that resorts to the risk capital market (hereinafter 'open').

Art 2449 Civil Code refers to this distinction with regard to companies owned by the state or other public entities such as municipalities (hereinafter

[47] Iss Europe, Ecg, Shearman & Sterling, 'Report on the Proportionality Principle in the European Union', available at https://tinyurl.com/y92l687c (last visited 27 December 2017); OECD, n 46 above, 18, where among the guiding principles to which the state-shareholder must comply with are mentioned 'well-structured, merit-based and transparent board nominations processes in fully-or majority-owned SOEs, actively participating in the nomination of all SOEs' boards and contributing to board diversity'; OECD, 'White Paper on Corporate Governance in Russia', available at https://tinyurl.com/y8jgtwl4, 29, (last visited 27 December 2018), where it is asserted that 'special concerns are raised in large companies with significant state ownership, in which board members nominated by the state may prefer the broader state interest – including political concerns – over the interests of the company and its shareholders. Direct conflicts of interest may arise where the state nominates as board members officials whose other responsibilities include regulation or oversight of the company or management of a related sphere of the economy, and for this reason such officials should not be nominated as board members'.

[48] See OECD, Directorate for Financial and Enterprise Affairs Corporate Governance Committee, *Working Party* n 45 above, 6, where best practice in relation to the appointment provides that 'board appointments, even in wholly-owned SOEs, should be entrusted to the annual general meeting of shareholder'; OECD, n 46 above, 71, where a recurring re-evaluation of the candidacies and the limit to appointment renewals is promoted as best practice.

[49] See decreto legislativo 17 January 2003 no 5, on the arbitration of disputes in the company and financial intermediation law, pursuant to Art 12 of legge 3 October 2001 no 366, for the corporate law reform (see below n 51).

[50] See decreto legislativo 17 January 2003 no 6, afterwards amended and supplemented, which has introduced into the Civil Code a new organic regulation of joint stock companies and cooperatives pursuant to the legge 3 October 2001 no 366. Art 1, para 1, decreto legislativo 6/2003 introduced Art 2380-*bis* in the Civil Code.

the 'state-owned companies' for brevity). Para 1 of the said article, with reference to the 'closed' state-owned companies provides that, if the state or other public entities have shareholdings in a public limited company, the articles of association may confer on them the power to appoint directors and statutory auditors, or members of the supervisory board proportionally to their shareholding.[51] Furthermore, para 2 of the same article provides for a right of removal reserved to the holder of the power of appointment. Obviously, this is not an obligation but a power; accordingly, powers of direct appointment and removal are potestative rights conferred on the state-shareholder by the articles of association.[52]

On the other hand, with regard to the state-owned companies which resort to the risk capital market ('open' state-owned companies), Art 2449, para 4[53] provides, as described above,[54] that the appointment right must be incorporated into financial instruments that include administrative rights pursuant to Art 2346, para 6, Civil Code, or in a 'particular class of shares'.

Furthermore – unlike para 1 – Art 2449, para 4 does not grant the state and other public entities (which hold the power of direct and reserved appointment of some directors) a further power of direct and reserved removal of those same members. Certainly, the articles of association might provide for this omission, and confer on the holder of financial instruments and shares bearing a right of reserved appointment a further right of removal, but the fact remains that this right is not conferred by law. Therefore in 'open' state-owned companies, there is not the same symmetry between the power of appointment and the power of removal established by law for 'closed' state-owned companies.[55]

[51] Precisely, Art 2449, para 1, Civil Code, amended by Art 13, para 1, legge 25 february 2008 no 34, (the so-called '*legge comunitaria 2007*'), provides that 'if the state or public bodies have shareholdings in a public limited company that makes recourse to the risk capital market (so-called 'open'), the bylaws may confer on them the power to appoint directors and statutory auditors, or supervisory board members, proportionally to their shareholding'. See n 53 below.

[52] On this topic see A. Pericu, 'Gli organi sociali nelle società "pubbliche" ', in S. Ambrosini ed, *Il nuovo diritto societario. Profili civilistici, processuali, fiscali e penali* (Torino: Giappichelli, 2005), 295; V. Donativi, 'La nomina' n 4 above, 124.

[53] As amended by Art 13, para 1, legge no 34/2008, following the decision of joined cases C-463/04 and C-464/04 *Federconsumatori, adiconsum, adoc, Zucca, associazione azionariato diffuso dell'aem e altri* v *the municipality of Milan*, [2007] ECR I – 10419, (case 'aem spa'), on the compatibility of the bylaws of 'aem' with Art 56 TEU, in *Giustizia amministrativa*, 1225-1227 (2007), with a note by F. Fracchia and M. Occhiena, 'Società pubbliche tra *golden shares* e 2449: non è tutto oro ciò che luccica'; in *Giurisprudenza commerciale,* 576-578 (2008), with a note by I. Demuro, 'L'incompatibilità con il diritto comunitario della nomina diretta ex art. 2449 c.c.'; in *Giurisprudenza commerciale*, 925-927 (2008), with a note by C. Corradi, 'La proporzionalità tra partecipazione e "potere di controllo" nell'art. 2449 c.c.'; in *Giornale di diritto amministrativo*, 521-523, (2008), with a note by C. Vitale, 'La Corte di Giustizia "boccia" l'art. 2449 del codice civile'.

[54] See above paras 2-3.

[55] The power of removal is not related to the power of appointment pursuant to the law, while this relation is present in 'closed' state-owned companies, as shown in Art 2449, paras 1-2, Civil Code: that is noted – among others – by M. Notari and A. Giannelli, 'Art. 2346, comma

The special rules dedicated to the appointment of directors in state-owned companies must however confront Art 2380-*bis*, para 1, Civil Code, introduced by the Italian Company Law reform, which even more decisively than in the past attributes the actions of directors to the lucrative company's interests.

Asserting that 'the management of the company is exclusively entitled to directors, who carry out the necessary actions for the implementation of the corporate purpose', Art 2380-*bis*, para 1 actually binds all directors – regardless of their background – to pursue the lucrative company's interests and not the public interest,[56] unless a provision of law provides otherwise.[57] The authority in management matters is as exclusive as the liability,[58] established by the new

6', in M. Notari ed, *Azioni. Artt. 2346-2362 c.c.*, in M. Marchetti et al eds, *Commentario alla riforma delle società* (Milano: Egea, 2008), 124-125; to the same extent, A. Abu Awwad, 'La "revoca riservata" ', in P. Abbadessa et al eds, *Amministrazione e controllo nel diritto delle società*. Liber Amicorum *Antonio Piras* (Torino: Giappichelli, 2010), 144; U. Tombari, 'Strumenti finanziari "partecipativi" (art. 2346, ultimo comma, c.c.) e diritti amministrativi nella società per azioni', in *Consiglio nazionale del Notariato. Studio 25 febbraio 2005 no 5571/I*, 10, instead, believes that holders of financial instruments including economic or administrative rights – pursuant to Art 2346, para 6, Civil Code – have the right of reserved removal. See M. Cian, *Strumenti finanziari partecipativi e poteri di* voice (Milano: Giuffrè, 2006), 121, who holds an intermediate position; and Id, 'Investitori non azionisti e diritti amministrativi nella "nuova" s.p.a.', in P. Abbadessa and G. Portale eds, *Il nuovo diritto delle società*. Liber Amicorum *Gian Franco Campobasso. Profili generali – Costituzione – Conferimenti – Azioni – Obbligazioni – Patrimoni destinati* (Torino: UTET, 2007), I, 754, who admits that shareholders hold a concurrent authority, but only with respect to the removal for just cause.

[56] On the meaning of Art 2380-*bis* Civil Code, with regard to the relationship between the company's interests and public interest, see A. Guaccero, 'Alcuni spunti in tema di governance delle società pubbliche dopo la riforma del diritto societario' *Rivista delle società*, 845-847 (2004), who emphasises the primacy of the profit-making also for the state-owned companies; A. Pericu, 'Artt. 2449-2451', in G. Niccolini and A. Stagno D'Alcontres eds, *Società di capitali*: *commentario* (Napoli: Edizioni Scientifiche Italiane, 2004), 1300, where the conclusion that directors appointed by public entities and directors appointed by shareholders are not subject to two distinct duties and two autonomous sources of liability governed by different systems; F. Goisis, *Contributo allo studio delle società in mano pubblica come persone giuridiche* (Milano: Giuffrè, 2004*),* 117, shows that even state-owned companies pursue the profit-making, and the public interest is nonetheless an extra-social interest, and as such it is legally irrelevant; C. Ibba, 'Azioni ordinarie di responsabilità e azione di responsabilità amministrativa nelle società in mano pubblica. Il rilievo della disciplina privatistica' *Rivista di diritto civile,* 151 (2006); N. Abriani*,* 'Assetti proprietari, modelli di governance e operazioni straordinarie nelle società a partecipazione pubblica: profili di danno erariale?' *Rivista di diritto dell'impresa,* 544 (2009); K. Martucci*, Profili di diritto singolare dell'"impresa"* (Milano: Giuffrè, 2013), 163; G. Racugno*,* 'La responsabilità degli amministratori di società pubbliche', in C. Brescia Morra et al eds, *Le imprese pubbliche. A volte ritornano*, in *Analisi giuridica dell'economia*, 487 (2015). A different opinion seems to be held by C. Di Nanni, 'La crisi delle società in mano pubblica tra privilegi normativi e limitazioni dell'autonomia privata', in *Scritti in onore di Ermanno Bocchini* (Padova: CEDAM, 2016), I, 397, starting from the unacceptable premise that the director of state-owned companies, compared to other directors, holds a special position considering that in addition to the 'ordinary duties', he would have the obligation towards the appointing body to pursue the public interest.

[57] See below, para III.1.

[58] On the link between collegiality and liability see, among others, A. Borgioli, 'La responsabilità solidale degli amministratori di società per azioni' *Rivista delle società*, 1075 (1978); G. Grippo,

relationship between shareholders and directors, set forth in Art 2364, para 1, no 5, and Art 2380-*bis*, para 1, Civil Code.

Even the director coming from the public sector is therefore bound to the care of the lucrative company's interests as sole common interests, and his special status is limited to particular procedures of appointment and removal provided for in Art 2449, as well as in Art 2451 Civil Code for the particular category of companies (limited by shares) of 'national interest'.[59]

It must be admitted, however, that, as the weight and importance of directors increase in the balance of corporate powers, the weight and importance of the special rules that confer powers of appointment and removal of directors on the state or other public entities also increase.[60] In consequence, the company law reform, emphasizing the centrality of the board of directors in the architecture of corporate powers,[61] has also increased the influence of these special powers on the corporate governance.

III. The State Shareholder

1. The State Shareholder and its Interest

Without a doubt, the state shareholder is a complex shareholder, whose weight, regardless of the size of its shareholding,[62] is able to cause imbalances

Deliberazione e collegialità nella società per azioni (Milano: Giuffrè, 1979), 146-149. After the company law reform the following author highlights that Art 2392, para 1, Civil Code reveals the clear legislative option for a joint and several liability system whose foundation, as in the mandate with a plurality of agents, is the assignment of the management appointment and the resulting *res eadem debita*, F. Barachini, *La gestione delegata nella società per azioni* (Torino: Giappichelli, 2008), 184-187, 192.

[59] Art 2451 Civil Code establishes that the provisions concerning state-owned companies also apply to companies (limited by shares) of 'national interest', in accordance with the provisions of laws that establish special rules for these companies with regard to company management, transferability of shares, right to vote and appoint directors, statutory auditors and managers. It should be noted that companies of national interest often, although not necessarily, are state-owned companies.

[60] R. Rordorf, 'Le società "pubbliche" nel codice civile' *Società*, 425 (2005).

[61] The fact is undisputed in the post-company law reform doctrine. With regard to state-owned companies specifically, see, for all, A. Guaccero, n 56 above, 845-847; C. Ibba, 'Società pubbliche e riforma del diritto societario' *Rivista delle società*, 5, text and fn 11 (2005).

[62] On this topic, for all, G.L. Pellizzi, 'Sui poteri indisponibili della maggioranza assembleare' *Rivista di diritto civile*, 190-193 (1967); D. Preite, 'Abuso di maggioranza e conflitto di interessi del socio nelle società per azioni', in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni, III, L'assemblea* (Torino: UTET, 1991), 3-6; Id, *L' "abuso" della regola della maggioranza nelle deliberazioni assembleari delle società per azioni* (Milano: Giuffrè, 1992), 30-33; M. Cassottana, *L'abuso di potere a danno della minoranza assembleare* (Milano: Giuffrè, 1991), 110-113. More recently, she returns to the topic describing a typological analysis of shareholders who hold certain corporate 'positions', such as the controlling shareholder or the state-shareholder in the privatisation processes, and analyses the relevance of this position, moving from an investigation perspective which is independent from the abuse of powers, C. Tedeschi, *"Potere di orientamento" dei soci nelle società per azioni* (Milano: Giuffrè, 2005), 41-44.

inside the company without necessarily becoming an abusive behavior.

As an institutional investor,[63] the shareholder-public entity, especially if it is the state, contributes to the company by authority[64] and social relevance,[65] and therefore may be defined not as an ordinary but as a featured member.[66]

The public interest, however remains an extra-social interest[67] (unless a special law provides otherwise)[68] and, like other extra-social interests which influence the decision-making process of any shareholder,[69] may 'only' result

[63] In companies with listed financial instruments, the state lawfully holds the position of 'public professional shareholder': see Art 2, para 1, letter a), decreto ministeriale 11 November 2011 no 236, which defines and identifies professional public clients, and other public entities that, upon request, may be treated as professional clients, pursuant to Art 6, para 2-*sexies*, of consolidated law on financial intermediation provided for in decreto legislativo 24 Februray 1998 no 58 (TUF), as subsequently amended and supplemented.

[64] L. Enriques, 'Una figura anomala (e transitoria?) di investitore istituzionale: il Ministero del Tesoro' *Rivista di diritto dell'impresa*, 47-49 (1998), observes the peculiar powers of control over directors' actions that the public shareholder may exercise.

[65] On the corporate significance of the shareholder's public nature and on its particular extra-social position see C. Tedeschi, n 62 above, 65-67, with particular reference to its ability to influence the state-owned companies.

[66] ibid 69: 'featured shareholders' are parties that 'with their behaviour, sometimes imposed by law, act towards the company in terms that we may define no longer anonymous'. The shareholder 'show himself to the company through the accomplishment of actions such as to place himself in a position suitable to affect the corporate interests. This consideration leads to attribute relevance to interests of these shareholders and regulate their impact on the corporate interests'.

[67] On this topic see above, text and authors cited in n 57.

[68] On this topic see G. Oppo, 'Pubblico e privato nelle società partecipate', in G. Oppo ed, *Scritti giuridici, VII, Vario diritto* (Padova: CEDAM, 2005), 349, who stated that 'the lucrative nature can (…) be combined with other purposes however, in case of its absence, there is no corporation but associations. Furthermore, not only the problem of compatibility with the corporate regulation but also the problem of avoiding the mandatory regulation of associations arises'. On the relevance of the lucrative purpose see also G. Marasà, 'La s.p.a. nel quadro dei fenomeni associativi e i limiti legali alla sua utilizzazione', in O. Cagnasso and L. Panzani eds, *Le nuove s.p.a.* (Bologna: Zanichelli, 2010), I, 150, who highlights that the regulation of heterogeneous conversion moves from a premise which is opposite to neutrality and thus confirms the relevance of the causal factor; to the same extent A. Laudonio, *La trasformazione delle associazioni* (Padova: CEDAM, 2013), 36. Contrariwise G.C.M. Rivolta, 'Diritto delle società. Profili generali', in R. Costi ed, *Trattato di diritto commerciale* (Torino: Giappichelli, 2015), 9 notes that the presence of state shareholding may determine a corporate interest structure that includes general interest purposes concurrent with lucrative or exclusive interests (and not only in companies wholly owned by public entities but also in other enterprises). The case of '*società consortile*' is different. According to Art 2615-*ter* Civil Code, the heterogenesis of the lucrative purpose may be set forth by a bylaws provision that establishes to honour the consortium purpose (while if there is not this 'exemption' clause in bylaws, the '*società consortile*' is bound to the lucrative purpose): see E. Cusa, 'Le società consortili con personalità giuridica: fattispecie e frammenti di disciplina', in P. Benazzo et al eds, *Il diritto delle società per azioni oggi. Innovazioni e persistenze* (Torino: UTET, 2011), 134.

[69] G. De Ferra, 'In margine alla riforma della società per azioni: delle società con partecipazione dello Stato o di enti pubblici' *Rivista delle società*, 801 (1967), the author noted that 'the counter-argument that the public entity is not allowed to vote in order to pursue a purpose which is different from the common aim and therefore that the public entity is not allowed, for example, to impose, with its majority vote, the construction of a plant in an economically distressed

into informal and confidential instructions,[70] not unlike the special interests of private shareholders, especially if these special interests concern the controlling shareholder and also remain outside the company's interests.

Both the state and the private shareholder may exert pressure on corporate bodies in the name of personal or otherwise extra-social interests. In both cases, however, these 'instructions' are not binding,[71] and a liability of the public body towards directors for the exercise of the power to give instruction can be applied only if its management and coordination activities of companies (in other words its role as a parent company) have been formalized or otherwise result in fact, according to Arts 2497 and 2497-*sexies*[72] Civil Code.

area, making prevailing the socio-economic benefit on the profit-making perspective of an investment in another location, remains academically theoretical, since it is anchored to an exclusively dogmatic consideration of the phenomenon'. And also G. Sena, 'Problemi del cosiddetto azionariato di Stato: l'interesse pubblico come interesse extrasociale' *Rivista delle società,* 58 (1958), who highlighted the problem of the exclusively private approach, with reference to the enterprises wholly or partly owned by public entities. And on the influence that the shareholder's individual and extra-social interests may exercise on the 'collective' interests see G. Ascarelli, 'Interesse sociale e interesse comune nel voto' *Rivista trimestrale di diritto e procedura civile*, 1145-1147 (1951), also in Id, *Studi in tema di società* (Milano: Giuffrè, 1952), 147-149; P.G. Jaeger, *L'interesse sociale* (Milano: Giuffrè, 1964), 190-192; D. Preite, 'Abuso' n 62 above, 23; A. Cerrai and A. Mazzoni, 'La tutela del socio e delle minoranze' *Rivista delle società*, 32-35 (1993); P.G. Jaeger, 'L'interesse sociale rivisitato (quarant'anni dopo)' *Giurisprudenza commerciale*, 804 (2000).

[70] On this topic see P. Schlesinger, 'I poteri extra-assembleari dell'azionista di controllo' *Rivista di diritto privato*, 445-447 (1996), who notes in a particularly incisive way that the shareholder may provide directors with 'advice, suggestions, invitations and even, if he considers them to be qualified as such, 'orders', 'instructions', 'directives' *et similia*: but in no case directors shall have the burden, at least on a legal/formal level, to reply or to account to them in relation to their work, or a duty of obedience'. The author wrote prior to the corporate law reform, and prior to the new regulation of the management and coordination activities of companies provided for in Arts 2497 - 2497-*septies* Civil Code; on this topic see also F. Bonelli, *La responsabilità degli amministratori di società per azioni* (Milano: Giuffrè, 1992), 131-134; Id, *La responsabilità degli amministratori*, in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni, IV, Amministratori. Direttore generale* (Torino: UTET, 1991), 372; P.G. Jaeger, 'Gli azionisti: spunti per una discussione' *Giurisprudenza commerciale*, 23-25 (1993). They highlight the controlling shareholder's preference for informal channels G. Scognamiglio, *Autonomia e coordinamento nella disciplina dei gruppi di società* (Torino: Giappichelli, 1996), 222-224; F. Guerrera, *La responsabilità "deliberativa" nelle società di capitali* (Torino: Giappichelli, 2004), 130-132.

[71] P. Abbadessa, 'La nomina diretta di amministratori di società da parte dello Stato e di enti pubblici (problemi ed ipotesi)' *Impresa ambiente e pubblica amministrazione*, 383 (1975); P. Schlesinger, n 70 above, 445-447; C. Ibba, 'Azioni ordinarie' n 56 above, 151 (2006); F. Galgano and R. Genghini, 'Il nuovo diritto societario', in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: CEDAM, 2006), 745.

[72] Art 2497, para 1, Civil Code provides that 'companies or legal persons that, exercising management and coordination activities of companies, act in their own entrepreneurial interest or in the interest of others in breach of correct corporate and business management principles (...) are directly liable towards the shareholders for the damage caused to the profitability and the value of the shareholding, as well as towards the corporate creditors for the damage caused to the integrity of the corporate assets. There is no liability when no damage is caused in the light of the total results of management and coordination activities or when the damage is completely eliminated also through specific transactions carried out for this purpose'. According to Art

On the other hand, the public shareholder is required to actively collaborate in the implementation of the company's interests and not simply to refrain from influencing it with extra-social interests, as unequivocally stated by the fact that in mixed state-owned companies the state shareholder, if it reaches the legitimacy threshold for the exercise of the right, is also entrusted with the task of preserving the interests and the corporate assets by means of a liability action brought by the minority shareholders, pursuant to Art 2393-*bis*, (which also benefits private shareholders).[73]

Conversely, the thesis according to which the disagreement between company's interests and public interests in state-owned companies might be resolved by exempting the state shareholder from the lucrative purpose and by recognizing the 'potential ambivalence of the functional corporate paradigm'[74] as well as the diversity between corporate structure and corporate function organization[75] has not been embraced.

The lucrative common interest is still not denied today, not even in business models in which the lucrative common interest's reconstruction is more complex and well-structured, such as the 'open' companies,[76] the wholly state-owned companies[77] and the municipally-owned companies,[78] the in-house providing

2497-*sexies*, para 1, Civil Code it is assumed that the management and coordination activities of companies are exercised by the company or entity required to draft the consolidated financial statements or by the company which exercises control pursuant to Art 2359 Civil Code.

[73] A. Guaccero, n 56 above, 860.

[74] P. Spada, 'Dalla nozione al tipo della società per azioni' *Rivista di diritto civile*, 132 (1985).

[75] With reference to the heterogeneity between the public interest and the lucrative purpose see, among others, G. Sena, n 69 above, 58. Others believe that, even in case of access of the public interest in the company's interests, there would not be a transformation but rather an extension of the corporate purpose: R. Bolaffi, *La società semplice* (Milano: Giuffrè, 1952), 128-130; G. Oppo, 'L'essenza della società cooperativa e gli studi recenti' *Rivista di diritto civile*, 384-385 (1959), and also Id, 'Pubblico' n 68 above, 349; G. Marasà, *Le «società» senza scopo di lucro* (Milano: Giuffrè, 1974), 87-89, 390; F. Fracchia, 'La costituzione delle società pubbliche e i modelli societari' *Diritto dell'economia*, 614 (2004); as meaning that state-owned companies are subject to the lucrative purpose C. Ibba, 'Società pubbliche' n 61 above, 5; and with reference to 'instrumental companies' set up to provide certain municipal services established in Art 6, para 1, decreto legislativo 17 May 1999 no 153, see G.B. Portale, 'Fondazioni «bancarie» e diritto societario' *Rivista delle società*, 34 (2005); with reference to the associative phenomena in general see A. Laudonio, n 68 above, passim. Others, without adhering to the thesis of the functional neutrality of the company vehicle, believe that the link between corporate function and corporate organisation may be differently 'binding' depending on the quality of the shareholders: P. Spada, n 74 above, 132. Finally others admit the partial release of the state-owned companies from the lucrative purpose: G. Santini, 'Tramonto dello scopo lucrativo nelle società di capitali' *Rivista di diritto civile*, 151-153 (1973); A. Rossi, *Profili giuridici della società a partecipazione statale* (Milano: Giuffrè, 1977), 252-254; G. Rossi, 'La società per azioni con partecipazione pubblica', in G. Rotondi ed, *Inchieste di diritto comparato. II. I grandi problemi della società per azioni nelle legislazioni vigenti* (Padova: CEDAM, 1976), 1632.

[76] M. Cossu, *Società "aperte" e interesse sociale* (Torino: Giappichelli, 2006), 282-285.

[77] P. Abbadessa, 'La nomina' n 71 above, 369-371 believes that the public interest remains relegated to the status of shareholder's personal interest; see also Id, 'Le società miste per i servizi locali: profili organizzativi speciali', in G. Ragusa Maggiore ed, *Studi in onore di Giuseppe*

companies,[79] or the sole-shareholder companies. This is the case in spite of the strong institutional feature that the last ones reveal[80] especially when the sole shareholder is the state or another public entity.[81]

Some different, partially conflicting conclusions might be reached with reference to the '*società benefit* model' and the '*società-impresa sociale* model', but, indeed, in both cases a special law recognize (and ask for) a different synthesis between the lucrative company's interest and other interests.[82]

It is a fact that the position of the controlling shareholder is quite unusual. That position gives rise to a particularly strong contractual relationship and consequently, the voting rights included in his shareholding must be considered,[83]

Ragusa Maggiore (Padova: CEDAM, 1997), I, 3-4; M. Miola, 'Le società miste come società di «diritto speciale»', in G. Di Giandomenico et al eds, *Le società miste locali per la gestione dei pubblici servizi* (Napoli: Edizioni Scientifiche Italiane, 1997), 181-182; G. Oppo, 'Pubblico' n 68 above, 346, where it is noted that 'not even the company law reform has put the lucrative purpose into question. The sunset of the lucrative purpose, of which so much has been spoken, may not relate to the companies provided for in the civil code but only to entities in which the corporate structure split from the typical purpose'; R. Rordorf, n 60 above, 427. To same extent, R. Carlizzi, 'La direzione unitaria e le società partecipate dagli enti pubblici' *Rivista di diritto commerciale*, 1210 (2010). But see instead F. Galgano and R. Genghini, n 71 above, 741-742, according to whom, in the wholly state-owned companies, the 'public shareholding will be the undisputed arbiter of the company and will be able to manage it as he wishes'; G.C.M. Rivolta, n 68 above, 9-10, who believes that even in mixed state-owned companies, where state shareholding is – at least in theory – compatible with the lucrative purpose, the bylaws might foresee the public interest as an interest to be exclusively or concurrently pursued with the lucrative interest.

[78] See G. Ferrarini and M. Filippelli, 'Independent Directors and controlling Shareholders' *Orizzonti del Diritto Commerciale*, 9 (2013), about considerations on the greater inclination of directors of public utilities towards the stakeholders' view, or at least towards a greater consideration of the enterprise value, as well as the shareholders' wealth.

[79] On the 'in-house providing company' model see M. Cossu, 'Le società *in house providing* nell'evoluzione legislativa e giurisprudenziale', in C. Ibba et al eds, *Le società pubbliche* (Torino: Giappichelli, 2011), 243-246.

[80] On this topic, after the Italian Company Law reform, see G. Oppo, 'Le grandi opzioni della riforma e la società per azioni' *Rivista di diritto civile,* 471 (2003); G. Scognamiglio, 'Tutela del socio e ragioni dell'impresa nel pensiero di Giorgio Oppo', in *Atti dei Convegni Lincei, 271. Giornate di studio in ricordo di Giorgio Oppo: "uomo persona e diritto"* (Roma: Scienze e lettere, 2013), 283.

[81] G. Oppo, 'Le grandi opzioni della riforma e la società per azioni' n 80 above, 288-289.

[82] See in particular legge 28 December 2015 no 208 on '*società-benefit*' and decreto legislativo 3 July 2017 no 112, on '*società-impresa sociale*'. Obviously both models will not be discussed here. Recently in argument see U. Tombari, 'L'organo amministrativo di S.p.a. tra 'interessi dei soci' ed 'altri interessi' *Rivista delle società*, 22-24 (2018).

[83] The homogeneous '*Mitverwaltungsrecht*', by K. Schmidt, *Gesellschaftsrecht* (Köln-Berlin-Bonn-München: K. Heymanns, 2016), 496-498; and to this extent, among many, B. Libonati, 'Responsabilità nel e del gruppo (responsabilità della capogruppo, degli amministratori, delle varie società)', in P. Balzarini et al eds, *I gruppi di società. Atti del convegno internazionale di studi, Venezia, 16-18 Novembre 1995* (Milano: Giuffrè, 1996), II, 1489-1491; and in the huge amount of literature v. E. Gliozzi, 'Holding e attività imprenditoriale' *Giurisprudenza commerciale*, 522-524 (1995); G. Scognamiglio, *Autonomia e coordinamento* n 70 above, 138-140; G. Guizzi, 'Partecipazioni qualificate e gruppi di società', in N. Abriani et al eds, *Diritto delle società. Manuale breve* (Milano: Giuffrè, 2008), 325-326; F. Guerrera, n 70 above, 129.

when this controlling position is expressed through non-institutional acts and shareholder meeting resolutions.[84]

Unlike what happens in mixed state-owned companies governed by the general law (and not by special rules), where the appointment of directors takes place simply according to the majority principle and the state shareholder has a power of influence that is directly proportional to its shareholding, in the wholly state-owned companies the public shareholder's power to appoint directors is greater. This is the case not only where directors are directly appointed by it according to Art 2449 Civil Code, but also when the public shareholder appoints directors at an ordinary shareholders' meeting.

Nevertheless, even when the state or other public entities are the controlling shareholders, it is admitted that they have an interest in the corporate activity or in the shareholding,[85] while it is not admitted that the public interest is part of the corporate purpose or that directors to be required to achieve it.[86]

2. State-Appointed Directors and the Company's Interests

The lucrative company's interests bind therefore directors appointed by the state or other public entities and, in state-owned enterprises, no employment relationship exists between the state and the director appointed by it.[87]

Accordingly, if previously the state-appointed director might have been discharged from liability for an act carried out in the public interest or in the extra-social interests, (even in contempt of the common lucrative interests) by means of a shareholders' resolution pursuant to Art 2364, para 1, no 4, today the possible assignment of a management act to the deliberative powers of shareholders – a possibility that is not prevented or forbidden –[88] does not discharge the state-appointed director (as well as other directors) from liability.

[84] G. Scognamiglio, *Autonomia e coordinamento* n 70 above, 222-224; F. Guerrera, n 70 above, 134.

[85] For all, see P. Abbadessa, 'La nomina' n 71 above, 372.

[86] It is even obvious that the 'reasons' for what a state or a public entity decide to acquire companies' stocks may be countless: lastly on this topic C. Angelici, 'In tema di 'socio pubblico' *Rivista di diritto commerciale*, 177 (2015).

[87] In the absence of an explicit authoritative intervention, in fact, the state shareholding is not connected to the exercise of a public function: see A. Guaccero, n 56 above, 854; G. Di Gaspare, 'La responsabilità amministrativa degli amministratori di società di capitale partecipate da enti pubblici o società dagli stessi controllate (art. 16 bis legge n. 31/2008) e la giurisdizione della Corte dei Conti', in G. Alpa et al eds, *Scritti in onore di Francesco Capriglione* (Padova: CEDAM, 2010), II, 1021.

[88] In general on the topic V. Calandra Buonaura, 'I modelli di amministrazione e controllo nella riforma del diritto societario' *Giurisprudenza commerciale*, 543 (2003); C. Montagnani, 'Artt. 2364-2364 *bis*', in G. Niccolini and A. Stagno D'Alcontres eds, n 57 above, 455. In particular with reference to state-owned companies see A. Guaccero, n 56 above, 846; N. Abriani, 'Le società a partecipazione pubblica nell'osmosi tra diritto societario e diritto amministrativo: assetti proprietari, modelli di governance, operazioni straordinarie', in C.L. Appio et al eds, *Studi in onore di Umberto Belviso* (Bari: Cacucci, 2011), 198.

The state-appointed director is therefore required to achieve the corporate purpose respecting the common lucrative purpose.[89] Moreover, the public interest, as any potentially conflicting extra-social interests, must be revealed, as well as the reasons for any transaction influenced by it.[90] However, as a result of Art 2380-*bis* and its impact on Arts 2373, 2391, 2392, para 1, 2397-*bis*, today it is even more difficult than in the past to pursue the public interest inside the companies.[91]

This set of rules primarily involves negative obligations, in particular: the obligation to refrain from competitive activities,[92] the obligation not to exert an undue influence on the corporation,[93] and the obligation to disclose significant interests.

In companies listed on regulated markets and those that participate in the risk capital market, there is a further obligation to guarantee the transparency of related-parties' transactions pursuant to Art 2391-*bis*.[94]

Moreover, the state-appointed director has also positive obligations. He must actively contribute to the correct performance of the business activity on a par with other directors,[95] share organizational risks,[96] evaluate the suitability of the organizational, administrative and accounting structure of the company in accordance with art 2381, para 5,[97] be jointly and severally liable with other directors for these tasks, (depending on their actual role in the company

[89] A. Guaccero, n 56 above, 847; E. Codazzi, 'Le "nuove" società *in house*: controllo cd. analogo e assetti organizzativi tra specialità della disciplina e "proporzionalità delle deroghe" ', 23, available at https://tinyurl.com/yafyt8ao (last visited 27 December 2018), the authors noted that since the state-appointed directors have '*the same rights and obligations*' of directors appointed by shareholders, 'the trust relationship between directors and the state is not suitable to compromise the respect for the typically lucrative or the corporate purpose'.

