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Utilitarianism and Retributivism in Cesare Beccaria

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Abstract

In analyzing Cesare Beccaria's theory of punishment, this article emphasizes that, while he clearly endorsed a proto-utilitarian theory of punishment strongly at odds with positive retributivism, he also accepted some elements of negative retributivism. This fact, however, should not be seen as weakness of Beccaria's view, but as another proof of his genius. As a matter of fact, he acutely understood that a purely utilitarian conception of punishment, not mitigated by negative retributivism, may indeed generate deep injustices – a lesson that we should remember today, when many scholars interpret the huge amount of data coming from the neurosciences as a proof that a utilitarian theory of punishment recommends itself.

I. 'Public Utility' and 'Human Justice'

There is no doubt that, for his idea that 'public utility (is) the foundation of human justice',[1] Cesare Beccaria should be considered a forerunner of utilitarianism. He also writes:

> 'It is better to prevent crimes than to punish them. This is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness, and to the minimum of misery, if we may apply this mathematical expression to the good and evil of life'. (§ 41, 147)

The purpose of prevention, therefore, is not punishment, as alleged by the retributivist tradition, but the increase of social utility – that is, the maximization of happiness. However, one should consider Beccaria as a forerunner of utilitarianism, but not an outright utilitarian. In fact, his

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[1] C. Beccaria, *An Essay on Crimes and Punishments. By the Marquis Beccaria of Milan. With a Commentary by M. de Voltaire. A New Edition Corrected* (Albany: W.C. Little & Co., 1872; original version 1764), § 7, 34. In this article, the quotes from Beccaria's *Of Crimes and Punishments* indicate the paragraph followed by the page number.

valuable comments on the purpose and the proper measure of punishment are not part of an actual theory – this theorization will only happen with Jeremy Bentham (who, incidentally, was deeply influenced by Beccaria) and then, with greater sophistication, with John Stuart Mill and Henry Sidgwick.[2] In particular, the reflection of the great Milanese still lacks precise definitions of the principle of utility and an appropriate discussion of the relevant terms ('useful', 'pleasant', 'pleasure', 'happiness', etc).

Moreover, as we shall see, it has been convincingly claimed that Beccaria does not actually defend pure utilitarianism. In fact, his proposal embodies – albeit in a conceptually subordinate role – some elements that can be plausibly traced back to the retributivist tradition; and these elements for Beccaria have an important function as safeguards against the possibility of disproportionate punishments and abuse on the part of magistrates.

In this article I will argue that, among the many reasons that make Beccaria's reflection relevant today, one is precisely the way in which he combines the utilitarian view of punishment with these retributivist elements. Finally, I will argue that only those contemporary conceptions that share Beccaria's semi-utilitarian setting are capable of withstanding the challenges currently emerging from research conducted in the fields of cognitive science and neuroscience.

II. Retributivism and Utilitarianism

Imagine a small community living on an isolated island in the ocean. The living conditions of the community are very good: all the inhabitants are respectful and supportive, and potential conflicts are quickly resolved thanks to the reasonableness and good will of all. Much of the credit for such serenity goes to the moral leader of the small population: a wise old man that, with his advice and exemplary morality, inspires rectitude and a sense of civic duty in the islanders.

Thus life on the island flows placidly, to the point that the only local policeman, having nothing to do, is terribly bored. So, one day, the police officer decides to reopen the file of the last criminal case that took place in the island and remained unsolved: a murder that happened fifty years ago, in which a young man was killed during a violent quarrel. Going through the file, the officer notes that a hair was found on the crime scene but, of course, police did not know how to analyse it back then. Delighted to have

[2] On the historical and theoretical vicissitudes of utilitarianism, cf B. Eggleston and D.E. Miller eds, *The Cambridge Companion to Utilitarianism* (Cambridge: Cambridge University Press, 2014) and J. Driver, *Consequentialism* (London: Routledge, 2011).

found something interesting to do, our hero takes his set of tools and analyses the hair's DNA. What a shock it is to find that the hair belongs to the wise old man!

Appalled, he runs to him and asks him: 'Dear wise old man, why did you never tell me you were there on the day of the murder fifty years ago? You could have helped the investigation!' 'You see', said the wise old man, spelling out the words slowly, 'not only was I there when the murder was committed, I was actually the one who did it!' Then, staring at the dismayed policeman, he continues: 'We were drunk, we argued for a very futile reason and I hit him with a bottle. He fell and died instantly. Since then I have lived in remorse and tried to atone for my deed by behaving in the best possible way and putting myself at the service of others. But if our community decides to punish me, I'll be ready to pay my dues.' There is no doubt that the wise old man is guilty: the important question, however, is whether he should be punished or not. What would we do, if we were in the judge's place?

When I present this case to my students, there are usually two main views: on the one hand, there are those who believe that punishing the wise old man (albeit mildly) is morally correct; on the other, there are those who think that in such a case any punishment would be unjust. Both responses have an intuitive basis. On the one hand, it seems obvious that punishment serves to rehabilitate the offender, to deter other potential criminals and to protect society from dangerous people: these are utilitarian justifications, because they look to the usefulness of the punishment for the society as a whole. And from a perspective of this kind, to punish the wise old man would not make sense (he is completely rehabilitated, he is not dangerous and there is no reason to think that there are other potential criminals to be discouraged). On the other hand, it also seems reasonable to think that punishment serves to restore the balance of justice, if it has been broken by someone responsible for a crime; and that this person deserves to be punished, no matter what the consequences of punishment. This conception has a *retributivist* character, as it assumes that the foundation of the punishment lies in the fact that the convicted person deserves it, which is why it is right to punish them without considering the potential social effects. From this point of view, justice requires that the wise man be punished.

Utilitarian views look to the future (that is, the consequences of the sentence), while retributivist ones look to the past (that is, the guilt that the offender must atone for). Utilitarianism is thus a form of consequentialism, because it assumes that to evaluate the morality of punishment one should only look at the consequences. Retributivism, instead, is a form of deontologism, as it makes the morality of punishment

depend on its ability to re-establish the balance of justice through the punishment of those who have broken it.

However, it is important to note that the retributivist ideal can be broken down into two very different components: one is *positive* ('all those who deserve to be punished ought to be punished') and one *negative* ('one who is not guilty must not be punished and one is guilty must not be punished in an excessive manner').[3] Both of these components are centred on the notion of *merit*, which in turn presupposes that of moral responsibility and consequently that of free action: whoever freely engaged in a certain wrong is morally responsible for it and therefore deserves to be punished.

It must be stressed that while the positive component is the main reason for the strictness of retributivism (that is, justice requires the severe punishment of all those who are guilty), the negative component acts, rather, as a safeguard. This happens for two reasons. First, it commands to not punish those who do not deserve it – even if such punishment were potentially capable of increasing public utility, as happens with the punishment of scapegoats, which satisfy the community's thirst for revenge. Secondly, it denies legitimacy to excessively severe and non-humane sentences (such as torture), even when these may bring obvious social benefits (which could happen, for example, if one tortured a terrorist to force them to confess the future plans of his organization).

As we shall see in the last paragraph, however, according to many contemporary authors, today's scholarship shows, or at least strongly suggests, the illusory nature of the ideas of free will, moral responsibility and merit. If these authors were correct, then all retributivist conceptions (and both their positive and negative components) should be abandoned.

III. Rule Utilitarianism and Negative Retributivism

On Crimes and Punishments discusses many of the themes that will later become typical of the utilitarian tradition, starting with the insistence on the social utility of punishment and hedonistic anthropology as a backdrop to the entire concept. In the Introduction to his masterpiece, for example, Beccaria writes that laws should be considered from the point of view of '*the greatest happiness of the greatest number*'.[4] He then

[3] This conceptual distinction, now widely used especially in the English-speaking world, was introduced by J. Mackie, 'Morality and the Retributive Emotions' *Criminal Justice Ethics*, I, 3–10 (1982); see also A. Walen, 'Retributive Justice' *Stanford Encyclopedia of Philosophy* (2014), available at http://plato.stanford.edu/entries/ justice-retributive/ (last visited 24 May 2016).

[4] See C. Beccaria, n 1 above, Introduction, 12.

goes on to say, in further detail:

> '(T)he intent of punishments is not to torment a sensible being, nor to undo a crime already committed (…) Can the groans of a tortured wretch recal the time past, or reverse the crime he has committed? The end of punishment, therefore, is no other, than to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal'. (§ XII, 47)

From this perspective, justice should not look backwards, to 'the time that does not return' – a stance which was rather common in the eighteenth century and sometimes still is, also due to the influence of religious ideas – almost as if justice had a responsibility to restore a supposed eternal order of justice that the offender has breached. According to Beccaria, rather, the goal that justice must set itself is, in fully secular terms, to increase the well-being of citizens, protecting them from dangerous people (the *special* function of punishment) and discouraging other potential criminals (the *general* function of punishment).

However, in addition to these canonically utilitarian arguments, Beccaria's system also has other aspects, which point to different directions. First, as noted by Philippe Audegean,[5] Beccaria's utilitarianism derives conceptually from his adherence to contractualism, and according to this perspective, utility should be pursued not because it is intrinsically right, but because natural necessity has led us to consider it as such: 'Necessity alone hath produced, from the opposition of private passions and interests, the idea of public utility, which is the foundation of human justice' (VII, 34). And then again: 'If there be any society in which this is not a fundamental principle, it is an unlawful society; for mankind, by their union, originally intended to subject themselves to the least evils possible' (§ XIX, 74).

Second, Beccaria explicitly rejects very harsh punishments not only when (as posited by utilitarianism) they are harmful to collective happiness, but also when, while not harmful, they are contrary to 'enlightened reason', justice and the spirit of the social contract that founded our penal system:

> 'If it can only be proved, that the severity of punishments, though not

[5] P. Audegean, 'Beccaria, Cesare' *Enciclopedia Italiana Treccani* (2012), available at http://www.treccani.it/enciclopedia/cesare-beccaria_%28Il-Contributo-italiano-alla-storia-del-Pensiero:-Diritto%29/ (last visited 24 May 2016). Audegean is the author of a fundamental text on Beccaria's philosophy of law, *La philosophie de Beccaria. Savoir punir, savoir écrire, savoir produire* (Paris: Vrin, 2010).