[90] E. Codazzi, n 89 above, 23.

[91] To this extent M.T. Cirenei, '*Riforma delle società, legislazione speciale e ordinamento comunitario: brevi riflessioni sulla disciplina italiana delle società per azioni a partecipazione pubblica*', in G. Horsman ed, *Liber Amicorum* Guy Horsmans (Bruxelles: Bruylant, 2004), 184, and in *Diritto commerciale internazionale*, 52 (2005).

[92] It should be highlighted that Art 2390 of the civil code grants relevance only to the competitive activity as a whole and not also to an isolated competitive act: R. Weigmann, 'Lo storno di affari da una società' *Foro italiano*, 235, I, 2 (1992), while the new Art 2391, para 5, also grants significance to the single competitive act, which as such would not be punishable pursuant to Art 2390: S. Corso, *Gli interessi "per conto di terzi" degli amministratori di società per azioni* (Torino: Giappichelli, 2015), 58-59. On Art 2391, para 5, see below para IV, 2.

[93] On the state shareholder as an *influencing shareholder* able to exercise 'direction powers' see S. Corso, *Gli interessi* n 92 above, 164.

[94] See below, para IV.

[95] For these topics see among others M. Rabitti, *Rischio organizzativo e responsabilità degli amministratori* (Milano: Giuffrè, 2004), 38; M. Irrera, *Assetti organizzativi adeguati e governo delle società di capitali* (Milano: Zanichelli, 2005), 76-78.

[96] On the link between principles of corporate organisation and rules of a correct corporate management, see in particular M. Rabitti, n 95 above, 57-59.

[97] In this perspective N. Abriani, 'Le società a partecipazione pubblica' n 88 above, 202; S. Corso, *Gli interessi* n 92 above, 226.

organization chart),[98] act in an informed manner pursuant to Art 2381, para 6[99] (the latter obligation *naturally* arises from the professional duties of their office also for non-executive directors)[100] (and without prejudice to the specific situations that might justify a different behavior).[101] Finally, the state-appointed director is subject to a general obligation of supervision that still survives, even though the new Art 2392, para 2, of the civil code has considerably reduced the joint and several liability of directors.[102]

Furthermore, the board of directors, which is an increasingly heterogeneous body with regard to the background and the interests of its members,[103] is entitled to measure and resolve possible conflicts between the company's interests[104] in

[98] N. Abriani, 'Le società a partecipazione pubblica' n 88 above, 202, where the author notes that the perimeter of the correct corporate management, according to Art 2391, para 2, includes adequate information and adequate corporate organisation, and is different for the '*plenum*' members, the executive directors and the chief executive officer.

[99] Art 2381, para 6, states that 'directors are required to act in an informed manner; each director may request the delegated bodies to provide the board with information on the management of the company during the board of directors' meeting'.

[100] In this respect D. Regoli, 'La funzione di controllo nel sistema monistico', in P. Abbadessa et al eds, *Amministrazione e controllo* n 55 above, 605.

[101] The obligation to act in an informed manner does not apply in case the director's lack of information is rational and justified, due to his lack of knowledge (inexperience) in a certain subject, or in the case in which a specific function has been delegated to other directors, or when the lack of information (also in this case rational) is due to the fact that entrepreneurial choices are determined by a third party, for example the holding when the company belongs to a corporate group: E. Marchisio, 'L'agire consapevolmente disinformato dell'amministratore di s.p.a.' *Rivista di diritto commerciale*, I, 113 (2017).

[102] Art 2392, para 2, provides that, a part from a delegation of powers (according to Art 2381) directors are jointly and severally liable if, being aware of detrimental facts, they have not done what they could to prevent them, eliminate or mitigate their harmful consequences. On the limitation of joint and several liability of non-executive directors see F. Bonelli, *Gli amministratori di s.p.a. a dieci anni dalla riforma del 2003* (Milano: Giuffrè, 2013), 109-111; F. Bonelli, 'Presidente del consiglio di amministrazione di s.p.a.: doveri e responsabilità' *Giurisprudenza comm*erciale, I, 223 (2013).

[103] P. Sanfilippo, 'Riforma delle società e interpreti in controtendenza: il caso della delega amministrativa 'obbligatoria" *Banca, borsa, titoli di credito*, I, 329-331 (2007); F. Barachini, *La gestione* n 58 above, 226.

[104] On the function of weighting and settlement of the board of directors on a collegial-style management basis see N. Salanitro, *L'invalidità delle deliberazioni del consiglio di amministrazione di società per azioni* (Milano: Giuffrè, 1965), 177-179; R. Weigmann, *Responsabilità e potere legittimo degli amministratori* (Torino: Giappichelli, 1974), 93; P. Abbadessa, *La gestione dell'impresa nella società per azioni* (Milano: Giuffrè; 1975), 103; K.J. Hopt, 'Aktionärskreis und Vorstandsneutralitat' *Zeitschrift für Unternehmens-und Gesellschaftsrecht*, 536-538 (1993); M. Stella Richter Jr and C. Salomão-Filho, 'Note in tema di offerte pubbliche d'acquisto, ruolo degli amministratori ed interesse sociale' *Rivista di diritto commerciale*, I, 146-149 (1993); M. Stella Richter Jr, 'La collegialità del consiglio di amministrazione tra ponderazione dell'interesse sociale e composizione degli interessi sociali', in B. Libonati ed, *Amministrazione e amministratori di società per azioni* (Milano: Giuffré, 1995), 310-312, where the consideration, with reference to the composition of the board of directors, that the complexity of the company's interests arises 'when the company becomes the meeting point of diversified positions'; M. Blair and L.A. Stout, 'A Team production Theory of corporate law' *Virginia Law Review*, 85, 319-321 (1999); N. Salanitro, 'Nozione e disciplina degli amministratori indipendenti', in P. Abbadessa et al eds,

the name of the sole common interest[105] that pre-exists their appointment,[106] that is, the lucrative interest. This increasingly requires a high ability to manage conflicts[107] and to mediate between opposing expectations.[108]

Nevertheless, the complexity of the role contrasts with the regulation of the board of directors' activity which is based instead on a *supposed harmony of interests* and it is not meant to govern diversity, or regulate cases in which its action can damage one or the other.[109] The problem is more evident for special classes of shares, and especially for shares carrying financial rights linked to the results of the company's activity in a specified division in which the probability of discordance between the common interests and the interests of the business unit is particularly high.[110] Moreover, a the 'particular classes of shares' and the financial instruments that incorporate rights of appointment in favor of the state shareholder in 'open state-owned companies' (Art 2449, para 4) share this *ostensible disintegration* of the common interest.[111]

The problem of the relationship between the interests of directors appointed by holders of non-equity financial instruments (Art 2346, para 6) and the interests

Amministrazione e controllo n 55 above, 381-384; M. Stella Richter Jr, 'Sulla composizione e sulla elezione dell'organo amministrativo di una società quotata' *Rivista di diritto comm*erciale, I, 53 (2012); M. Stella Richter Jr, 'Art. 147 *ter*. Elezione e composizione del consiglio di amministrazione', in M. Campobasso et al eds, *Le società per azioni. Commentario* (Milano: Giuffré, 2016), II, 4195; taken up by S. Corso, 'La possibile composizione di interessi nel consiglio di amministrazione di s.p.a.', 19, available at https://tinyurl.com/yahb8mr2 (last visited 27 December 2018).

[105] In the absence of different legal provisions, the only unitary company's interests must remain the lucrative interests as stated in Art 2247 of the civil code. That is highlighted in particular by P. Sanfilippo, *Funzione amministrativa e autonomia statutaria nelle società per azioni* (Torino: Giappichelli, 2000), 109; P. Sanfilippo, 'Il presidente del consiglio di amministrazione nelle società per azioni', in P. Abbadessa and G. Portale eds, *Il nuovo diritto delle società*. Liber Amicorum *Gian Franco Campobasso. Assemblea – Amministrazione* (Torino: UTET, 2007), II, 448, fn 24; M. Cossu, *Società "aperte"* n 76 above, 305-307.

[106] P. Sanfilippo, 'Il presidente del consiglio' n 105 above, 448, text and fn 24.

[107] A. Mazzoni, 'L'impresa tra diritto ed economia' *Rivista delle Società*, 666 (2008), notes that from the perspective of company law the 'directors' duty to manage, mediating among all different interests of which various categories of those who provide long-term share capital (shareholders, bondholders or holders of hybrid financial instruments)' stand out as a right to finance the company that the corporate law reform seems to favour.

[108] And see S. Corso, 'La possibile composizione' n 104 above, 3; S. Corso, *Gli interessi* n 92 above, 2009.

[109] P. Sanfilippo, *Funzione amministrativa* n 105 above, 98; F. Mondini, *Le azioni correlate* (Milano: Giuffré, 2009), 151.

[110] On this topic, F. Mondini, n 109 above, 150-152; F. Mancuso, *Le società emittenti azioni correlate* (Torino: Giappichelli, 2015), 21-25.

[111] On the topic of the 'fragmentariness' of the unitary idea of company's interests see especially R. Weigmann, 'Luci ed ombre del nuovo diritto azionario' *Società*, 277 (2003); R. Weigmann, 'Dalla società per azioni alla società per carati', in P. Benazzo et al eds, *Il nuovo diritto societario fra società aperte e società private* (Milano: Giuffré, 2003), 171-174. On the common interest in this scenario see M. Cossu, *Società "aperte"* n 76 above, 167-170; M. Porzio, '...Allo scopo di dividerne gli utili', in M. Porzio et al eds, *Scritti in onore di Ermanno Bocchini* (Padova: CEDAM, 2016), II, 945-947.

of the different classes of shareholders, which highlights the increase of vertical[112] and horizontal[113] inner conflicts, is included.

The impact of interests of all these elements, and their interference with the common interest may, however, be brought back into balance. It should be taken into consideration that those are 'concrete interests' crowded around all enterprises – not just the state-owned companies – and 'the enterprise (...) *is not a* bundle of relationships (...) but *is in a* bundle of relationships',[114] many of which belong to the enterprise regulation, not to the company law.[115]

The principle of the management unity, which is an axiomatic concept in the Art 2380-*bis* of the civil code, therefore implies that all the directors, regardless the way they were appointed,[116] must care and implement the company's interests,[117] as well as they must have technical discretion in identifying

[112] See R. Weigmann, 'Luci ed ombre' n 110 above, 277; R. Weigmann, 'Dalla società per azioni' n 110 above, 171-174; A. Bartalena, 'I patrimoni destinati a uno specifico affare' *Banca borsa titoli di credito*, I, 99 (2003); U. Tombari, 'La nuova struttura finanziaria della società per azioni (*Corporate Governance* e categorie rappresentative del fenomeno societario)' *Rivista delle società*, 1100-1101 (2004); M. Cossu, *Società 'aperte'* n 76 above, 244-247; V. Cariello, *'I conflitti 'interorganici' e 'intraorganici' nelle società per azioni* (*prime considerazioni*)', in P. Abbadessa and G. Portale eds, n 55 above, 2, and n 105 above, text and fn 34.

[113] In general, inner conflicts between holders of different classes of financial instruments are 'horizontal', as noted by U. Tombari, 'La nuova struttura finanziaria' n 111 above, 1101.

[114] Our italics. For this evocative reply to the rhetoric *of the nexus of contracts reconstruction* see G. Oppo, 'Patto sociale, patti collaterali e qualità di socio nella società per azioni riformata' *Rivista di diritto civile*, II, 57 (2004), and also in Id, *Scritti giuridici* n 68 above, 316, from which we quote; in addition, on this topic see M. Cossu, *Società 'aperte'* n 76 above, 178-183.

[115] R. Costi, 'Relazione di sintesi', in R. Sacchi et al eds, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders. In ricordo di Pier Giusto Jaeger*, (Milan: Giuffré, 2010), 189-192; M. Cossu, 'The "company's interests" of the "società aperte" under Italian Corporate Laws' *European Company and Financial Law Review*, 45, 58 (2013). It is well-known that the *nexus of contracts theory* establishes an osmotic relationship between business and company, which makes 'the distinction between what is placed inside and what is outside of it' irrelevant: M. Cossu, *Società "aperte"* n 76 above, 30-31; C. Angelici, 'Le basi contrattuali della società per azioni', in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni*, *I, Tipo, Costituzione, Nullità* (Torino: UTET, 2004), 1, 107, who notes that the *nexus of contracts theory* is based on an idea of the contract which is different from the continental one: the contract '(...) is meant in an absolutely generic way, so to speak, purified of its technical-legal value, as an equivalent to the voluntary activity of private individuals (...)'. However, the distinction between corporate interests and business interests is also present in a part of the English doctrine: among many see W. Bratton Jr, 'Public Values, Private Business, and US Corporate Fiduciary Law', in G. Mccahery et al eds, *Corporate Control and Accountability. Changing Structures and the Dynamics of regulation* (Oxford: Clarendon Press, 1994), 23-27.

[116] P. Sanfilippo, 'Il presidente del consiglio' n 105 above, 446-447, who highlights that the interest of the appointing state shareholder must remain a secondary interest. And see M. Lutter, G. Krieger and D.A. Verse, *Rechte und Pflichten des Aufsichsrat* (Köln: Otto Schmidt, 6th ed, 2014), 149-152, 275-278; K.J. Hopt, 'Interessenwahrung und Interessenkonflikte im Aktien-, Bank- und Berufsrecht - Zur Dogmatik des modernen Geschäftsbesorgnungsrechts' *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, I, 1-3 (2004).

[117] In this regard, with specific reference to state-owned companies, M. Cossu, *Società* '*aperte*' n 76 above, 167-168; F. Santonastaso, 'La riforma dell'art. 2449 c.c. e le società con partecipazione degli enti pubblici locali', in G. Alpa et al eds, *Studi per Franco di Sabato*, *IV*, *Società* (Napoli:

ways to do that.[118] They are involved in to carry and include these various interests in the common interest.[119]

These conclusions are perfectly in line with a more general trend because, in all legal systems, the state-appointed directors are bound by the obligation to pursue the common interest on a par with directors appointed by private shareholders.[120]

This means, first, that if the director appointed by the state or a public entity does not act in accordance with the common interest, this justifies his removal for just cause, and therefore the 'unfaithful' director can be replaced exactly as it would occur to any other director. [121] Secondly, this also means that the state-shareholder is not entitled to bring an action for liability against directors for direct damage of the public interest.

IV. State Shareholder, State-Appointed Director and Regulation on Related-Parties' Transactions

When it is said that public interests must remain confined to extra-social interests,[122] it is assumed that such interests are a threat to the company and that

Edizioni Scientifiche Italiane, 2009), II, 377. Generally, he underlines that directors' duties are univocal regardless of the appointment procedure and the position held, F. Bonelli, 'Presidente del consiglio' n 102 above, 222-223.

[118] R. Weigmann, *Responsabilità e potere* n 104 above 122-124; V. Allegri, *Contributo allo studio della responsabilità civile degli amministratori* (Milano: Giuffré, 1979), 132, where it is stated that directors, exercising the managerial discretion, face the limit of the corporate purpose and the obligation to pursue the company's interests; F. Bonelli, *La responsabilità* n 70 above, 131-134, 372; V. Calandra Buonaura, 'Potere di gestione e potere di rappresentanza degli amministratori', in G.E. Colombo and G.B. Portale eds, *Trattato delle società per azioni* n 70 above, 112; M. Stella Richter Jr and C. Salomão-Filho, 'Note in tema di offerte' n 104 above, 113-115; M. Stella Richter Jr, 'La collegialità del consiglio di amministrazione' n 104 above, 283-284; and to the same extent, after the company law reform, F. Bonelli, 'Responsabilità degli amministratori di s.p.a.' *Giurisprudenza commerciale*, I, 3, 637 (2004).

[119] In this regard M. Stella Richter Jr, 'La collegialità del consiglio di amministrazione' n 104 above, 303; P. Benazzo, *Autonomia statutaria e quozienti assembleari nelle società di capitali* (Padova: CEDAM, 1999), 37-38; M. Irrera, *Le delibere del consiglio di amministrazione. Vizi e strumenti di tutela* (Milano: Giuffré, 2000), 448-449; M. Stella Richter Jr, 'Art. 147 *ter*' n 104 above, 4195; also the check of the compatibility of the director's background with the company's interests is a fact to be deduced *ex post* and not *a priori*: R. Santagata, '*Cumulo di cariche amministrative ed interessi in conflitto nelle società per azioni*', in P. Abbadessa et al eds, *Amministrazione e controllo* n 55 above, 432, text and fn 34.

[120] Ocde Directorate for financial and enterprise affairs corporate governance Committee, *Working Party on State Ownership and Privatisation Practices. Board of Directors of State-Owned Enterprises, An Overview of National Practices*, DAF/CA/SOPP(2012)1/FINAL (Paris: Ocde, 2012), 15 of the document: 'like any private company owner, the state acting in its capacity as shareholder needs to form ideas about whom it wants on the board to act in its own and the company's best interest'.

[121] In this regard, for all, see F. Bonelli, *La responsabilità degli amministratori di società per azioni* n 70, 12.

[122] See above, para III, 1.

they are totally irrelevant for other shareholders. To the contrary, the corporation might actually benefit from these interests, and they might coincide with the *desiderata* of all or some shareholders.

In capitalist models based on relational and reputational mechanisms, the state shareholder may especially be a vehicle of information and *special opportunities* that might favor the company over competitors. More precisely, the access of the state shareholder may represent an instrument of company asset growth or an enhancement of company's image as well as an increase of *chances*,[123] bringing it financial, political, relational and reputational benefits.

In any case it is essential to always bear in mind that the pattern of relationships that bind the public body holding a power of appointment and the director appointed by it represents a permanent influence on the director's activity, which may not be dealt solely with the traditional regulation of the conflict of interests pursuant to Art 2391, para 1, of the civil code.[124] This regulation is designed to be applied only to episodic disagreements which are traceable to a single management operation:[125] The new Art 2391, as amended by the company law reform, also regulates all of the personal interests of directors, not only those in conflict with the company;. This provision, however, only applies to situations of occasional conflict.[126] This is also established in the special regulation of Art 150, para 1, decreto legislativo 24 February 1998 no 58 (TUF), which is dedicated to directors' interests in listed companies.[127]

There is, therefore, no doubt that the state shareholder, as the main and most influential related party of the company, is able to influence the activity of one or more directors in a permanent way.[128] This is the reason why Art 2391-*bis*,

[123] A collective advantage of the presence of the state shareholder might be the access of the company into a certain market, or the possibility to confer a corporate role on certain parties; an individual advantage might be the appointment of the shareholder to certain political or corporate positions.

[124] Art 2391, para 1, of the civil code provides that 'the director must inform the other directors and the board of statutory auditors of any interest he has on his own behalf or on behalf of third parties in a particular company transaction, giving details of the nature, terms, origin and amount. In case of a managing director, he must also refrain from carrying out the transaction, delegating it to the board. If the director is a sole director, he must also notify such information at the next shareholders' meeting'.

[125] L. Enriques, *Il conflitto di interessi degli amministratori di società per azioni* (Milano: Giuffrè, 2000), 203.

[126] F. Bordiga, 'La rinuncia all'incarico del componente di organi di s.p.a.' *Rivista delle società*, 680 (2017).

[127] Art 150 of decreto legislativo 24 February 1998 no 58 (TUF) provides that 'the directors shall promptly inform the board of statutory auditors, according to the procedures established in the bylaws, and at least on a quarterly basis on the activities and the most significant economic, financial and equity transactions carried out by the company or its subsidiaries. In particular, they shall report on transactions in which they have an interest for their own account or on behalf of third parties or that are influenced by the party who exercises management and coordination activities of companies'.

[128] Generally, on the state shareholder as an influential shareholder capable of exercising 'powers of guidance' see S. Corso, *Gli interessi* n 92 above, 164; C. Tedeschi, '*Potere di orientamento*'

para 1, of the Civil Code, introduced by the company law reform,[129] provides for all listed and 'open' companies an obligation of transparency regarding all related-party transactions,[130] both from the point of view of the obligation to state reasons[131] and their accounting and fiscal evidence.[132] Indeed, the fact that, according to Italian law, transactions with related-parties are regulated only in 'open' companies is due to the fact that these companies collect public savings, and therefore such transactions are intrinsically dangerous in such a context.

More specifically, rules and obligations regarding the transparency of operations with a related party are instrumental in preventing an 'open' company from concluding a transaction that a 'closed company' would not have concluded on the assumption that this transaction is potentially detrimental to the company because *of a potential conflict of interest*.[133] Even in 'open' state-owned companies, the obligation of disclosure regarding these transactions complies with a two-fold function. First, disclosure establishes an obligation of confidentiality,[134] and prevents the circulation and disclosure of corporate information from being undue and untimely, or from happening selectively.[135] Secondly, it represses the

n 62 above, 69.

[129] Art 2391-*bis* provides that 'boards of directors of companies that make recourse to the risk capital market, according to the general principles established by the Consob (the public authority responsible for regulating the Italian financial markets, hereinafter referred to as Consob), adopt rules that ensure the transparency and the substantial and procedural fairness of related-party transactions and let them be known in the management report. To this end, they may be assisted by independent experts, based on the nature, value or characteristics of the operation. The principles referred to in the first paragraph apply to transactions carried out directly or through subsidiaries and govern the transactions themselves in terms of decisional competence, explanation and documentation. The board of statutory auditors oversees compliance with the rules adopted pursuant to the first paragraph and refers to the general meeting within its reports'.

[130] M. Cossu, *Società "aperte"* n 76 above, 275-276.

[131] It is not enough to justify the theoretical adherence to the company's interests but it is necessary to account for the convenience of the transaction concretely, otherwise that will be void due to a lack of justification: A.D. Scano, *La motivazione delle decisioni nelle società di* capitali (Milano: Giuffré, 2018), 134. A problem of accounting evidence in the financial statements of the transaction and of the relationships with the related parties is also arisen: see better below text and n 137.

[132] On the obligation of the board of directors to state a substantial and non-formal motivation, and to justify specifically and non-generically the convenience of the transaction for the company see A.D. Scano, *La motivazione delle decisioni nelle società di capitali* n 131 above, 131-132.

[133] On the relationship between 'conflicting transactions' and 'related-party transactions' see below para IV, 2.

[134] Finally, M. Stella Richter Jr, 'La informazione dei singoli amministratori' *Banca impresa società*, 342-344 (2017).

[135] In particular, it might have been revealed to certain parties, for example shareholders, reporters or analysts or be incomplete or inadequate: see the application criterion 1.C.1., lett. *j*) of the self-regulatory code of listed companies (the *Preda* Code), in the updated version of 2011. A recent overview on selective information among directors and some shareholders and its allowable boundaries (in the wider scenario of shareholders' activism and without specific reference to public shareholders) see M.C. Mosca, 'Comunicazione selettiva dagli amministratori agli azionisti e presidi a tutela del mercato' *Rivista delle società*, 36-40, 47-49 (2018).

public body's exercise of an external directive (hetero-direction) power on the company.

That said, and starting from the definition of 'related party'[136] (regardless of the general question if corporate resolutions shall be motivated, which cannot be examined in depth here),[137] we want to draw attention to the two-fold obligation of directors of 'open' state-owned companies to comply with substantial and procedural transparency and fairness[138] in related-party transactions and the obligation to *state reasons,* pursuant to Art 2391-*bis*,[139] for decisions influenced by the relationship with the state or other public body as a related party.[140]

Similarly, we will not overall exclude from consideration the fact that the

[136] Which is very wide: M. Ventoruzzo, 'Art 2391-*bis*', in F. Ghezzi et al eds, *Commentario alla riforma delle società. Amministratori. Artt. 2380 – 2396 c.c.* (Milano: Giuffré, 2005), 501. For the definition of 'related party' see Art 2391-*bis* of the Civil Code, and the regulations provided for in the *Delibera Consob* 12 march 2010 no 17221, as amended by the further *Delibera Consob* 27 April 2017 no 19974. attachment 1 (hereinafter *delibera Consob*), to the resolution states the definition of related party, establishing that for the purposes of Art 3, para 1, lett *a*) of the regulation, a person is a party related to a company if '(a) directly, or indirectly, also through subsidiaries, trustees or third parties: (*i*) controls the company, is controlled by the company, or is subject to common control; (*ii*) holds a stake in the company which may exercise significant influence over the latter'. The perimeter of the related parties referred to in the regulation is identified by the accounting principle *IAS 24*, including the financial statement disclosures on related-party transactions, approved in november 2009 and endorsed by the European Commission Regulation 632/2010/EU of 19 July 2010, which amends the European Commission Regulation 1126/2008/EC of 3 November 2008, and which also ratifies the relevance of indirect relation, requiring listed companies and their subsidiaries to provide a detailed report on the transactions carried out with these entities at the approval of the annual financial statements and the half-yearly financial report. And on the significance of the independent directors' opinion to support the justification of the transaction see L. Marchegiani, *La motivazione delle deliberazioni consiliari nelle società per azioni* (Milano: Giuffré, 2018), 85-86.

[137] Generally, among the most recent contributions, see N. Abriani, 'Assetti proprietari' n 56 above, 200; M. Libertini, 'Ancora in tema di contratto, impresa, società. Un commento a Francesco Denozza, in difesa dello 'istituzionalismo debole'' *Giurisprudenza commerciale*, I, 691 (2014), with regard to the general principle that requires an obligation to state adequate reasons – and consequently a judicial review of legality – whenever there is an internal conflict of interests, or when conflicting proposals have been submitted for approval of the decision-making body, without affirming a general obligation to state reasons such as the obligation that exists for management acts, fn 56; G. Guizzi, *Gestione dell'impresa e interferenze di interessi. Trasparenza, ponderazione e imparzialità nell'amministrazione delle s.p.a.* (Milano: Giuffrè, 2014), 26-28; M. Stella Richter Jr, 'L'inoppugnabilità delle decisioni degli organi sociali', in G. Conte et al eds, *Principi, regole, interpretazione. Contratti e obbligazioni, famiglia e successioni: Scritti in onore di Giovanni Furgiuele* (Bologna: Universitas studiorum, 2017), I, 537, text and fn 42; A.D. Scano, n 130 above, 162-164; L. Marchegiani, n 136 above, 83-86.

[138] L. Marchegiani, n 136 above, 127, who highlight that the hendiadys 'convenience and substantial fairness' which occurs in the justification of related-party transactions (see Arts 7-8 of *delibera Consob* (above fn 135) must be understood 'in the sense of convergence of the two parameters of judgment in a order of unitary evaluation and comparison of the conditions of transaction closing with the standard of the market, in a judgment which basically coincides with the former, with the conditions that would have been applied to an unrelated party'.

[139] For the text of Art 2391-*bis* see n 128 above.

[140] On the motivation as a crucial factor of the control on the fair exercise of the power see in particular N. Abriani, 'Assetti proprietari' n 57 above, 200.

transaction carried out with the self-interested state-appointed directors, pursuant to Art 2391, para 1, may be convenient to the entity.[141] We also cannot exclude the fact that the transaction carried out by having the public body-related party as a counterpart may be beneficial, or may bring 'offsetting benefits' because they do not necessarily have to be current but they might also be future benefits.[142]

Since the transaction between the company and the state shareholder as a related party is not univocally attributable neither to an advantage nor to a disadvantage, the problem then shifts to the burden of stating reasons for the transaction.[143]

1. 'Related Directors', 'Interested Directors' and 'Group Directors'

It is very common that directors involved in related-party transactions and contracts pursuant to Art 2391-*bis* of the civil code are also directors holding significant interests pursuant to Art 2391 of the aforesaid code.[144] Indeed, this possibility may be defined as 'endemic', even though not really 'structural'.[145] Therefore, it may happen that, in a transaction with related parties, both the group's interest and the interest of one or more directors may be involved. In that case, there will be a 'full aggregation,' meaning that a related-party transaction involves the director's interest along with the 'reasons and interest of the group'. In this case Arts 2391-*bis*, 2391 and 2497 of the Civil Code shall apply.[146]

However, this does not necessarily always happen.[147] First, because the regulation on related-party transactions does not consider any significant interest

[141] Ar 2391, para 2, of the Civil Code establishes that 'in the cases provided for in the previous paragraph, the resolution of the board of directors must properly state the reasons and the convenience of the transaction for the company'.

[142] Moreover, even with regard to the offsetting benefits resulting from the exercise of a management and coordination activities, it is allowable that the advantage is planned, and therefore future, even if linked to a commitment 'that, on the basis of an *ex ante* assessment, is reasonably reliable': E. Marchisio, n 101 above, 144.

[143] On the topic of the non-binary relationship between the company's interests and the directors' decision at a given point, and on the fact that the complexity of business decisions makes uncertain the outcome of a judicial review of such transactions, see C. Angelici, 'Profili dell'impresa nel diritto delle società' *Rivista delle società*, 243 (2015).

[144] On the wide overlap between the regulation of directors' interests, pursuant to Art 2391, and the regulation on related-party transactions, according to Art 2391-*bis*, in particular on the fact that usually, although not necessarily, the individual interest of one or more directors or the interest on of third parties are included in contracts between related parties, see M. Ventoruzzo, n 136 above, 540-542; A. Pomelli, 'Commento all'Art 2391 *bis*', in A. Maffei Alberti ed, *Il nuovo diritto delle società* (Padova: CEDAM, 2011), I 786; G. Minervini, 'Gli interessi degli amministratori di s.p.a.', in P. Abbadessa and G. Portale eds, n 55 above, 601.

[145] As highlighted by A. Pomelli, n 144 above, 786.

[146] P. Montalenti, 'Operazioni con parti correlate: questioni sistematiche e problemi operativi' *Rivista di diritto commerciale*, I, 68 (2015).

[147] For example, the transaction between the company and one of its subsidiaries is a transaction with a 'related party' but not necessarily a specific interest of a single director and the group's interest must be involved (and not necessarily the decision is influenced by the unitary management), as highlighted by P. Montalenti, n 146 above, 68.

according to Art 2391, para 1, but only the director's interest regarding transactions creates a correlation between the director and the related party. This confirms the opinion that Art 2391-*bis* is not limited to 'overstating the situation' with respect to Art 2391,[148] but it aims to regulate a more complex case,[149] which therefore not coincides with that.

Secondly, it is important to clarify that this pattern of relationships does not necessarily fit into a corporate group structure because the shareholding of the state or other public body does not always belong to such a structure in the public sector. Moreover, the state shareholder does not always exercise a power of management and coordination. Accordingly, 'Management' and 'correlation, as described above', are therefore two distinct phenomena.[150]

2. The State-Appointed Director, the Company's Interests and Corporate Opportunities

The analysis described above shows that Art 2380-*bis* also binds state-appointed directors to pursue the lucrative common interest of the entity. Art 2391 defines the perimeter of the obligation of transparency of directors' interests and shows that it comprises financial and non-financial interests, including relational interests, interests in conflict with the company and non-conflictual interests.

It must be added that Art 2391-*bis*, para 1,[151] prohibits both the state-majority shareholder and state-appointed director from using the shareholding in order to make the state achieve extra-social benefits of financial or non-financial nature.

The special power of appointment (now incorporated in financial instruments that include administrative rights or in a particular class of shares) and, eventually, the power of removal (which is not conferred by the law but may be conferred with the articles of association, as mentioned above) are also significant in this perspective,[152] since that their presence might be for the company a source of

[148] As stated by G. Minervini, n 144 above, 601.

[149] Highlighted by ibid 601.

[150] On reciprocal independence among 'director's interests', 'group interests' and 'related-party transactions', see P. Montalenti, n 146 above, 66-68; on the fact that neither the regulation concerning the interests of directors, pursuant to Art 2391, nor the regulation of the management and coordination activities of companies, according to Art 2497 of the Civil Code fully regulate the abuses resulting from related-party transactions, see N. Michieli, 'Gli amministratori indipendenti nel comitato parti correlate' *Giurisprudenza commerciale*, I, 1034-1035 (2014); Id, *La gestione del conflitto d'interessi nelle operazioni con parti correlate* (Milano: Giuffré, 2016), 57-59.

[151] Once again, we highlight the text of Art 2391-*bis*, para 1 (see also n 128 above): 'the board of directors of companies that resort to the risk capital market, according to the general principles stated by Consob, adopt rules that ensure the transparency and substantial and procedural fairness of transactions with related parties and let them be known in the management report. To this end, they may be assisted by independent experts, based on the nature, value or characteristics of the transaction'.

[152] A. Musso, *La rilevanza esterna del socio nelle società di capitali* (Milano: Giuffré, 1996),

remuneration opportunities not consistent with its lucrative purpose.[153]

The principle of fairness in corporate management (which is not mentioned but implicit in Art 2391, para 1,[154] and which is explicitly stated in Art 2391-*bis*, para 1) actually wishes to prevent the situation where a certain type of familiarity, and therefore a stable relationship between shareholder and manager, may create, not only an occasional, but also a regular conflict of interest. This means that this regular conflict of interest may affect not just a single act but also the whole activity of the firm.[155]

Moreover, the increasing heterogeneity in the composition of the board,[156] the public interest in general, and the board member's membership public administration are factors that help to diversify the state-appointed director from other directors and to complete his professional expertise (which must be intended as a *mix* of specific skills and experiences).[157] The public interest in general, however, is a factor hardly considered on its own regardless of additional factors.[158] Furthermore, the public interest is also included in the assessment of the independence requirement, even if it does not necessarily compromise the director's independence.[159] Therefore, the state-appointed director, both when he has a conflict of interest and when he is self-interested pursuant to Art 2391, para 1, is liable, in accordance with Art 2391, para 4, for the damage that the company may have suffered as a result of his acts and omissions.[160]

280, where it is highlighted that 'specific clauses of bylaws or the direct management policy of the state-appointed directors (...) may perhaps be suitable to balance these needs'. The author writes with reference to the regulation preceding the company law reform but his remarks are still valid; F. Barachini, 'L'appropriazione delle *corporate opportunities*', in P. Abbadessa and G. Portale eds, n 55 above, 617.

[153] For hints on this topic and its connection with special rights of appointment see A. Musso, *La rilevanza* n 52 above, 279-280.

[154] On the principle of fairness relating to the corporate management understood as a legal obligation and not only as a general clause see M. Cossu, *Società 'aperte'* n 76 above, 297-298.

[155] ibid 154. This explains why the regulation on the transparency of transactions with related parties applies also to transactions carried out through subsidiaries, as provided for in Art 2391-*bis*, para 2.

[156] On this aspect see M. Erede and F. Ghezzi, 'Regolazione pubblica e autonomia privata nella composizione del consiglio di amministrazione di società quotate: un'indagine empirica' *Rivista delle società*, 933, text and fn 18 (2016).

[157] ibid 946, fn 45.

[158] Thus, an example of such a provision is Art 15, para 3, of bylaws of ' 'Terna spa', which provides that those who have not gained an overall experience of at least three years in managerial activities at public institutions or administrations engaged in credit, financial or insurance sector, or in sectors strictly related to the company's activities may not be appointed as directors and, if appointed, must resign' (the alternative requirements are: a) having carried out management or control activities in public limited companies with a share capital of no less than two million euros; b) having performed professional or university teaching activities in legal, economic, financial and technical-scientific subjects closely related to the company's activities).

[159] It cannot be denied that there is a specific relationship between independence and 'origin' of the director, although a director with a public background may also be independent: see M. Erede and F. Ghezzi, n 156 above, 937.

[160] Art 2391, para 4, provides that 'the director is liable for damage suffered by the company

In 'open' companies pursuant to Art 2391, para 5,[161] the state-appointed directors are *also* liable for damage suffered by the company because of the use of information, news or business opportunities learned by them in the performance of his appointment for the benefit of the public entity. Moreover, it should be noted that, in all these cases the abuse of corporate opportunities do not involve self-dealing transactions but may involve misappropriation, or exploitation.[162]

In the specific context of 'open' state-owned companies, the misappropriation may acquire two main forms: abuse of privileged information, (in terms of their *preferential disclosure* in favor of the state or public body[163] or more likely in favor of his political representatives),[164] or the use of privileged information in order to obtain favors from the state or public body.[165] An example would be the director's exploitation ort access into a certain market or the participation in a public call for tenders.[166] These assumptions, however, are strongly contiguous, both because they involve the misleading use of information[167] and because they may involve an unfair competition offense.[168]

In the same way as Art 2391, para 1, involves the wider and more varied idea of 'interest', (which does not necessarily coincide with a financial benefit) Art 2391, para 5 (as extensively as para 1) provides for the use of 'information', 'news' or 'business opportunities' for personal or third-party advantage, provided that they are company-related. The only difference is that advantages must have been achieved in the director's performance of his duties.

Only a few companies have, in their rules for related-party transactions explicitly considered operations which are concluded as a result of a public

as a result of his/her act or omission'.

[161] Art 2391, para 5, provides that 'the director is also liable for the damage suffered by the company as a result of the use of information, news or business opportunities, learned in the exercise of his assignment for his personal or third-party benefit'.

[162] As highlighted by F. Barachini, 'L'appropriazione' n 152 above, 615.

[163] C. Macrì, 'L'amministratore 'interessato'', in G. Scognamiglio ed, *Profili e problemi dell'amministrazione nella riforma delle società* (Milano: Giuffré, 2003), 145, who notes that the damage resulting from the insider trading, provided for in Art 2391, para 5, should have been included in the regulation of directors' liability towards the company, since it governs the overall damages (and not also the case of liability for losses resulting from the transaction in which the director had an interest).

[164] As noted by A. Zoppini, 'La società (a partecipazione) pubblica: verso una *public corporate governance*?' *Rivista di diritto commerciale*, 32 (2018).

[165] In the former case, the conduct performs a breach of the duty of fidelity, in the latter case, it carries out the 'exploitation of the position held to achieve personal benefits or interests': see F. Barachini, 'L'appropriazione' n 152 above, 615.

[166] The case is described by F. Barachini, 'L'appropriazione' n 152 above, 615, 628. The participation in public calls for tenders belongs to the second group, as reported by the author.

[167] V. Meli, 'La disciplina degli interessi degli amministratori di s.p.a. tra nuovo sistema e vecchi problemi' *Analisi giuridica dell'economia*, 167 (2003); C. Macrì, n 163 above, 145; M. Ventoruzzo, n 136 above, 497; F. Barachini, 'L'appropriazione' n 152 above, 615.

[168] F. Barachini, 'L'appropriazione' n 152 above, 628, fn 44.

tendering procedure.[169]

V. Conclusions

Art 2380-*bis* also requires state-appointed directors to solely pursue the lucrative company's interests – that is, only interests common to all shareholders. Art 2391 sets out the parameters of the transparency obligation of directors and includes equity and non-equity interests, along with 'relational' interests, as well as a privileged relationship with the appointing public entity. Art 2391, para 2, requires the company to state the reasons for its entering transactions involving the interest of a state-appointed director and must prove the current or future 'convenience', ie the 'offsetting benefits' to the company Art 2391-*bis*, para 1, prohibits the director appointed by the state shareholder to use his shareholding to make the latter obtain extra-social benefits, both of an economic and non-economic nature. Art 2391, para 5, requires the administrator to compensate the damage caused to the company through the preferential use of information, news or business opportunities in his own interest or in the interest of a third party (therefore particularly in favor of the public administration to which the shareholder belongs).

With regard to this latter feature, it is clear that damages can be excluded if the company demonstrates the current or future 'offsetting benefits' resulting from this use (as the transaction with the self-interested director pursuant to Art 2391, para 1).

It is also clear that, in all cases, the director may negotiate with the company the possibility of using such information and business opportunities (even when their use can harm the company).[170]

The recourse to all these cautions complies primarily with the general principles of transparency, care in the fulfilment of a professional assignment[171] and fairness.[172] It also complies with the duty to get ready for an adequate

[169] An example of such a provision is the regulations for related-party transactions of 'Atlantia spa', which considers the operations which are concluded as a result of a public tendering procedure among the 'ordinary' related-party transactions, updated on 22 November 2017.

[170] G. Romano, 'La funzione della disclosure nella disciplina degli interessi degli amministratori di s.p.a.' (15-17), paper ODC 2012, available at www.academia.edu, notes that the director who owns significant information on business opportunities, which belongs to the company, and is interested in exploiting it personally or on behalf of third parties, must fully disclose it pursuant to Art 2391, para 1, as well as declare his intentions in this regard. If the director fulfils these fiduciary duties, then, he is allowed to use the information, because the law has not entirely prohibited the exploitation of business opportunities (not even when they might harm the company) but rather it has provided for a general negotiation system of their allocation between the director and the company.

[171] In general, on the relationship between the evaluation of the director's care and the adoption of inconsistent or unjustified behaviours see F. Vassalli, 'L'Art 2392 novellato e la valutazione della diligenza degli amministratori', in G. Scognamiglio ed, n 163 above, 124-126.

[172] See F. Maimeri, 'Controlli interni delle banche tra regolamentazione di vigilanza e modelli

organizational structure,[173] which is a duty to which executive directors (according to Art 2381, para 5),[174] non-executive directors, and the board as a whole (pursuant to Art 2381, para 3, second part)[175] are subject. These cautions are also part of the duty to fulfil the managerial mandate with the professional care required by the nature of the assignment, including also the duty to arrange (or rearrange) their organizational structure to prevent the eventuality a certain kind of 'familiar' relationship between a state-shareholder and a state-appointed director from creating systemic conflict of interests or misappropriation behaviors.

In terms of enforcement, the law does not establish specific penalties, either for the breach of the duty of disclosure and abstention, carried out by the director holding interests, (according to Art 2391, para 1)[176] or for related-party transactions, (pursuant to Art 2391-*bis*, para 1) or for the abuse of corporate opportunities, (pursuant to Art 2391, para 5) which are all obligations supported only by the general rules relating to directors' liability.[177]

Nevertheless, three conclusions flow from this analysis. First, the adherence to any agreement that puts the director at the mercy of, and under the permanent subjection of an external power, is unlawful and therefore justify a removal for just cause, (pursuant to Art 2383, para 3, of the civil code) as that compromises

di organizzazione aziendale' *Rivista di diritto commerciale*, I, 609 (2002); C. Amatucci, 'Adeguatezza degli assetti, responsabilità degli amministratori e *business judgement rule*' *Giurisprudenza commerciale*, I, 643-644, (2016).

[173] M. Irrera, *Assetti organizzativi adeguati e governo delle società di capitali* (Milano: Giuffré, 2005), 76-79; V. Buonocore, 'Adeguatezza, precauzione, gestione, responsabilità: chiose sull'Art 2381, commi terzo e quinto, del codice civile' *Giurisprudenza commerciale*, I, 5 (2006); M. Mozzarelli, *'Appunti in tema di rischio organizzativo e procedimentalizzazione dell'attività imprenditoriale'*, in P. Abbadessa et al eds, *Amministrazione e controllo* n 55 above, 733-735; C. Amatucci, n 172 above, 645-647. With specific reference to the financial services, see M. Rabitti, n 95 above, 38-40; F. Maimeri, n 172 above, 609-611; G. Scognamiglio, 'Recenti tendenze in tema di assetti organizzativi degli intermediari finanziari (e non solo)' *Banca borsa titoli di credito*, I, 146-148 (2010), who points out that this is a principle of enterprise organisation, and therefore it is common to all enterprises even if provided for by Arts 2381, para 3, and 2403 of the Civil Code exclusively with reference to public limited companies; A. Minto, 'Assetti organizzativi adeguati e governo del rischio nell'impresa bancaria' *Giurisprudenza commerciale*, I, 1170-1172 (2014).

[174] Pursuant to Art 2381, para 5, 'the delegated bodies ensure that the organisational, administrative and accounting structure is in line with the nature and size of the company and report to the board of directors and the board of statutory auditors, at the frequency established by the bylaws and, in any event, at least every six months, the general trend of management and its expected future development, as well as the most significant transactions carried out by the company and its subsidiaries that are particularly significant in terms of size or other characteristics'.

[175] Pursuant to Art 2381, para 3, second sentence, 'on the basis of the information received, the board of directors assesses the adequacy of the organisational, administrative and accounting structure of the company; when drafted, it examines the strategic, industrial and financial plans of the company; and, on the basis of reports from delegated bodies, evaluates the general management trend of the company'.

[176] See C. Macrì, n 163 above, 139.

[177] It has already been mentioned that, according to Art 2391, para 4, the director is liable for damage suffered by the company as a result of his act or omission.

the independence of the director's role.[178] Secondly, in spite of the fact that such an agreement is a discretionary act, judicial authorities might be entitled to review the acceptance of this agreement.[179]

Lastly the issue of the right to appoint directors by the state and other public bodies, and in particular their role as suppliers and, at the same time, users of corporate opportunities, requires a more in-depth consideration. The current regulation on related-party transactions is not able to interdict either the conflicts of interests caused by the presence of the state or other public entity as shareholder and the state-appointed directors or the singular features of transactions with related parties in state-controlled and municipally-controlled companies.[180]

[178] F. Bordiga, n 126 above, 680. And among the case-laws regarding unlawfulness of the management shareholders' agreement see Corte di Cassazione 24 maggio 2012 no 8221, *Società*, 245-247 (2013), with a note by A.M. Perrino, 'Patto parasociale di gestione e giusta causa di revoca', also G. Mollo, 'Revoca degli amministratori a seguito della stipulazione di un 'patto di gestione" *Il nuovo diritto delle società,* 19, 222 (2013).

[179] On the increase of corporate discretionary powers in the Italian company law reform and on the fact that this also leads to an extension of the judicial review, M. Libertini, n 137 above, 692; and on the topic of the increase of judicial review on board of directors' resolutions, see F. Di Girolamo, 'Regole di validità e regole di condotta: la valorizzazione dei principi di buona fede e correttezza' *Giurisprudenza commericale*, I, 569-570, (2004). Expressly on the application of the business judgement rule to transactions with related parties see also P. Montalenti, n 146 above, 70-72, for a partly different reading.

[180] For a few remarks in this respect see A. Zoppini, n 164 above, 32.

Corporate and Financial Markets Law

Foreign Capital in Chinese Telecommunication Companies: From the Variable Interest Entity Model to the Draft of the New Chinese Foreign Investment Law

Giulio Santoni*

Abstract

The VIE (Variable Interest Entity) model allows offshore companies that control Chinese companies operating in restricted business areas, such as Internet operations, to be listed abroad. In fact, the Chinese legislator has excluded foreign investors from certain companies. Unlike legal systems, the criterion to determine the existence of foreign investments is the acquisition of shares. Therefore, in order to avoid restrictions imposed by Chinese laws applicable to foreign investments, offshore holding companies control the relevant Chinese companies through a bundle of contracts, rather than by acquiring their shares. This scheme has allowed Chinese companies operating in strategic industries to attract foreign investment, thus circumventing the strict provisions of the relevant Chinese Laws on Foreign Investments. At the same time, the VIE scheme has been strongly criticized for both the operational and regulatory risks that it poses. In this essay, I will analyze the regulatory and economic reasons that led Chinese companies to rely on such an opaque structure, through a brief comparison between the EU and Chinese legislation on foreign investments, in paragraph I. In paragraph II, we will discuss in depth the structure of the VIE model and provide some case studies. Finally, in paragraph III and in the conclusions, we will provide some insight into the Draft of a new Foreign Investment Law in China, a project that will finally unite and harmonize the major sets of rules on foreign investments in a sole piece of legislation. In these paragraphs I will also present some ideas on the effect that the adoption of this law might have on existing investments that adopted the VIE scheme.

I. Genesis and Use of Variable Entities

1. An Outline of the Legal Framework of Chinese Restrictions on Foreign Investments and Its Role in the Rise of VIE

The necessity for Chinese companies to resort to Variable Interest Entities (or VIEs) arose from the exclusion of foreign investors from certain sensitive business areas, regulated by Chinese law ('per Chinese law').[1] Before examining the economic reasons that have led to the diffusion of VIE's, as well as the

* LLM in Comparative Law, China University of Political Science and Law.

[1] K. Rosier, 'The Risks of China's Internet Companies on U.S. Stock Exchanges' 3 *U.S.- China Economic and Security Review Commission Staff Report*, available at https://tinyurl.com/ydavrzak (last visited 27 December 2018).

typical structure of this investment tool and the problems that can arise with the evolution of Chinese legislation on this matter, an outline of the legal framework of restrictions on foreign investments is provided.

A specific feature of Chinese company law is that it distinguishes between (ordinary) companies, foreign companies and FIE (Foreign invested enterprises). The identifying traits of what Chinese Company Law refers to as 'companies' are their establishment and registration within the territory of China, by Chinese citizens or by legal entities that were previously established by Chinese citizens, or by the Chinese government and its agencies. Foreign companies, on the other hand, are those companies incorporated outside the territory of China, that are subject to foreign company laws.[2] These foreign legal persons are allowed to engage in production and operate businesses through the establishment of branches. Branches, according to Art 195 of the Chinese Company law, are not legal persons. The foreign company bears civil liability for the branches' activities. Furthermore, and most importantly, the establishment of branches requires approval by competent national authorities.

Foreign citizens and companies can also engage in economic activities in China through the establishment of a Foreign Invested Company. These companies are incorporated in China. However, aside from being subject to provisions contained in Chinese Company Law, they also obey the rules of the Law on Sino-Foreign Equity Joint Ventures,[3] the Law on Sino-Foreign Co-operative Joint Ventures,[4] and the Wholly Foreign Owned Enterprise Law,[5] as

[2] Art 191 of the 2013 Company Law of the People's Republic of China (adopted at the fifth Session of the Standing Committee of the eighth National People's Congress on 29 December 1993. Revised for the first time on 25 December 1999 in accordance with the Decision of the thirteenth Session of the Standing Committee of the ninth People's Congress on Amending the Company Law of the People's Republic of China. Revised for the second time on 28 August 2004 in accordance with the Decision of the eleventh Session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on Amending the Company Law of the People's Republic of China. Revised for the third time at the eighteenth Session of the tenth National People's Congress of the People's Republic of China on 27 October 2005).

[3] The Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, adopted on 1 July 1979 at the second Session of the fifth National People's Congress. Amended on 4 April 1990 at the third Session of the seventh National People's Congress, in accordance with the Decision to Revise the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures. Amended on 15 March 2001 at the fourth Session of the ninth National People's Congress, in accordance with the Decision to Revise the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures).

[4] Law of the People's Republic of China on Sino-Foreign Co-operative Enterprises, adopted on the 13 April 1988 at the first Session of the seventh National People's Congress Revised 31 October 2000 at the eighteenth Meeting of the Standing Committee of the National People's Congress by the Decision on the Revision of the 'Law of the People's Republic of China on Sino-Foreign Co-operative Enterprises'.

[5] Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment, adopted on the 12 April 1986 at the fourth Session of the sixth National People's Congress. Revised 31 October 2000 at the eighteenth Meeting of the Standing Committee of the National

well as other administrative regulations. Within the framework of administrative regulations disciplining the matter of foreign investment vehicles, the Catalogue of Foreign Investments issued by MOFCOM (Ministry of Finance and Commerce), has a central role;[6] it divides foreign invested economic activities in China into encouraged activities, restricted activities, and prohibited activities.

The establishment of a foreign company or joint venture is subject to the approval of the competent Chinese authorities (MOFCOM).[7] The determining factor in deciding when a company is subject to special laws is the presence of foreign capital. For instance, the Law on Enterprises with Sole Foreign Investment provides, in Art 2, that

> 'Enterprises with sole foreign investment as referred to in this Law are those enterprises established within the Chinese territory, in accordance with the relevant Chinese laws, with their capital provided in full by a foreign investor'.

While the Law on Sino-Foreign Equity Joint Ventures (EJVs) does not provide a corresponding definition, the position of the foreign investor within the EJV is defined by its capital investment, as well. Art 3 of the said Law establishes that an EJV is characterized by the presence of a twenty five percent quota of foreign invested capital.[8]

The aforementioned laws and regulations directly tackle the issue of the establishment of companies in China by foreign investors. Mergers and acquisitions are subject to the 2006 Provisions on Mergers and Acquisitions (M&A Provisions).[9] With regard to the discipline of VIEs, the M&A Provisions provide that

> 'where a domestic company, enterprise or natural person intends to take over its domestic affiliated company in the name of a company, which

People's Congress by the Decision on Revision of the 'Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment'.

[6] The Catalogue Guiding Foreign Investment in Industries promulgated by the Sate Development and Reform Commission and Ministry of Commerce on 15 March 2015 is available at https://tinyurl.com/j87djle (last visited 27 December 2018).

[7] For instance, the Wholly Foreign Owned Enterprise Law so provides under Arts 6 and 7 thereof.

[8] We did not take into account Co-operative Joint Ventures (CJV) in this explanation, as the presence of foreign investment in these investment vehicles is subtler, considering that they are characterized by the contractual nature of relations between ventures. In any case, CJV's are extremely uncommon.

[9] The Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2006 M&A Rules), which became effective in September 2006, was promulgated jointly by MOFCOM, the State-owned Assets Supervision Administrative Commission (SASAC), the State Administration of Taxation (SAT), the State Administration of Industry and Commerce (SAIC), the China Securities Regulatory Commission (CSRC) and the State Administration of Foreign Exchange (SAFE).

it lawfully established or controls, it shall be subject to the examination and approval of the MOFCOM'.[10]

A brief comparison between the Chinese regulations of Foreign Investment and their counterpart in the EU, might allow us to better understand the scope of limitations imposed by the Chinese legislator. In fact, the impetus to limit or exclude foreign influence from certain industries have also led the European legislator towards the promulgation of a variety of protection mechanisms, aimed at excluding certain foreign businesses from entering the EU market or acquiring EU companies.

A necessary foreword is that European scholars have observed how the European system aims to protect relevant local industries. Thus, Foreign Investment regulations in the EU are not only aimed at excluding the foreign acquisition of strategically relevant companies[11]. The latter are usually considered to be industries that are instrumental in providing the Member State with essential services. These are, for instance, defence or energy supplies, which cannot be taken over by foreign entities. On the other hand, protection of local industries from foreign influence is not determined by the sector in which the industry is operating but is rooted in its importance to the national economy. Foreign investments may transplant decision-making processes outside of the Member State, which implies that decisions that will impact the environment, employment and other fundamental issues will not undergo the scrutiny of national authorities and public opinion.[12,13] Furthermore, specific limitations are applied in case the investor is a non-EU sovereign fund.[14]

The sketch of the system provided in the previous paragraph, highlights important differences with the Chinese system. Firstly, the EU legislator has never issued a document such as the Catalogue on Foreign Investments. Foreign Investments, and in particular the establishment of new companies, are permitted and not subject to the approval of any administrative authority. Any limitations imposed are specifically aimed at avoiding a loss of control over pivotal decisions but in general do not prevent any foreign presence from being admitted into entire sectors of the economy. Therefore, even in sensitive industries, the presence of foreign investors is not precluded, as long as the investment is not designed to obtain control over the companies' decision-making process.

Entry barriers still exist in some Member States, but are not targeted at all

[10] Art 11 of the 2006 Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.

[11] A. Guaccero et al, 'Investimenti stranieri e fondi sovrani: forme di controllo nella prospettiva comparata USA-Europa' *Rivista delle società*, 1359-1394 (2008).

[12] ibid 1376.

[13] It is important to remind that in case the acquiring company is not national but EU, different rules will apply, in order to implement the principles of the EU common market.

[14] See for reference Communication from the EU Commission COM (2008) 115 of 27 February 2008, on 'A Common European Approach to Sovereign Wealth Funds'.

foreign investments. On the contrary, such barriers may only apply to those investments that result in a change of control in an existing, important enterprise. For instance, as provided for by the 1975 Industry Act, the UK has maintained a broad power of intervention, in order to restrict foreign investments that may result in the acquisition of decision-making powers within an enterprise that is of substantial importance to the United Kingdom. This mechanism can, however, only be activated by the British Parliament in Westminster. Thus it cannot compare with the force of the barriers arranged by the Chinese legislator.

Aside from these direct investment limitations, the EU provision, contained in Directive 2004/25/EC, also provides for indirect restrictions, most notably connected to the discipline of hostile takeovers. In Italy, the directive has been implemented through the provision of limited exceptions to the rules of board neutrality, a system that has indeed been criticized because it creates a potential commingling of entrepreneurial and political issues.[15]

What is really interesting here, however, is to highlight how the EU system as a whole does not restrict the flow of foreign capital per se, but only as it is a means of acquiring control of the tools of corporate governance within specific enterprises that are of particular interest to the national economy. In the Chinese system, on the other hand, the legislator has arranged tools that exclude the flow of foreign capital from entire sectors of the economy, and namely those that are defined as prohibited or restricted in the Catalogue of Foreign Investments, regardless of the fact that these investments will result in the displacement of the decision making processes in foreign countries. A further major difference is that the Chinese legislator has not adopted the concept of control in order to determine when a business is excluded from certain industries, relying on a more rigid mechanism of share quotas. The Catalogue of Foreign Investments, in fact, provides quotas of foreign held shares that cannot be exceeded, for each type of restricted industry.

The rigid criterion used to determine the application of the Catalogue of Foreign Investments incentivized the usage of forms of investment that would not require the acquisition of shares by the foreign company, while allowing foreign capital to flow into Chinese companies operating in restricted sectors. This led to the adoption of the VIE scheme, under which corporate governance tools are replaced by a bundle of contracts and, therefore, do not fall within the scope of application of the Catalogue. In fact, as will be discussed in more detail, Variable Interest Entities are complex corporate tools set up with the purpose of financing solely Chinese companies with foreign capital, without falling within the scope of application of the MOFCOM catalogue on foreign investments and the 2006 M&A Provisions.[16] It is worth mentioning that the compliance of the VIE model

[15] A. Guaccero et al, n 11 above, 1387.

[16] L. Guo, 'Chinese Style VIEs: Continuing to Sneak under Smog?' 572 *Cornell International Law Journal*, 570, 604 (2014).

with Chinese Law has been repeatedly questioned. Most of these criticisms rely on the provisions contained in Art 52, para 3, of the Chinese Law on Contracts, according to which a contract is invalid whenever the parties intend to conceal an illegal purpose under the guise of a legitimate transaction.[17] Consequently, the contracts that are conceived to enable control on VIE's by foreign investors are not enforceable in China.[18] Foreign investors are unable to influence the decision-making process of VIE's. On the other hand, foreign entities investing in China through legitimate means such as an EJV or a WOFE (Wholly Owned Foreign Enterprise, *infra*) have the right to choose some or all of the members of the Board of Directors and more in general to influence relevant decisions within the company.[19] The fact that some of the most important Chinese companies have adopted the VIE model is unsurprising and VIEs are now so common they could be considered as a standard corporate model. Nevertheless, the issuance of new sets of rules that the Chinese legislator has announced in 2015, has left foreign investors questioning the legal risk on their VIE investments.

2. Economic Factors Leading to the Proliferation of VIE's

Chinese companies, especially in sectors requiring investments that are not secured by heavy assets, as in the case of the Internet economy, have struggled to raise sufficient funds within the Chinese financial system. In fact, the Chinese financial system was, and still is, unable to meet the rising demand for credit to private economic operators.[20] On the one hand, Chinese banks are mostly State-owned, and focus their efforts on the financing of publicly owned enterprises or publicly sponsored investment projects.[21] Furthermore, these hard to access bank loans represent three fifths of the Chinese financial system.[22] Access to the market is burdensome and tends to favor well-established companies over innovative start-ups.

Some brief highlights on relevant laws might enable us to best assess this statement. Art 15 of the Chinese Securities Law provides that any public issuance of securities must be examined and approved by the CSRC (China Securities Regulatory Commission). Public issuance is defined as an issuance of securities towards non-specified recipients or to more than two hundred specified recipients. In order to obtain such approval, the company must have a net asset value that is higher than thirty million RMB (roughly three point five million USD). Moreover, Art 16 of the Securities Law requires the average distributable profits

[17] See, for instance, K. Rosier, n 1 above, 4.

[18] See the Alibaba case, below.

[19] Art 6 of the Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures.

[20] S. Sen, 'Finance in China after the WTO' 40(6) *Economic and Political Weekly*, 565-571 (2005).

[21] ibid

[22] D.J. Elliot and K. Yan, 'The Chinese Financial System: An Introduction and Overview' (July 2013), available at https://tinyurl.com/y9azvodm (last visited 27 December 2018).

of the previous three years to be sufficient to pay the one-year interest rate on corporate bonds. Furthermore, gathering financial provisions outside of the official markets of Shanghai and Shenzhen can easily result in criminal offenses. According to the Supreme People's Court Interpretation no 18/2010, public offerings made without the approval of the CSRC fall within the scope of Art 176 of the Criminal Law which is triggered when a person 'Illegally tak(es) savings from the public'.

The Chinese market has been partly able to overcome the obstacles represented by a State-owned banking system and a closed financial market. Since the early 2000s, private companies have represented the true engine of Chinese growth and accounted for sixty percent of the Chinese GDP (Gross Domestic Product) and seventy percent of employment.[23] Various forms of credit access usually referred to as shadow banking, have largely fueled this growth.[24] In more recent years, online platforms and online banks have also offered more credit options for start-ups and enterprises operating in high-risk sectors.[25] Nevertheless, due to the fact that China's shadow banking system only began to boom in recent years, its scale is still relatively small, when compared to informal finance in economies such as the USA, the EU or the United Kingdom.[26]

While figures on the participation of shadow banking in China's value-added telecom services companies are unavailable, it is noteworthy how this specific type of company offers highly rewarding, but also high-risk, investment opportunities, while displaying needs for capital funds that informal markets, such as the shadow banking system, might struggle to meet.

Value-added telecom services are restricted, meaning that foreign investors can only own a certain percentage of the company shares.[27] At the same time, relevant Chinese laws require private companies to obtain a special permission in order to be listed on foreign capital markets. Nevertheless, many of the largest Chinese network operators have opted to raise capital abroad, often in the US financial markets. In fact, Chinese network operators listed in the USA are so numerous and so important, both in size and impact on the development of the Chinese economy, that one could say that Chinese Internet companies systemically rely on the US capital market.[28] The following graph reinforces the validity of

[23] X. Feng et al, *The Ecology of Chinese Private Enterprises* (Singapore: World Scientific Publishing, 2015), 71, 73.

[24] D.J. Elliott, 'Shadow banking in China: a primer' 1 *Economic Studies at Brookings*, available at https://tinyurl.com/jopfwf5 (last visited 27 December 2018).

[25] W. Ma, *China's Mobile Economy, Opportunity in the Largest and Fastest Information Consumption Boom* (Southern Gate, Chichester: John Wiley & Sons, 2017), 250.

[26] D.J. Elliot et al, n 22 above, 16.

[27] On the progressive liberalization of telecom services in China see: W. Shen, 'Deconstructing the Myth of Alipay Drama – Repoliticizing Foreign Investment in the Telecommunications Sector in China' 36(10-11) *Telecommunication Policy*, 929–942 (2012).

[28] T.Y. Man, 'Policy above Law: VIE and Foreign Investment Regulation in China' 3 *Peking University Transnational Law Review*, 215, 217 (2015).

this statement:[29]

Table 1[30]

Company	Stock Symbol	Main service	Capitalization (Billion USD)	Stock exchange
Baidu	BIDU	Internet search	$58.27	NASDAQ
JD.com	JD	E-commerce	$33.3	NASDAQ
Qihoo 360	QIHU	Internet security and software	$23.82	NYSE
NetEase	NTES	Web portal	$9.24	NASDAQ
Ctrip.com	CTRIP	Travel website	$7.48	NASDAQ
Weibo	WB	Microblog	$6.04	NASDAQ
YY	YY	Social network	$3.79	NASDAQ
Youku Tudou	YOKU	Online video	$3.77	NYSE
Sohu.com	SOHU	Internet advertising and search	$2.26	NASDAQ
Changyou.com	CYOU	Online games	$1.41	NASDAQ
Renren	RENN	Social network	$1.22	NYSE

The first VIE structures were devised in the early 2000s, when Sina and Sohu, two Chinese companies, were listed on the Nasdaq and Price Waterhouse audited both.[31] As soon as 2012, over fifty percent of the Chinese companies listed in US markets were in fact VIE structures.[32] However, it was only with the record-breaking IPO launched by e-commerce giant Alibaba in 2014 that the issue of legal risk surrounding this investment vehicle became a widely discussed topic in mainstream and specialist publications. A further aspect that makes Alibaba's IPO (Initial Public Offering) particularly interesting is that, unlike other Chinese Internet companies, Alibaba actually matched the requirements to be listed on a Chinese stock exchange, and seemingly opted to go abroad due to the better opportunities that international stock markets can offer, compared to the relatively underdeveloped Chinese market. Furthermore, as will be discussed further, the Alibaba Group is also characterized by an unusual governance structure.

[29] It should also be noted that VIEs are one of many vehicles of foreign direct investment in China, see D. Yang, H. Dingquan and Y. Jiahui, 'Cross-border Merger and Acquisition of Chinese Domestic Listed Companies' 11(2) *Frontiers Law China*, 392-395 (2016).

[30] P. Gillis, 'Variable Interest Entities in China' 1 *Forensic Asia, Guest Series*, 18 September 2012, available at https://tinyurl.com/yaudcg4q (last visited 27 December 2018).

[31] ibid 3.

[32] ibid 3.

II. An In-Depth Analysis of the Legal Structure of VIEs

1. Definition of VIEs

As mentioned in the previous paragraph, the first examples of Chinese VIE were Sina and Sohu. Both companies were network operators and were, thus, engaged in restricted activities. In order to be listed abroad, without directly violating restrictions imposed by Chinese law, business operations were separated among several companies. Non-restricted business operations of Sina and Sohu were incorporated within a WOFE (Wholly Foreign Owned Enterprise) owned by an offshore company (ListCo). On the other hand, restricted business operations were linked to a Chinese company, owned by Chinese natural persons (the Operating Company/Property Company, OpCo).[33] However, the Chinese company was *de facto* owned by the WOFE, as a series of contracts between the two companies mimicked property rights of the latter over the former.[34] Finally, the offshore company owning the WOFE was listed on NASDAQ.