> immediately contrary to the public good, or to the end for which they were intended, viz., to prevent crimes, be useless; then such severity would be contrary to those beneficent virtues, which are the consequence of enlightened reason, which instructs the sovereign to wish rather to govern men in a state of freedom and happiness, than of slavery. It would also be contrary to justice, and the social contract'. (§ III, 21)

> 'By *justice* I understand nothing more than that bond, which is necessary to keep the interest of individuals united; without which, men would return to the original state of barbarity. All punishments, which exceed the necessity of preserving this bond, are in their nature unjust'. (§ II, 19)

Finally, as Audegean notes, Beccaria – despite conceiving of legislation in a utilitarian sense (and, indeed, precisely because of this) – believes that, when applying the law, judges should act in accordance with an ethical perspective, not a utilitarian one. That is, they must apply the law without resolving to interpret it to increase the usefulness of the punishments imposed: 'no magistrate, even under a pretence of zeal, or the public good, should increase the punishment already determined by the laws' (§ III, 20); 'There is nothing more dangerous than the common axiom: *the spirit of the laws is to be considered*' (§ IV, 22).

Besides, also this thesis derives from the contractualist setting of Beccaria's view: the original agreement cannot provide for the arbitrary exercise of law that would follow from the magistrate's case-by-case interpretation. Thus, for Beccaria, the justification of punishment can only have a utilitarian basis; however, its implementation by the judges is deontological, because it should not be affected by the assessment of the consequences that a punishment could have, but rather only by its compliance with the law, which defines who should be punished and to what extent.

Beccaria therefore deviates from classical utilitarianism in three ways: with respect to the ultimate foundation of the concept; with respect to the formulation of the law (which cannot provide for excessively harsh punishments, even when they do not cause social damage); and with respect to its implementation (which cannot contemplate arbitrary decisions on part of magistrates). As said above, such derogations depend on Beccaria's adoption of the contractualist ideal. However, why Beccaria believes that the original contract cannot tolerate excessively harsh punishments or the magistrates' arbitrary decisions remains to be explained. Using contemporary philosophical jargon, one might interpret this incompatibility in two ways.

First – and this is the interpretation preferred by Audegean – it can be assumed that Beccaria does not merely anticipate the principles of the

concept that is now called 'act utilitarianism' (according to which moral actions are those that maximize social utility), but rather foreshadows an embryonic form of 'rule utilitarianism': the notion that the morality of an action is determined by its compliance with the norms that maximize overall happiness.[6] For example, with regards to the limit that Beccaria sets for the prosecutors' subjective interpretation of the law, Audegean writes:[7]

> 'The criminal law must (...) follow a rule-utilitarianism *avant la lettre*: it produces the best consequences when the judges respect the rules deontologically, not ideologically. This combination of norms to be respected and values to be maximized reflects the fusion of contractualism and utilitarianism. The contractors - equal, different, driven by their interests – can only be bound and punished in the name of utility. But utility itself presupposes security: the satisfaction of their desire prescribes the strict, absolute sovereignty of the norms. Therefore the end justifies the means, but not *à la* Machiavelli, as the means designate a unconditioned respect of the rules. Such rules must equally apply to everyone, regardless of people's status and circumstances: otherwise, some would have more rights, or more freedom than others, and one would go back to the insecurity of the natural state'.

However, some scholars, such as White,[8] leverage the idea of negative retribution to propose an alternative and not implausible interpretation of Beccaria's theses on the harshness of the law and the magistrates' arbitrary decisions.[9] Their idea, essentially, is that for Beccaria the pursuit of utility – which is still the ultimate horizon of the penal system – is bound by the principle that you should never impose punishments that, however useful, would affect people who do not deserve to be punished or deserve to be punished less harshly. From this perspective, in fact, within the set of those whom it would be useful to punish, only those who deserve it are

[6] On rule utilitarianism, cf B. Hooker, 'Rule Consequentialism' *Stanford Encyclopedia of Philosophy* (2008), available at http://plato.stanford.edu/entries/consequentialism-rule (last visited 24 May 2016).

[7] See P. Audegean, 'Beccaria, Cesare' n 5 above.

[8] M.D. White, 'On Beccaria, the Economics of Crime, and the Philosophy of Punishment' 2 *Philosophical Inquiries*, 121-137 (2014).

[9] Of course, to insist on the role of negative retribution in Beccaria is very different from considering him as an outright retributivist, as D.B. Young, 'Cesare Beccaria: Utilitarian or retributivist?' 11 *Journal of Criminal Justice*, 4, 318-319 (1983), surprisingly proposed. Indeed, it cannot seriously be doubted that Beccaria refused the positive component of retributivism without hesitation.

to be punished. In this way, to the benefit of the defendants and in the overall interests of justice, Beccaria imposes a dual condition upon the possibility of punishing someone: the utilitarian limitation and that based on negative retribution.

In this regard, let us examine the famous passage in which Beccaria writes:

> 'That a punishment may not be an act of violence, of one or of many, against a private member of society, it should be public, immediate and necessary; the least possible in the case given; proportioned to the crime, and determined by the laws'. (§ XLVII, 161)

Indeed, it seems reasonable to assume that some of the requirements of justice that Beccaria mentions in this passage – that of proportionality and that of strict observance of the laws in the infliction of punishment – may intuitively hint at his adherence to the ideal of negative retribution, according to which a punishment, to be fair, should only be imposed upon those who deserve it, and only to the extent that they deserve it. It must be noted that this holds even if punishment thereby loses part of its powers of deterrence and social protection – that is, some of its ability to increase public utility.

In my opinion, this latter interpretation is more plausible than that which refers to rule utilitarianism; still, it should be recognized that textual evidence is not enough to unravel the issue. It is also possible, and even probable, that Beccaria was ambivalent on the subject.

IV. Scapegoating and Excessive Sentencing

Finally, it might be interesting to move the discussion from the historical and interpretative level to the theoretical level and attempt to understand if, in this sense, Beccaria anticipated rule utilitarianism or if, on the contrary, he limited the effects of act utilitarianism by implicitly referring to negative retribution. Indeed, there are very good reasons to believe that rule utilitarianism is not capable of responding convincingly to an objection concerning utilitarianism in general: that is, the scapegoat issue mentioned briefly above. How can one prove, by merely using the conceptual tools of act utilitarianism, that scapegoating or excessive sentencing are unjust practices, regardless of the circumstances?

According to its most traditional version, 'act utilitarianism', if one is to behave morally, one must perform the actions that maximize 'general utility' (which is often interpreted as meaning general happiness). This definition has the advantage of being very simple; unfortunately, it leaves room for the obviously unjust practices of scapegoating and disproportionate

sentencing. Suffice it to consider the simple cases in which an innocent individual is punished or a convicted person is punished too harshly, in order to deter potential criminals. This practice may produce a general benefit for the community (and would thus be *ipso facto* acceptable from the perspective of act utilitarianism); however, its injustice is clear. This proves that, *pace* act utilitarianism, the mere maximization of social utility cannot be the ultimate standard of just punishment.

Some philosophers have attempted to respond to this objection by developing an alternative version of utilitarianism: 'rule-utilitarianism', according to which in order to behave morally, instead of merely performing those actions that maximize general happiness, one should rather perform those actions that conform to the norms the application of which guarantees the maximization of general utility.

To prove that this form of utilitarianism is capable of solving the scapegoat and excessive sentencing problems, it should be demonstrated that a norm that, in specific conditions, would make it possible for an innocent individual to be punished could never maximize general utility – and thus should not be followed. Upon a first glance, this appears to be the case: indeed, if potential criminals knew that they could be punished even if they did *not* commit any crimes, they would not be discouraged from committed their crimes. Moreover, it may be argued that the punishment of innocent individuals would generate widespread indignation among the community, and indignation does not appear to be a good catalyst for maximizing utility.

However, upon a closer analysis, it may be seen that rule utilitarianism cannot eradicate the problem of scapegoating and excessive sentencing. Indeed, cases are conceivable in which accepting a rule that allows for the possibility of sentencing an innocent person (or of disproportionately sentencing a guilty person) may increase general happiness more than accepting a rule that would consistently rule out that possibility. An example to this effect is the practice of decimation, which was common during World War I especially among the Italian, Russian, and French armies; there were many less (if any) such instances in the armies of the Central Powers.[10] The practice of decimation entailed the execution of several soldiers chosen at random from a company that had allegedly, as a whole, fought cowardly. Its purpose was to set an unforgettable example for the victims' surviving comrades. It should be noticed that, given the random procedure used in choosing which soldiers to execute, also those who

[10] A. Bach, *Fusillés pour l'exemple 1914-1918* (Paris: Editions Tallandier, 2003); I. Guerrini and M. Pluviano, *Le fucilazioni sommarie nella Prima guerra mondiale* (Udine: Gaspari, 2004).

personally should not have been accused of cowardice may have been executed (as shown in Stanley Kubrick's famous movie *Paths of Glory*, which is based on a true story). Moreover, if one examines the data, it could be reasonably argued that the practice of decimation may have played a role in the Allies' victory – in other words, it may have been very useful to them, as the general utility of those countries had been substantially raised. However, even if true, would this fact make such a practice morally acceptable? The answer is, inevitably, no.[11]

Briefly, the main problem of every form of utilitarianism is that it cannot translate, without exceptions, the ideal of justice in terms of general utility. If pure utilitarianism, in any of its versions, were to be accepted, there would always be situations in which obviously morally wrong practices – such as scapegoating or excessive sentencing – would become acceptable.

A much more promising alternative is that of limiting act utilitarianism by means of negative retribution This perspective was chosen, for example, by the two main legal-ethical thinkers of the twentieth century in the English-speaking world: John Rawls[12] and Herbert L.A. Hart.[13] Hart, in particular, has offered the most convincing treatment of the issue. In his view, punishment can only be justified on a utilitarian basis: one can punish only those whom it is useful to punish. Such a thesis is obviously incompatible with positive retributivism, according to which one should punish those who deserve it, whatever the consequences of their punishment. Nevertheless, when it comes to punishments established by judges, Hart introduces a negative-retributivist constraint – just like Beccaria, according to White's interpretation. In this light, given the usefulness of punishment, one must never punish those who do not deserve it, nor can one punish someone more than they deserve.