Although such an arrangement struggles to comply with the accountability requirements set by the US Securities and Exchange Commission (SEC) at the time, PwC (PricewaterhouseCoopers) managed to attest that the network of contracts linking the Chinese company to the WOFE was, in practice, equivalent to control over the Chinese company's equities by the WOFE.[35]

While Sina and Sohu were successfully listed in the USA with this scheme, the collapse of energy giant Enron in 2001 led American authorities to enact stricter accountability standards for VIEs.[36] These provisions were implemented, in light of the Enron experience. Enron, a listed company, had hidden its losses and unprofitable business operations through Special Purpose Entities that were not included in the balance sheet. Since 2002, some minor changes in accountability standards were introduced. The main body of rules set out through FIN-46R, however, have remained mostly unchanged to date.[37]

[33] ibid 3.

[34] K. Johnson, 'Variable Interest Entities: Alibaba's Regulatory Work-Around to China's Foreign Investment Restrictions' 12(2) *Loyola University: Chicago International Law Review*, 249-266, 253 (2015).

[35] P. Gillis, n 30 above, 3.

[36] A. Reinstein et al, 'Consolidation of Variable Interest Entities: Applying the Provisions of FIN 46 (R)' (5) available at https://tinyurl.com/y8l3dekz (last visited 27 December 2018), the authors explain how Enron had set up an elaborate array of Special Purpose Entities (SPEs) to shift debt away from its books, while absorbing substantially all of the risk associated with that debt either through guarantees of the debt or the SPE's assets The stricter accountability was enacted in the form of FASB Interpretation no 46 on Consolidation of Variable Interest Entities - FIN - 46R.

[37] It should be mentioned that Financial Accounting Standards Board (FASB) have been, however, partially reviewed. The latest FASB updates, ASU 2015, 02 and ASU 2017, 02, respectively, impact the following areas of consolidation analysis, most of which apply to the VIE assessment: i. Limited partnerships and similar legal entities; ii. Entities other than limited partnerships and their equivalents; iii. Evaluating fees paid to a decision maker or a service provider as a variable interest; iv. The effect of fee arrangements on the primary beneficiary

The FIN-46R standards further extended pre-existing accountability rules by expanding the provisions of Accounting Research Bulletin (ARB) 51. ARB 51 provided that the 'usual condition for a controlling financial interest' was met upon 'ownership by the company (…) of over fifty percent of the outstanding voting shares of another company'.[38] In addition, FIN-46R recognizes that controlling financial interests may also exist, should a parent company be the primary beneficiary of a Variable Interest Entity. FIN 46-R defines VIEs as all entities subject to at least one of the conditions set forth in FIN 46-R. These conditions are:

a. the entity is unable to rely solely on its capital derived from equity investment at risk, in order to pursue its business activities, as it relies on additional financial support provided by third parties.

b. the holders of the equity investment as a group lack: (1) the direct or indirect ability to make decisions about an entity's activities through voting rights or other rights; (2) 'the obligation to absorb the expected losses of the entity, should they occur'; or (3) 'the right to receive the expected residual returns of the entity, should they occur'.[39]

After defining VIEs, FIN 46-R provides that any company listed on US securities market must consolidate its VIEs in its balance sheet, whenever the parent company has the power to direct activities, absorb losses of the entity, or has the right to receive returns or dividends from the entity.[40] The main purpose of the FIN 46-R standards was to prevent listed companies from using Special Purpose Vehicle/Entity (SPEs) to hide debt or poor performing assets, as Enron did.[41]

Chinese operators, on the other hand, had an interest in falling within the scope of FIN 46-R. Indeed, they needed to consolidate a restricted business operation within the balance of an offshore company that could be listed. In other words, an offshore company would establish a Chinese WOFE, which, as mentioned in the first paragraph, can be legitimately owned by a foreign company. Subsequently, the WOFE would set up a network of contracts with a Chinese company, thus acquiring the ability to make decisions, the obligation to absorb the expected losses, or the right to receive the expected residual profits. If these requirements were met, US regulators would deem the Chinese company to be a VIE controlled by the offshore company. Therefore, they would require the

determination; v. The effect of related parties on the primary beneficiary determination; vi. Certain investment funds. (Accounting Standards Update, ASU 2015, 02) and Non-profit entities (ASU 2015, 02).

[38] M.J. Chapman, 'China's Variable Interest Entities in Context: Past, Present and Future' 4 *University New South Wales Student Series No 16-05*, (22 January 2016), available at https://tinyurl.com/ycdj3vxj (last visited 27 December 2018).

[39] See FIN 46-R, 8.

[40] P. Gillis, n 30 above, 5. See also A. Reinstein et al, n 36 above, 6-7.

[41] J.L. Zhang, 'Economic Consequences of Recognizing Off-Balance Sheet Activities' 5 *AAA 2009 Financial Accounting and Reporting Section (FARS) Paper* (11 September 2008).

offshore company to consolidate the VIE within its balance sheet, notwithstanding that the Chinese company was not directly owned by the offshore company. The original scheme devised by Sina and Sohu is still intact. However, Chinese VIEs listed after the Enron scandal needed to implement a more complex network of contracts, compared to what Sina and Sohu had set up, in order to meet the requirements set out in FIN-46R.[42]

2. The Standard Framework of Contracts

The basic structure of VIEs was essentially similar to what was analyzed in the Sina and Sohu cases. Chinese restrictions on foreign businesses would be worked around by establishing a Chinese company (the OpCo), owned by Chinese nationals, through which it would exercise restricted economic activities. The OpCo is linked through a bundle of contracts to an offshore company (the ListCo), which would then be listed on a major international financial market, usually in the US. However, in addition to mimicking ownership through a bundle of contracts between a WOFE, which was established by the ListCo, and the OpCo, post FIN-46R VIEs developed a standard framework of contracts, which the American regulators treated as having the effect of depriving the Chinese nationals owning the OpCo of their equity rights and to establish a variable interest in favor of the WOFE. The standard contract framework is usually a combination of loan agreements, equity pledge agreements, call option agreements, technical service agreements, and power of attorney.[43]

1. Loan agreements: Through a combination of loan agreements and equity pledge agreements between the WOFE and the natural persons owning the OpCo, it is possible to capitalize business operations, while providing collateral for the WOFE, in the form of equity of the OpCo. The loan agreement is usually RMB denominated, does not provide for any interest and provides for a renewable term.[44] The fact that the loan contract is engaged between a WOFE and Chinese natural persons enables the VIE to circumvent restrictions that limit loans between foreign companies (such as the offshore company) and Chinese companies (such as the OpCo). This type of agreement still encounters some difficulties. Firstly, it is unlikely that performing loans to Chinese citizens can enter within the business scope of a WOFE, although, reportedly, in no case has the validity of a VIE been challenged on this point.[45] Furthermore, the contract might fall within the scope of Art 52, para 3, of the Chinese Contract Law, which, as mentioned above, provides that contracts, which have the purpose of circumventing legal provisions, are invalid. This latter comment can be applied to most of the contracts forming the consolidation of the VIE and represents a major legal risk.

[42] M.J. Chapman, n 38 above, 4.
[43] P. Gillis, n 30 above, 5.
[44] ibid 5.
[45] ibid 5.

2. Equity pledge agreements: As we mentioned above, the equity pledge agreement is designed to establish collateral for the loan. Agreements usually include a one hundred percent rate of pledge on the loan, and a renewable term. Furthermore, it provides the WOFE with a real right over the equities of the OpCo, thus theoretically reducing the risk that they are transferred without permission of the controlling entity.[46] [47] It is important to mention that, while an equity pledge in favor of the WOFE restricts the ability of natural persons owning the Chinese company to autonomously sell the company's equities, these agreements cannot result in the WOFE owning the equities.[48]

3. Call option agreements: Pursuant to call option agreements entered between the WOFE and the owners of the Chinese company, the WOFE is given the right to purchase the Chinese company at the lowest possible price under PRC law. This type of agreement aims to blur the separation line between the two companies, by leaving open the possibility of a future acquisition. It has, however, little or no practical effect. In fact, as mentioned before, under PRC law the type of activity that Chinese companies included under this scheme usually exercise (ie, internet operations, online trading, etc) cannot be owned by a foreign invested entity, such as a WOFE.

4. Technical service agreements: Technical service agreements serve the fundamental role of transferring residual profits of the Chinese company to the WOFE and then to the listed offshore company. The services provided by the WOFE to the Chinese company may vary by company and industry, but often include website maintenance, programming, sales support, fulfillment services, curriculum development, and any other agreement allowing the transfer of funds from the Chinese company to the VIE. Another common way to extract profits is to confer intellectual property or real estate in favor of the WOFE and lease such commodities to the Chinese company, in exchange for a rent that can be unilaterally decided by the WOFE.[49]

5. Power of attorney: Finally, the WOFE is granted a wide set of powers of attorney that allows it to perform all activities connected to shareholders rights, in the name and on behalf of the natural persons owning the Chinese company.

[46] For reference the model of equity pledge agreement available at https://tinyurl.com/y7swe2nn (last visited 27 December 2018).

[47] China adopts a civil law system that identifies the pledge as a real right; see Chapter XVII of the Chinese Real Right Law.

[48] According to Arts 63 and 64 of the 1995 Law on Guaranty of the People's Republic of China, movable property hypothecation (ie pledge), requires the transfer of the hypothecated assets to the pledgee. In case of an equity pledge agreement, this means that the stocks or other securities into which the equity is incorporated, are transferred to the pledgee/creditor (ie the WOFE). Therefore, the ability of the OpCo to transfer the equities is theoretically reduced. At the same time, Art 63 of the 1995 Guaranty Law provides that if the debtor fails to pay off the debt, the pledgee has he right to sell or auction the asset to get paid off preferentially with the proceeds. The pledgee does not, however, have the right to satisfy its credit by acquiring the hypothecated items.

[49] P. Gillis, n 30 above, 6.

In conclusion, the VIE structure is consolidated through a series of agreements aimed at circumventing Chinese regulations while formally satisfying the requirements set out by the SEC. In fact, as mentioned above, the SEC requires the parent company to have the power to direct activities, or absorb losses of the entity, or the right to receive returns or dividends from the entity; the network of contracts exemplified above formally fulfills these requirements. Powers of attorney grant the WOFE, directly controlled by the listed company, the power to direct activities within the restricted business area. Furthermore, call option agreements and equity pledge agreements formally establish a connection between the two companies. Losses are absorbed through loan agreements that compensate for capital contributions. As for dividends, lease agreements and technical service agreements, which enable the WOFE to unilaterally modify the compensation for its services, allow the transfer of profits. Furthermore, Art 19 of the Law on Wholly Foreign Owned Enterprises states that the foreign investor may remit abroad legitimate profits that have been earned from an enterprise with sole foreign investment, other legitimate income, and funds obtained after liquidation of the enterprise.[50] Therefore, once the funds are transferred from the Chinese company to the WOFE, they can be legitimately transferred to the listed company.[51]

3. Risks Involved in the Proliferation of VIE Structures (A Focus on the Governance of the Alibaba Group)

While enabling some of the activities that are usually performed by corporations, VIE structures do not provide for the same level of shareholder protection. In fact, the main business is run by the OpCo, ie a Chinese company owned by Chinese natural persons. Protection of ListCo shareholders and other investors relies solely on the enforceability of Chinese contract law. However, the network of contracts, on which the governance of the VIE structure depends, is hardly enforceable in China, due to the applicability of Art 52 of the Law on Contracts. Furthermore, the main purpose of VIE operations is to circumvent Chinese regulations that aim to protect relevant businesses from foreign influence. This matter is of extreme importance. The People's Liberation Army, in particular,

[50] Art 19, Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment: The foreign investor may remit, abroad, legitimate profits earned from an enterprise with sole foreign investment, other legitimate income and funds obtained after liquidation of the enterprise.

Wages and other legitimate income of foreign staff and workers of an enterprise with sole foreign investment may be remitted abroad after payment of individual income tax in accordance with the law.

[51] On the purposes of VIE structures see also W. Shen, 'Dark Past, Grey Present or Bright Future? - Foreign Investors' Access to China's Telecommunications Industry and a Political Economy Analysis of Recent Industrial Policy Moves' 13 *Journal World Trade & Investments*, 513, 525 (2013).

has determined that as long as foreign countries maintain a position of informational domination, the openness of Chinese Internet operators will represent a menace to national security.[52]

These risks are well known to American supervisory authorities. Investors are also aware of them, since legal risks connected to VIE operations are included in the prospectus. For instance, Alibaba Group's F1 form for registration on NASDAQ includes detailed information on its structure and on the implied risks.[53] Alibaba Group's prospectus focuses on three types of risks, as follows:

1. Firstly, the prospectus describes risks that are connected to the ability of the investors to nominate directors and, thus, influence company operations. The stocks and other financial instruments available to investors are issued by Alibaba Group Holding Limited, a Company incorporated and existing under the laws of the Cayman Islands.[54] The simple majority of the directors is, however, appointed by Alibaba Partnership, an entity that the prospectus generically defines as an 'entity formed by the founders of Alibaba Group and other partners who are accepted by them, and is led by a Partnership Committee formed by Jack Ma, Joe Tsai, Jonathan Lu, Lucy Peng and Ming Zeng'. One could claim that the Alibaba operation is tolerated by the Chinese government insofar as Chinese citizens maintain direct control of all relevant corporate bodies. Indeed, when American retail giant Walmart attempted the acquisition of Chinese online retailer Yihaodian, the Chinese authorities prescribed that the business activities of Yihaodian be separated, and only allowed Walmart to purchase Yihaodian's logistic framework.[55] On the other hand, most VIEs that have been successfully listed on the US market (such as those listed in Table 1) are actually controlled by Chinese citizens. This impression is strengthened, if we take two additional facts into account. Firstly, according to the Catalogue of Foreign investments, FIEs are actually entitled to operate in the restricted sector of value-added telecommunication services, as long as Chinese entities hold fifty-one percent of the company shares. However, out of twenty-two thousand telecom business licenses that were released to 2008, only seven were granted to FIEs.[56] Secondly, as will be discussed hereinafter, the Draft of the New Chinese Law on Foreign Investments relies on the concept of actual control of the company, in order to determine when a company is foreign owned or foreign invested. In the

[52] D. Cheng, *Cyber Dragon* (Santa Barbara: Praeger, 2017), 12-14.

[53] Alibaba is a major Chinese company, which had a market value of two hundred sixty-four billion USD in 2015, as described at https://tinyurl.com/y7prw7q5 (last visited 27 December 2018).

[54] Amendment no 7 to Form F-1: Registration Statement under the Securities Act Of 1933, Alibaba Group Holding Limited, 230.

[55] H. Freehills, *MOFCOM declaring the use of a VIE (variable interest entity) structure in the internet sector illegal?*, available at https://tinyurl.com/ydynmmuz, 7 August 2012 (last visited 27 December 2018).

[56] W. Shen, n 27 above, 931, provides an in depth analysis on the difficulties that foreign investors must face when entering the Chinese telecommunication industry.

approach of the Chinese legislature, the concept of actual control will replace the current provisions that define the foreign or Chinese nature of a company on the basis of the origin of the conferred capital.[57]

In addition, as far as the managerial aspects of the Alibaba Group are concerned, it should be noted that, as the prospectus states, e-commerce activities performed by the VIE are dependent on the online payment services offered by Alipay. This platform, however, is not part of Alibaba Group, as it is owned by Jack Ma.[58] Given this factor, the power of Alibaba Partnership within the VIE, aside from relying on the control of governance tools, such as the board of directors, is also strengthened by the fact that its members control businesses that are complementary to the exercise of Alibaba's business.

2. The SEC requires the listed parent company to have the power to direct activities of the relevant entity, to absorb its losses and receive its revenues, in order to consolidate a VIE in a parent company's balance sheet. As stated, Chinese operators formally satisfy these requirements by entering into a network of contracts, which mimic corporate governance. Therefore, the actual ability of the parent company (or ListCo) to govern the VIE depends on the enforceability of these contracts. It has already been mentioned how these contracts might theoretically fall within the scope of Art 52, para 3, of the Chinese contract law. This norm declares the invalidity of contracts that aim to circumvent Chinese Law. At the same time, the main purpose of the bundle of contracts, through which VIEs are controlled, is to circumvent restrictions on foreign investments provided by relevant Chinese regulations, ie the Catalogue of Foreign Investments.[59] This major weakness in the set-up of VIE structures is also addressed in the Alibaba prospectus, which states that

> 'there are very few precedents and little formal guidance as to how contractual arrangements in the context of a variable interest entity should be interpreted or enforced under PRC law, and as a result it may be difficult to predict how an arbitration panel or court would view such contractual arrangements. As a result, uncertainties in the PRC legal system could limit the ability to enforce the contractual arrangements'.[60]

It is safe to say that Alibaba's representation of the enforceability of its contract network within the PRC is an understatement. Important cases that have been decided in China show how these networks of contracts are in fact hardly enforceable. Coincidentally, among these, one of the most famous is the

[57] See para 3 of this Art. The provision is contained in Art 18 of the 2015 Draft of a New Foreign Investment Law of the PRC.

[58] Amendment No 7 to Form F-1: Registration Statement under the Securities Act of 1933, Alibaba Group Holding Limited.

[59] Art 52, para 3 of the PRC Contract Law.

[60] Amendment no 7 to Form F-1: Registration Statement under the Securities Act of 1933, Alibaba Group Holding Limited, 51.

case that led Jack Ma to personally own Alipay. The payment system was initially developed under the business operation of a WOFE, which was controlled by an offshore company, in which Jack Ma and Yahoo!, among others, participated. When Chinese regulators stated that business operations, such as third-party payment systems, could not be operated through a WOFE, the first reaction of the group was to establish a VIE, called Zhejiang Alibaba. Zhejiang Alibaba was created and owned by Jack Ma, but, in theory, the former owners of Alipay controlled it through a bundle of contracts. The VIE, however, was not granted the licenses required by the competent authorities. In order to launch the third-party payment business, Jack Ma, acting as legal representative of Zhejiang Alibaba, transferred Alipay to himself; without Yahoo! and other shareholders of the offshore controlling company, the WOFE could do anything, with the exception of settling for compensation.[61] [62]

Regarding the issue of enforceability of VIE agreements, the Supreme People's Court has intervened at least twice. A well-known decision is the Chinachem case of October 2012. Chinachem Financial Services, a Hong Kong company, was relying on a VIE scheme in order to perform banking activities (which are restricted) in China. The scheme relied on a Chinese owned company, Chinachem Small and Medium Enterprise Investment Co. Ltd, to which Chinachem FS lent the investment funds; through this vehicle, Chinachem FS purchased a six point five percent hare quota in China Minsheng Bank. The Hong Kong Company controlled the vehicle via power of attorney and trust agreements. When the parent company and the VIE commenced a dispute, the Supreme People's Court stated that these agreements were entered into with the purpose of circumventing Chinese law and were therefore unenforceable, pursuant to Art 52 of the Chinese contract law.[63] In a second important case that took place in 2015, *Yaxing* v *Anbo*, however, the Supreme People's Court modified its position, deciding that VIE contracts were enforceable.[64] The decision concerned a dispute about a cooperation agreement signed between Anbo – a VIE formally owned by Chinese individuals but linked through a frame of contracts to Nasdaq-listed Ambow Holdings, – and Yaxing RMB. According to the agreement, Ambow was to acquire seventy percent of two schools from Yaxing for the price of one hundred and sixty million RMB, half of which were to be paid in shares of Ambow Holdings.[65] Subsequent to the loss of value of

[61] W. Shen, n 27 above, 933.

[62] P. Gillis, n 30 above, 8.

[63] Charles Comey et al, 'China VIEs: Recent Developments And Observations', available at https://tinyurl.com/y7njuzkc (last visited 27 December 2018).

[64] Supreme People's Court, *Appeal ruling of Beijing Anbo* v *Changsha Yaxin*, 117th decision of the Second civil matters section of 2015.中华人民共和国最高人民法院, 北京师大安博教育科技有限责任公司与长沙亚兴置业发展有限公司二审民事裁定书（民二终字第117号，2015, available at https://tinyurl.com/yad3d29f (last visited 27 December 2018).

[65] In China education is a restricted industry, according to the Catalogue of Foreign Investments and to relevant regulations issued by the Ministry of Education.

Ambow shares, Yaxing sued the VIE, claiming that the cooperation contract was invalid due to the fact that it pursued a purpose contrary to the law. In the first instance, the case was decided by the High People's Court of Hunan Province, which held that the contract was valid because Anbo's shareholders were Chinese natural persons. Anbo had originally been established as a Chinese company and the subsequent stipulation of power of attorney that gave Ambrow Holdings the power to choose the company directors, with the purpose of listing the latter company on the Nasdaq, did not change the fact that it was its Chinese shareholders who controlled it. As Anbo was formally a Chinese company, the cooperation framework agreement was indeed valid. After Yaxing's appeal, the Supreme People's Court upheld the decision of the Hunan High People's Court. The Supreme Court agreed that Anbo could not be deemed to be a foreign company, while also challenging the assumption that any contract signed in violation of the Catalogue of Foreign Investments is invalid. In particular, according to the Supreme People's Court, it was held that the contract could not be treated as be invalid according to Art 52 of the contract law because the Catalogue of Foreign Investments and the relevant provisions issued by the Ministry of Education were mere administrative provisions. This decision could potentially subvert the judicial trend that we described above. However, a few clarifications ought to be made: a) Chinese Courts do not need to follow precedents; b) In this decision the Supreme People Court solicited the opinion of the Department of Policy and Regulations of the Ministry of Education. The competent Ministry agreed that under certain circumstances restrictions to foreign investments (and VIEs) might not be applied to the education industry. However, this exception to the application of the Catalogue of Foreign Investments and of other relevant administrative regulations, released by the Ministry of Education, could not apply to value added telecommunications, which, unlike education, represent a matter of national security; c) as will be discussed shortly hereinafter, a draft of a new Law on Foreign Investments relies on the actual control that shareholders have of companies in order to determine whether such companies are national or foreign owned. As we will further discuss, in future, a company might be deemed to be Chinese regardless of the existence of a network of contracts formally binding it to foreign entities, unless such contracts determine actual control over the Chinese company. In *Anbo* v *Yaxing* the Supreme People's Court determined that Chinese shareholders maintained control over the schools, even if the appointment of the school management was delegated and the profits of the school were transferred to Ambow Holdins, a foreign company. It is, however, important to underline that the Court further argued that the schools had been managed by the physical persons owning Anbo's shares in accordance with all relevant legislation. In other words, the fact that Chinese individuals maintained factual control over company operations, in spite of the presence of a VIE structure did influence the judicial decision.

3. Thirdly, and finally, VIE operations are affected by regulatory risk. In other words, the competent Chinese authorities might at any time explicitly forbid this type of investment.[66] Indeed, it aims to enable foreign capital to flood into sectors of the economy that are deemed to be of vital importance. Chinese government intervention has been mentioned several times, such as in the Walmart and Alipay cases, in which specific operations were not allowed to be executed through VIEs. These interventions underline the acknowledgement of this type of operations on behalf of the Chinese government. The fact that most of these instances ended with a restriction on VIEs is a clear indicator of the government's intention to eventually purge sensitive areas of Chinese economy of this type of investment.

The actual question is how this will happen. Chinese Internet companies are proving to be essential in the transition of China from a manufacturing, export-oriented country to a service-based country that relies on internal consumption.[67] An abrupt interruption of the main source of financing for this industry could have serious consequences on its ability to further develop. Furthermore, considering that the value of the involved investments is in the range of hundreds of billions of US dollars, political repercussions should also be taken into account.

Robin Lee, the founder of Baidu, offered a possible solution, suggesting that future legislation may prohibit VIE structures, while recognising currently existing VIEs.[68] Such an approach could have negative effects, both political and economic. On the one hand, it would be perceived the legislator granting favours to some private enterprises and not others. On the other hand, it would disrupt competition in the Chinese Internet industry, a sector in which giants such as Baidu, Tencent and Alibaba have already been accused of monopolistic tendencies.

III. Towards a New Foreign Investment Law

The MOFCOM has released a draft for a future, more general and all-encompassing Foreign Investment Law, which will supersede the Laws on Equity Joint Ventures, Co-operative Joint Ventures, and WOFEs. In fact, concepts such as EJV, CJV and WOFE will cease to exist. More specifically, the draft of the new Foreign Investment Law introduces the new concept of actual control. This new concept will replace the determination of the foreign or national nature of a company on the basis of the origin of the invested capital.

More precisely, this provision is included in Arts 11, 12 and 14 of the Draft.

[66] Amendment no 7 to Form F-1: Registration Statement under the Securities Act of 1933, Alibaba Group Holding Limited, 51.

[67] W. Ma, n 25 above, 50, 55.

[68] S. Dickinson, 'China VIEs Are Dead. Done. Over. Stick A Fork In Them', available at https://tinyurl.com/yd3oelbb, 22 January 2015 (last visited 27 December 2018).

Art 11 defines Foreign Investors as: (1) Individuals who do not have Chinese nationality; (2) Businesses incorporated under the laws of other countries or regions; (3) Governments of other countries or regions or their subordinate departments or authorities; (4) International organizations; and (5) Domestic businesses controlled by the aforesaid subjects, which shall be deemed as foreign investors. Art 12 contains a complementary norm, defining Chinese investors as Chinese nationals, the Chinese government, and entities controlled by these subjects. Furthermore, Art 14 defines the hybrid category of Foreign invested enterprises as companies partially or wholly owned by foreign investors, incorporated under the laws of the PRC.

It is evident that the definition of actual control of the company will be essential in the distinction between Chinese and Foreign Enterprises. Art 18 of the same law defines this concept, which seems to be an innovation in Chinese company law. According to the norm, the term 'control' refers to any of the situations included in a short list:

(a) A person holds, directly or indirectly, more than fifty percent of the shares, equity, property shares, voting rights or other similar rights on the company;

(b) In a case where directly or indirectly owned share equity, property shares, voting rights or other rights on the company are less than fifty percent, a company is deemed to be controlled under any of the following circumstances:

1. The controlling entity has the right to appoint, directly or indirectly, more than half of the members of the board of directors or similar decision-making bodies;

2. The controlling entity may ensure that its nominee obtains more than half of the seats of the board of directors or similar decision-making bodies;

3. Its voting rights are sufficient to have a significant impact on the resolutions of the decision-making bodies, such as the shareholders' meeting, the shareholders' general meeting or the board of directors;

(c) A person exercises a decisive influence on the business operations, financial strategy, personnel or technology of the enterprise through contracts, trusts, etc.

It seems that Art 18.C explicitly refers to VIE entities, insofar as they allow foreign companies to exercise a decisive influence on business operations, as described in the norm. This does not necessarily mean that all investments imputable to VIEs will be invalidated. Although VIEs gather capital provisions in foreign markets, they do not grant governance powers to foreign investors. As was seen in the Alibaba case, the company's arts of association often provide mechanisms that allow the founders of the company to maintain control, despite subsequent capital investments. In other words, these companies are under the actual control of Chinese investors.[69] According to the new definition provided by Art 12, companies in which Chinese citizens exercise actual control are deemed to be Chinese companies. Therefore, those VIEs that are controlled by Chinese

[69] See above the paras on Alibaba Group's governance structure.

people should be allowed to continue their activity when the New Investment Law will be introduced. Indeed, they will not need to disguise the foreign investments, since, unlike the laws that are currently in force, the Draft of the New Foreign Investment Law does not take capital investments into account, as long as these capital investments do not exceed the fifty percent quota set out by Art 18.A. It is worth mentioning that this limitation could be easily circumvented by only offering shares that are not granted voting rights to foreign subjects.

IV. Conclusions

As many authors have observed, the introduction of the New Foreign Investment Law will probably end the proliferation of VIE schemes in China, but it will not exclude foreign investments in Chinese Internet economy, as long as the corporate structures underlying these investments preserve control by Chinese citizens or companies.[70] The main purpose of Chinese limitations to foreign investments is, in fact, to prevent sensitive sectors of the economy from falling under the control of overseas entities. This is confirmed not only by the provisions of the Draft regarding actual control by foreign investors, but also by the MOFCOM 2011 announcement no 53, pursuant to the Security Review Circular ('M&A Rule'); Art 9 of the M&A Rule reads:

> 'With regard to the merger and acquisition of domestic enterprises undertaken by foreign investors, the authorities should judge whether such a transaction is subject to the security review based on the essential content and actual impact of the transaction. Foreign investors shall not avoid M&A security review through any means, including but not limited to commissioned shareholdings, trusts, multi-level investments, leases, loans, contractual control, and overseas transactions'.

In other words, this MOFCOM circular instructs authorities controlling Sino-Foreign M&A operations to evaluate the 'actual impact' of an operation, that is, whether it results in foreign investors obtaining 'actual control' of the PRC business by engaging in 'overseas transactions' and exercising 'contractual control'.[71] This implies the intention to differentiate between foreign invested businesses that are still controlled by Chinese entities and those actually falling under the influence of foreign investors. The first category will likely be considered to be a Chinese company and will therefore be allowed to operate in restricted business areas.

On the other hand, entities that are subject to the actual control of foreign

[70] I.E. Brown, 'China's Leaked CSRC Report Five Years Later: Baseline for VIE Trajectory' 39 *Houston Journal of International Law*, 197, 214 (2017).

[71] S.Y. Shi, 'Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States' 37 *Fordham International Law Journal*, 1281 (2014).

investors have always been restricted (see Alipay and Walmart cases) and will likely continue to be. Some authors have argued that since Arts 25 and 26 replace the catalogue of foreign investments with shorter Negative lists, they might liberalize the Chinese Internet economy sector.[72] This prediction may be accurate, but it fails to take into consideration the statistical data gathered from 2001 until today. These clearly show how foreign invested Internet companies have been basically excluded, despite the fact that, according to the Catalogue of Foreign Investments, they should have already been allowed, as long as Chinese shareholders were holding the majority of shares.[73] Nor does it take into account recent publications that clearly highlight the strategic importance that the People's Liberation Army attributes to excluding foreign influence from the Chinese Internet economy.[74]

In conclusion, while a clear overview will not be possible until the New Investment Law is actually promulgated, it seems that the Chinese system maintains a clear distinction between foreign and domestic businesses. The main innovation will be the parameter under which the foreign or domestic nature of a company is evaluated, since the draft, as well as recent regulations, such as MOFCOM announcement no 53 of 2011, seem to take into account actual influence, and not only equity shares. This innovation will allow Chinese companies to openly gather foreign financial provisions, as long as they manage to maintain control of the company's governance.

[72] M.J. Chapman, n 38 above, 4.
[73] D.J. Elliot and K. Yan, n 22 above.
[74] P. Gillis, n 30 above, 6.

Corporate and Financial Markets Law

The Evolving Role of the Board: Board Nomination and the Management of Dissenting Opinions

Mario Stella Richter *jr* and Federico Ferdinandi*

Abstract

In recent years, significant steps ahead have been taken in Italy to enhance corporate governance standards. The traditional commonplace, describing the Italian system as hostile to investors' activism, is no longer accurate. This paper aims at (re)starting a discussion about the issues of board nomination and the management of dissenting opinions, looking at the current legal and factual framework through the lens of the evolving role of boards of directors and advocating for a larger room for private ordering and self-regulation.

I. Introduction

The purpose of this paper is to start a discussion about the evolving role of the board of directors and to jointly consider two quite problematic issues: on the one hand, the board nomination and, on the other hand, the management of dissenting opinions within the board.

A discussion about the role of the board of directors requires answers to the following questions:

- Which functions does a board perform?
- Are these functions always the same in every jurisdiction?
- Are these functions always the same in every corporation?

According to the reasoning of a prominent Oxford Corporate Law Professor,[1] boards of directors perform five main functions:

- First, they act as a marketing tool to sell the corporation;
- Second, they engage in periodic self-evaluation;
- Third, they manage (more precisely, boards set the business strategy);
- Fourth, boards monitor; and
- Finally, boards mediate between shareholders and other constituencies and between different groups and kinds of shareholders.

Are these different functions always the same in every jurisdiction? And are

* Mario Stella Richter *jr* is Full Professor of Commercial Law, University of Rome "Tor Vergata". Federico Ferdinandi is LLM Candidate, Harvard Law School. This paper is based on the 'Introductory speech' given by Mario Stella Richter at the *Italy Corporate Governance Conference 2017*, Milan, 30th November 2017.

[1] L. Enriques, 'The Role of Italian Companies' Boards in the Age of Disruptive Innovation', available at https://tinyurl.com/zavt627 (last visited 27 December 2018).

they really performed in every single corporation?

The answer may be yes and no at the same time.

It may be yes, considering the strong convergence of the different jurisdictions in the global economy: it is indeed very well known that the basic principles of corporate governance have achieved a high degree of uniformity across developed markets' jurisdictions.

It may be no, considering that much depends on the ownership structure of the corporation or, at least, on the ownership structure that the specific law-maker had in mind when she conceived and laid down the rules concerning the structure and composition of the board as well as the nomination and election of the single directors. Depending on the features of the country's typical ownership structure and on the agency problems that consequently need be addressed, each country's corporate law enacts a somehow different regime for the board's nomination and election.

From this viewpoint, the Italian experience and the development of Italian legislation are quite interesting.

II. The Italian Rules on Board Composition and the Issue of Majorities that Become Minorities

Before 2005 there were no special provisions concerning the composition, nomination and election of the boards of Italian listed companies. The civil code applied and, at least theoretically, a listed corporation could have been managed even by a sole director.

However, this scenario has since changed. As corporate governance issues met with increasing awareness and consideration, we witnessed a proliferation of rules. The result is that the Italian model has ultimately become way too intricate and that the current regime governing the composition of the board is overly complex and stiff.

These days, the formation of a board has become the product of an 'alchemy', which must include at least the following components: executive and non-executive directors; independent and non-independent directors; 'majority' and 'minority' directors; female and male directors.

Other requirements in terms of diversity, international experience and professional background and qualifications are added by corporate governance recommendations, provisions of bylaws, as well as by special regulations applying to specific business sectors.

Because of the excessive rigidity of the current system, we currently face increasing difficulties in dealing with changing economic realities.

As a matter of fact, the slate voting mechanism was originally designed for companies controlled by a single shareholder or a group of shareholders. However,

also in Italy, such kind of ownership structure is progressively fading away.[2]

In addition, it happens with increasing frequency that slates which are filed and considered as 'majority' ones turn out to be, after the actual vote, 'minority' slates, and that the slates filed as 'minority' turn out to be 'majority' slates, since they bring together most of the market's votes. However, since the slate that actually wins often comprises a number of candidates lower than the one needed to fill the vacant board seats, there is an issue of 'majorities' that become 'minorities' which has led, with the current election system, to paradoxical results.

III. The Outgoing Board's Proposal: A Possible Solution?

The issue of majorities that become minorities is just one of the many signs which suggest that the system needs to be reshaped in a more general and flexible way.

In many foreign jurisdictions, the candidates for the role of director are or may be selected by the outgoing board, sometimes through a procedure involving a special committee. This solution might prove appropriate also for the Italian reality, at least in a number of cases.

Indeed, it duly values the function of the management body in selecting the best possible candidates for the advancement of the corporate interests. For instance, as the recent amendments to the Consolidated Financial Act concerning the adoption of board diversity policies suggest,[3] directors in charge are those in the best position to give consistency to the otherwise elusive notion of diversity.

Moreover, proposals coming from the outgoing board of directors would be welcomed by foreign institutional investors, who are pretty much accustomed to this practice.

According to the last available Assonime report, twenty-seven listed companies (about ten percent of all Italian listed companies) include a clause in their bylaws which allows the outgoing board to file a slate for the election of future directors, and so far five companies have made use of such clause.

After the publication of the abovementioned report, two other important corporations (ie Unicredit and Mediaset) decided to do the same at their annual general meetings.

The trend is clear and a more significant use of this sort of bylaws provisions is

[2] Consob, 'Report on corporate governance of Italian listed companies (2017)', available at https://tinyurl.com/y6v4gnf2 (last visited 27 December 2018), 9. The available data shows that, as of the end of 2016, Italian widely held companies were fourteen, and together accounted for almost twenty-one percent of the overall market capitalization (therefore, for more than a fifth). Moreover, weakly controlled companies (which are companies neither controlled by a shareholders' agreement nor majority controlled) were forty-three, and together accounted for around forty-four percent of the overall market capitalization.

[3] Art 123-*bis*, decreto legislativo 24 February 1998 no 58 (hereinafter referred to as 'Consolidated Financial Act').

foreseeable in the future, and probably every corporation should consider the opportunity to introduce bylaws provisions that allow the outgoing board of directors to submit a slate for the election of the incoming directors.

IV. The Renewed Need for Private Ordering and Self-Regulation

Introducing bylaws provisions of the kind described above is something that can be done, of course, also without changing the law. However, the Italian legislator should seriously consider the opportunities for simplification and for restoring an adequate space for self-regulation.

First, self-regulation as regards the system of gender quotas[4] must be prioritised. Such a system will soon cease to be compulsory. This is a discipline that has proven very effective and has given a significant contribution to the understanding of the importance of diversity within corporate bodies. As long as the temptation to extend the duration of the provisional regime is resisted, then, eventually, self-regulation will have a chance of building on this useful experience, laying down the necessary recommendations.[5]

Second, self-regulation should be restored also with regard to the appointment of independent directors. The safeguard represented by independent directors is a typical expression of the corporate governance codes worldwide. It is now commonly established in the culture and practice of Italian listed companies as well. Regardless of the binding provisions, the reality of listed companies usually shows a number of independent directors greater than that strictly required by the Consolidated Financial Act.[6]

Nowadays, it seems counterproductive rather than useful to keep on having rules like these in binding statutory provisions.[7] Repealing such rules would solve a number of problems; for example, the one determined by the dual notion of independence according, respectively, to the Consolidated Financial Act and to the Italian Corporate Governance Code.

Finally, the rule – also binding and basically representing the peculiar feature of the Italian model – which reserves at least one board seat for the minority slate[8] needs to be looked at.

It is commonly agreed that such a rule has been beneficial in companies where institutional investors hold a stable and significant portion of the share capital. Minority slates get filed in about a half of Italian listed companies, but only in a number of cases (always involving blue chips) these slates can be said

[4] Introduced in Italy with legge 12 July 2011 no 120 (so-called 'Golfo-Mosca') and whose effects are limited to the first three renewals of the relevant corporate body.

[5] See, in this regard, the new recommendations of the Italian Corporate Governance Code concerning diversity introduced in July 2018.

[6] Consob, 'Report on corporate governance of Italian listed companies (2017)' n 2 above, 15.

[7] Arts 147-*ter* and 147-*quater*, Consolidated Financial Act.

[8] Art 147-*ter*, Consolidated Financial Act.

to come from the market.

As noted by one of the most extensive empirical investigations on the matter,[9] the activism of institutional investors – which arguably represents the necessary basis for the proper operation of the slate voting mechanism – is largely affected by the ownership structure and the size of companies. In other terms, institutional investors (and particularly mutual funds) usually concentrate their Italian investments on a limited number of blue chip companies.

To sum up, the point is that there are good reasons to design a less rigid statutory system, possibly providing for different regimes applying to the different market segments and finally doing away with a 'one-size-fits-all' approach.

The matter needs to be further investigated. The goal, here, is just to express the opinion that listed companies do certainly need their boards to be expert, independent, plural and diverse, but also that much larger room for self-regulation and for private ordering is necessary.

V. The Dissenting Opinion Inside (and, Unfortunately, also Outside) the Boardroom

The other subject to be considered – as anticipated at the beginning of this article – is that of the *dissenting opinion* within the boardroom.

Only ten or twenty years ago the dissenting opinion within a corporate body was something that existed in Italy only in the books. As a matter of fact, boards of directors decided unanimously almost without exception; and there were plenty of anecdotes about that.

Independent and minority directors contributed to changing such a reality. In Italy, the culture of corporate governance improved impressively in quite a short period of time. The corporate practice has changed since the introduction of the Italian Corporate Governance Code, the implementation of the slate voting system, of the record date mechanism and of other significant innovations.

The phenomenon has attracted attention also in academia: three leading scholars have published an important empirical study concerning dissenting directors in Italy.[10] Their study takes into account various issues such as: (i) the topics on which directors dissent more frequently; (ii) the personal characteristics of dissenting directors; (iii) the consequences of dissent in terms of returns and volatility of the shares; etc.

As the study points out, directors' dissent is

[9] M. Belcredi et al, 'Board election and shareholder activism: the Italian experiment', in Id and G. Ferrarini eds, *Boards and Shareholders in European Listed Companies* (Cambridge: Cambridge University Press, 2013).

[10] P. Marchetti et al, 'Dissenting Directors', *European Corporate Governance Institute (ECGI) - Law Working Paper no 332/2016*, available at SSRN https://tinyurl.com/ybgcv5j3 (last visited 27 December 2018).

> 'a valuable, indeed vital, attribute of good corporate governance. Vocal opposition might help correct a good-faith mistake or, in more serious and extreme circumstances, warn the market of possible abuse and other risks for investors'.[11]

However, there is also a dark side of the moon. A dissenting opinion is not *per se* a sign of actual independence, good faith and integrity.

Of course, there is still the risk that boards are quite too ready to rubberstamp the decisions of executive directors. However, this is not a trait unique to the Italian corporate governance. Instead, what is becoming typical and peculiar of some Italian companies is, unfortunately, an atmosphere of distress and even of quasi-permanent conflict within the corporate bodies.

This is a problem we should not underestimate.

There is already anecdotal evidence of boards steadily engaged in legal disputes, employing permanent legal counsellors and receiving a non-stop flow of legal opinions (which is something indeed very advantageous for corporate lawyers and corporate law professors, but not necessarily for the corporation and its stakeholders as well). Discussions held within a corporate body (or between different corporate bodies) often give rise to complaints and disputes, which in some cases are even taken to court. Moreover, derivative actions have been brought against single directors for their filibustering and biased or interested behavior.

This way the duty of confidentiality is jeopardized, and we often read in the papers about dissenting votes expressed within the boardroom, something which – to be precise – represents a violation of the confidentiality duty and would not be allowed under Italian corporate law.

As a matter of fact, there are kinds of systematic dissent that are either used as a recurring cautionary measure (in order to avoid liability) or motivated by selfish goals or even by an unhealthy desire for protagonism.

VI. Conclusions

While the efforts to give a proper board representation to minorities are more than welcome, a warning should be issued about: (i) the consequences resulting from a significant change in the ownership structure of Italian listed companies; (ii) the dangers of the distortions in the system.

In a nutshell, significant steps have been taken in Italy to enhance corporate governance standards. The traditional commonplace, describing the Italian system as hostile to investors' activism, is no longer accurate. Especially foreign investors, venture capitalists and hedge funds are as much active towards Italian listed

[11] ibi, 2.

corporations as they are abroad. However, now it is time to take care of the distortions. We have the duty to ensure that conflicts and systematic dissent do not become the hallmark of Italian corporate governance. To that effect, further analysis is needed in order to achieve a comprehensive solution.

Short Symposium

A Foolish Inconsistency: Religiously and Ideologically Expressive Conduct

Michael R. Dimino*

Abstract

In *Masterpiece Cakeshop, Ltd* v *Colorado Civil Rights Commission*, Masterpiece's owner, Jack Phillips, argued that forcing him to bake a wedding cake for a same-sex wedding would violate both his right to free speech and his right to the free exercise of religion, both of which are protected by the First Amendment to the US Constitution. Under US Supreme Court precedent, Mr Phillips's free-speech claim would be evaluated under the intermediate-scrutiny test of *United States* v *O'Brien*. Yet Mr Phillips's free-exercise claim would be evaluated under a different standard: the rational-basis test of *Employment Division* v *Smith*.

These different standards are problematic because the free-speech and free-exercise claims are inherently connected, as the freedom of expression includes the freedom to express oneself on religious topics, and religious exercise communicates beliefs and expresses devotion. The two different standards are also susceptible to manipulation by litigants, who have an incentive to characterize religious claims as philosophical or ideological to take advantage of *O'Brien*'s more favorable standard. In this Article, Professor Dimino argues that the Court should end the inconsistency either by overruling *O'Brien* and applying *Smith* to speech cases as well as religion ones, or by overruling *Smith* and applying *O'Brien* to religious cases as well as speech ones.

I. Introduction

The United States Constitution's First Amendment forbids the government from 'prohibiting the free exercise' of religion or 'abridging the freedom of speech, or of the press'.[1] Despite the textual similarity between the Constitution's protections for speech and religious exercise,[2] the Supreme Court's doctrine

* Professor of Law, Widener University Commonwealth Law School; Fulbright Scholar, University of Roma Tre (Spring 2018). The author wishes to thank participants at workshops at Roma Tre and the Università Degli Studi del Sannio, especially Daniele Fiorentino, Camilla Crea, and Luca Perriello.

[1] US Constitution Amendment I.

[2] The two clauses do use different gerunds when referring to the kinds of laws that Congress 'shall (not) make'. There is a plausible textual argument (though the Court has never made it) that generally applicable laws 'abridge' but do not 'prohibit' a right when the effects of those generally applicable laws interfere with the ability to exercise the right. See M.W. McConnell et al, *Religion and the Constitution* (New York: Wolters Kluwer Law & Business, 4th ed, 2016), 61. Ultimately, such an argument probably fails in the kinds of cases discussed here, however,

treats them very differently when it comes to granting exemptions from 'valid and neutral law(s) of general applicability',[3] ie, laws that regulate the conduct of the general population and that do not single out speakers or religious believers for disfavored treatment.

Under the rule of *Employment Division* v *Smith*, the government need not grant an exemption from a generally applicable law for people whose religious beliefs compel them to engage in conduct that violates the law. Generally applicable laws limiting religious exercise are evaluated only under rational-basis scrutiny – a level of review extremely deferential to the government.

Free-speech claimants, on the other hand, fare much better than do individuals relying on the Free Exercise Clause. Under the leading case of *United States* v *O'Brien*,[4] generally applicable laws that regulate conduct but impose an incidental burden on speech can be enforced, even against the speaker, but only if the laws pass a form of intermediate scrutiny – a standard more demanding than rational basis.

This difference in legal standards is inappropriate, and the recent case of *Masterpiece Cakeshop, Ltd* v *Colorado Civil Rights Commission*[5] highlighted the incompatibility of *Smith* and *O'Brien*. *Masterpiece Cakeshop* involved a generally applicable law – Colorado's law prohibiting discrimination on the basis of sexual orientation – and Masterpiece's claim that it had a constitutional right to an exemption from that law. Masterpiece's owner, Jack Phillips, argued that he had a right under the Free Exercise Clause and the Free Speech Clause to refuse to bake a wedding cake for a same-sex couple.[6] According to Phillips, baking the wedding cake would have been sinful, and the law therefore compelled him to violate his religious beliefs, in violation of the Free Exercise Clause.[7] Apart from his religious objection, Phillips also asserted a free-speech claim: that forcing him to bake the cake would force him to use his artistic talents to express a message of support for the wedding – a message he had a free-speech right to refuse to make.[8]

Even though Phillips was asserting exactly the same claim under two different provisions of the same constitutional amendment, the religious aspect of the claim was governed by *Smith* and the non-religious aspect was governed by *O'Brien*.

because generally applicable laws banning a certain kind of religious exercise (like peyote use, as in *Employment Division, Oregon Dep't of Human Resources* v *Smith* 494 US 872 (1990)) or expressive conduct (like flag-burning, as in *Texas* v *Johnson* 491 US 397 (1989)) prohibit – and not just impair – the activity.

[3] *Employment Division* v *Smith* n 2 above, 879 (quoting *United States* v *Lee* 455 US 252, 263 no 3 (1982) (Stevens J, concurring in the judgment)).

[4] 391 US 367 (1968).

[5] 138 S Ct 1719 (2018).

[6] ibid 1727.

[7] ibid 1726.

[8] ibid.

This Essay criticizes that difference in legal standards, and argues that religious and secular expression should be governed by one consistent First Amendment test: Either the rational-basis test of *Smith* or the intermediate-scrutiny test of *O'Brien* should govern both speech- and religion-based claims for exemptions. Alternatively, if both tests are to be retained, the Supreme Court should more clearly define which kinds of expression or behavior trigger which standard, so that litigants cannot obtain a more favorable legal standard simply by characterizing identical conduct in different ways.

II. The Different Standards of *Smith* and *O'Brien*

Generally applicable laws, such as the Colorado law at issue in *Masterpiece Cakeshop*, directly regulate conduct, not belief or speech. At least on their face, they do not favor or disfavor particular beliefs. Because those laws may restrict one's ability to convey thoughts through actions, however, the laws can limit one's ability to express beliefs, whether those beliefs are based in religion, political ideology, morals, philosophy, or any other set of principles.

Recognizing this ability of laws limiting conduct to limit expression as well, the Supreme Court held in *United States* v *O'Brien* that regulations of conduct that incidentally limited expression would be evaluated under a test of intermediate scrutiny. More precisely, a law restricting one's ability to engage in 'expressive conduct' or 'symbolic speech' – conduct, such as waving or burning a flag, that carries a message –[9] is valid 'if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest'.[10]

The Court applied the test and upheld O'Brien's conviction for destroying his draft card, even though O'Brien had burned the draft card as part of a political protest. Importantly, though, the Court did so only after analyzing the law prohibiting destruction of draft cards to ensure that the law was sufficiently related to the government's important interest in the effective functioning of the draft.[11]

At the time *O'Brien* was decided, religious claims for exemptions from generally applicable laws were governed by an even more protective standard:

[9] See *Spence* v *Washington* 418 US 405, 410-11 (1974) (*per curiam*) (holding that Spence's conduct – displaying an upside-down American flag with a peace sign duct-taped to it – was protected by the First Amendment because '(a)n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it').

[10] *United States* v *O'Brien* 391 US 367, 377 (1968).

[11] ibid 381-82.

the strict-scrutiny test of *Sherbert* v *Verner*[12] and *Wisconsin* v *Yoder*.[13] That standard (at least in theory)[14] required the government to grant an exemption from a generally applicable law whenever that law would burden religious exercise, unless the government had a compelling reason to deny the exemption.[15]

The compelling-interest test of *Sherbert* and *Yoder* was severely limited, however, in the 1990 case of *Employment Division* v *Smith*. *Smith* held that neutral laws of general applicability did not require any form of heightened scrutiny, even if their effect was to make it more difficult for some individuals to exercise their religion. *Smith* left two exceptions, which allowed it to avoid explicitly overruling *Sherbert* and *Yoder*. First, if the government permits exceptions to its law when the law results in a hardship for secular reasons, it may not refuse to consider religious hardships.[16] Second, if the free-exercise claim is accompanied by another constitutional claim, 'such as freedom of speech and of the press (…) or the right of parents (…) to direct the education of their children', then the compelling-interest test would apply.[17] This 'hybrid'[18] exception does not apply in all instances where the Free Speech Clause might be implicated, however. Rather, there must be some plausibility to the speech or parental right being asserted.[19] In *Smith* itself, the Court characterized the religious exercise at issue (smoking peyote, a hallucinogenic drug, as part of a religious ceremony) as 'unconnected with any communicative activity or parental right'.[20]

Thus, after *Smith*, religious claims and speech claims for exemptions were evaluated under different standards, with religious claims being reviewed under a standard more deferential to the government. In other words, exemptions were more likely to be constitutionally required for individuals asserting free-speech rights than for individuals asserting free-exercise rights. Justice Scalia, the author of the Court's decision in *Smith*, belatedly acknowledged the incongruity of the

[12] 374 US 398 (1963).

[13] 406 US 205 (1972).

[14] The test was not nearly as 'strict' in practice as its language would have indicated. See, eg, *Goldman* v *Weinberger* 475 US 503 (1986) (rejecting a claim for an exemption from an Air Force regulation prohibiting headgear, as applied to a yarmulke). See also E. Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments* 962 (St Paul, MN: Foundation Press, 6th ed, 2016) ('Strict scrutiny here (ie, under *Sherbert*) proved far weaker than the strict scrutiny applied to content-based speech restrictions or race classifications').

[15] See *Yoder* 406 US at 221; *Sherbert* 374 US at 403.

[16] *Employment Division v Smith* n 2 above, 884.

[17] ibid 881.

[18] ibid 882.

[19] See M.W. McConnell et al, n 2 above, 162-163 (discussing a split among lower courts about the meaning of the hybrid-rights exception, with 'several' courts saying that a hybrid-rights claim requires the non-free-exercise claim to be 'colorable') (citing *Thomas* v *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 703 (9th Cir 1999); *Swanson* v *Guthrie Ind School Dist*, 135 F.3d 694, 700 (10th Cir 1998); and *Axson-Flynn* v *Johnson*, 356 F.3d 1277, 1295-96 (10th Cir 2004)).

[20] *Employment Division v Smith* n 2 above, 882.

Smith and *O'Brien* standards, and suggested that *O'Brien* be overruled.[21] The rest of the Court, however, declined to act on Justice Scalia's suggestion, and as a result we continue to have different standards for free-exercise and free-speech claims.

This differential treatment is 'anomalous',[22] not only because the rights to free speech and free exercise are protected by the same amendment, but because the rights are so similar, both in theory and in practice.[23] As a theoretical matter, both rights are part of the right to be free from government interference in one's thoughts, beliefs, and feelings. As a practical matter, one's right to speak includes the right to speak about religious topics, so that '(m)any free exercise claims can (…) be recast as a freedom of speech or freedom of expressive association claims'.[24]

The same claim should not receive different treatment depending on which clause is invoked.[25] The doctrines should be brought into line, either by applying the *Smith* rule in free-speech cases as well as religious ones, or by applying the *O'Brien* rule in religious cases as well as ideological ones. *Masterpiece Cakeshop* highlights the mistake made by current law in subjecting a conceptually identical claim to two different legal standards.

III. Religion and Speech in *Masterpiece Cakeshop*

The constitutional claim in *Masterpiece Cakeshop* provides a perfect example of the overlap between speech- and religion-based claims for exemptions from generally applicable regulations of conduct. Jack Phillips, the proprietor of

[21] See *Barnes* v *Glen Theatre Inc* 501 US 560, 579 (1991) (Scalia J, concurring in the judgment).

[22] D. Bogen, 'Generally Applicable Laws and the First Amendment' 26 *Southwestern University Law Review*, 201, 233 (1997).

[23] See F.M. Gedicks, 'The Normalized Free Exercise Clause: Three Abnormalities' 75 *Indiana Law Journal*, 77, 121 (2000) ('(I)t seems intuitively correct that similar rights should be enforced to a similar extent with similar doctrine').

[24] J. Rubenfeld, 'The First Amendment's Purpose' 53 *Stanford Law Review*, 767, 810, fn 96 (2001); D.J. Hay, 'Baptizing *O'Brien*: Towards Intermediate Scrutiny of Religiously Motivated Expressive Conduct' 68 *Vanderbilt Law Review*, 177, 211-214 (2015) (suggesting that attorneys characterize free-exercise claims as expressive-conduct free-speech ones because 'their clients' acts of worship have a secondary communicative, evangelical, or didactic purpose'.). In *Rosenberger* v *Rector and Visitors of the University of Virginia* 515 US 819 (1995), for example, the Court relied on the Free Speech Clause in declaring unconstitutional a state-university policy that denied funds to a student newspaper because of its religious viewpoint. The claim could plausibly have rested on the Free Exercise Clause.

[25] See D.T. Coenen, 'Free Speech and Generally Applicable Laws: A New Doctrinal Synthesis' 103 *Iowa Law Review*, 439 (2018) ('Common sense might suggest that a serious speaker should be no more able to challenge a generally applicable law than a serious worshipper'); D.J. Hay, n 24 above, 211 ('A coherent First Amendment jurisprudence would treat communicative religious conduct the same as it treats communicative political conduct'). As noted below, however, Coenen himself disagrees with this analysis.

Masterpiece Cakeshop, believed it would be sinful for him to participate in a gay wedding by making the wedding cake. Colorado law required him to serve customers without regard to sexual orientation, however, and so he was put to the choice of complying with the law and violating his religious beliefs or following his religious beliefs and violating the law. Phillips's straightforward religious-exercise claim, however, would likely have foundered because of *Smith*.

But if Phillips's religious objection to gay marriages were recharacterized as a political, philosophical, or ideological objection (as indeed it was), then *O'Brien*, and not *Smith*, would be the governing precedent. Granting that the government's interest in promoting equality for sexual-orientation minorities would be at least 'important or substantial' and 'unrelated to the suppression of free expression',[26] Phillips's claim for an exemption would turn on the final element of the *O'Brien* test: whether 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest'.[27] However that issue would be decided, the *O'Brien* standard was more favorable to Phillips than was the *Smith* test, which provided no constitutional protection at all beyond requiring that the law be neutral and generally applicable.

Thus, the very same claim of the bakery owner in *Masterpiece Cakeshop* could trigger two different legal standards, depending on whether it was evaluated under the Free Exercise Clause or the Free Speech Clause.

IV. The First Amendment Should Treat Speech- and Religion-Based Exemptions Equally

1. Speech- and Religion-Based Claims Are Intrinsically the Same

Both the freedom of speech and the freedom of religious exercise are based on the freedom of mind – the liberty against governmental interference with one's thoughts and beliefs. The freedom of *religious* thought and belief is merely a subset of the freedom of thought and belief that is protected more generally in the Free Speech Clause.[28] The Supreme Court has already recognized the

[26] *United States* v *O'Brien* 391 US 367, 377 (1968).

[27] ibid.

[28] See *Heffron* v *International Society for Krishna Consciousness*, 452 US 640 (1981); F.M. Gedicks, n 23 above, 121-122 (referring to the Free Exercise Clause as 'doctrinally redundant' after *Employment Division* v *Smith*, n 2 above, 'protecting nothing that is not also fully protected by another constitutional provision'); K. Greenawalt, 'Religion and the Rehnquist Court' 99 *Northwestern University Law Review*, 145, 156-157 (2004) (asking 'whether *anything* that is not redundant remains' of the 'Free Exercise Clause after *Smith*'); T.R. McCoy, 'A Coherent Methodology for First Amendment Speech and Religion Clause Cases' 48 *Vanderbilt Law Review*, 1335, 1350 (1995) ('To say that the Free Exercise Clause provides no protection at all from (inadvertent) impositions on religious freedom (caused by generally applicable laws) is to read the Free Exercise Clause as essentially meaningless surplusage in the contemporary context'.).

connection between the two Clauses: 'The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment'.[29]

Further, as others have pointed out, constitutional protections for free exercise and free speech often serve the same functions in society besides preserving citizens' minds as off-limits to government. Both rights

> 'implicate matters of personal choice and identity, allow for robust pluralism in our diverse society, help curb dissension and social conflict, and protect minority rights that will not necessarily be addressed through the political process'.[30]

Rights as closely connected as speech and religion – that protect the same values of liberty of thought and belief, that serve the same beneficial functions for society, and that appear next to each other in the same Amendment – should be protected through the same level of constitutional scrutiny. And yet, anomalously, *Smith* permits governments to reject claims for religious exemptions as long as the law has a rational basis, whereas *O'Brien* permits the government to reject speech-based exemptions only if the government passes intermediate scrutiny.

In a recent article, Professor Dan Coenen argued that because 'the Free Exercise Clause and the Free Speech Clause operate in different contexts to protect different values', it makes sense to deny religious observers exemptions from generally applicable laws even if such exemptions are available to non-religious speakers.[31] Coenen offered two differences between the values protected by the clauses. Ultimately, however, neither is persuasive and one's entitlement to an exemption from a generally applicable law should not depend on whether the claim is evaluated under the Free Exercise or Free Speech Clause.

Coenen's first argument is that religiously based exemptions from generally applicable laws are especially problematic because exemptions result in favoritism for religious believers – and therefore create a problem under the Establishment Clause.[32] This argument falls apart, though, because far from suggesting that religious exemptions would be unconstitutional under the Establishment Clause,

The redundancy of the Free Exercise Clause discussed in this Essay concerns protections for religious expression, including expressive conduct. The Free Exercise Clause may well retain significant independent force in other doctrinal areas, such as the prohibition on secular courts deciding religious questions, see *United States* v *Ballard* 322 US 78, 86 (1944).

[29] *Lee* v *Weisman* 505 US 577, 591 (1992).

[30] S.H. Barclay and M.L. Rienzi, 'Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions' 59 *Boston College Law Review*, 1595, 1612 (2018). See also S.D. Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' 140 *University of Pennsylvania Law Review*, 149, 196-198 (1991) (discussing reasons for protecting religious freedom).

[31] D.T. Coenen, n 25 above, 466.

[32] ibid.

Smith invited states to give religious exemptions. *Smith* held that states would not be *required* to give religious exemptions, but noted that states could give exemptions if they desired.[33] Subsequent cases have confirmed that religious exemptions (at least the vast majority of them) are permissible accommodations – not impermissible establishments – of religion.[34] Without the Establishment Clause as a reason to deny religion-based exemptions, there is less reason to distinguish between religion-based exemptions and speech-based ones.

Coenen's second argument is that free speech deserves special protection because of its central role in fostering an 'open society'.[35] Professor Coenen is surely correct about the importance of the freedom of speech,[36] but the Framers would not have gainsaid the importance of the freedom to exercise religion either.[37] It may be that political speech is more likely to promote societal goals such as effective self-government or the search for truth, whereas the benefits of free exercise tend more to the benefit of the individual exercising the right. But the Constitution often protects the rights of individuals for the benefit of those individuals, even when those rights harm the interests of society,[38] and governmental intrusion into one's communications with his god may be just as offensive to personal liberty as governmental intrusion into one's communications with other humans.[39]

[33] See *Employment Division* v *Smith* n 2 above, 872, 890 ('To say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts'.).

[34] See *Gonzales* v *O Centro Espírita Beneficente União do Vegetal*, 546 US 418 (2006); see also *Holt* v *Hobbs*, 135 S. Ct. 853 (2015); *Burwell* v *Hobby Lobby Stores, Inc*, 134 S. Ct. 2751 (2014).

[35] D.T. Coenen, n 25 above, 466, 467. See also, eg, *New York Times Company* v *Sullivan* 376 US 254-270 (1964); *Palko* v *Connecticut* 302 US 319, 326-327 (1937) ('(F)reedom of thought, and speech (…) is the matrix, the indispensable condition, of nearly every other form of freedom'.); *Whitney* v *California* 274 US 357, 375-376 (1927) (Brandeis J, concurring). See generally A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948).

[36] Not everyone, however, agrees that speech should enjoy a privileged position relative to other constitutional rights. Critical legal scholars, in particular, argue that equality can be threatened by free speech. See, eg, C. Mala Corbin, 'Speech as Conduct: The Free Speech Claims of Wedding Vendors' 65 *Emory Law Journal*, 241, 252, 301-302 (2015).

[37] See generally, eg, W.L. Miller, *The First Liberty: Religion and the American Republic* (New York: Paragon House, 1985).

[38] See, eg, US Constitution Amendment IV (securing the right against unreasonable searches and seizures); US Constitution Amendment V (securing the right against compulsory self-incrimination); *Mapp* v *Ohio* 367 US 643 (1961) (requiring the exclusion of illegally obtained evidence from criminal trials); *Miranda* v *Arizona* 384 US 436 (1966) (placing limits on the admissibility of criminal suspects' voluntary confessions).

[39] See, eg, *West Virginia State Board of Education* v *Barnette* 319 US 624, 638 (1943) ('The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to

In any event, if free speech and the free exercise of religion include communication with other humans about religious topics, as they certainly do, it seems odd, to say the least, to conclude that religious speech or expressive conduct fosters an open society when evaluated under the Free Speech Clause, but not when evaluated under the Free Exercise Clause.

Perhaps, then, Professor Coenen is saying that religious exercise should not be able to take advantage of the more generous *O'Brien* test, either because religious exercise is not communicative or because speech on religious topics has less constitutional value than other speech. Neither argument is tenable. Religious exercise usually communicates a message about the actor's faith, and so it is implausible that religious exercise could receive diminished protection because it is, as a class, non-communicative. Indeed, the communicative value of religious exercises is often the whole point of exercising religion in a ceremony observed by others.

Neither can one plausibly contend that religious speech carries less constitutional value than speech on other topics or exhibiting other viewpoints. Such an argument would be inconsistent with the line of cases culminating in *Rosenberger* v *Rector and Visitors of the University of Virginia*,[40] which held that government could not discriminate against speech with a religious viewpoint. Under *Rosenberger*, religious viewpoints are as entitled to constitutional protection as are any others. Like philosophy, religion 'provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered'.[41]

Because the First Amendment specifically enumerates the right of free exercise in addition to the right of free speech, it is conceivable that religious speech and expressive conduct should receive *more* protection than non-religious ideological speech and expressive conduct.[42] It is very hard to understand, however, why conduct that expresses a religious message should be accorded less protection than conduct that expresses a non-religious message.[43] In addition to the textual argument for according religion special protection, there is a practical consideration that similarly suggests that we have more to fear from

free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections'.).

[40] 515 US 819 (1995).

[41] ibid 831. See also ibid 836-837 (demonstrating that the University's policy disfavoring religious viewpoints could also apply to 'philosophic position(s)' because of the difficulty in distinguishing between religious viewpoints and philosophic ones).

[42] Cf, eg, *Lamb's Chapel* v *Center Moriches Union Free School District* 508 US 384-400 (1993) (Scalia J, concurring in the judgment) (referring to the Free Exercise Clause as giving 'preferential treatment' to religion). The reference is ironic, given Justice Scalia's authorship of the *Smith* opinion denying preferential treatment to religion.