V. The Challenge of the Neurosciences

These observations are relevant to a discussion of particular importance today. Indeed, a growing number of authors – interpreting in a very controversial manner the vast amount of data issuing from science, in particular from cognitive neuroscience – argue that (i) the ideas of free will,

[11] A rule utilitarian could perhaps argue that this objection that this reasoning is hypothetical (since it is not certain that the decimations helped the cause of the Allies in WW1). However, first, the point is a principled one (it shows that there may be situations in which just punishment is disconnected by the maximization of general utility). Second, certainly one would not want to decide if the practice of decimation is an acceptable one on the empirical ground of whether it helped the country that accepted it to win a war!

[12] J. Rawls, 'Two Concepts of Rules' 54 *The Philosophical Review*, 3-32 (1955).

[13] H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

responsibility and merit are merely illusory and therefore (ii) retributivist conceptions, insofar as they rest upon those ideas, should be abandoned altogether. According to this view, the only way to offer an acceptable theory of punishment comes from utilitarianism (whether act utilitarianism or rule utilitarianism). The proponents of this view believe that this radical resetting of the foundations of the law and theory of punishment should be warmly welcomed by all those who care about the fate of justice and garantism. For instance, Joshua Greene and Jonathan Cohen[14] wrote that:

> 'At this time, the law deals firmly but mercifully with individuals whose behaviour is obviously the product of forces that are ultimately beyond their control. Some day, (that is, when we accept the fact that free will is an illusion and therefore the behaviour of all of us is beyond our control) the law may treat all convicted criminals this way. That is, humanely'.

Positions of this kind are increasingly common.[15] And yet, they face serious problems. First, they over-idealize the way that society treats those who have committed crimes but do not have the capacity to discern. Second, they assume that the supposed illusory character of free will, moral responsibility and merit has been actually demonstrated by science – which is actually extremely doubtful.[16] Finally, and this is the most interesting point for the purposes of our analysis, these positions are unjustifiably optimistic with respect to the consequences of a radically utilitarian conception of punishment. The crucial fact is that, if it were true that the ideas of free will, moral responsibility and merit are illusory, then, in addition to positive retributivism, negative retributivism (according to which one can only punish those who deserve it and only as harshly as they deserve) would also be disproved. Therefore, there would be no counterarguments to the possibility that scapegoating should be considered acceptable: indeed, as seen above, neither act nor rule utilitarianism possess the conceptual resources to prove this practice is unjust.

Therefore, while assuming a utilitarian background, only negative retributivism can place a theoretical limit upon the possibility of accepting

[14] J. Greene and J. Cohen, 'For the law, neuroscience changes nothing and everything' *Philosophical Transactions of the Royal Society of London B*, CCCLIX, 1784 (2004).

[15] See M. Gazzaniga, *Who's In Charge? Free Will and the Science of the Brain* (New York: Harper Collins, 2011); S. Harris, *Free Will* (Oxford: Oxford University Press, 2012); D. Pereboom, *Free Will, Agency, and Meaning in Life* (Oxford: Oxford University Press, 2014).

[16] See the brilliant pamphlet by A. Mele, *Why Science Hasn't Disproved Free Will* (New York: Oxford University Press, 2014) and D. Dennett, 'Reflections on Free Will' (2014), available at https://www.samharris.org/blog/item/reflections-on-free-will (last visited 24 May 2016).

unfair but socially useful practices, such as the condemnation of those who do not deserve it or the infliction of disproportionate punishments. After all, already two centuries ago, a great Italian thinker appeared to have a better/clearer? ('better' is a bit generic) idea of the subject than many contemporary authors do today:

> 'It is doubtless of importance, that no crime should remain unpunished; but it is useless to make a public example of the author of a crime hid in darkness. A crime already committed, and for which there can be no remedy, can only be punished ... with an intention that no hopes of impunity should induce others to commit the same (This is Beccaria's *act utilitarianism*). If it be true, that the number of those, who, from fear or virtue, respect the laws, is greater than of those by whom they are violated, the risk of torturing an innocent person is greater, as there is a greater probability that, *cæteris paribus,* an individual hath observed, than that he hath infringed the laws'. (This is Beccaria's *negative retributivism*) (§ XVI, 60)[17]

[17] I wish to thank Pasquale Femia, Patrizio Gonnella and Dario Ippolito for their helpful comments on an earlier version of this essay.

On the Importance of Sharing National Law so as to Shape Future Trans-National Legal Solutions

Diana Wallis*

It is a privilege, as an English common lawyer, to be asked to write the editorial to an English language journal focusing on Italian Law. I write at a moment when the formal campaign period leading to UK's referendum on a possible exit from the European Union has just begun. The stakes for the English common law and our legal system could not be higher. There are few who would question the immense influence of the common law on European legal development, but not only, in turn the common law has been enriched both by direct transplants and a closer working with civilian systems. That is how it should be in the modern world; our legal systems as used by increasingly global entities and indeed global citizens need to be more open, flexible and interconnected. How the common law will fare in the case of a Brexit is difficult to predict, but the worry is that it will become more insular and certainly less influential.

That is why the sharing of our various national law experiences and developments is so important; when you are staring into the face of the possibility of losing that dynamic exchange, then what might be lost is thrown into sharp relief. As one who studied Swiss law before I embarked on my common law legal studies I have always been an advocate of comparative legal education; we have so much to learn from one another and this Journal is an innovative example of that. In preparing to write this introduction it has been a huge pleasure to dip into the previous issues.

I always remember when I began my civilian legal education how astonished I was to make even the basic discovery that there were indeed three Rs not just two; so not just Renaissance and Reformation, but also of course Reception, a concept that is almost entirely absent from most English history teaching! It is this that gives Italian Law its illustrious heritage and huge influence through the work of the university scholars of

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the medieval age. When I think that the 'father' of my favourite legal discipline, conflict of laws, Bartolus, was an outstanding Italian legal scholar of that age.[1] This golden period of Italian legal scholarship has given so much to the development of the law we now know and take for granted in our respective national traditions (even in the common law). So there is all the more reason that a wider audience should now become familiar with modern Italian Law. Even more so when as has been well documented elsewhere we see the emergence of a 'law market' where English and German law have been openly touted to gain work for national courts and legal services. We may have misgivings about the commercialisation of national justice systems but if the side effect is to give greater visibility to differing legal approaches and solutions there may equally be positive outcomes. So I believe any enterprise that allows us to discover or indeed rediscover Italian Law is to be welcomed.

In this respect I am delighted that the European Law Institute will this September hold its Annual Conference in the historic university city of Ferrara. Our aim, as always to bring together the European legal community in the widest sense; judges, practitioners and academics, meeting to look for better solutions to Europe's legal problems. The Institute is itself a 'legal borrowing', modelled on its elder cousin the American Law Institute which has had huge impact over a period of nearly ninety years in influencing US legal developments. This is the ELI's aspiration and by all accounts we have not made a bad start, having got the ear of the European institutions on a number of topical issues, particularly but not only in respect of contract law and civil procedure. The fact that we are meeting in Ferrara and hosted by our colleagues in the Law School there means that we are equally assured of a high level of Italian law input.

At the same moment ELI will launch an Italian hub, this development has already occurred in a number of countries and allows ELI colleagues to meet regionally and locally to discuss ELI projects, help bring forward new ones and generally address European legal matters of topical interest. So I would hope that the deepened presence of ELI on the Italian stage during this year will be very much a complimentary activity to the aspirations of this Journal.

[1] See in this regard P. Femia, 'Criticism. From the Outskirts of a World Without a Centre' 1 *The Italian Law Journal*, 1, 4-16 (2015).

Essays

The Performance of the Italian Civil Justice System: An Empirical Assessment*

Remo Caponi**

Abstract

The unreasonable length of Italian civil proceedings goes on filling pages of newspapers and magazines. According to some authoritative views, the inefficiency of the civil justice system helps explain why the Italian model of legislation and scholarship in civil procedure is not as influential on the European scene as it was in the past. Interestingly enough, a nearly diametrically opposed thesis has also been advanced, according to which the Italian procedural law and mainstream scholarship in civil procedure lack a clear, up-to-date, principle-oriented and comprehensive approach towards problems and challenges that contemporary civil justice systems face today. Such an outdated and overly complicated approach might contribute to the inefficiency of the Italian system of civil justice. The Italian Law Journal, which aims to both spread knowledge (and criticism) of the Italian legal system and foster international debate among lawyers of different traditions, may be an appropriate venue for deepening our understanding of the current performance of the Italian civil justice system. It may, in particular, assist us in ascertaining the major causes for its inefficiencies, with a view to assessing (in a subsequent article) whether the prevailing way of thinking of legal scholars may, in the end, exacerbate the relevant problems.

I. Introduction

When it comes to the features of Italian civil procedure that are best known abroad, its most powerful device comes immediately to mind: the 'Italian Torpedo'.

In 1997 a lawyer, Mario Franzosi, suggested how ruthless litigants could turn the undue delay of the ordinary civil proceedings in Italy to their advantage:

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> 'And here comes the slow-moving ship. (...) If an action for declaration of non-infringement is started before a slow-moving Italian court (for obtaining a declaration that there is no violation of patent registered in Italy and/or in other European countries), all the other European judges must decline jurisdiction on their own motion until the Italian case is decided. And since an Italian case is decided when the three degrees of jurisdiction are exhausted (first instance, appeal and second appeal), this may take an outrageous length of time. During this time, the enforcement of the intellectual property right would be paralyzed. (...) The possibility of jeopardizing the system with an action for obtaining a declaration of non-infringement, in a slow-moving country, of a patent registered in various European countries is a serious challenge to the system of the enforcement of intellectual property. To continue to use the maritime analogy, the Italian torpedo could pose a real threat to an organized convoy.'[1]

Although Italian torpedoes have been somewhat disarmed by the recast Brussels Regulation, at least in the context of exclusive jurisdiction clauses,[2] the unreasonable length of Italian civil proceedings goes on filling pages of newspapers[3] and magazines.[4]

According to some authoritative views, the inefficiency of the civil justice system helps explain why the Italian model of legislation and scholarship in civil procedure is not as influential on the European scene as it was in the past.[5]

Interestingly enough, a nearly diametrically opposed thesis has also been advanced, according to which the Italian procedural law and mainstream scholarship in civil procedure lack a clear, up-to-date, principle-oriented and comprehensive approach towards problems and challenges that contemporary civil justice systems face today. Such an outdated and overly complicated approach might contribute to the

[1] M. Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo' *European Intellectual Property Review*, 382, 384 (1997).