[43] D.J. Hay, n 24 above, 209 ('(T)he text of the Constitution arguably allows for greater protection of religious exercise than it does expressive conduct. At a minimum, the text of the Constitution would seem to require parity'.).

non-religious exemptions than from religious ones: Everyone has ideological beliefs and we all act according to our philosophies and beliefs constantly. Therefore a speech-based exemption from generally applicable laws provides an opportunity for each of us to demand an exemption from nearly any law at nearly any time. Religion, on the other hand, is more circumscribed.[44] While surely many religious believers try to follow the tenets of their religion in all aspects of their lives, there are few people who could claim a religious reason for speeding or bank robbery.[45] If ideological reasons were enough to force courts to apply heightened scrutiny, however, then anybody could trigger that heightened standard of review just by claiming that the offense was committed as a way of protesting the extent of modern government or the unequal distribution of wealth.[46]

In the end, though, these arguments should be rejected. True, religion is specifically referenced in the First Amendment, but so is the freedom of the press. Yet, the Supreme Court has interpreted the freedom of the press to be virtually, if not totally, subsumed within the freedom of speech.[47] And while religious exemptions might cause fewer disruptions for society (and courts) than would speech exemptions, it would do so at the cost of providing special benefits to religious people that would not be available to non-religious ones.

The most convincing reason to treat religion-based and speech-based claims the same, however, is that whether one's beliefs are grounded in religion or morality, one faces the same crisis of conscience when the law requires him to engage in behavior that he believes to be wrongful. The individual who is forced to cater a gay wedding, to pay taxes to support a war, to vaccinate his children, or to limit himself to marrying one woman at a time is being compelled to do something that violates that individual's sense of morality. Whether that individual believes that the behavior is immoral *because his religion says so* should be irrelevant.[48] Whether the objections are religious or philosophical, the government

[44] See S.H. Barclay and M.L. Rienzi, n 30 above, 1599 ('(E)xpressive claims are much more pervasive than religious claims, both in absolute terms and as a percentage of all reported cases'.); L.W. Goodrich and R.N. Busick, 'Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases' 48 *Seton Hall Law Review*, 353 (2018) (finding that religious exemption claims are rare, even after the Supreme Court's decision in *Burwell* v *Hobby Lobby Stores, Inc*, n 34 above, which held that Hobby Lobby was statutorily entitled to an exemption from mandated contraceptive coverage under the Affordable Care Act).

[45] See n 21 above ('Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression'.).

[46] See *Rumsfeld* v *Forum for Academic and Institutional Rights*, 547 US 47, 66 (2006).

[47] See *Cohen* v *Cowles Media Co*, 501 US 663, 669 (1991); *Branzburg* v *Hayes*, 408 US 665 (1972). See also R.L. Weaver, *Understanding the First Amendment* (Durham: Carolina Academic Press, 2017), 246-47 ('Media (…) have no favored position under the First Amendment and possess freedoms coextensive with the public. (…) (T)he weight of case law has aligned with the notion that the press has no rights beyond those of an ordinary citizen'.). But see, eg, P. Stewart, 'Or of the Press' 26 *Hastings Law Journal*, 631 (1975).

[48] See R.A. Smolla, 'The Free Exercise of Religion After the Fall: The Case for Intermediate

is still burdening that person's conscience by using that person as an agent of *the government's* moral judgment.

It might be objected that individuals forced to act in a manner contrary to their moral beliefs face no penalty other than pangs of guilt for violating their consciences. Individuals forced to violate their religion, however, may believe that they will be made to suffer an eternal punishment for violating God's law. Such an argument, however, is inconsistent with Supreme Court precedent, which implies that the Religion Clauses extend to far more belief systems than ones featuring an afterlife that rewards and punishes believers for behavior on Earth. According to *United States* v *Seeger*,[49] which involved the interpretation of a statutory conscientious-objector exemption from military service, one may claim an exemption where service would be contrary to one's 'belief in relation to a Supreme Being' (the statutory phrase), even if one does not believe in a supreme being. Rather, the exemption extends to every sincere belief 'occup(ying) a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption'.[50] If 'religion' extends as far as *Seeger* suggests it does, then religious beliefs become practically indistinguishable from deeply held philosophical views.[51] An individual with a 'religion' that contains a moral code but no punishment for misbehavior is put to exactly the same choice by a generally applicable law as someone whose beliefs stem from a non-religious source.[52] In both cases, the law compels the objector to engage in behavior he believes to be wrong, but in neither case does the person need to fear eternal damnation if he chooses to subordinate those moral considerations and follow the law.

None of this is to say whether or when the government should be able to override the individual's moral judgments. Rather, this discussion says only that the government's ability to do so should be the same whether the individual's

Scrutiny' 39 *William & Mary Law Review*, 925, 942 (1998) ('(If a unified test were adopted for free-exercise cases and speech cases, n)eutral laws of general applicability that burden *either* religious or philosophical expression of beliefs would be equally protected'.).

[49] 380 US 163 (1965).

[50] ibid 166.

[51] Consider, for example, the question whether 'humanism' is a 'religion'. See *Center for Inquiry, Inc* v *Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir 2014). Humanists have ethical values that are not derived from a belief in any god. If their philosophy amounts to a religion, it is difficult to understand what philosophy protected by the Free Speech Clause would not also be protected under the Free Exercise Clause. See also *Africa* v *Pennsylvania*, 662 F.2d 1025 (3rd Cir 1981) (considering the 'religious' beliefs of an organization 'absolutely opposed to all that is wrong'); *Cavanaugh* v *Bartelt*, 2016 WL 1446447 (D. Neb. 2016) (addressing the status of Pastafarianism, a 'religion' that worships the Flying Spaghetti Monster as a way of mocking traditional religion).

[52] See R.A. Smolla, n 48 above, 942 ('(B)y bringing free exercise cases into a parity with speech cases, the problem of distinguishing when expression of conduct is religiously motivated and when it's not would disappear. The (difficult question) whether an objector's problem with a law is truly religious or merely philosophical would evaporate.') (footnote omitted).

objection to the generally applicable law is religiously based or not.

2. Under Established Supreme Court Precedent, Religious Expression Implicates Both Free Speech and Free Exercise

Masterpiece Cakeshop may be the latest case involving the confluence of the rights of speech and religion, but it is hardly the first. As early as 1940, *Cantwell* v *Connecticut* struck down a law requiring governmental approval before one could solicit contributions 'for any alleged religious, charitable or philanthropic cause'.[53] The Court rested its decision on the Free Exercise Clause, but could just as well have chosen the Free Speech Clause, and indeed it relied on *Near* v *Minnesota* –[54] a case interpreting the Free Press Clause – as support for its holding.[55] *Murdock* v *Pennsylvania*, another case from early in the Court's First Amendment jurisprudence, held that a licensing fee for solicitors violated both the Free Press Clause and the Free Exercise Clause as applied to Jehovah's Witnesses who were selling religious books and pamphlets.[56]

Several cases decided under the Free Speech Clause protected the rights of religious speakers, and accordingly stand for the proposition that government may not discriminate against religious viewpoints. In *Lamb's Chapel* v *Center Moriches Union Free School District*, for example, the Court held that it violated the Free Speech Clause for the school district to refuse to allow access to school facilities for groups with religious viewpoints.[57] *Westside Community Board of Education* v *Mergens*[58] and *Widmar* v *Vincent*[59] similarly used the Free Speech Clause to require government to grant access to religious groups on the same terms as other groups. More recently, the Court held in *Rosenberger* v *Rector and Visitors of the University of Virginia* that a student organization could not be denied university funding to publish its newsletter, when the university's reason for denying the funding was the newsletter's religious viewpoint.[60]

In each of these cases, the Court relied on the Free Speech Clause,[61] but the Free Exercise Clause would also have provided support for the Court's holding (which presaged the Court's holding in *Masterpiece Cakeshop*)[62] that the

[53] 310 US 296, 301-02 (1940).
[54] 283 US 697 (1931).
[55] See ibid, 304 no 5 (citing *Near* v *Minnesota* n 54 above, 713).
[56] 319 US 105, 117 (1943) (holding that the challenged law was 'an abridgment of freedom of press *and* a restraint on the free exercise of religion' (emphasis added)). Other cases similarly protected the right to distribute religious literature. See S.H. Barclay and M.L. Rienzi, n 30 above, 1613, fn 106 (citing *Follett* v *McCormick*, 321 US 573, 577 (1944); and *Jamison* v *Texas*, 318 US 413, 414, 417 (1943)).
[57] 508 US 384, 393-94 (1993).
[58] 496 US 226 (1990).
[59] 454 US 263 (1981).
[60] 515 US 819 (1995).
[61] See ibid 828-37.
[62] See *Masterpiece Cakeshop, Ltd* v *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1728-

government could not discriminate against religion or religious expression.[63] Indeed, that was the major point of those cases: prohibitions on viewpoint discrimination apply to protect religious viewpoints as much as political ones.[64] Such discrimination is unconstitutional for the same reason it is unconstitutional to discriminate against disfavored political groups, expression, and behavior: The government may not control thought by privileging viewpoints with which it agrees.[65] Again, the two Clauses provide the same protection for religious and ideological expression because both protect the freedom of thought and belief that is implicated by both kinds of expression.

In *West Virginia Board of Education* v *Barnette*,[66] perhaps the most canonical of all First Amendment cases, the Court did not even say which portion of the First Amendment required the government to grant an exemption to Jehovah's Witnesses who refused to salute the American flag. The Court noted that the compulsory flag salute was alleged to be a denial both 'of religious freedom, and of freedom of speech',[67] and held that the compulsion violated the First Amendment without distinguishing between those two arguments. Quite the contrary. In perhaps the most eloquent passage in Supreme Court history, the Court equated the First Amendment's protection of ideological and religious thought:

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics, nationalism, religion, or other matters of opinion*, or force citizens to confess by word or act their faith therein'.[68]

Masterpiece Cakeshop was therefore hardly novel in presenting a situation with overlapping claims of rights to exemptions grounded in the Free Speech Clause and the Free Exercise Clause. Not only had several other cases presented comparable scenarios, but the Court has recognized and acknowledged that the two Clauses protect the same right of thought and belief.

1732 (2018).

[63] See *Church of the Lukumi Babalu Aye* v *City of Hialeah*, 508 US 520 (1993).

[64] That is, unless the Establishment Clause prohibits the government from supporting religious belief or expression. As *Rosenberger* and *Lamb's Chapel* hold, however, the Establishment Clause does not prohibit the government from granting religious groups access to government facilities on the same terms as those available to other groups. See *Rosenberger*, 515 US, n 40 above, 837-46; *Lamb's Chapel*, 508 US, n 42 above, 394-96.

[65] See, eg, *Masterpiece Cakeshop*, 138 S. Ct., n 62 above, 1731 (saying that the government may not discriminate among viewpoints 'based on the government's own assessment of offensiveness'); *Texas* v *Johnson*, 491 US 397, 414 (1989) ('If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable'.).

[66] 319 US 624 (1943).

[67] ibid 630.

[68] ibid 642 (emphasis added).

3. Different Standards Can Be Manipulated by Litigants

The previous two sections argued that speech- and religion-based claims for exemptions from generally applicable laws should be evaluated under the same standard because one's ideological, political, philosophical, and religious commitments are all part of that person's belief system or conscience.[69] Even if a different standard should apply to claims grounded in the freedom of religion from the standard applicable to claims grounded in the freedom of speech, however, it makes no sense for those categories to be so ill-defined as to permit rights-claimants to manipulate the law by choosing the more favorable legal rule.

Under current law, religious claims are governed by *Smith* and speech claims are governed by *O'Brien*, but what about cases, like *Masterpiece Cakeshop*, in which claimants could raise both claims? Surely an individual with a speech claim that qualifies for intermediate scrutiny under *O'Brien* cannot be relegated to the rational-basis rule of *Smith* simply because he *also* has a religious claim. Therefore, the *Smith* rule would apply only in cases where there is a religious claim but no claim under the Free Speech Clause.

As one commentator has pointed out, however, such cases are exceedingly rare, if there are any at all. 'Most acts of worship serve a dual sacramental-communicative purpose' by exhibiting the worshipper's devotion and 'implicitly encourag(ing) others to behave likewise'.[70] Accordingly,

> 'the space between *O'Brien* and *Smith* creates an opportunity for creative advocates to recast their clients' religious conduct as expressive conduct, triggering an intermediate standard for a claim that would otherwise receive only minimal scrutiny'.[71]

Such 'creative advoca(cy)' was apparent in *Masterpiece Cakeshop*. If free-speech and free-exercise claims were evaluated under the same standard, Mr Phillips's objection to baking a cake for a gay wedding could have been approached as a free-exercise claim, as a free-speech claim, or both. The constitutional standard, and the ultimate result, would be the same regardless of which of the three approaches were followed. The ideologically or philosophically expressive elements of Mr Phillips's claim, such as his desire not to make a literal or metaphorical statement in support of gay marriage, would have added nothing (and taken nothing away) from the claimed freedom of religious expression.

[69] I use the term 'conscience' in its modern sense to refer to one's internal sense of morality, or of right and wrong, whether stemming from religious beliefs or philosophical ones. At the time of the First Amendment's adoption, 'conscience' had a decidedly religious meaning. See W.L. Miller, n 37 above, 122-123; J. Witte Jr, 'The Essential Rights and Liberties of Religion in the American Constitutional Experiment' 71 *Notre Dame Law Review*, 371, 394 (1996).

[70] D.J. Hay, n 24 above, 211.

[71] ibid 214.

V. Potential Resolutions

Smith denied constitutional protection to religious adherents who wished to exercise their religion in ways that violated generally applicable laws. *O'Brien*, however, granted some constitutional protection (though not total immunity) to political and ideological speakers who wished to express their thoughts and beliefs in ways that violated generally applicable laws. As demonstrated above, it is wrong to apply different standards to exemption claims that differ only in that one person's reason for wanting an exemption is religious and another person's reason is moral, philosophical, or ideological.

In this section, I note some potential ways of resolving the conflict between *Smith* and *O'Brien* – first by overruling one or the other, and second by narrowing the application of *Smith* to cases of religious exercise that are not communicative. It is not within the scope of this Essay to argue for one or another of these options. Rather, I will leave that issue for a future article, and be content here to set forth a few options that might permit the Court to bring some coherence to this area of law.

1. Overrule *Smith* or *O'Brien*

The most obvious way to resolve the conflict between *Smith* and *O'Brien* is for the Court to overrule one of the cases. The Court could hold that *O'Brien*'s test of intermediate scrutiny applies to all incidental restrictions on expression imposed by generally applicable regulations of conduct, whether the expression is religious or not. Alternatively, the Court could overrule *O'Brien* and hold that generally applicable laws that impose restrictions on expression, like generally applicable laws that impose restrictions on the free exercise of religion, would trigger only the rational-basis test.

Several commentators have proposed replacing *Smith* with *O'Brien*, and applying intermediate scrutiny to claims for religious exemptions from generally applicable laws.[72] They argue that *O'Brien*'s test of intermediate scrutiny appropriately balances the competing considerations in *Sherbert* and *Smith*: protecting religious exercise against unnecessary (and perhaps unintentional) interference by government, while not being so demanding on the government as to permit a religious believer to become 'a law unto himself'.[73] The disadvantage of the test is its flexibility and therefore unpredictability. Reasonable people are

[72] See D.A. Bogen, 'Generally Applicable Laws and the First Amendment' 26 *Southwestern University Law Review*, 201, 253 (1997); B.A. Freeman, 'Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability' 66 *Modern Law Review*, 9, 57 (2001); D.J. Hay, n 24 above, 214-222; J.M. Oleske Jr, 'A Regrettable Invitation to 'Constitutional Resistance', Renewed Confusion over Religious Exemptions, and the Future of Free Exercise' 20 *Lewis & Clark Law Review*, 1317, 1361-63 (2017); R.A. Smolla, n 48 above, 940-942.

[73] *Reynolds* v *United States* 98 US 145, 167 (1879).

likely to disagree about whether a government's law is justified by an 'important or substantial' government interest, and whether the law is sufficiently well tailored to that interest.[74]

The opposite approach – overruling *O'Brien* and extending *Smith* – was proposed by Justice Scalia in *Barnes* v *Glen Theatre*.[75] *Barnes* involved a strip club that claimed that its dancing was constitutionally protected free speech, and that wanted an exemption from a generally applicable ban on nudity. The Court applied *O'Brien* and rejected the claim for an exemption.[76] In the view of the Court, the nudity ban was justified by the government's interest in 'protecting societal order and morality'.[77] Justice Scalia would have preferred not to apply *O'Brien* at all. He pointed out that *Smith* allowed the government to enforce generally applicable laws without granting religious exemptions, and he argued that the same rule should apply to reject individuals' claims for speech-related exemptions from generally applicable laws.

The *Smith* approach is relatively easy to apply and has an analogy in the Court's approach to the Free Press Clause.[78] Laws that are targeted against religious action, or laws that are targeted against speech or the press, would not be 'neutral' and so would be evaluated under heightened scrutiny. But speakers, members of the press, and religious persons would have to adhere to the same limitations on their conduct that neutral laws impose on everyone else.[79]

For the same reason, *Smith* has an element of fairness. Constitutionally mandated exemptions to general rules for speakers, the press, and religious people can lead to unfair impositions on other members of the population and resentment among those others who have to follow rules that the exempted groups do not have to follow. Further, exemptions can lead to false claims of religious or ideological scruples as a way of escaping the dictates of law. Heightened scrutiny also places a significant burden on government (which has to defend individual applications of its generally applicable laws) and courts (which have to evaluate the claimed exemptions). Finally, to the extent that exemptions are granted, the beneficiary of an exemption is permitted 'by virtue of his beliefs, "to become a

[74] *United States* v *O'Brien* 391 US 367, 377 (1968).

[75] See n 21 above.

[76] See ibid 567 (opinion of the Court).

[77] ibid 568.

[78] There is also an analogy to equal-protection law. Laws that discriminate on their face between racial groups, for example, trigger heightened scrutiny. But laws that merely impose disproportionate burdens on one race or another do not trigger heightened scrutiny unless they were motivated by a discriminatory purpose. *See Washington* v *Davis* 426 US 229 (1976). Likewise here, laws that facially discriminate against religious exercise, or speech, or the press would receive heightened scrutiny, but neutral laws that merely impose a burden on religious exercise, speech, or press would not.

[79] Dean Smolla, who advocated extending *O'Brien* to religious claims, favored extending it to press claims as well. See R.A. Smolla, n 48 above, 942, fn 80.

law unto himself" '.[80] The *Smith* rule is much simpler, providing a guarantee against laws that are designed to suppress religion (or speech or press), but allowing the unfettered operation of laws that merely have a disproportionate impact on religious exercise (or speech or press).

On the negative side, applying *Smith* to free-speech cases would permit the government to restrict more expressive conduct, causing society to lose benefits resulting from the free exchange of ideas. Even *Smith* itself recognized that a more protective standard might be appropriate where necessary to protect 'an unrestricted flow of contending speech'.[81]

A further problem with extending *Smith* to the free-speech context is that it would widen the disparity between the legal rule (strict scrutiny) applicable to the regulation of pure speech and the legal rule (rational basis) applicable to the regulation of expressive conduct. Because of how common it is to express ourselves through actions (eg, hand-gestures, flag-waving, eyebrow-raising, hair styles, etc), it may be inappropriate to apply a strict standard of review when the government regulates the words we use, but to apply a very deferential standard of review when the government regulates expressive conduct.

2. Narrow the Applications of *Smith* to Truly Non-Communicative Exercises of Religion

One intriguing way of squaring *Smith* with *O'Brien* is to limit *Smith*'s rational-basis test to religious exercise that is non-communicative. Stated differently, this approach would broaden *Smith*'s exception for hybrid rights to include all claims in which the religious exercise communicated a message.[82] *O'Brien* would thus apply in all instances of symbolic speech or expressive conduct because by definition only communicative conduct can be expressive conduct or symbolic speech. Religious conduct that is not expressive, however – like any other non-expressive conduct – would be evaluated under the rational-basis test.

This approach can be squared with the language of *Smith*,[83] which accepted heightened scrutiny in cases involving both speech and religious exercise,[84] and which noted that Smith's peyote-smoking was 'unconnected with any communicative activity'.[85] Where religious activity *is* communicative, then, *O'Brien* rather than *Smith* might control.

In order to square this approach with the *facts* of *Smith*, though, one would have to define 'expressive' or 'communicative' extremely narrowly so as not to include religious rites of the sort involved in *Smith*. But if 'ingest(ing) peyote for

[80] See n 2 above, 885 (quoting *Reynolds* v *United States* 98 US 145, 167 (1879)).
[81] ibid 886 (1990).
[82] See D.J. Hay, n 24 above, 214.
[83] For one attempt to do so, ibid.
[84] See *Smith* n 3 above.
[85] ibid.

sacramental purposes at a ceremony of the Native American Church'[86] is not an expressive or communicative exercise of religion, it is difficult to imagine what would be. As Daniel Hay has noted, 'acts of worship have a secondary communicative, evangelical, or didactic purpose' in addition to the purpose of serving as 'symbols of personal devotion, fidelity, or virtue.'[87] They may 'communicate stories central to their faiths'[88] or encourage others to act in accordance with the beliefs of the religion.[89] At the least, when performed in public, religious acts communicate the actor's profession of his belief in, or identification with, the religion.[90]

So while one could alleviate the inconsistency between *Smith* and *O'Brien* by limiting *Smith* to a certain class of cases and *O'Brien* to a different set, such a limitation presents challenges. The distinction would either appear to require a crabbed view of the communicative qualities of religious exercise (deeming many religious rituals 'noncommunicative' despite their genuine communicative value) or would require that *Smith* be limited to only truly noncommunicative religious exercise – a limitation that would come very close to practically overruling *Smith*.[91]

A more-promising way of limiting the conflict between *Smith* and *O'Brien* is to adopt a relatively narrow understanding of expressive conduct, but to apply *O'Brien*'s intermediate scrutiny to all expressive conduct, whether religious or ideological. The Supreme Court has already recognized that there must be limits on expressive conduct, or else *O'Brien* would apply whenever someone claimed an ideological reason for violating the law.[92] The Court's definition of expressive conduct is not well established – and a full examination is the subject of a future article – but the Court has insisted that conduct does not trigger intermediate scrutiny under *O'Brien* unless it is 'inherently' expressive.[93] That test is problematic because nothing – not even spoken sounds or lines written on paper – is *inherently* expressive. Nevertheless, the Court correctly wishes to limit expressive conduct to that conduct that would be perceived by others (not just the speaker himself) as conveying a message.[94] A mere intention of expressing oneself should not be sufficient to trigger *O'Brien* if others would not recognize the conduct as communicating a message.

As applied to *Masterpiece Cakeshop*, the question would be whether others

[86] ibid 874.
[87] D.J. Hay, n 24 above, 214.
[88] ibid.
[89] ibid 211.
[90] ibid 212.
[91] Cf M.W. McConnell, n 2 above, 163 (suggesting that a very broad reading of the hybrid-rights exception would amount to overruling *Smith*).
[92] See n 46 above.
[93] ibid 66.
[94] See n 9 above, 410-411 (requiring a likelihood that expressive conduct would be 'understood by those who viewed it').

would recognize Mr Phillips's refusal to bake the gay-wedding cake as conveying a message (whether religious or philosophical), or whether others would recognize baking such a cake to be expressive of a message (whether religious or philosophical). If the conduct would be understood as expressive, intermediate scrutiny would apply. If the conduct would not be understood as expressive (even if Mr Phillips believed it to be expressive), rational basis would apply. Either way, the religious or philosophical/ideological nature of the message would be irrelevant.

As with an approach that more simply narrows *Smith*'s scope, an approach focused on defining the limits of expressive conduct would apply the rational-basis test to non-expressive conduct. In other words, *Smith*'s rational-basis test would apply to non-communicative religious conduct, just as the rational-basis test applies to non-communicative secular conduct. Instead of either pretending that religious rituals are non-communicative or applying *O'Brien* to all conduct that is related to one's religious beliefs, however, this approach would represent a middle course. It would protect religious and ideological expression equally under *O'Brien*, but intermediate scrutiny would apply only to those behaviors that are commonly understood to be (or that are 'inherently') expressive.

VI. Conclusion

Masterpiece Cakeshop highlighted the inconsistency between two different areas of First Amendment law. By providing greater protection to ideologically motivated expressive conduct than to religiously motivated expressive conduct, the Supreme Court has created two different legal standards to evaluate conduct that is, at its essence, the same. To make matters worse, the dual standards encourage litigants to characterize religious claims as free-speech claims, permitting the dual standards to be manipulated and further demonstrating the interchangeability of the right to engage in expressive conduct found in the Free Speech Clause and the Free Exercise Clause.

The free-exercise claim and the free-speech claim in *Masterpiece Cakeshop* were the same. Regardless of which provision of the First Amendment he invoked, Mr. Phillips wished to engage in the same behavior. The fact that he had two overlapping moral reasons – religious and philosophical – for seeking an exemption from Colorado's anti-discrimination law should not have changed the legal standard applicable to his claim.

Masterpiece Cakeshop may have been decided, but other cases raising First Amendment challenges to anti-discrimination laws are on their way to the Supreme Court. When they arrive, the Court should bring coherence to this area of the law by holding that religious and secular expressive conduct holds the same constitutional value and should be evaluated under the same standard: either the intermediate scrutiny of *O'Brien* or the rational basis of *Smith*.

Short Symposium

Discrimination Based on Sexual Orientation and Religious Freedom in European Contract Law

Luca Ettore Perriello*

Abstract

The recent case of *Lee* v *Ashers Bakery* has raised the question of whether or not freedom of religion may justify a provider's refusal to serve a customer because of his sexual orientation. Businesses and, in general, all activities that involve relationships with the public at large are a crucial touchstone for the non-discrimination principle. Under European law, people engaged in the public offering of goods, services and employment are not entitled to discriminate, not even on religious grounds. Accommodation of religious belief would bring about disquieting consequences relating to the equality and dignity of vulnerable minorities. No distinction can be drawn between status and conduct, and the forced speech argument seems to have a very different scope of application.

I. Setting the Scene

Belfast, May 2014. Mr Lee, a gay activist volunteering for QueerSpace, an organization supporting the recognition of same-sex marriage,[1] was planning to attend an event to mark the end of Northern Ireland's International Day Against Homophobia and Transphobia and the political momentum towards acceptance for same-sex marriage.

Mr and Mrs McArthur had run Ashers Bakery since 1992. The bakery's name came from a passage in the Genesis 49:20: 'Out of Asher his bread shall be fat, and he shall yield royal dainties'. The McArthurs were devout Christians and believed that homosexuality was a sin and marriage should be only between a man and woman. They were determined to run their business according to biblical teachings. However, they offered a 'Build-a-Cake' service, which let customers have their cakes iced with the images and slogans which they wanted.

Mr Lee had purchased cakes from Ashers Bakery on several occasions. The owners and staff did not know about his sexual orientation and his support for

* Postdoctoral Researcher in Private Law, University of Salerno.

[1] Northern Ireland is the only country in the British Isles which does not recognize same-sex marriage. For a detailed account of the peculiar political and legal context in which the decision developed, see E. Fitzsimons, 'A Recipe for Disaster? When Religious Rights and Equality Collide Through the Prism of the *Ashers Bakery* Case' 15 *Hibernian Law Journal*, 66-67 (2016). Before 2015, the Northern Ireland Assembly had already voted against same-sex marriage on five occasions.

same-sex marriage. One day, he placed an order for a cake to be decorated with Bert and Ernie (two fictional puppet characters from a popular US tv show, rumored to be gay), the QueerSpace logo, and the slogan 'Support Gay Marriage'. He paid for the cake and was issued with a receipt.

A few days later, he received a call from Mrs McArthur, informing him that they had to cancel the order because of the bakery being a Christian business but were willing to offer a full refund. Mr Lee was outraged by Ashers Bakery's denial but was able to order a similar cake with another bakery and take it to the event. However, he refused to put it all aside and decided to sue Ashers Bakery on grounds of discrimination based on sexual orientation and/or religious belief and/or political opinion.[2]

In finding for the plaintiff, the County Court held that Ashers Bakery had discriminated on all three grounds and awarded five hundred pounds in damages. The Court of Appeal dismissed an appeal, considering Ashers Bakery's conduct to be associative direct discrimination on ground of sexual orientation, and refused to read the legislation in force in light of the rights and freedoms established in the European Convention of Human Rights (hereinafter, ECHR). The case went all the way to the Supreme Court which, in a long-awaited decision handed down on 10 October 2018, ruled that there had been no discrimination based on sexual orientation and had there been discrimination on grounds of political opinion, the plaintiff should have provided justification to force Ashers Bakery to express an opinion with which it did not agree.

In phrasing its contentious arguments, the Court engaged with several issues of anti-discrimination law: the dividing line (if there is and should there be any) between status and conduct, the forced speech doctrine, the impact of religious freedom on running a business. Against this background lies the more comprehensive question of whether or not party autonomy is endowed with constitutional status or if limitations on the party's freedom to choose a contractual partner must be drawn. These issues have been framed in different ways in common law and civil law jurisdictions. While in Italy a lively debate has arisen over the extent to which anti-discrimination rules should apply to transactions other than those concluded in the context of an offer to the public at large, in common law jurisdictions, recent landmark cases, such as the aforementioned *Lee* v *Ashers Baking Company Ltd*[3] and in the United States, *Masterpiece Cakeshop Ltd* v *Colorado Civil Rights Commission*,[4] have wrestled with the

[2] The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 prohibit direct and indirect discrimination based on sexual orientation in the provision (for payment or not) of goods, services or facilities to the public. The Fair Employment and Treatment Order 1998 makes it illegal to discriminate on grounds of religious belief or political opinion. Note that the UK Equality Act 2010 does not apply to Northern Ireland. It contains a far-reaching provision forbidding all forms of discrimination in the provision of services to the public (section 29).

[3] [2018] UKSC 49.

[4] 584 US (2018). The facts are similar though not the same. In *Masterpiece,* a Christian

question of whether or not freedom of religion might justify a supplier's refusal to serve a customer, or to negotiate at arm's length,[5] because of his sexual orientation or other protected characteristics.

The aim of this article is to discuss the struggle between the right not to be discriminated against because of sexual orientation and the religious freedom of businesses involved in the supply of goods and services to the public, from the standpoint of European contract law. Part II disputes the law and economics of non-discrimination on grounds that markets are not always effective in destroying or minimizing discriminatory conduct on their own. While non-discrimination was originally enacted to combat market failures, it has grown into a general principle of EU law, designed to protect human rights. Part III contends that freedom to choose a contractual partner is constrained by respect for equality and dignity. It is argued that discrimination does not always entail comparison and it may be upheld when it is justified by legitimate aims. Part IV explores the issue of whether or not religious freedom may exempt a business from anti-discrimination legislation. Providers of goods and services to the public at large are not allowed to discriminate on the basis of sexual orientation, nor even on religious grounds. The distinction between status and conduct has no currency in European contract law and the forced speech doctrine has a different scope of application.

II. The Law and Economics of Non-Discrimination

The prohibition on discrimination in contract law is a concept of relatively recent vintage and a peculiar outcome of EU law.[6] EU secondary legislation encompasses a variety of forms of discrimination. Directive 2000/43/EC promotes equal treatment between persons irrespective of racial or ethnic origins; Directive 2004/113/EC prohibits discrimination between men and women in the access to and supply of goods and services; Directive 2006/54/EC targets discrimination between men and women in matters of employment and occupation. The directives are not concerned with any characteristics which may trigger

baker refused to serve a gay couple with a wedding cake because he opposed same-sex marriage. There was no evidence, however, that the couple wanted the cake to be decorated with any particular message. The baker's refusal invites suspicion that it was grounded on his opposition to a status, rather than a message. Nevertheless, the US Supreme Court opined that the Colorado Civil Rights Commission had lacked religious neutrality in dealing with the case.

[5] P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 534, points out that discrimination occurs even where a seller accepts a process of negotiation but charges the buyer at a higher price. Under these circumstances, the buyer will have to bear the cost of the purchase as well as that of his social position.

[6] See D. Maffeis, 'Il divieto di discriminazione', in G. De Cristofaro ed, *I «princípi» del diritto comunitario dei contratti.* Acquis communautaire *e diritto privato europeo* (Torino: Giappichelli, 2009), 267.

discrimination in the supply of goods or services; hence they do not concern sexual orientation.[7] At first blush, it appears that EU law is aloof from discrimination in contracts on grounds other than gender and ethnicity.[8]

However, on closer inspection, this conclusion would be sound only if the analysis were carried out with a view that is limited to secondary legislation. For there to be discrimination in cases other than those provided for by law, it is not strictly necessary to deploy the tools of interpretation by way of analogy.[9] Indeed, the prohibition on discrimination is now enshrined in general principles of EU law: Art 19 of the Treaty on the Functioning of the European Union (TFEU);[10] Art 21 of the Charter of the Fundamental Rights of the European Union (CFREU);[11] Art 14 of the European Convention on Human Rights (ECHR).[12] These principles mandate that the grounds for discrimination can

[7] Long before the directives came into force, it was believed that insofar as a supplier could discriminate based on his idiosyncrasies, he was entitled to discriminate based on any protected characteristics. See G. Pasetti, *Parità di trattamento e autonomia privata* (Padova: CEDAM, 1970), 16, contending that if a supplier can treat two male buyers differently, then he can treat even a man and a woman, a Catholic or a Protestant differently, in much the same way as a testator might prefer a liberal over a communist, an Indian over a Chinese person. However, see P. Femia, n 5 above, 540, fn 843, arguing that the categories of protected individuals should be articulated according to axiology, not logic. The reason why discrimination against women, Catholics or Chinese people is prohibited, while another form, based on an idiosyncrasy, is not, is that the former runs contrary to constitutional values.

[8] A Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM/2008/0426) was presented on 2 July 2008 but has not yet been approved. The CJEU in case, C-303/06 *Coleman* v *Attridge Law*, [2008] ECR I-05603, addressed discrimination by association perpetrated against the mother of a disabled child. The case is relevant not only because the Court considered disability as a protected characteristic but because it paved the way for actions to be brought by people who are treated unfavorably on grounds of their association with a protected person. On the matter, see L.B. Weddington, 'Protection for Family and Friends: Addressing Discrimination by Association' *European Anti-Discrimination Law Review*, 13 (2007).

[9] M. Mantello, 'La tutela civile contro le discriminazioni' *Rivista di diritto civile*, 449-451 (2004), argues that analogy might stretch the protected characteristics to cover cases not provided for by legislation, namely sexual orientation.

[10] Art 19 TFEU reads that the Council, without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, may take appropriate action to combat discrimination. This has led to speculation on whether or not Art 19 contains an original assignment of competences or rather only expands accessory competences. Cf J. Neuner, 'Protection Against Discrimination in European Contract Law' *European Review of Contract Law*, 49 (2006). However, M. Barbera, 'Il nuovo diritto antidiscriminatorio: innovazione e continuità', in M. Barbera ed, *Il nuovo diritto antidiscriminatorio* (Milano: Giuffrè, 2007), XLII, points out that the equality principle is not a 'competence' but a general principle which runs across the whole system.

[11] While Art 21 CFREU is a 'negative' provision, prohibiting several forms of discrimination, Art 19 TFEU entails a 'positive' obligation for the Council to fight discrimination: A. Celotto, 'Art 21', in Id, R. Bifulco and M. Cartabia eds, *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea* (Bologna: il Mulino, 2001), 173.

[12] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' 76 *Law and Contemporary Problems*, 85 (2013), contends that it is true that Art 14 ECHR is not restricted

stretch far beyond those considered by domestic statutes or directives. Still, different treatments based on subjective idiosyncrasies must pass muster, otherwise any interpreters' (courts and scholars) reasons will annihilate those of the parties.[13]

The principles do cover the most invidious forms of discrimination, such as those based on a party's sexual orientation, his religious belief or his social and financial resources.[14] Therefore, it is not appropriate to advocate that contractual differentiation is forbidden only insofar as it is grounded on an unalterable characteristic.[15] For even a characteristic which is dependent on an individual choice may be protected.

The prohibition on discrimination is thus cast in the form of rules *and* principles, laid down in secondary and primary legislation. The transition from a protection confined to secondary legislation in the form of rules to one established in primary legislation in the form of principles epitomizes an evolution in the purposes underlying the prohibition. When anti-discrimination provisions were initially enacted, it was thought that they were instrumental in tackling market failures and enhancing free movement of goods and services.[16] Discrimination generates costs because, when suppliers do not wish to do business with people having given characteristics, the total amount of transactions tends to decline. When these transactions involve several Member States, discrimination

to a finite list of protected characteristics but it does not confer a free-standing action because, to invoke protection, it is necessary to show interference with some other convention rights.

[13] E. Navarretta, 'Principio di uguaglianza, principio di non discriminazione e contratto' *Rivista di diritto civile*, 563-564 (2014), makes the point that discrimination based on a characteristic which is not covered by constitutional principles is permitted and reasonable but it might be exceptionally prohibited when it amounts to an affront to dignity. Others believe that the notion of unfair discrimination is dependent on social context, so protection can be afforded only to those characteristics which are associated with a history of subjugation and disadvantage, like race and gender: J. Gardner, 'Liberals and Unlawful Discrimination' 9(1) *Oxford Journal of Legal Studies*, 7-8 (1989).

[14] On discrimination against the poor, see M. Fabre-Magnan, 'What Is a Modern Law of Contracts?' *European Review of Contract Law*, 381 (2017), praising its inclusion within Art 21 CFREU (which mentions 'property', '*fortune*' in the French translation), while the French Labor Code says nothing about it. However, he concedes that 'it is hardly ever appealed to, especially as the EU Court of Justice has done its utmost to make this Charter toothless'. But see J. Neuner, n 10 above, 44-45, arguing that differentiation based on economic inequality is permitted and quite inexorable in a free market economy. The poor pay more and a universal prohibition would turn the system into a freedom-hostile egalitarian régime. However, the Author seems to overlook the wording of Art 21 or, more likely, denies the provision a horizontal effect.

[15] Arguing this way: J. Neuner, n 10 above, 46, on grounds that an alterable characteristic is 'protected in principle by respect for the idea of self-determination and is therefore potentially justifiable as an ethical or moral guide to action'. This concept, however, is at variance with Art 21 CFREU, which clearly encompasses alterable characteristics as grounds for prohibited discrimination, such as religion or belief, property and language. The same holds true for Art 14 ECHR (religion, political or other opinion, property or other status) and Art 19 TFEU (religion or belief).

[16] D. La Rocca, *Eguaglianza e libertà contrattuale nel diritto europeo* (Torino: Giappichelli, 2008), 58.

curtails economic integration.[17] Parties' decisions, taken out of bias against, for example, sexual orientation are irrational because they neglect the most material factors in contract performance, ie price and quality.[18]

However, legal and economics scholars lament that a legal ban on discrimination is inefficient and unnecessary because competitive markets can create mechanisms that, in the long run, eliminate or minimize discrimination. When a discriminatory seller declines to deal with a buyer, he will experience a cost from the denied transaction. The discriminatory seller will have to charge more than non-discriminatory sellers for the same good or service but the buyers will obviously purchase from sellers with the lowest prices. Perfect competition eradicates discrimination by squeezing prejudiced sellers out of the market.[19]

With respect, this view suffers from three infirmities.[20]

Firstly, markets are not always effective in hampering discrimination; this is a result when monopolies taint competition.[21] Under these circumstances, discrimination brings about higher costs than non-discrimination. A customer discriminated against by a monopolist cannot turn to a different supplier for the same goods or service; he is simply denied access to the goods or service in question. A non-competitive market does not manage to thwart discrimination on its own and anti-discrimination legislation is not only necessary but is also efficient in impairing monopoly power.

Conversely, when the cost of non-discrimination is higher, the discriminatory practice should be upheld.[22] This happens when a seller bears different costs in

[17] F. Zoll, 'Non-Discrimination and European Private Law', in C. Twigg-Flesner ed, *The Cambridge Companion to European Union Private Law* (Cambridge: Cambridge University Press, 2015), 298.

[18] M.F. Starke, 'Fundamental Rights Before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm?', in H. Collins ed, *European Contract Law and the Charter of Fundamental Rights* (Cambridge-Antwerp-Portland: Intersentia, 2017), 107.

[19] Cf G. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1973); R. Posner, *Economic Analysis of Law* (Boston: Little, Brown and Company, 1992), 651, arguing that anti-discrimination laws generate non-pecuniary and psychic costs on discriminators who are averse to associating with minorities; R. Cooter, 'Market Affirmative Action' 31(1) *San Diego Law Review*, 140-141 (1994); and with regard to the provisions against employment discrimination in the Civil Rights Act, see R. Posner, 'The Efficiency and the Efficacy of Title VII' 136(2) *University of Pennsylvania Law Review*, 513-522 (1987).

[20] As illustrated by A.S. Vandenberghe, 'The Economics of the Non-Discrimination Principle in General Contract Law' 4 *European Review of Contract Law*, 415-419 (2007). See also J.J. Donohue III, 'Is Title VII Efficient?' 134(6) *University of Pennsylvania Law Review*, 1411-1432 (1986), contending that, by adding a legal penalty to the market penalty, anti-discrimination legislation facilitates the process of driving discriminators out of the market and maximizing profits.

[21] R. Epstein, *Forbidden Grounds* (Cambridge MA: Harvard University Press, 1992), 85, remarks that 'the use of the anti-discrimination provision (…) has powerful justification whenever practical or legal circumstances prevent the emergence of a competitive market'.

[22] See A.S. Vandenberghe, n 20 above, 428-429, articulating a balancing test to assess whether or not discrimination shall be permitted or prohibited. Pointing out that discrimination is not *per se* objectionable, see J. Neuner, n 10 above, 44-45, who contends that discrimination

selling to different customers and price discrimination prevents costly customers from being unjustifiably subsidized by the economical ones. Take car insurance companies charging male drivers more, on grounds that, statistically, they have more accidents than female drivers. The reason behind discrimination is that insurance companies know very little about their customers at the time the policy is signed. Thus, they rely on statistical data to avoid the costs that distinguishing a particular male driver from the average male driver would entail.[23] However, what is commonly overlooked by this cost-benefit analysis is that discrimination trumps human dignity and equality even when its costs are lower than those connected with anti-discrimination legislation.[24] Moreover, when information is ascertained that the insured male customer is actually a very responsible driver, the insurance premium should be reduced or statistical discrimination will no longer be justified.

Secondly, where prejudice is widespread, business owners will tend to comply with it, in order to maximize profits or avoid bankruptcy. Sellers assume that given consumer groups, on average, are less solvent, less patient in carrying out negotiations, more willing to access goods and services usually associated with culturally dominant groups and thus willing to pay more. Sellers do not shy away from their bias but go along with it. The market does not eradicate discrimination but rather internalizes it for the sake of its own survival.[25]

Last but not the least, anti-discrimination law can be used to revise and reshape cultural preferences, in much the same way as education does.[26] Law is

optimizes offers, improves individual elements of performance and contributes to a diversified market.

[23] On statistical discrimination, see I. Ayres, 'Fair Driving: Gender and Race Discrimination in Retail Car Negotiations' 104(4) *Harvard Law Review*, 843 (1991), showing that in Chicago's retail car market, black and women are charged more than white men. Statistical discrimination can be cost-based, when certain customers tend to impose additional costs on a dealership, eg they pose greater credit risks. Revenue-based statistical discrimination stems from sellers' inferences that certain customers on average are willing to pay more. Protected characteristics, such as race and gender, serve as proxies to inform sellers about how much individual consumers would be willing to pay for a car.

[24] It is often the case that markets advance purposes which run counter to the purposes furthered by legal systems. See F. Criscuolo, *Diritto dei contratti e sensibilità dell'interprete* (Napoli: Edizioni Scientifiche Italiane, 2003), 31, arguing that market purposes consist in profit maximization, wealth concentration, subjugation and exploitation of individuals. Law should take a stance and use coaction to facilitate mandatory purposes. See also L. Ciaroni, 'Autonomia privata e principio di non discriminazione' *Giurisprudenza italiana*, 1819 (2006), stressing the concept of free market as *ordo legalis*, governed by public regulation, as opposed to *ordo naturalis*, held together by endogenous forces.

[25] Cf P. Femia, n 5 above, 535.

[26] See R. Post, 'Law and Cultural Conflict' 78(2) *Chicago Kent Law Review*, 488-489 (2003), citing the Civil Rights Act 1964 as a means by which to 'reshape the repressive norms of race that characterized the American workplace'. However, A.S. Vandenberghe, n 20 above, 418-419, cautions that the preference-shaping role of private law is weak because courts dislike interfering with subjective preferences and the remedies against violations of contract law consist of compensatory damages, which do little or nothing to wipe out bias and hatred.

understood as a means by which to reflect the norms of a pre-existing culture but also to displace individual preferences which are at odds with human dignity and equality. Predicating the preference-shaping role of law is tantamount to acknowledging its superior moral authority.[27] Law aspires to a perfectionist model of freedom of contract, whereby the interference with the contracting party's choices is not warranted by his inability to identify and pursue his interests but by his judgment being clouded by a wrong set of preferences which the law seeks to amend by relying on absolute, transcendent, politically-neutral principles, namely human dignity and equality.[28]

This evidence lends support to the conclusion that anti-discrimination law is essential and that a cost-effective analysis of discriminatory actions is unconvincing; bias, mischief and economically irrational factors are not the only reasons behind discrimination.[29] In a case heard by the Court of Padua in 2005,[30] a bar had charged black and Albanian customers twice as much as other customers in order to keep unpleasant individuals at bay. The Court ordered the bar to stop the discriminatory conduct and awarded non-pecuniary damages in the sum of one-hundred euros for each plaintiff. There seems little doubt that the bar's decision was economically sound, ie pursuing profit maximization but still the Court found it to be discriminatory.

Casting non-discrimination in general principles and framing it as a 'right not to be discriminated against' (as in II. – 2:101 Draft Common Frame of Reference) has contributed to endowing it with an axiological nature. Originally envisaged with a view to preventing market failures, the prohibition on discrimination now tends to be instrumental in protecting human rights.[31] Still,

[27] 'Where the legal system over-rides my right to make autonomous choices, or to act on my personal preferences, with respect to my contracting partners or the terms on which I choose to interact, it is unavoidably making a moral judgement about the quality of my preferences': M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge MA and London: Harvard University Press, 1997), 188.

[28] Comparing the paternalist model and the perfectionist model, M.R. Marella, 'The Old and the New Limits to Freedom of Contract in Europe' 2 *European Review of Contract Law*, 269 (2006), contends that 'while paternalism restricts our bargaining freedom only in the name of satisfying our deepest set of preferences, the perfectionist is a moralist who is prepared to ignore our deepest wishes when these are deemed unworthy'. It appears that anti-discrimination law is in line with the perfectionist model.

[29] U. Breccia, 'Il contratto in generale', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 1999), XIII, 203.

[30] Tribunale di Padova 19 May 2005, *Giurisprudenza italiana*, 949 (2006).

[31] See E. Navarretta, n 13 above, 548-549, defining non-discrimination in contract as the epitome of the new constitutional objectives advanced by the European Union, which tend to protect fundamental rights and not only economic freedoms. Therefore, it is not accurate to state that a general principle of non-discrimination in contract law exists insofar as the discriminatory conduct is not isolated but widespread because only in this case does discrimination prevent the customer from accessing the goods or service in the market. This view was taken by D. Maffeis, 'Il contratto nella società multietnica: è un atto illecito la determinazione di un prezzo doppio per i clienti extracomunitari' *Giurisprudenza italiana*, 962 (2006).

the human rights discourse should not be over-emphasized because prohibition secures the right of vulnerable groups to conclude contracts but says nothing about its substance.[32] Moreover, the Court of Justice of the European Union (CJEU) has so far been reluctant to acknowledge the horizontal direct effect of the non-discrimination principle within private relations.[33]

III. The Fettered Freedom to Choose a Contractual Partner

The reasons behind non-discrimination are not to be conflated with market failures. That a gay customer who is denied a cake, could just leave and purchase from another seller, is *not* a sound argument for upholding discriminatory conduct.[34] In fact, the UK Supreme Court did not deploy this argument when it found for the baker. Yet, the non-discrimination principle interferes with a tenet of party autonomy, ie the freedom to choose a contractual partner.[35] While

[32] A. Somma, 'Social Justice and the Market in European Contract Law' 2 *European Review of Contract Law*, 185-186 (2006), warns that under EU law (including the Nice Charter), market regulation merely seeks to avoid its collapse, not promote social justice. The 'social market economy' model does not encourage solidarity between individuals and is at variance with the national constitutions of several Member States. The bans on contract discrimination do not alter the picture because they apply 'exclusively to the contracting parties, and nothing is said of the dealings between them. That is to say, it is an ideal way of eliminating hurdles to the free movement of goods, but it will do nothing at all about social deprivation'. Non-discrimination exemplifies *formal* equality, rather than *substantive* equality: E. Navarretta, n 13 above, 549-550.

[33] Cf case C-144/04 *Werner Mangold* v *Rüdiger Helm*, [2005] ECR I-9981 and case C-555/07 *Kücükdeveci* v *Swedex GmbH & Co*, [2010] ECR I-365, wherein the CJEU instructed German courts to disapply national laws governing the contract of employment that permitted age discrimination, in light of the general principle of non-discrimination. Some scholars claim that this is an example of horizontal direct effect: 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. Yet, it is true that the Court ordered to disapply national discriminatory laws because they infringed a general principle but, strictly speaking, this line of reasoning conforms to the weaker model of horizontal *indirect* effect, whereby contract law must be interpreted and applied in light of a fundamental right: M. Stürner, 'How Autonomous Should Private Law Be?', in H. Collins ed, *European Contract Law* n 18 above, 39.

[34] It is not accurate to claim that the prohibition on discrimination cannot apply when the single seller's prejudice does not correspond to a widespread prejudice because the discriminated party can turn to other sellers for the same goods or service. This stance is taken by D. Maffeis, 'Discriminazione (diritto privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 2011), 498-499. A discriminatory conduct transgresses human dignity and equality, even when it is isolated. See also N. Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' 5 *Oxford Journal of Law and Religion*, 425 (2016), pointing out that the narrow view that the right of religion in the employment context could be well-protected by the fact that an employee whose religious freedom was impaired could leave and find another job, does not receive support from current European jurisprudence.

[35] See V. Roppo, 'Il contratto', in G. Iudica and P. Zatti ed, *Trattato di diritto privato* (Milano: Giuffrè, 2001), 79, contending that, as long as contract is the realm of freedom, it is also the realm of inequality and discrimination, stemming from parties' freedom to choose their contract partners. In a similar vein: A. Galasso, *La rilevanza della persona nei rapporti privati* (Napoli: Jovene,

individuals have the right to choose whether or not to enter into a contract at all, they also have the right to choose with whom to contract and this aspect allows them to fit their negotiations into their schemes of values and preferences.[36] This general rule suffers no exception in the commercial context.[37] However, there is a sufficiently broad consensus that party autonomy does not come down to negative freedom from State authority[38] but it involves the duty to refrain from unjustifiable interference with the rights of others. Most importantly, the choice of a contractual partner should not override individuals' rights to take pride in their identities.[39]

Some argue that a prohibition on a decision to discriminate does not even amount to a state interference because parties remain free to choose with whom to contract and are not required to justify their choices. The prohibition tackles the refusal to contract (or the negotiation on worse terms), not the freedom to pick a contractual partner.[40] However, what this view overlooks is that freedom of contract embraces freedom *not* to contract and *not* to justify the refusal to contract. So, it appears that the prohibition to discriminate does undermine the sanctity of contract but a limitation of this magnitude is accepted either because party autonomy is not vested with constitutional status[41] or because it is, yet it

1974), 44; G. Oppo, 'Eguaglianza e contratto nelle società per azioni' *Rivista di diritto civile*, I, 635 (1974); P. Barcellona, *Formazione e sviluppo del diritto privato moderno* (Napoli: Jovene, 1987), 274, illustrating that freedom to determine contract terms postulates freedom to choose a partner; U. Breccia, n 29 above, 200; C. Camardi, 'Integrazione giuridica europea e regolazione del mercato. La disciplina dei contratti di consumo nel sistema del diritto della concorrenza' *Europa e diritto privato*, 716 (2001); F. Galgano, 'Il negozio giuridico', in A. Cicu, F. Messineo and P. Schlesinger eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2002), 53, arguing that party autonomy encompasses the right to say 'no', without having to justify the refusal.

[36] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 77, citing, for instance, freedom to choose 'a more expensive airline offering a worse deal simply on the ground that its rival has a poor reputation in respect of matters which concern us personally, such as its refusal to recognize a trade union for the purposes of collective bargaining or its poor record on environmental matters'. Cf also E. Picker, 'L'antidiscriminazione come programma per il diritto privato' *Rivista critica del diritto privato*, 701 (2003), contending that non-discrimination is a foreign body within the system of private law, tending to jeopardize its fundamentals, namely the freedom to choose a contractual partner. Picker suggests limiting its operation to exceptional circumstances, like violations of public policy.

[37] Cf Baroness Hale's remarks in *Bull* v *Hall* [2013] UKSC 73: 'The general rule is that suppliers of goods and services are allowed to pick and choose their customers'.

[38] Negative freedom is a cornerstone of liberal thought. See I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 124, arguing that 'there ought to exist a certain minimum area of personal freedom which must on no account be violated (…) A frontier must be drawn between the area of private life and that of public authority'.

[39] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 74, elucidating that 'liberty is not limited to negative freedom from interference, but requires the law to promote the positive freedom or autonomy of all members of a society'.

[40] G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' *Rivista di diritto civile*, 1402 (2015).

[41] See P. Rescigno, 'L'autonomia dei privati', in Id et al, *Studi in onore di Gioacchino Scaduto* (Padova: CEDAM, 1970), II, 539-540. Rescigno's theory revolves around the wording of Art 2

needs to be accommodated with other fundamental values,[42] such as dignity *and* equality.

That both these values make the underlying purposes of the prohibition is a matter of dispute. Some scholars hold the firm view that framing the policy behind non-discrimination in terms of substantive equality would replace the fundamental choices made in a market economy with Catholic solidarism, socialism or Marxism.[43] They censure the attempt to implant personal values into contract law, which would result in entrusting the judiciary with the power to safeguard socially and economically weak individuals. Yet, distributive justice should lie with the legislature.[44] The policy behind non-discrimination is, rather, found in an American-style 'equal opportunity', which pursues the narrower aim of safeguarding customers' self-expression and the efficiency of market exchange.[45]

Some examples may shed light on the issues at stake. They would include a railway company providing separate cars for whites and blacks;[46] a restaurant providing separate tables and crockery for citizens and foreigners; a realtor

Constitution, which reads: 'the Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social organizations wherein his personality is developed and it requires the performance of fundamental duties of political, economic, and social solidarity' (translation by M. Cappelletti et al, *The Italian Legal System. An Introduction* (Stanford, CA: Stanford University Press, 1967), 281). He argues that the provision does not guarantee the development of personality but the protection of social organizations and rejects the view that construes this as protection of the contract which originated them. Rescigno's theory reflects the concerns with making party autonomy a fundamental right, which would turn any contract into the realm of unfettered freedom from public authority. See also G. Alpa, 'Libertà contrattuale e tutela costituzionale' *Rivista critica del diritto privato*, 49 (1995), contending that freedom to conduct a business is not a fundamental right because the Constitution subordinates it to social utility and respect for human dignity. In a similar vein, see F. Galgano, 'Artt. 41-44', in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro italiano, 1982), 26; P. Perlingieri, 'Mercato, solidarietà e diritti umani' *Rassegna di diritto civile*, 101 (1995).

[42] In contrast to Rescigno, see P. Femia, n 5 above, 498-503, who argues that Art 2 Constitution prioritizes personality, so the analysis should not start with social organizations but with personality unfolding itself in legal relations, namely in contracts. Party autonomy is not a fundamental right *per se* but displays of it are covered by a web of constitutional principles needing to be balanced against each other and adjusted to each particular case. Consequently, the constitutional reasons behind party autonomy differ. Where party autonomy affects non-pecuniary values, what is at stake is the personality principle under Art 2 Constitution. Instead, where it concerns production and transfer of wealth, its cornerstone is Art 41 Constitution, securing freedom to conduct a business. For similar remarks see P. Perlingieri and M. Marinaro, 'Art 41', in P. Perlingieri ed, *Commento alla Costituzione Italiana* (Napoli: Edizioni Scientifiche Italiane, 2001), 286; C. Donisi, 'Verso la depatrimonializzazione del diritto privato' *Rassegna di diritto civile*, 655 (1980); A. Lener, 'Violazione di norme di Condotta e tutela civile dell'interesse all'ambiente' *Foro italiano*, 105 (1980).

[43] D. Maffeis, 'Il contratto nella società multietnica' n 31 above, 955-956.

[44] E. Navarretta, n 13 above, 565-566. This point was previously made by R. Sacco and G. De Nova, 'Il contratto', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2004), I, 38, contending that social issues left unsolved by the market must be solved with measures other than contract law (such as fiscal aids or public services).

[45] D. Maffeis, 'Il contratto nella società multietnica' n 31 above, 956.

[46] See *Plessy* v *Ferguson* 163 US 537 (1896).

differentiating offers for 'normal' and 'different' people. No unequal treatment results from these cases, because customers receive the same service but these hideous forms of discrimination are outwith the law due to their affront to human dignity. Consequently, it is argued that the essence of discrimination does not lie in inequality but in its affront to dignity.[47]

However, this appears to be a narrow view, which construes the concept of unequal treatment in its mere 'quantitative' dimension (whites and blacks travel under the same conditions; citizens and foreigners have the same meal) but downplays its 'qualitative' aspects (whites and blacks are accommodated in separate cars; citizens and foreigners sit in separate areas and use separate crockery).

A dignity-only concept of discrimination tarnishes the variety of purposes underlying the prohibition and narrows the remedy for its violation down to the compensation of damages, while contractual remedies (such as those invalidating the unlawful refuse to contract or amending the discriminatory agreement) stay out of the picture.[48] Besides, for the dignity-based theory not to be one-sided, it

[47] For these examples, see A. Gentili, 'Il principio di non discriminazione nei rapporti civili' *Rivista critica del diritto privato*, 228-229 (2009), who argues that discrimination is, above all, an affront to human dignity; any other consequences (such as denial of access to a good or service) are not the essence of discrimination because they may not occur under the circumstances. Other scholars connect non-discrimination with dignity: D. Maffeis, 'La discriminazione religiosa nel contratto' *Osservatorio delle libertà ed istituzioni religiose*, May 2008, 20-24, claiming that non-discrimination does not prevent a party from treating a partner differently from any others, but prevents a party from treating a partner worse because of prejudice; C.M. Bianca, 'Il problema dei limiti all'autonomia contrattuale in ragione del principio di non discriminazione', in Id et al, *Discriminazione razziale e autonomia privata. Atti del Convegno di Napoli del 22 marzo 2006* (Roma: Unar, 2006), 64; M.R. Marella, 'Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti' *Rivista critica del diritto privato,* 87 (2007); 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), 38; D. Strazzari, *Discriminazione razziale e diritto. Un'indagine comparata per un modello «europeo» della discriminazione* (Padova: CEDAM, 2008), 258. In US case law, see the Appellate Division of the New York Supreme Court in *Gifford* v *McCarthy*, 137 AD 3d 30 (2016), holding that 'discriminatory denial of equal access to goods, services and other advantages made available to the public not only deprives persons of their individual dignity, but also denies society the benefits of wide participation in political, economic, and cultural life'.

[48] G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013), 182-185, contending that the dignity-based argument would approximate discrimination to the traditional model of tort built on compensation. A similar line is taken by B. Troisi, 'Profili civilistici del divieto di discriminazione', in Id et al, *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 297, equating discrimination with different treatment; P. Femia, n 5 above, 521-522, who advances the plea for a diversified application of equality to party autonomy and highlights that equal treatment is just a possible but not inevitable outcome of equality, which may also justify different treatments. Equal treatment is required only where inequalities cannot be justified. On a more abstract level, see V. Crisafulli, 'Diritti di libertà e poteri dell'imprenditore' *Rivista giuridica del lavoro e della previdenza sociale*, I, 70 (1954), claiming that party autonomy cannot infringe constitutional provisions securing individual freedoms; P. Perlingieri, 'Principio di uguaglianza e istituti di diritto

should take into account the hurt sustained by the seller while being forced to engage in a sale which he finds to be contrary to his conscience.[49] The discriminatory refusal to contract may be respectful of the seller's dignity but still run counter to the equality principle.

These remarks elucidate that non-discrimination can be rooted in dignity *and/or* equality. It might be the case that discrimination frustrates dignity but not equality, as in the aforementioned cases involving railway companies and restaurants. There are further illustrations of the point; the firm addressing the public at large with an invitation to offer and then turning down the first offer because of a protected characteristic of the offeror or the private club seeking to ward off certain groups of aspiring members and, to that end, adopting detrimental application conditions for anyone and for a limited period of time.[50]

Yet, it might also be the case that discrimination frustrates equality, while the individual is not hindered in the exercise of his dignity. *Lee* v *Ashers Bakery* is precisely illustrative of this antinomy. Central to the Supreme Court's reasoning was that the bakery had not objected to a personal status but had refused to approve of a (seemingly anti-Christian) message conveyed by a cake.[51] The bakery claimed that its conduct had not offended the gay customer's dignity, although he could not access the service on an equal footing to a heterosexual customer; indeed, the bakery would have had no trouble with a 'Support Heterosexual

civile', in Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), II, 459. At the other end lies the theory that the equal treatment principle clashes with freedom of contract. See: L. Paladin, 'Eguaglianza (diritto costituzionale)' *Enciclopedia del diritto* (Milano: Giuffrè, 1965), 532; P. Rescigno, 'Sul cosiddetto principio di uguaglianza nel diritto privato' *Foro italiano*, I, 665 (1969), claiming that equal treatment and distributive justice in private law presuppose either a community of people (such as a company) or state interference in the economy (as per the duty to contract upon the monopolist); G. Pasetti, n 7 above, 14, arguing that the equality principle is binding only upon the legislature; D. Carusi, *Principio di uguaglianza, diritto singolare e privilegio. Rileggendo i saggi di Pietro Rescigno* (Napoli: Edizioni Scientifiche Italiane, 1998), 34. Statements to this end can also be found in Corte di Cassazione-Sezioni unite 29 May 1993 no 6031, *Foro italiano*, I, 1794 (1993). Within this narrative, the legal provisions imposing on businesses an obligation to treat equally (eg Art 2597 of the Italian civil code, concerning the monopolist operator) shall be considered exceptions and construed restrictively: C. Grassetti, 'Patto di boicottaggio e concorrenza sleale' *Rivista di diritto industriale*, I, 17 (1959).

[49] D. Laycock, 'Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel' *The Yale Law Journal Forum*, 378 (2016), points out that the dignitary harm must be acknowledged on the religious sellers' part too because those seeking a religious exemption from anti-discrimination law 'believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates'.

[50] D. Maffeis, 'La discriminazione religiosa nel contratto' n 47 above, 24.

[51] § 23 of the judgment: 'the reason for treating Mr Lee less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way'. Therefore, 'direct discrimination is treating people differently' and not necessarily affronting their dignity.

Marriage' slogan. Still, the Court accepted this submission and found no relevant discrimination in the bakery's conduct, thereby apparently (though not explicitly) embracing the view that only a conduct harmful to human dignity is tantamount to unlawful discrimination.

In a nutshell, discrimination is prohibited: i) when it affronts human dignity, even though the discriminated is treated equally; ii) when it results in an unjustified different treatment, without impinging on human dignity; iii) when it infringes both equality and human dignity. This variety of articulation points to the shortcomings in the conventional wisdom that scrutiny of contractual discrimination is threefold. According to several scholars, that scrutiny does not have a twofold structure (comparing fact and norm) but a threefold one (comparing fact, norm and *tertium comparationis*).[52] In the case at hand, the relevant comparator is the heterosexual customer ordering a cake decorated with a 'Support Heterosexual Marriage' message.[53]

However, this view is misguided for two reasons.

Firstly, it identifies prohibited discrimination with different treatment and is silent as to the cases in which the individual is treated in the same way but his or her dignity is compromised. It is not accurate to say that, where no comparison between different situations is feasible, then discrimination is permitted.[54] No wonder the directives equate discrimination with harassment, ie any unwanted conduct related to a protected characteristic, taking place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Harassment does not entail comparison because its prohibition tends to safeguard the right not to be

[52] In the Italian literature see: M.V. Ballestrero, *Dalla tutela alla parità, La legislazione italiana sul lavoro delle donne* (Bologna: il Mulino, 1979), 250; B. Troisi, n 48 above, 297; D. Izzi, 'Discriminazione senza comparazione? Appunti sulle direttive comunitarie di seconda generazione' *Giornale di diritto del lavoro e di relazioni industriali*, 425 (2003); D. La Rocca, n 16 above, 175; L. Sitzia, *Pari dignità e discriminazione* (Napoli: Jovene, 2011), 249. See also M. Banton, 'Discrimination Entails Comparison', in P.R. Rodrigues and T. Loenen eds, *Non-Discrimination Law: Comparative Perspectives* (The Hague: Brill, 1999), 107.

[53] This was the relevant comparator according to the County Court of Northern Ireland and the Court of Appeal in *Lee* v *Ashers Bakery*. Conversely, M. Arnheim, 'Lee v McArthur: The Gay Wedding Cake Revisited' *Law & Religion UK*, 18 December 2017, argues that a better comparator would have been the Christian bakers themselves, in that they were being forced to treat *themselves* less favorably than they treated a prospective customer. He then criticizes the baker's lawyers for not making this point. With respect, it appears that this view misunderstands the role of the comparator, who cannot but be *tertium*, ie a party other than the discriminated or the discriminator.