[2] See Art 31, para 2 European Parliament and Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[3] See R. Scammell, 'Busy Italian judge defers case until 2019' *The Guardian* online, 4 January 2016, available at http://www.theguardian.com/world/2016/jan/04/busy-italian-judge-defers-case-2019-taranto (last visited 24 May 2016).

[4] 'The wheels of justice grind slow' *The Economist*, 20 February 2016, 46.

[5] V. Varano, 'Il diritto processuale civile italiano in Europa', in M. Bussani ed, *Il diritto italiano in Europa (1861-2014). Scienza, giurisprudenza, legislazione. Annuario di diritto comparato e di studi legislativi* (Napoli: Edizioni Scientifiche italiane, 2014), 125, 127.

inefficiency of the Italian system of civil justice.[6]

The Italian Law Journal, which aims to both spread knowledge (and criticism) of the Italian legal system and foster international debate among lawyers of different traditions, may be an appropriate venue for deepening our understanding of the current performance of the Italian civil justice system.[7] It may, in particular, assist us in ascertaining the major causes for its inefficiencies, with a view to assessing (in a subsequent article) whether the prevailing way of thinking of legal scholars may, in the end, exacerbate the relevant problems.

II. The Current Performance of the Italian System of Civil Justice

1. The Use of Quantitative Indicators

It has become a commonplace that the Italian system of civil justice is inefficient, largely because of the huge backlog of cases before courts and undue delays in ordinary civil proceedings.[8]

To assess the current performance of the Italian system one has to use some quantitative indicators, including the number of judges and practitioners, the flow of proceedings, the clearance rate, the disposition time, the litigation rate, et cetera.

The clearance rate can be used to ascertain whether courts are keeping abreast of the number of incoming cases without, thereby, increasing their backlog.[9] The clearance rate, expressed as a percentage, is obtained when the number of resolved cases is divided by the number of incoming cases

[6] See R. Stürner, 'Die Rolle des dogmatischen Denkens im Zivilprozessrecht' *Zeitschrift für Zivilprozess*, 271, 297, fn 139 (2014).

[7] For further remarks on the topic dealt with in the subsequent paragraph II, see R. Caponi, 'European Minimum Standards for Courts. Independence, Specialization, Efficiency. A Glance from Italy', in C. Althammer and M. Weller eds, *Europäische Mindeststandards für Spruchkörper* (Tübingen: Mohr-Siebeck, 2016) forthcoming.

[8] For Italian readers: 'ordinary proceedings' refers to proceedings encompassing a *cognizione piena*, a plenary assessment on the issues of fact and law of the dispute.

[9] See European Commission for the Efficiency of Justice (CEPEJ), 'Report on European Judicial Systems. Efficiency and Quality of Justice', 2014 Edition, 2012 Data, 190, available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf (last visited 24 May 2016): 'A clearance rate close to 100% indicates the ability of the court or of a judicial system to resolve more or less as many cases as the number of incoming cases within the given time period. A clearance rate above 100% indicates the ability of the system to resolve more cases than received, thus reducing any potential backlog. Finally, if the number of incoming cases is higher than the number of resolved cases, the clearance rate will fall below 100%. When a clearance rate goes below 100%, the number of unresolved cases at the end of a reporting period (backlog) will rise'.

and the result is multiplied by one hundred.

Moreover, the length of proceedings (or disposition time indicator) can provide further insight into how courts manage their flow of cases. This indicator, expressed in days, is obtained when the number of unresolved cases at the end of a period (normally a year) is divided by the number of resolved cases in the same period and the result is multiplied by three hundred sixty-five (days).[10]

One should be aware, of course, that using indicators is a somewhat risky business, as the researcher (especially the scholar in civil procedure working, so to speak, in a stand-alone position) has no control over its methodological premises. However, one has to 'step in', as it were, as the use of indicators for evaluating the performance of judicial systems has rapidly spread since the beginning of the twenty-first century. While it is quite possible that cultural factors difficult to reduce to quantitative data are the single most important determinant of the performance of legal systems, quantitative analysis is helpful insofar as it highlights key areas in which the legal system is under-performing and indicates where resources should be allocated.

In the subsequent subparagraphs, I take stock of several statistical data concerning the number of judges, the number of civil cases in the courts of first and second instance, the numbers of lawyers, and the litigation rates in Italy.

2. Number of Judges

[10] See ibid 190: 'A case turnover ratio and a disposition time indicator provide further insight into how a judicial system manages its flow of cases. Generally, a case turnover ratio and disposition time compares the number of resolved cases during the observed period and the number of unresolved cases at the end of the observed period. The ratios measure how quickly a judicial system (or a court) "turns over" the cases received – that is, how long it takes for a type of case to be resolved. The relationship between the number of cases that are resolved during an observed period and the number of unresolved cases at the end of the period can be expressed in two ways. The first measures the share of resolved cases from the same category in the remaining backlog (...). The second possibility, which relies on the first data, determines the number of days necessary for a pending case to be solved in court. This prospective indicator (...) is an indicator of timeframe, more precisely of disposition time, which is calculated by dividing 365 days in a year by the case turnover ratio (...). It needs to be mentioned that this ratio does not provide a clear estimate of the average time needed to process each case'.

A slightly different formula used to calculate delay is $(C1 + C2): (E + U) = g$. C1 is the number of proceedings pending at the beginning of a period (normally, a year), C2 is the number of proceedings pending at the beginning of the following period, E is the number of cases filed during the year, U is the number of cases disposed of during the year, and finally g is the average duration in years and fractions of years.

The number of career magistrates, as fixed by statute,[11] is ten thousand one hundred fifty-one: six thousand three hundred seventy-nine judges, two thousand one hundred fifty-seven prosecutors (among them, circa one hundred fifty are on temporary leave of absence to perform other duties, eg at the Ministry of Justice, and three hundred fifty-four are trainees). There are about two thousand seven hundred sixty-five career judges examining civil cases at first and second instance.[12]

In addition to career magistrates, there is an even higher number of honorary magistrates.[13] They have a legal education (mostly, they are practitioners) and are managed by the High Council of the Judiciary (*Consiglio Superiore della Magistratura*, CSM), but their status and remuneration is quite different from that of career magistrates. There are several types of honorary judges; among whom are those dealing more intensively with civil cases including one thousand eight hundred eighty justices of the peace, (*giudici di pace* who also deal with small minor criminal offences),[14] two thousand one hundred fifty-six honorary judges in the courts of general jurisdiction (*tribunali*), one hundred seventeen honorary judges in the courts of appeal, and one thousand ninety-six honorary judges in the juvenile courts.[15]

The trend towards the deployment of an increasing number of honorary judges is grounded in the need to reduce the costs of the administration of justice, but the differences of status and pay between honorary and career judges has caused tensions that need to be reconciled by the legislator.[16] Historical statistics, concerning the first decades of the twentieth century, show that the Italian justice system performed far better than today, when honorary judges adjudicated the largest number of civil disputes.[17]

3. Number of Proceedings at First and Second Instance

It is worth comparing the number of judges examining, exclusively or mainly, civil cases (two thousand seven hundred sixty-five career judges,

[11] Currently, legge 13 November 2008 no 181.

[12] This number emerges from a survey conducted in 2014 by the High Council of the Judiciary, available at www.csm.it. In reality, the number of career judges will be a little higher, as a few courts did not answer the questionnaire sent around by the High Council.

[13] Art 106, para 2 and Art 116 Constitution.

[14] For this number of currently working justices of the peace, see Ministero della giustizia, 'Piano della performance 2015-2017', 11, available at https://www.giustizia.it/giustizia/it/contentview.wp?previsiousPage=mg_1_8_1&contentId=ART1169110 (last visited 24 May 2016).

[15] These data are available at www.csm.it.

[16] See the draft law 2015 no 1738 currently pending in Parliament.

[17] See A. Proto Pisani, 'Che fare della Magistratura onoraria?' *Foro italiano*, V, 364 (2015).

one thousand eight hundred eighty justices of the peace, two thousand one hundred fifty-six honorary judges in the *tribunali*, and one hundred seventeen honorary judges in the courts of appeal) with the number of civil cases before the courts of first and second instance. The notion of 'civil cases' refers to all ordinary proceedings (including labour disputes, family matters, bankruptcy and insolvency, at first and second instance), summary proceedings (mainly issuing payment orders and provisional measures), and enforcement proceedings, unless otherwise indicated.[18]

Consider the statistics from 2013, provided by the Italian Ministry of Justice.[19] Concerning the justices of the peace, they were charged with some one million three hundred seventy-two thousand four hundred twenty-one new cases; one million four hundred fifteen thousand twenty cases were resolved, while one million two hundred ninety-six thousand seventy-five cases were pending at the end of 2013. Accordingly, the justices of the peace had a clearance rate of one hundred three, such that the backlog of cases was decreasing relative to the previous year. The average disposition time amounted to three hundred thirty-four days. The justices of the peace disposed of an average of seven hundred fifty-two cases per capita (one million four hundred fifteen thousand twenty divided by one thousand eight hundred eighty), without distinguishing between ordinary proceedings and special proceedings (mainly payment orders).