[54] The CJEU's caselaw on gender discrimination clearly exemplifies this point. Consider the cases in which the Court ruled that the employer's refusal to enter into a contract of employment with a pregnant woman or her dismissal, was unlawful discrimination: Case C-177/88, *Dekker* v *VJV-Centrum*, Judgment of 8 November 1990; Case C-32/93, *Webb* v *EMO Air Cargo (UK)*, Judgment of 14 July 1994, all available at www.eur-lex.europa.eu. In these cases, no relevant male pregnant comparator could be identified; still the Court was ready to strike down the discriminatory conduct.

disadvantaged, not the right not to be *more* disadvantaged.[55]

Secondly, assuming that discrimination may be banned in cases in which a different treatment occurs, the threefold review says nothing of the reasons behind differentiation.[56] In other words, the *tertium comparationis* does not reveal why the discriminated individual is treated differently and does not differentiate cases in which this can be justified by a worthwhile aim pursued by the supplier or cases in which it is grounded in his bias against individuals bearing given protected characteristics. Certainly, Mr Lee was not treated on an equal footing with any heterosexual customers placing an order for a cake emblazoned with 'Support Heterosexual Marriage' but the adjudication on a discriminatory refusal to contract would end with that finding and the supplier's religious beliefs would be immaterial.

It may be the case that forms of discriminatory conduct are upheld, no matter how hideous the underlying reasons may be because otherwise a legitimate aim may not be attained.[57] In other cases, unequal treatment is warranted as a

[55] Cf M. Barbera, n 10 above, XXXII; C. Favilli, *La non discriminazione nell'Unione Europea* (Bologna: il Mulino, 2008), 253; A. Gentili, n 47 above, 215-216.

[56] See G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' n 40 above, 1408-1410, citing ethical banks as an example of justified discrimination. Ethical banks do not engage in financial activities with businesses that hamper human rights. These differences in treatment do not amount to prohibited discrimination, if justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (eg refusing to finance businesses which produce and sell weapons or use child labor). Another example of justified discrimination is a body of rules for tenants requiring that common parts of a building be not used for activities associated with a particular cultural group, for health reasons. On the general defense of justification, which is available to indirect discrimination claims, see also C. Fenton-Glynn, 'Replacing One Type of Oppression with Another? Same-Sex Couples and Religious Freedom' 73(1) *The Cambridge Law Journal*, 31 (2014); F. Zoll, n 17 above, 306. To the contrary see D. Maffeis, *Offerta al pubblico e divieto di discriminazione* (Milano: Giuffrè, 2007), 193, arguing that the legitimate aims pursued do not make ethical banks lawful.

[57] Cf Art 4 of the Anti-Racism Directive 2000/43/EC, which allows Member States to provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate; Art 4, para 5, of the Equal Access Directive (2004/113/EC), which does not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary; Art 20, para 2, of the Services Directive 2006/123/EC, which stipulates that Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria. On the objective justification of indirect discrimination see case C-127/07, *Arcelor Atlantique et Lorraine and others*, Judgment of 16 December 2008; Case C-236/09, *Test-Achats*, Judgment of 1 March 2011; Case C-20/12, *Giersch and others*, Judgment of 20 June 2013, all available at www.eur-lex.europa.eu. The ECtHR follows suit, claiming that 'a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does

means by which to ensure equality for minorities. This is the 'positive action' doctrine, which allows Member States to adopt or maintain specific measures to prevent or compensate for disadvantages linked to a protected characteristic.[58]

Two conclusions can be drawn from these remarks. Firstly, a finding of discrimination does not always require identification of a relevant comparator because evidence of unfavorable treatment resulting from the possession of a protected characteristic may suffice. Secondly, the principle of equality demands justification of any differences in the conditions of access to goods or services. Equal treatment is just a possible and not inevitable outcome of equality. It is required when discrimination has no objective and reasonable justification, that is, discrimination does not pursue a legitimate aim and the means of achieving that aim are not appropriate and necessary.

This is not to say that the legitimacy of the aim lies with the lawyers and the courts' subjective preferences and idiosyncrasies[59] because the criteria justifying discrimination can be found in fundamental rights and freedoms, which are sourced either in a Constitution or in international conventions, particularly the ECHR and the CFREU. So, when the Italian Football Federation sought to refuse to license non-EU football players whose residence permit expired before the end of the season, the Tribunal of Lodi decisively replied that the alleged 'protection of football nurseries' amounts to ethnocentricity, which is an unacceptable social model.[60] But what about religious freedom? Can it justify discrimination? Is a Christian baker entitled to decline service to a gay customer because entering into the contract would compromise his most intimate religious beliefs?

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., *Karlheinz Schmidt* v *Germany*, Judgment of 18 July 1994; most recently, Eur. Court H.R., *Petrov and X* v *Russia*, Judgment of 23 October 2018, all available at www.hudoc.echr.coe.int.

[58] Examples of positive action doctrine can be found in Art 5 Anti-Racism Directive 2000/43/EC; Art 7, para 2, Equal Treatment Directive 2000/78/EC; Art 6 Equal Access Directive 2004/113/EC; Art 3 Equal Opportunities Directive 2006/54/EC. For further discussion see F. Zoll, n 17 above, 309.

[59] Arguing thus: D. Maffeis, 'Il diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti' *Le nuove leggi civili commentate*, 179 (2015). He contends that the claim to draw a hierarchy of values is essentially ahistorical, because a multi-ethnic and multi-cultural society mixes up a variety of ethical, religious, political, social principles, preferences and models. Who is to say if gambling is right or wrong or if an ethical bank has the right to refuse to deal with a fur trader? *Contra* G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' n 40 above, 1410, who correctly appeals to the hierarchy of interests in the Constitution, which disapproves the trade of weapons, the exploitation of child labor, the use of technology which endangers the environment, etc.

[60] Tribunale Lodi, 13 May 2010, available at https://tinyurl.com/ybfhj68f (last visited 27 December 2018).

IV. Doing Business Without Religion

The right to freedom of religion is recognized by Art 9 ECHR and Art 10 CFREU. Both provisions include the right to change religion, either alone or in community with others and in public or private, to manifest religion, in worship, teaching, practice and observance. However, Art 9 ECHR adds that limitations can be prescribed by law insofar as they are necessary in a democratic society for the protection of the rights and freedoms of others.

Now, the question is whether or not the bakery's refusal to ice a cake or, generally speaking, a supplier's refusal to provide any goods or services to a customer because of his sexual orientation can be protected under those conventions, although the wording itself of Art 9 ECHR seems unmistakably to suggest that freedom of religion can be constrained by the right of others to express their identities and not be discriminated against because of them.

If we look at the other hemisphere, there is unequivocal Australian authority for the proposition that an action can be protected as a religious manifestation so long as there is no alternative for the believer but to act in that way. The Supreme Court of Victoria embraced this approach in *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited*.[61] Cobaw, a charitable organization concerned with LGBT youth suicide prevention, contacted CYC, a Christian camping organization, to run a two-day program at a CYC-owned and operated camp. CYC provided information that it could not allow an organization advocating for homosexual lifestyle to use its premises, due to its view that homosexuality was not a valid expression of human sexuality. In ruling against CYC, the Court of Appeal relied on section 77 of the Equal Opportunity Act 1995 (Vic), which exempted from anti-discrimination legislation those acts which were *necessary* for a person in order to comply with his genuine religious beliefs or principles.[62] The Court took the view that Christian doctrine could not have *required* denying a booking request and there was indeed an alternative for CYC to comply with its religious beliefs, which was to advertise that sex outside marriage was forbidden on the campsite.

If this reasoning were to be applied to the case at hand, it would transpire that Christianity certainly does not require a refusal to bake a cake with a 'Support

[61] [2014] VSCA 75.

[62] A similar provision is now enshrined in the Equality Opportunity Act 2010 (Vic), section 84, the only piece of legislation in Australia which protects religious freedom of general citizens, as opposed to religious organizations and professionals. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, instead, only exempts religious organizations, whose sole or main purpose is not commercial. Being an entirely commercial enterprise, Ashers Bakery could not avail of the exemption. In terms of legislative reforms, E. Fitzsimons, n 1 above, 83, advises against the extension of the tightly drafted and narrow exception to any business, because this would undermine the rule of law: 'consumers cannot reasonably be expected to discern which providers of goods and services may discriminate against them when entering the normal transactional discourse'.

Gay Marriage' slogan. There is no rule in Christian doctrine that not only recommends against but prevents believers from doing business with homosexual people or couples alike.

Yet, the view that a manifestation of religion is protected only insofar as there is no alternative but to act in that way seems to be too narrow. The European Court on Human Rights (ECtHR) took a different stance in the case of *Eweida* v *United Kingdom*,[63] wherein the Court held that 'in order to count as a manifestation within the meaning of Article 9, the act in question must be intimately linked to the religion or belief' and continued that 'there is no requirement on the applicant to establish that he or she acted in the fulfilment of a duty mandated by the religion in question'. So, for there to be a protected manifestation of religion, it is not necessary that the act in question be compulsory.[64] Specifically, British Airways' policy that prevented its employees from displaying a cross could not be supported on the ground that Christian doctrine does not mandate wearing a cross. However, it is difficult to argue that refusing to serve a gay customer, which is not required by Christian doctrine, is as intimately linked to religion as wearing a cross or a *niqab* or having a *payot*. These are clear-cut religious symbols that anyone, on objective grounds, would associate with Christianity, Islam and Judaism respectively.

It is true that the ECtHR has stretched the protection of religious freedom to cover acts that do not constitute *generally recognized forms* of worship or devotion but it has also demanded that a *sufficiently close and direct nexus* exists between the act and the underlying belief, which remains with the courts to determine on the facts of each case. With these requirements in mind, forms of conduct bearing merely personal and subjective religious meanings, which clash with the rights of others, must be denied enforcement *vis*-à-*vis* third parties, otherwise law would turn individual bias into rights to discriminate.[65] A supplier's

[63] [2013] ECHR 37. The judgment considered a quartet of cases concerning the religious rights of UK employees. In one of them, *Ladele*, a Christian civil registrar refused to register same-sex partnerships. In another, *McFarlane*, a Christian sex therapist and relationship counsellor, working for a private organization, refused to work with same-sex couples. They were dismissed by their employers. The ECtHR accepted there had been a *prima facie* interference with the workers' rights to religious freedom but then considered that the aims pursued by the employers 'aimed to secure the rights of others which are also protected under the Convention' and were 'intended to secure the implementation of its policy of providing a service without discrimination'. The ECtHR did acknowledge religious freedom but also required that it be weighed against the rights of innocent third parties. Although the case did not directly concern service providers, it appears that the Court's reasoning can apply to cases involving contractual discrimination based on sexual orientation.

[64] See N. Foster, n 34 above, 418, applauding the wider reading of the provisions on religion offered by the ECtHR.

[65] The Italian caselaw on the right to wear a kirpan is illustrative of this analysis. See Corte di Cassazione, 31 March 2017, *Cassazione penale*, 616 (2018), wherein the Court held that no religious belief can justify possession of weapons in public places because religious freedom is restricted by public policy, which calls for safety and peaceful coexistence. On the contrary, in Canada, see *In Multani* v *Commission scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256, wherein

refusal to deal with a gay customer is not recognized by the general community of believers and non-believers as a Christian manifestation, is in no way required or recommended by Christian doctrine, and is not directly and closely associated with it (like going to mass on Sunday, wearing a cross, abstaining from meat on all Fridays of Lent). Any Christian business owner has the right to believe, privately, that same-sex marriage is a sin but cannot claim to substantiate that belief in commercial conduct which interferes with the rights of others.[66]

Businesses and, in general, all activities that involve permanent relationships with the public are a crucial touchstone for the non-discrimination principle. Under European law, people engaged in the public offering of goods, services and employment are not entitled to discriminate,[67] not even on religious grounds. It does not matter if the supplier is a person operating as a business or a private individual; what matters is that the goods or service are available to the public at large. The non-discrimination principle applies to bakeries selling cakes, B&Bs offering accommodation, Airbnb hosts, taxi drivers supplying rides, private individuals advertising items on a website or in a local newspaper and so forth.

the Supreme Court upheld a Sikh student's right to wear a kirpan to school, without investigating the centrality of kirpans to the Sikh faith. The Court was satisfied with the finding that the claimant's personal and subjective belief in the religious significance of the kirpan was sincere.

[66] This is why, in *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited* n 61 above, the Victoria Court of Appeal considered that the rule that sex shall only be between heterosexual married couples, was one of 'private morality' for those within the church and did not have to be applied to those outside it who chose to behave otherwise. This is a far cry from intending religious freedom as 'merely dealing with what goes on in church meetings', as critically claimed by N. Foster, n 34 above, 424. What is at stake here is the balance of religious freedom with the rights of non-believers and people who hold different faiths.

[67] This view has gained consensus in European anti-discrimination literature. Cf D. Maffeis, *Offerta al pubblico e divieto di discriminazione* n 56 above, 42-43, contends that only discrimination connected with offers to the public harms the efficiency of the market; Id, 'Il diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti' n 59 above, 166; P. Morozzo della Rocca, 'Gli atti discriminatori nel diritto civile, alla luce degli artt. 43 e 44 del t.u. sull'immigrazione' *Diritto di famiglia e delle persone*, 43 (2002), claiming that the protection of a privacy interest ceases where the goods or service are offered to the public; N.M. Pinto Oliveira and B. MacCrorie, 'Anti-Discrimination Rules in European Contract Law', in S. Grundmann ed, *Constitutional Values and European Contract Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 121; C. Barnard and A. Blackham, 'Discrimination and the Self-Employed', in H. Collins ed, *European Contract Law and the Charter of Fundamental Rights* n 18 above, 197, contending that anti-discrimination rules also apply to those offering access to services in their own private home (eg Airbnb); E. Navarretta, n 13 above, 560-562, claiming that non-discrimination applies only to offers to the public because law cannot sacrifice the multitude left out of the market and uphold the discriminator's bias, the only exception being individual negotiations carried out in restricted markets over fundamental services (such as housing). For the same conclusion but using different arguments, see *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited* n 61 above, wherein the Court of Appeal of Victoria held that 'where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs in the context of worship or other religious ceremony. That is because a person engaged in commercial activities can continue to manifest their beliefs in the religious sphere'.

The only exclusions from the non-discrimination principle concern: i) transactions that are not concluded in the context of an offer to the public; ii) transactions that are concluded in the context of private life; iii) transactions that are concluded in the context of family life.[68] The scope of application of European anti-discrimination directives is clearly limited to the provision of goods and services 'available to the public' and 'outside the area of private and family life'.[69] Sellers and buyers of goods and services through individual negotiations, sellers and buyers of goods and services in the context of their private and family lives, are exempted. A domestic householder is entitled not to hire a Muslim plumber, a man can lawfully decide to sell his vineyard to his nephew rather than his niece because he believes that men make better wine, a prospective hotel guest can decide to go elsewhere because he dislikes black owners, a person seeking work can refuse to apply to a Christian organization. The reason behind the exclusion is that the law safeguards privacy interest, that is, the most intimate choices concerning whom I allow in my home, to whom I turn to purchase goods or services, which must remain free from state intervention and in which the non-discrimination principle must yield to self-determination.[70]

An argument to the contrary has been made that the prohibition on discrimination shall apply also to individual negotiations, ie transactions that are conducted outside the scheme of an offer to the public or an invitation to offer. Otherwise, the legislative exclusion of transactions in the area of private and family life would be redundant. In this area, it is impossible for the party to make an offer to the public at large and he or she addresses his/her offer to a given individual, whose choice is not justified by economic reasons (but by

[68] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 83: 'there appear to be three overlapping categories of exclusions: (1) transactions that are not concluded in the context of an offer to the public; (2) transactions in the context of private life; (3) transactions in the context of family life'.

[69] See, in the Anti-Racism Directive 2000/43/EC, Art 3 ('access to and supply of goods and services which are available to the public') and recital no 4 ('It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context'); Art 3 of Equal Access Directive 2004/113/EC ('this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context').

[70] C. Barnard and A. Blackham, n 67 above, 214-215. However, they contend that the exception of private customers acting as potential recipients/purchasers of services shall be limited to decisions taken in the most narrow, private, domestic context. Anti-discrimination legislation should still apply to private customers acting in a commercial context. In German literature, see K.H. Ladeur, 'The German Proposal of an "Anti-Discrimination" Law: Anticontitutional and Anti-Common Sense. A Response to Nicola Vennemann' 3 *German Law Journal*, 2002, available at https://tinyurl.com/y8x66mop (last visited 27 December 2018), supporting the view that a liberal theory of rights and privacy, in particular, makes it unacceptable to force private individuals to make decisions of which they disapprove.

friendship and kinship).[71]

The exclusions from anti-discrimination legislation cover transactions carried out in the context of family life *and* private life but this theory seems to have only the former in mind; also, its premise appears to be ill-advised. Indeed, in the context of private and family life, it is *possible* for the individual to look for goods or services within the public community of providers/suppliers and make biased decisions. Consider a Christian householder advertising in a local newspaper that he is seeking a plumber. As a private customer and potential *purchaser* of services in the context of his own home, he is entitled to discriminate against a Muslim or Hindu plumber. Here, party autonomy prevails over the non-discrimination principle. Transactions carried out in the area of private and family life, even where they follow an invitation to offer addressed to the public at large, are exempted from the non-discrimination principle.[72]

These brief remarks show that the UK Supreme Court's conclusion that a bakery offering its goods and services to the public is entitled to discriminate against homosexuals, is at variance with EU legislation. The decision draws on two controversial arguments that have no currency in European contract law; i) the distinction between status and conduct; ii) the forced speech doctrine. On the first argument, the Court accepted that the McArthurs did not cancel the order because of Mr Lee's sexual orientation but because they opposed same-sex marriage. They would not have taken issue with supplying Mr Lee with a cake without that message. The objection was to the message, not the messenger.[73]

[71] G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* n 48 above, 105-107. In a similar vein, see B. Checchini, 'Eguaglianza, non discriminazione e limiti dell'autonomia privata: spunti per una riflessione' *La nuova giurisprudenza civile commentata*, 193, fn 39 (2012), arguing that, if non-discrimination is a principle, it should apply to any negotiations, regardless of the ways the contract is concluded.

[72] Cf C. Barnard and A. Blackham, n 67 above, 214-215: 'equality law does not, and in our view should not, apply to decisions made by private parties (purchasers) in the domestic context as to whose services to hire (…) This means that individuals are free to make their own choices without the risk of being sued, and the courts are not put into the invidious position of having to scrutinize private choices in the domestic setting'; H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 83-84: 'as a private individual looking for a service, there remains an unfettered freedom to choose a contractual partner, even if the choice is exercised on such proscribed grounds as race, sex and religion'. However, the ECtHR has, at least on one occasion, applied the non-discrimination principle to a will, ie an act drawn up in the context of private and family life. See *Pla and Puncernau* v *Andorra*, Judgment of 13 July 2004, available at www.hudoc.echr.coe.int, concerning a will, dated 1939, in which the testator had stipulated that her son and heir was to pass on his inheritance to a 'child or grandchild from a legitimate and canonical marriage'. The issue arose whether an adopted son could inherit the property, at a time when Andorra did not have a law on adoption. The ECtHR held that an interpretation of domestic law should be adopted that avoided discrimination between adopted and biological children. But see D. Maffeis, 'Discriminazione (diritto privato)' n 34 above, arguing that a testator is free to discriminate, even explicitly, on any grounds, because a testament is not an offer to the public.

[73] § 22 of the judgment. See also R. Ahdar, 'Is Freedom of Conscience Superior to Freedom of

This argument is demonstrably flawed. It is true that advocating for same-sex marriage is not indissociable from homosexual orientation; people of all orientations can and do support same-sex marriage.[74] However, distinguishing a person's identity and his or her actions and consequently permitting discrimination against the actions, means denying the right to accept and enjoy that identity.[75] Individuals would be entitled to have a homosexual orientation but not to fulfill their identity through relationships with others of the same or different orientation. Besides, it is quite challenging to conjure up a baker who earnestly refuses to make a cake with a 'Support for Gay Marriage' message but harbors warm feelings for the LGBT community.

Religion?' 7 *Oxford Journal of Law and Religion*, 140 (2018), provocatively asking: 'Can one still hate the sin and not the sinner?'. Ahdar draws on Harold Berman's statement in *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids: Eerdmans Publishing, 1993), 16: 'it is a cardinal principle of the Western religious tradition (both in its Christian and Judaic aspects) to "hate the sin and love the sinner" '. In Italian literature, see D. Maffeis, 'Discriminazione (diritto privato)' n 34 above, 499, drawing on criminal jurisprudence to argue that there is no discrimination where a party refuses to contract because of the other's party behavior (eg, during negotiations, the other party turns out to be dirty, villainous, drunk, loud or a thief; for the same reason, a bank can decline to give a badly-dressed customer a loan or an employer can say 'no' to a potential employee who clumsily reacts to coffee being spilled over the table). The criminal case quoted is Corte di Cassazione 13 December 2007 no 13234, *Giurisprudenza italiana*, 164 (2009), in which the Court held that discrimination amounting to crime must be based on status (gypsy, black, Jewish etc) and not on conduct, so discrimination based on others' diversity is a far cry from discrimination based on others' criminal attitudes.

[74] But see J. Seglow, 'Same-Sex Wedding Cake: The Supreme Court's Lee v. Ashers Ruling Explained' *The Conversation*, 11 October 2018, contending that 'while support for gay marriage is not a proxy for a person being gay, many gay and lesbian people do identify – and perhaps uniquely identify – with the cause of same-sex marriage, so there is a strong association for them at least'.

[75] 'To distinguish between an aspect of a person's identity and conduct which accepts that aspect of identity or encourages people to see that part of identity as normal or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity': *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited* n 61 above, § 57. American courts too do not support the distinction between status and conduct. In the US, see: *Elane Photography* v *Willock* 309 P3d 53 (NM 2013), in which the New Mexico Supreme Court upheld a fine levied on a photographer who had declined to provide services for a same-sex wedding; *State of Washington* v *Arlene's Flowers Inc* 389 P.3d 543 (Wash 2017), concerning a florist's refusal to supply flowers to a same-sex wedding, the Washington Supreme Court rejected the distinction between conduct and orientation, holding that same-sex marriage is inextricably tied to sexual orientation; *In the Matter of Klein dba Sweet Cakes by Melissa*, Commissioner of the Bureau of Labor and Industries, State of Oregon, case nos 44-14, 2 July 2015, 2015 WL 4868796, in which a cake shop which had declined to make a same-sex wedding cake was ordered to pay one-hundred thirty-five thousand dollars in damages, with the Commissioner holding that refusal to provide a wedding cake because of an opposition to same-sex marriage was tantamount to refusing to provide a cake because of the customers' sexual orientation. In Canada, see *Saskatchewan (Human Rights Commission)* v *Whatcott* 2013 SCC 11, in which the Supreme Court of Canada upheld a fine imposed on an activist for distribution of pamphlets against homosexuality, claiming that 'where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself'.

On the second argument, the Court applied the forced speech doctrine to uphold Ashers Bakery's refusal to provide a cake emblazoned with a message with which they profoundly disagreed. Developed in the US First Amendment jurisprudence, the forced speech doctrine demands that no one be compelled to have or express an opinion in which he does not believe. The Court drew on precedents of the ECtHR and the Privy Council to support its view. In *Buscarini* v *San Marino*,[76] the ECtHR unanimously held that requiring members of the legislature to take an oath on the Holy Gospels was not compatible with Art 9 of the Convention. The second case quoted is *Commodore of the Royal Bahamas Defence Force* v *Laramore*,[77] in which the Privy Council held that a Muslim soldier had been hindered in the enjoyment of his freedom of conscience, when he was forced to attend Christian prayers on parade and take off his cap.

The forced speech argument is not alien to European law. However, the facts of cases relied on by the Court in support of its reasoning are very different from the position of Ashers Bakery.[78] Swearing a Christian oath and attending Christian prayers are objectively manifestations of belief, with which adherents of other religions are not concerned. The same does not hold true for offering a 'Build-a-Cake' service to the public, an activity in which people of any faith and any political opinions may be engaged. No one could reasonably understand baking a cake as being communicative of an anti-Christian message.[79]

Also, if we turn the forced speech argument upside down, it must be so that whenever a provider readily delivers goods or services, then he implicitly agrees

[76] (1999) 30 EHRR 208.

[77] [2017] UKPC 13. The UK Supreme Court quotes many other cases, including one of its own: *RT Zimbabwe* v *Secretary of State for the Home Department* [2012] UKSC 38, in which it held that an asylum seeker who has no political views and therefore does not support the persecutory regime in his home country, is entitled to claim asylum when the alternative is to lie and feign loyalty to that regime in order to avoid ill- treatment. Thus, the doctrine of forced speech applies to political opinions and religious beliefs alike.

[78] See J. Rowbottom, 'Cakes, Gay Marriage and the Right Against Compelled Speech' *UK Constitutional Law Association Blog*, 16 October 2018, also pointing out that Ashers Bakery is a business involved in the provision of goods and services, whose underlying purpose is not religious. This is why the analogy with the Christian printing business being required to print leaflets with an atheist message, which the Court used, is misguided, because 'the Christian book publisher exists for a particular expressive purpose, while the baker does not'.

[79] Cf C. Chandrachud, 'Bittersweet Judgment: The UK Supreme Court in the Ashers Baking Case' *UK Constitutional Law Association Blog*, 15 October 2018, accusing the UK Supreme Court of stretching the notion of forced speech to the breaking point; C. Stoughton, 'Case Comment: Lee v Ashers Baking Company Ltd & Ors' *UK Supreme Court Blog*, 15 October 2018, claiming that labelling messages on cakes as expressions of the baker's conscience is a misunderstanding of the forced speech doctrine. On the difference between protected speech and conduct, see Justice Ginsburg's dissenting opinion in *Masterpiece Cakeshop*: 'for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative… (the baker) submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's'.

to endorse or facilitate that message.[80] But a Naples supporter agreeing to bake a cake celebrating a Juventus success cannot really be seen as rooting for Juventus; a party planner being required to organize a Hallowe'en party cannot really be seen as endorsing pagan idolatry.[81]

V. Conclusion

The essay has aimed to show that the prohibition to discriminate in European contract law serves multiple purposes. Originally thought to fight market failures, non-discrimination has since been cast as a general principle and proven to be instrumental in the protection of fundamental values. Fulfillment of equality, in particular, does not prevent suppliers of goods and services from discriminating, so long as any differentiation is justified by a legitimate aim. Religious freedom, however, is not an excuse for discrimination; the distinction between status and conduct has no currency in European contract law and the forced speech doctrine seems to have a very different scope of application.

Accommodation of religious beliefs in the commercial context would bring

[80] This point was made by the Court of Appeal in Northern Ireland [2016] NICA 39, § 67. See also E. Fitzsimons, n 1 above, 83. The Supreme Court dismissed the Court of Appeal's argument and went so far as to say 'there is no requirement that the person who is compelled to speak can only complain if he is thought by other to support the message, (…) what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed'. The consequences of this line of reasoning may be disquieting. See J. Rowbottom, n 78 above, arguing that this view would make it legal to raise forced speech allegations in relation to warnings on cigarette packets, the publication of defamation rulings or replies to attacks in the media or the teaching of mainstream science by a teacher who is skeptical of climate change.

[81] The Hallowe'en cake and the football team cake examples can be found in the Court of Appeal's judgment, n 77 above, § 67. But see M. Arnheim, n 53 above, contending that this is a false analogy. Hallowe'en does not have a religious meaning anymore, so 'nobody would take a Hallowe'en cake to be an inducement to adopt any particular belief, and the same applies to a cake for a sports team'. On the contrary, a cake with a 'Support Gay Marriage' slogan does send a political message at a time when Northern Ireland was still discussing the legalization of same-sex marriage. However, these appear to be value and context-specific judgments. In Italy, for example, many Catholics oppose Hallowe'en because they associate it with pagan idolatry. Consider the rivalry between Celtic FC and Rangers FC in Glasgow; support for either of these teams is traditionally associated with Catholicism and Protestantism respectively. Unfortunately, several commentators have promoted the forced speech argument too far. See C. Murphy, 'Let Them Eat Cake?' *Trinity College Law Review*, 8 March 2017, considering whether or not the law might compel a Jewish baker to decorate his cakes with swastikas or a homosexual baker may be forced to produce cakes with homophobic slogans; similarly see R. O'Dair, ' "Gay Cakes" and Human Rights: The Ashers Case' *Lawyers' Christian Fellowship*, 27 October 2016, listing Muslim printers being obliged to publish cartoons of Mohammed, Jewish ones being obliged to publish the words of a Holocaust denier, gay bakers accepting orders for cakes with homophobic slurs. Yet, it seems inappropriate to compare supporting same sex-marriage and celebrating Nazism, offending homosexuals, advocating for historical revisionism. Some of these activities (eg Holocaust denial) may be a crime in some countries.

about disproportionate consequences.[82] Firstly, it would impose an excessive burden on the individual in relation to the aim sought to be achieved. In fact, unlike the wearing of religious clothes or symbols, religious accommodation in the supply of goods and services disrupts the dignity and equality of the customer who is denied the goods or service.[83] Secondly, letting providers of goods and services in the commercial context take their (often archaic and bigoted) prejudices out on innocent customers is a measure which is unsuitable and unnecessary to protect their right to religious freedom. The scope of the non-discrimination principle is not to prioritize one protected characteristic over another, which would occur if service providers were allowed to invoke their religious beliefs to obtain an exemption and thus be treated differently from any other providers but to foster mutual tolerance between opposing groups.[84] Accommodation of religious belief would ignite a culture war between discriminated gay customers and zealot providers,[85] and force the courts to take

[82] Cf E. Fitzsimons, n 1 above, 82, comparing reasonable religious adjustment in the employment context (eg the right to have a neutral prayer room), where employees are in a more vulnerable position than their employers, while a similar power disparity does not characterize the supply of goods and services. On the principle of proportionality in EU law see P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials* (Oxford: Oxford University Press, 5th ed, 2011), 526. The principle requires a three-prong test of EU action and national action falling within the sphere of EU law, which must: i) be suitable to achieve the desired end; ii) be necessary to achieve the desired end; iii) not impose a burden on the individual that is excessive in relation to the objective sought to be achieved. However, balancing tests are sometimes met with skepticism. See: K.H. Ladeur, n 70 above, claiming that it would be hard to envisage a court scrutinizing the motives underlying contract refusals; M. Cousins, 'Sexual Orientation, Equal Treatment and the Right to Manifest Religion: Lee v McArthur' 28(3) *King's Law Journal*, 443-444 (2017), preferring specific legislative exemptions to judicial individualized balancing tests.

[83] R. Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' 77(2) *Modern Law Review*, 228-229 (2014), articulates a three-prong test for assessing whether or not religious accommodation is justified: '(i) the particular manifestation of religious beliefs itself causes no direct harm to others; and (ii) the requested accommodation involves minimal cost, disruption or inconvenience to the accommodating party; and (iii) the requested accommodation will (upon further examination) cause no indirect harm to others'. Applying this test, a religiously motivated refusal to serve others should not be tolerated because it would cause harm to others, despite involving minimal cost, disruption or inconvenience (the customer could easily obtain the same goods or services elsewhere with little or no difficulty). But see J. Gardner, n 13 above, 6, making the point that discrimination remains unlawful even when the victim has not suffered any psychological injury or has not realized that the discrimination has occurred; M. Cousins, n 82 above, 443, lamenting that the harm-based approach is fact-specific and highly subjective, and quoting the *Baby Loup* case decided by the French *Cour de Cassation*, in which the court prevented a crèche worker from wearing an Islamic garment because this might encroach on the children's freedom of conscience, thought and religion.

[84] See E. Fitzsimons, n 1 above, 78, contending that anti-discrimination law should operate in an even-handed way across individuals exposed to discrimination. On the purposes of anti-discrimination law, see also the Eur. Court H.R., *SAS* v *France*, Judgment of 1 July 2014, available at www.hudoc.echr.coe.int: 'ensure mutual tolerance between opposing groups (…). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.

[85] Cf D. NeJaime and R.B. Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics' 124 *The Yale Law Journal*, 2520 (2015), arguing that complicity-based

sides with the knights rather than the villains.[86]

conscience claims, ie requests to be exempted from being complicit in the assertedly sinful conduct of others, 'provide an avenue to extend, rather than settle, conflict about social norms in democratic contest'.

[86] Cf Justice Scalia's dissenting opinion in *Romer* v *Evans*, 517 US 620 (1996), in which the majority of the US Supreme Court held that a state constitutional amendment in Colorado, preventing any city, town, or county in the state from taking any legislative, executive, or judicial action to recognize homosexuals or bisexuals as a protected class, did not satisfy the Equal Protection Clause. In dissent, Justice Scalia argued that it is no business of courts (as opposed to the political branches) to take sides in culture wars. 'When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains – and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn' (§§ 652-653).