In the ordinary courts of general jurisdiction (*tribunali*), there were two million eight hundred thirteen thousand sixty-eight new lodgements, two million eight hundred ninety-nine thousand two hundred forty-seven resolved cases, and three million two hundred sixty-five thousand eight hundred seventy-five cases pending at the end of 2013. Accordingly, the clearance rate was one hundred three. The average disposition time, taking into account only the main body of ordinary proceedings (ordinary proceedings, proceedings regarding labour disputes, and proceedings regarding social security benefits), amounted to nine hundred twenty-three days (one million eight hundred thirty-seven thousand five hundred forty cases pending at the end of 2013, divided by seven hundred twenty-six thousand six hundred thirty-eight resolved cases, and the result multiplied by three hundred sixty-five).[20]

In the courts of appeal, there were one hundred twenty-three thousand two hundred forty-one new cases, one hundred sixty-four thousand five hundred seventy-seven resolved cases, and three hundred ninety-seven

[18] For detailed statistics distinguishing among the different types of proceedings, see Ministero della giustizia, n 14 above, 15.

[19] Ibid.

[20] For these data on ordinary proceedings, ibid.

thousand five hundred thirty-six cases pending at the end of 2013. Accordingly, the clearance rate was one hundred thirty-three, such that the backlog of cases in the courts of appeal is substantially decreasing. The average disposition time amounted to eight hundred eighty-one days.

4. Number of Judges and Number of Resolved Cases

Career judges as well as lay judges in the *tribunali* and in the courts of appeals (two thousand seven hundred sixty-five career judges, two thousand one hundred fifty-six honorary judges in the *tribunali*, one hundred seventeen honorary judges in the courts of appeal) disposed of an average of one hundred seventy-six ordinary proceedings per capita in 2013 (seven hundred twenty-six thousand six hundred thirty-eight resolved cases in the *tribunali*, one hundred sixty-four thousand five hundred seventy-seven resolved cases in the courts of appeal).[21] To these proceedings one should add, as far as the *tribunali* are concerned: bankruptcy proceedings, proceedings in family matters, executory proceedings, special proceedings (mainly payment orders and provisional measures).

5. The Overload of the Supreme Court

The heavy workload of the *Corte di Cassazione* has been a serious problem for a number of decades. The Italian Supreme Court decides cases in civil and criminal matters, and is charged with the task of reviewing appellate judgments on points of law[22] and ensuring 'the exact observance and the uniform interpretation of the law'.[23]

The Italian Constitution provides for a right to review by the *Corte di Cassazione* on grounds of violation of law.[24] Due to the extensive use of this guarantee, the number of appeals to the *Corte di Cassazione* has increased dramatically in the last decades. Just over three thousand appeals were submitted annually during the 1960s. In the 1980s the number had grown to more than ten thousand in civil cases only.[25] In 2013, there were twenty-nine thousand ninety-one civil cases lodged to the Court for review. In the same year the Court disposed of thirty thousand one hundred seventy-nine civil cases. At the end of the year there were

[21] I could not distinguish between courts in first and second instance, as I had at my disposal only the aggregate number of two thousand seven hundred sixty-five career judges dealing with civil cases in the *tribunali* and *corti di appello*.

[22] See Art 360 code of civil procedure. See M. De Cristofaro and N. Trocker eds, *Civil Justice in Italy* (Nagoya: Nagoya University, 2010), 24.

[23] Art 65 regio decreto 30 January 1941 no 12, law on judicial organisation (*ordinamento giudiziario*).

[24] See Art 111, para 7 Constitution.

[25] See M. De Cristofaro and N. Trocker eds, n 22 above, 26, fn 24.

ninety-eight thousand six hundred ninety civil cases pending![26]

The clearance rate of the Supreme Court for 2013 was one hundred three, meaning that the *Corte di Cassazione* is decreasing its backlog. As to the length of proceedings, in 2013 the disposition time by the Supreme Courts amounted to slightly more than three years and three months (one thousand one hundred ninety-three days).

Court delays are not the only consequence of the heavy workload and the flood of applications. The large numbers of decisions require a large number of judges: in 2013 there were one hundred twenty-one civil judges who decided approximately two hundred forty cases per capita:[27] subtracting thirty days of holidays and fifty-two weekends from three hundred sixty-five days, each judge of the Supreme Court writes slightly more than one judgment per day. Thus, conflicting judgments are unavoidable and, as such, the *Corte di Cassazione* has been for decades unable to guarantee the consistency and predictability of its decisions, which makes the uniform interpretation of the law a difficult task to be achieved:[28] 'Instead, the court has become a sort of judicial supermarket, wherein lawyers can often be sure to find any precedent they need to plead the case of their client',[29] which increases legal uncertainty and the litigation rate in the Italian legal system.

In the last decade certain 'internal' procedural devices were introduced to reduce the workload of the Court with modest results.[30] The best solution to tackle this problem would be to filter access to the Court in order to reduce the number of appeals only to those having a great significance, analogous to how access to the German Supreme Court is regulated.[31] This reform proposal is strongly opposed by the bar, on the

[26] See Ministero della giustizia, n 14 above, 15.

[27] See Corte suprema di cassazione, 'Relazione sull'amministrazione della giustizia nell'anno 2014', 61, available at http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_amministrazione_Giustizia_2014_del_Primo_Presidente_Giorgio_Santacroce.pdf (last visited 24 May 2016).

[28] See M. De Cristofaro and N. Trocker eds, n 22 above, 26.

[29] S. Chiarloni, 'Civil Justice and its Paradoxes: An Italian Perspective', in A.A.S. Zuckerman et al eds, *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999), 263, 267.

[30] See from the newest reform of the Art 360, no 5 Code of Civil Procedure (legge 7 August 2012 no 134); Art 360-*bis* Code of Civil Procedure (legge 18 June 2009 no 69, also introducing the Sixth Section of the Supreme Court 'Filter'); Art 366-*bis* Code of Civil Procedure (introducing in 2006 a new requirement of the application for review, the so called *quesito di diritto*, query on point of law, abolished in 2009); Arts 375, 380-*bis*, 380-*ter* Code of Civil Procedure (legge 24 March 2001 no 89, regulating an accelerated proceedings).

[31] Pointing in that direction, see the results of the General Assembly of the Supreme Court, held in June 2015, suggesting to Parliament and government to amend Art 111

basis that the constitutional right to review by the *Corte di Cassazione* implies an unrestricted access to courts up to the Supreme Court.

6. Backlog of Cases

Finally, examining all adjudicating bodies (justices of the peace, *tribunali*, courts of appeal, *Corte di Cassazione*) as well as all civil cases, there were some four million three hundred eighty-eight thousand five hundred ninety-one new proceedings initiated, four million five hundred sixty-nine thousand three hundred thirty-two resolved cases, and five million one hundred fifty-five thousand ten cases pending at the end of 2013 (with a four per cent decrease of backlogs, compared to 2012).

The number of cases pending at the end of year has steadily decreased in the last four years, with an average decrease of some five per cent per year. Of course, strictly speaking not all cases pending are delayed, because one has to subtract from the amount cases pending those whose duration is no longer than the 'reasonable' length.[32]

7. Average Performance of Judges as a Cause of Inefficiency?

In the light of these statistics, one can exclude that the average performance of Italian judges plays the key role in causing the unreasonable length of ordinary civil proceedings. This finding is confirmed by the 2016 European Union (EU) Justice Scoreboard, which states that the Italian rate of resolving civil and commercial litigation at first instance (clearance rate) is the second best in Europe (after Luxembourg).[33]

Constitution, by way of limiting the admissibility of appeals to the *Corte di Cassazione* in civil matters to cases in which this is needed in order to formulate 'legal principles of general validity', available at http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20150625_DocumentoAssembleaGenerale.pdf (last visited 24 May 2016).

[32] The problem of assessing the reasonable length of ordinary civil proceedings in Italy cannot be addressed here. At any rate, the level of delay has become clearly unreasonable in many cases in Italy, giving rise to many complaints to the European Court of Human Rights for violation of Art 6, para 1 European Convention on Human Rights. To curb the number of complaints to the European Court, a law was passed in 2001 (legge 24 March 2001 no 89) and amended in 2012 and 2013 which entitles those who suffered damages from the undue delay of proceedings to claim monetary compensation. It should be kept in mind that the compensation may be claimed only when the duration of proceedings is over three years (in first instance).

[33] See '2016 EU Justice Scoreboard', figure no 8, available at http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf (last visited 24 May 2016) where one can find the clearance rates of 2010, 2012, 2013, and 2014. The extraordinary good performance in 2012 can be explained by a significant decrease in the number of cases initiated, particularly in the years 2010 and 2011, due both to the increase of court taxes (*contributo unificato*) that litigants are required to pay to initiate the proceedings, and the Italian Mediation Act 2010 (decreto legislativo 4 March 2010 no 28), which provides

Of course, this is not to say that the bench has no responsibility for the current situation of the civil justice system. As to the professional evaluations and promotions of magistrates, until the mid-1960s career advancement in the judiciary was based on evaluations by senior judges, who were expected to evaluate the written judicial opinions of their younger colleagues. Following a number of statutes enacted between 1966 and 1979, this system has undergone radical change. As a consequence, promotions have been based largely on seniority of service. Promotion to a higher position means the judge is entitled, but not obliged, to perform the higher level functions. Therefore, a judge may gain the status and the salary of an appellate court judge, but is permitted to continue to serve as a judge of first instance if he or she so wishes. As a consequence, several thousand judges enjoy the status and the salary of judges of *Cassazione* without being required to fulfil the attendant duties. These changes have certainly fostered the independence of judges. On the other hand, it has been acknowledged that the peculiar relationship which, over the past forty years or so, has been created between promotion and professional evaluation is unsatisfactory. In fact, it is quite uncommon for a judge not to be promoted or to be dismissed from office for inability or incompetence prior to the age of mandatory retirement.

Professional evaluations and promotions are now regulated by a new law.[34] Magistrates are evaluated several times in the course of their career with reference to four aspects of their performance: capacity, productivity, diligence, and motivation. The new law aims to make the conditions of professional evaluations and promotions more stringent. An analysis of the decisions of the CSM under the new regulation shows that all the magistrates that were evaluated were regularly promoted.[35] Additionally, the fixing of performance targets remains an open issue in Italy.[36]

8. Litigation Rate

In order to inquire further into the reasons for the unreasonable length of ordinary civil proceedings in Italy, it is worth recalling that the number

that mediation must be sought prior to the commencement of proceedings in a significant number of disputes. For further remarks on this point, see R. Caponi, Italian Civil Justice System: 'Most Significant Innovations in the Last Years (2009-2012)', in O.G. Chase et al eds, *Civil Litigation in Comparative Context*, 136, available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_074529.pdf (last visited 24 May 2016); G. Pailli and N. Trocker, 'Italy's New Law on Mediation in Civil and Commercial Matters' *Zeitschrift für Zivilprozess-International*, 75 (2013).

[34] Decreto legislativo 5 April 2006 no 160.

[35] See G. Di Federico, 'Judicial Independence in Italy', in A. Seibert-Fohr ed, *Judicial Independence in Transition* (Berlin, New York: Springer, 2012), 374.

[36] See R. Fuzio, 'La misura del lavoro del magistrato tra standard e carichi esigibili. Problema nuovo? A che punto siamo (Nota a Consiglio sup. magistratura, 23 settembre 2015 e Consiglio sup. magistratura, 23 luglio 2014)' *Foro italiano*, III, 58 (2016).

of new first instance initiated cases per one hundred thousand inhabitants was two thousand six hundred thirteen in 2012.[37] Thus, the litigation rate is higher than in Germany (one thousand nine hundred sixty-one), the UK (one thousand eight hundred fifty-nine), and Austria (one thousand two hundred thirty-five), lower than Spain (three thousand eight hundred twenty-eight) and Greece (five thousand eight hundred thirty-four, which is extraordinarily high compared to all others European countries), and similar to France (two thousand five hundred seventy-five). Thus, the Italian litigation rate, compared to that of similarly positioned European countries, is high.[38]

This finding as to Italy might be rather a consequence than a cause of the undue delay of civil proceedings, as debtors who are unwilling to fulfil their obligations can to some extent rely on the duration of proceedings and are comfortable when facing lawsuits.[39]

9. High Number of Lawyers as a Cause of Inefficiency?

Although a self-regulated body, the legal profession has not been very successful in controlling admissions in the past decades. As of 2012, Italy has the third highest number of lawyers among the countries of the Council of Europe: two hundred twenty-six thousand two hundred twenty-two, that is to say circa three hundred seventy-nine per one hundred thousand inhabitants[40] (in Germany they are two hundred per one hundred thousand inhabitants, in France eighty-five, in Greece three hundred eight, in Spain two hundred eighty-five, in Austria ninety-three).

Apart from a fortunate minority of specialists in such fields as business law and administrative law, most lawyers must make what income they can out of handling large numbers of cases in low-value fields, such as car-accidents, credit recovery and employment law disputes.[41]

As Nicolò Trocker clarifies:

> 'The pursuit of sources of income contributes to the judicial burden, favours futile controversies and makes lawyers turn into a stimulus to

[37] See CEPEJ, 'Report on European Judicial Systems' (2014 edition), 202, table 9.4, available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf (last visited 24 May 2016).

[38] For an inquiry into the causes of litigation in Italy, dating back to the 1990s but still useful, see S. Pellegrini, *La litigiosità in Italia* (Milano: Giuffrè, 1997).

[39] On this point see D. Marchesi, *Litiganti, avvocati e magistratura* (Bologna: Il Mulino, 2003), 71: 'pathological component of civil justice demand'.

[40] CEPEJ, n 37 above, 377, table 12.1. The highest number of lawyers is in Luxembourg; the second highest is in Greece.

[41] M. De Cristofaro and N. Trocker eds, n 22 above, 49.

litigation instead of a restraint over it.'[42]

The work practices of law firms further enable lawyers to handle a large numbers of cases simultaneously.

As Sergio Chiarloni put it:

> 'In such hierarchically structured firms, a chief with managerial and representative functions supervises the work of a large number of employees. The lower level employees are often beginners, employed at the level that their talents allow. Some apprentices carry out jurisprudential and doctrinal research, others carry papers to and from the court. The present slow procedures allow practitioners to manage an increasing caseload while keeping the same number of employees. Most work can be performed in the office. Thanks to postponements, work can be scheduled in order to allow the most cost-effective employment of staff.'[43]

10. Structure of Proceedings

The work practices described by Chiarloni are also adopted by medium- and small-sized law firms, which make up the bulk of the legal profession in Italy. The reference made to 'postponements' synchronizes work practices with the structure of ordinary civil proceedings.[44] The civil procedure of Italy, as well as those of other countries belonging to the Romance legal family (such as France, South American countries and, until the new code of civil procedure of 2000, Spain) originates from the Italian-canonical procedure. Based on this model, a procedural model with three different stages has developed: the written introductory phase (made up of the statement of claim, the defendant's response, and the exchange of a number of briefs between the parties); the fact-finding phase (made up of the taking of evidence by the instructing judge); and the final decision phase, where the decision on the dispute is to be issued by the instructing judge (or a judicial panel in certain cases)[45] after the parties have been given the opportunity to exchange their final briefs. The fact-finding phase often requires several hearings for the evidence to be compiled. This model is characterized by a sequence of hearings and not by a concentrated main hearing, such as in Germany, England and (after the new Code of Civil

[42] Ibid.

[43] See S. Chiarloni, n 29 above, 267.

[44] See R. Caponi, 'Zur Struktur des italienischen Zivilprozesses' *Festschrift für Rolf Stürner zum 70. Geburtstag* (Tübingen: Mohr Siebeck, 2014), 1455.

[45] For these cases, see Art 50-*bis* Code of Civil Procedure.

Procedure, enacted in 2000) in Spain.[46]

This structure of proceedings not only enables law firms to organize their work for a significant amount of pending cases, but also makes it possible for most judges to handle their heavy workload. In these conditions, they are more comfortable with a number of hearings (where very little advances), postponements centred on a mostly written handling of the case by the parties, and a final examination of written submissions by the judge, rather than with proceedings centred on a labour-intense main hearing.

In conclusion, the current structure of ordinary proceedings coincides with the interests of law firms and the bureaucratic spirit of many judges rather than with the public interest in the administration of justice.

11. Backlog of Cases as a Driver of Undue Delay of Proceedings

The ratio of the number of judges examining civil proceedings to the number of cases to be dealt with has been unfavourable for decades. There are too few judges in relation to the disputes to be resolved. The number of career judges per one hundred thousand inhabitants in Italy is lower than that of most European countries (Italy ten point six; Germany twenty-four; France ten point seven; Spain eleven point two; Austria eighteen point three; Greece twenty-three point three).[47] The ratio of honorary judges per one hundred thousand inhabitants is even more unfavourable (Italy five point five; Germany one hundred twenty-two point three; France thirty-eight; Spain sixteen point seven; Austria N/A, Greece N/A).

Relatively low numbers of judges, coupled with a high litigation rate, results in the huge backlog of cases. As of 2013, the number of cases pending before the courts of first instance amounted to one million two hundred ninety-six thousand seventy-five before the justices of the peace, and three million two hundred sixty-five thousand eight hundred seventy-five before the *tribunali*.[48]

The huge workload of the courts plays the leading role in determining the undue delay of ordinary civil proceedings and making it difficult to implement procedural reforms aimed at changing the structure of proceedings by introducing proceedings centred on a main hearing, which would be the best solution from a comparative prospective.

However, it would not be fair to say that there is 'too much' litigation in Italy (and possibly anywhere) just as it would not be fair to say that there are

[46] For this comparison, see R. Stürner, 'The Principles of Transnational Civil Procedure. An Introduction to Their Basic Conceptions' *Rabels Zeitschrift*, 201-223 (2005).

[47] CEPEJ, n 37 above, 155, table 7.1.

[48] See Ministero della giustizia, n 14 above, 15.

too many sick people or too many people who want to make use of public transport. There are only governments which are unable to put courts, hospitals, and public transport companies in an appropriate position to perform their duties and to cope with their caseloads, patients and passengers.

In Italy, the problems caused by the unfavourable ratio of the number of judges to the number of civil cases to be dealt with has been underestimated for decades. The indifference and the inability of the political process to tackle this problem in a timely manner has contributed to the increase of the backlog of cases pending before the courts.

III. Legislative Changes in the Last Few Years

Italian policy makers and regulators have too often relied upon the reforms of the rules of procedure instead of developing more comprehensive remedies for the problems under discussion. In the last few years, however, one can detect signs of change, pointing to improving court organization; although the proposals are mixed with remnants of old approaches.

The following main innovations took place since 2012: (a) about seven hundred courts of first instance (more than thirty *tribunali* and more than six hundred sixty-five *giudici di pace*) were removed; (b) e-justice, in terms of digital communications between courts and practitioners have been further fostered; (c) summary proceedings were introduced before the courts of second instance, leading to the refusal of appeal if there is no 'reasonable prospect of success' (Art 348-*bis* Code of Civil Procedure), which has certainly contributed to the decrease of the backlog of cases in the courts of appeal; (d) powers of the Supreme Court to quash a judicial decision for defective reasoning were limited (Art 360, para 1, no 5 Code of Civil Procedure); (e) the possibility to change procedural track (from the normal to an accelerated proceedings) at the first hearing has been introduced (Art 183-*bis* Code of Civil Procedure); (f) the legal framework for lawyers to negotiate the resolution of the dispute has been enhanced (*negoziazione assistita*); (g) the possibility for judges to be assisted by law clerks has been improved; (h) further small changes in the fields of enforcement of judgments and insolvency proceedings have been introduced at the beginning of May 2016.[49]

IV. The Current Performance of the Italian Civil Justice System: An Evaluation

[49] Cf decreto legge 3 May 2016 no 102.

The current performance of the Italian civil justice system gives no cause for joy. Yet, the situation has been steadily improving in the last few years. One of the main factors of this change has been rather concealed. Since the end of the 1990s the collection of statistical data on the judicial system by the Ministry of justice has been enhanced, thus enabling scholars and policy-makers to obtain a better understanding of the real situation, which is very diverse from a region to region, from court to court, making it difficult to adopt uniform performance targets on a national basis for the time being.[50] As to the geographical distribution of backlog, the bulk of it is in southern Italy, while a number of courts, especially in northern Italy, are performing relatively well. By way of example, the *tribunale* of Turin adopted in recent years a very successful backlog-reduction programme[51] and the Ministry of Justice is currently attempting to expand this programme on a national basis.[52]

Special statistical inquiries focused both on the performance of single courts or certain regions can point to specific causes for inefficiencies depending either on abnormal litigation rates in some judicial districts or dysfunctions in certain courts.

V. Concluding Remarks

In the end, the question remains as to how to tackle the problems of Italian civil justice in an effective way.

One can start by recalling the main factors that may determine the success or failure of any given judicial system. In essence, three criteria stand out, and they can be placed on an ascending scale of importance: first, skilfully drafted procedural rules; second, appropriate financial resources; third, the attitude of parties, legal practitioners and judges.

The first factor requires that the procedural rules be skilfully drafted and adequate to meet the expectations of parties, practitioners and judges. This is only a first element, which is not conclusive; since there has never been a procedural law so well constituted such as to prevent all bad practices and, conversely, there has never been a procedural law so misguided as to prevent good practices of judicial proceedings (to paraphrase Virgilio Andrioli, an outstanding Italian scholar in civil procedure of the twentieth century).

[50] Cf the special statistical inquiry as of October 2014, available at https://www.giustizia.it /giustizia/it/mg_2_9_10_1.wp?previsiousPage=mg_14_7 (last visited 24 May 2016).

[51] So called '*Strasburgo*' Program.

[52] '*Strasburgo 2 Program*'. Mario Barbuto, former President of the *tribunale* of Turin has joined the Ministry of Justice as a chief of the Department dealing with the subject of court organisation.

Justice is administered in courthouses, not simply through written words in statutory provisions. It needs, in fact, considerable financial investment by governments. Thus, the second factor is the availability of financial resources such as to implement the procedural law in a satisfactory way.

Moreover, the performance of judicial systems does not depend only on carefully drafted rules and adequate financial resources, but also on the role played by a third factor: mindset, cultural views, ethical beliefs, style, usage and customs affecting policy-makers, people and professionals involved in the machinery of justice. For instance, the propensity of individuals to litigate depends considerably also on cultural and ethical attitudes, such as the degree of honesty, fairness, integrity and good faith that characterizes human relations in a given environment and in a given historical moment; the degree of individuals' social responsibility and awareness of their rights; and the habit of resorting to methods of alternative dispute resolution, and so on.

In particular, promoting mediation and others means of alternative dispute resolution, through proper education of the public and the legal profession,[53] can play a major role in reducing the disputes brought before the courts for adjudication. However, it should be clarified that ADR methods should not be seen as a remedy for the inefficiencies of the machinery of justice. Instead, they should have an 'added value', even though courts operate effectively and efficiently. The promotion of mediation should always be accompanied by efforts to improve the efficiency of public civil justice system and not by attempts at limiting access to courts. Thus the adjective 'alternative' is actually misleading in relation to out-of-court dispute resolution methods. The out-of-court dispute resolution methods ought not to be an alternative to the state civil justice system, but rather its complement.

A major role is also played by habits of mind, professional skills as well as the level of cooperation among judges, practitioners and judicial staff. For example, the fast-paced development of technologies, as it occurs today, requires also an adaptability to new standards of technology. Even the availability of adequate financial resources is of little benefit if it does not come with the managerial skills required to manage these resources in an efficient way.

Propensities to litigate, habit of resorting to ADR, professional and managerial skills, are mainly cultural issues. Thus, judicial practice is influenced by a number of factors, among which the binding force of legal

[53] A short period of mandatory mediation as it is envisaged in the amended version of the Mediation Act could be useful to that end. Cf legge 9 August 2013 no 98.

rules plays a less critical role than the mindset, the cultural views and ethical beliefs of parties, judges, and professionals.[54]

In short, the third factor, the cultural one, is the most important, since it enhances the role of skilful drafting and financial resources.

However, one should be cautious with simple causal assertions, like those treating culture as a factor external to law that shapes behaviour and institutional arrangements. In the end, one should treat culture as a set of shared meanings that make certain options more thinkable such as to enable one to act accordingly. This approach is in line with Clifford Geertz's thoughts,[55] which rejected interpretations of culture that placed ultimate significance on its capacity to produce particular social practices and argued that seemingly identical practices may have entirely different meanings, such that the value of cultural interpretation is to sift through those meanings rather than simply to assert that culture causes the practices themselves.[56]

The task of deepening the extent to which the attitudes of scholars of civil procedure may play a role with regard to these variables remains for another article.

[54] For a definition of 'practice of the law' as 'a whole series of legal relevant conducts engaged by a homogeneous social group', see J. Ghestin, 'Rapport de synthese', in Travaux de l'association H. Capitant ed, *Le role de la pratique dans la formation du droit* (Paris: Economica, 1985), 17.

[55] See C. Geertz, *The Interpretation of Cultures. Selected Essays* (New York: Basic Books, 1973), 6, 12.

[56] For further remarks on this point, R. Caponi, 'Harmonizing Civil Procedure: Some Initial Remarks', in B. Hess and X. Kramer eds, *From Common Rules to Best Practices in European Civil Procedure* (Baden Baden: Nomos, 2016), forthcoming.

Essays

Post Rule of Law: The Structural Problem of Hybridity in International Criminal Procedure

Kerstin B. Carlson*

Abstract

The value of developing hybrid international criminal procedure (ICP) is that it is arguably inclusive (representing two major legal traditions) and distinct from any domestic system, thus creating a separate, sui generis realm for international criminal law (ICL) jurists to meet. Since its inception at Nuremberg, individual elements of hybridity have consistently caused concern amongst practitioners and legal theorists, largely around questions of transposition as jurists from one tradition resisted practices from the other. Transposition problems remain unresolved in modern ICP and have received extensive attention in the literature. The practice of hybridity itself, however – the determination to operationalize ICL through procedures drawing from different legal traditions, with specific practices drawn from singular jurisdictions – has received less critical scrutiny. This article addresses the practice of hybridity in ICP, drawing examples from the construction and evolution of hybrid procedure at the International Criminal Tribunal for the Former Yugoslavia (ICTY), to argue that the hybridity practiced by international criminal tribunals renders them 'post rule of law' institutions, thus challenging their central didactic and norm-constructing roles.

I. Introduction

Beginning with the International Military Tribunal (IMT) at Nuremberg, international criminal tribunals (ICTs) have developed and applied a hybrid criminal procedure, drawing on practices from two of the world's major legal traditions, common law and civil law. As institutions practicing international criminal law (ICL) have expanded, and as twenty years of jurisprudence from the Yugoslav and Rwanda tribunals joins a growing jurisprudence from the International Criminal Court (ICC), international

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criminal procedure (ICP) has emerged as a legal field. ICP is the subject of several legal treatises,[1] and is taught in some law schools.

The value of developing *hybrid* ICP is that it is arguably inclusive (representing two major legal traditions)[2] and distinct from any domestic system, thus creating a separate, *sui generis* realm for ICL jurists to meet.[3] Since its inception at Nuremberg, individual elements of hybridity have consistently caused concern amongst practitioners and legal theorists, largely around questions of transposition as jurists from one tradition resisted practices from the other.[4] Transposition problems remain unresolved in modern ICP and have received extensive attention in the literature.[5] The

[1] R. Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 3rd ed, 2014); V. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Leiden: Martinus Nijhoff Publishers, 2008); V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence', in K.A.A. Khan, C. Buisman et al eds, *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010); M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (Oxford: Oxford University Press, 2012); A. Whiting, 'The ICTY as a Laboratory for International Criminal Procedure', in B. Swart, A. Zahar et al eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011); R. May and M. Wierda, *International Criminal Evidence* (Leiden: Brill Publishers, 2002); J.D. Jackson and S.J. Summers, *The Internationalization of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (New York: Cambridge University Press, 2012); M.C. Bassiouni, *Introduction to International Criminal Law* (The Netherlands: Martinus Nijhoff Publishers, 2012); J. Doria, H. Gasser et al eds, *The Legal Regime of the International Criminal Court Essays in Honour of Professor Igor Blishchenko* (Leiden: Brill Publishers, 2009); A. Cassese, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009).

[2] But see discussion in R. Vogler, 'Making International Criminal Procedure Work: From Theory to Practice', in R. Henham and M. Findlay eds, *Exploring the Boundaries of International Criminal Justice: Strategies for Achieving Justice in Post-Conflict Societies* (Farnham: Ashgate Publishing Group, 2011), 105-127 (noting that ICP importantly neglects African and Islamic law traditions).

[3] M. Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' 1(1) *Journal of International Criminal Justice*, 13-25, 20 (2003) (arguing that hybrid international laws will have 'acquired a new dimension, independent of their original meaning'); K. Ambos, 'International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?' 3 *Third International Criminal Law Review*, 1-37 (2003); P.L. Robinson, 'Ensuring Fair And Expeditious Trials At The International Criminal Tribunal For The Former Yugoslavia' 11 *European Journal of International Law*, 569-589 (2000).

[4] For example, at the IMT, the charge of conspiracy, as drawn from the common law, was resisted by those trained in the civil law tradition. See S. Pomorski, 'Conspiracy and Criminal Organizations', in G. Ginsburgs and V.N. Kudriatsev eds, *The Nuremberg Trial and International Law* (The Netherlands: Martinus Nijhoff Publishers, 1990).

[5] See, for example, the rich discussion on plea bargaining before ICTs, eg R. Rauxloh, *Plea Bargaining in National and International Law, a Comparative Study* (Abingdon: Routledge, 2012); M. Harmon, 'Plea Bargaining: The Uninvited Guest at the International

practice of hybridity[6] itself, however – the determination to operationalize ICL through procedures drawing from different legal traditions, with specific practices drawn from singular jurisdictions – has received less critical scrutiny.[7]

This article addresses the practice of hybridity in ICP, drawing examples from the construction and evolution of hybrid procedure at the International Criminal Tribunal for the Former Yugoslavia (ICTY), to argue that ICT operation is 'post rule of law'. Rule of law processes underwrite liberalism and legalism and shore up the rationale for ICL.[8] The central function of ICTs is to deliver (as courts) and model (as didactic institutions)[9] justice. Yet ICTs face particular pressures that distinguish them from domestic criminal courts, specifically to achieve convictions in order to justify the public resources expended on international trials.[10] These

Criminal Tribunal for the Former Yugoslavia', in J. Doria, H. Gasser et al eds, n 1 above, 161-182.

[6] Note that the term hybrid refers entirely to the procedure applied by tribunals, and not the structure of the tribunals themselves. In international criminal law 'hybrid' usually references particular court structures comprising national and international judges, such as the Special Court for Sierra Leone, the Extraordinary Chambers for Cambodia, the Special Panels for serious Crime in East Timor, and the Chambres Africaines Extraordinaires in Senegal. See A. Del Vecchio, *International Courts and Tribunals between Globalisation and Localisms* (The Hague: Eleven International Publishing, 2014), 156-170.

[7] Much of the critical commentary examining hybridity in fact seeks practical resolutions designed to improve the 'marriage' of the two systems as represented at ICP. See, eg R. Skilbeck, 'Frankenstein's Monster: Creating a New International Procedure' 8 *Journal of International Criminal Justice*, 451-462 (2010); M. Farlie, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit' 4(3) *International Criminal Law Review,* 243-319 (2004); J.D. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy' 7(1) *Journal of International Criminal Justice*, 17-39 (2009); R. Vogler, n 2 above.

[8] The International Bar Association defines rule of law thus: 'An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process; are all unacceptable'. (IBAS 2009 resolution, available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=a19de354-a0d7-4b17-a7ff-f6948081cd85 (last visited 24 May 2016)).

[9] M.R. Damaška, 'What is the Point of International Criminal Justice?' 83 *Chicago-Kent Law Review*, 329-365 (2008). Regarding the ICTY's capacity in this regard, see eg, L. Nettlefield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010).

[10] See, for example, Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 para 42 (23 August 2004): 'The two ad hoc tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars – equivalent to more than 15 per cent of the Organization's total regular budget. Although

pressures emerge from the principal-agent relationship between ICTs and the community of states they serve, a structure that excludes the interests of third parties and is common to international organizations (IOs) generally.[11] Unlike other IOs, however, ICTs' failures of accountability to third parties challenge their capacity to meaningfully perform their central function (because delivering and modeling 'justice' turns on the legitimacy[12] courts enjoy before third parties).

The paper is divided into four parts. Part one explores civil and common law systems as cultural typologies. Both traditions share similar goals and rationales for criminal sanctions – both empower a state apparatus to substitute private retribution with a public process through which the guilty are punished and the innocent exonerated – yet the means applied differ significantly. Part two contrasts the specifics of criminal procedure between the two systems, demonstrating how the logic of each typology maps onto procedural elements in domestic criminal law practice. Part three moves these considerations to the international realm, examining some specifics of ICTY procedure to show how the ICTY's evolving procedure constitutes civil law methods *harnessed* by common law methodologies, a situation that threatens institutional legitimacy through a structural disregard for the presumption of innocence. Part four argues that the practice of hybridity at ICL has effectively placed its institutions not as bulwarks of a cosmopolitan, global rule of law system, but rather as institutions that have deliberately left the rule of law in their wake (that have become, as the title evokes, 'post rule of law'). The fourth part concludes with one example of a post rule of law ICL practice, sentencing by the ICTY.

II. Legal Typologies as Legal Cultures

John Merryman's classic monograph on the civil law distinguishes legal *traditions* (civil law and common law) from particularized legal *systems* within those traditions.[13] In some contemporary discourse, however,

trying complex legal cases of this nature would be expensive for any legal system and the tribunals' impact and performance cannot be measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions.'

[11] J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' 26(1) *The European Journal of International Law*, 9-82 (2015).

[12] Re variations and measurements of judicial legitimacy see D. Bodansky, 'Legitimacy in International Law and International Relations' (2011) APSA 2011 Annual Meeting Paper, available at SSRN: http://ssrn.com/abstract=1900289 (last visited 24 May 2016).

[13] J. Merryman and R. Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Palo Alto: Stanford University Press, 3rd ed, 2007). See also H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 4th ed, 2010); S. Zappalà, *Human*

making distinctions between the dichotomies of the two systems has become *passé*. Challenges come in several forms. Some commentators insist that the extensive borrowing between legal systems makes discussions of distinct or separate legal schools obsolete.[14] Others seek to draw distinctions between domestic and international practices that would make categories applied to domestic legal systems inapplicable at international law.[15] Moreover, there is a scholarly split between theorists of ICL and comparative law scholars,[16] and within comparative law scholarship itself, regarding the possibility and compatibility of legal transplants.[17]

Resistance from contemporary commentators notwithstanding, this first section traces the distinct ideological impulses that distinguish the two western legal traditions of common and civil law, arguing that these ideological frameworks substantiate individual understandings of how justice and fairness are practiced. At criminal law procedure is the framework for substantive justice to be performed. Faulty procedure, or procedure not received as legitimate, will raise justice concerns even where the outcome is desired or understandable. Put another way, procedure seen as legitimate has the potential to make even an undesired outcome 'fair' to observers.[18] Thus the question of ICP's structure has traction far beyond its practitioners, with wider ramifications for the legitimacy of ICL and its

Rights In International Criminal Proceedings (Oxford: Oxford University Press, 2003), 15-16 (arguing that important distinctions exist that substantially differentiate the two traditions).

[14] K. Ambos, n 3 above (arguing that both systems are equally adversarial and inquisitorial); M.R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) (defining legal traditions in terms of separate ideas of officialdom, but nonetheless noting that the extensive borrowing from outside engaged in by modern legal systems obscures strict divides).

[15] M. Langer, 'The Rise of Managerial Judging in International Criminal Law' *Bepress Legal Series Working paper*, 343 (2005); F. Mégret, 'In Search of the 'Vertical': An Exploration of What Makes International Criminal Tribunals Different (and Why)?' *Working Paper Series*, 1-57 (2008).

[16] See M. Delmas-Marty, n 3 above, 15 (arguing that ICP represents a rapprochement between ICL and comparative law); E. Grande, 'Comparative Criminal Justice', in M. Bussani and U. Mattei eds, *The Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press, 2012), 191-209 (noting that comparative criminal law is an underdeveloped field that has blossomed with the rise of ICL); see also R. Vogler, n 2 above, 111-112.

[17] Where there is a debate regarding whether practices can be 'transplanted' (A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scotland: Scottish Academic Press, 1974)) or whether the context in which a rule exists is essential to that rule's function, so that where a rule or practice removed from its native context likely loses significant meaning (see D. Nelken, 'Comparativists and Transferability', in P. Legrand and R. Munday eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), 437-466); P. Legrande, 'The Impossibility of Legal Transplants' 4(111) *Maastrict Journal of European and Comparative Law*, 111-124 (1997).

[18] T. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 1990).

understood capacity as a mechanism for transitional justice and institutional modeling.

1. Criminal Law Processes in Common Law and Civil Law Traditions

Rule of law practice is central to common and civil law traditions in the modern age.[19] Rule of law practices place the transparency and even application of democratically determined laws at the center of state action.[20] The rule of law encompasses ideas of balance, fairness, and the social contract, where the legitimacy of government rests on the consent of the governed. Rule of law practice is particularly central to the sensitive business of turning the massive power of the state against the individual to potentially deprive him of liberty or property: ie, the practice of criminal law. Criminal procedure is substantive criminal law operationalized per a rule of law standard.

Although western criminal systems have indeed borrowed much from each other,[21] there remain central foundational ideologies that separate the common and civil law traditions. Common law, also referred to as 'judge-made law' developed in England and was exported to her former colonies. Common law recognizes precedent – previously decided cases – as a form of legal authority. Also known as 'adversarial law', the common law tradition subscribes to the value of a contest in order to determine truth. This 'marketplace of ideas' approach, wherein the strongest idea should triumph, positions the court, and very specifically the trial, as the site where social and legal norms are decided or affirmed.

Common law ensures a fair trial through procedural safeguards surrounding the performance of the trial itself (such as common law's

[19] M. Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' 74 *Southern California Law Review*, 1307-1351 (2001).

[20] J. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press, 2011), 6 (discussing the creation of post war democracies in Europe as a 'constitutional settlement').

[21] The reform of the Italian criminal system in the 1980s to incorporate elements of adversarialism is the most discussed example, although there are others (see W. Pizzi and L. Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' 17(1) *Yale Journal of International Law*, 1-40 (1992); E. Grande, 'Italian Criminal Justice: Borrowing and Resistance' 48 *American Journal of Comparative Law*, 227-259 (2000). Borrowing goes the other way, as well: see R. Subramanian and A. Shames, 'Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States' *VERA Institute of Justice* (2013), available at http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf (last visited 24 May 2016) (discussing a project where US judges were introduced to Dutch and German sentencing practices and ideologies and reported implementing ideas into their own practice).

notoriously complex rules of evidence). At common law, trials represent the exposition, climax and *dénouement* of the story being told. Trials are characterized by spectacle and performance[22] (often referred to as the central 'orality' of the preceedings). Because of the uncertainty of trial outcomes, both sides in the contest (the prosecution and the defense, who are adversaries) enjoy incentives to bargain or otherwise avoid trial. In the particularized common law system of the US, for example, plea bargaining (wherein defendant and prosecution agree on the outcome of the case and thereby avoid jury trial) is estimated to dispose of up to ninety-five percent of criminal cases.[23]

Civil law, also known as 'codified law' or inquisitorial law, follows the principle articulated by Montesquieu that a legal code, drafted by legislators, constitutes the law that must be applied, without creativity or approximation, by judges.[24] Civil law systems construct procedure around an investigation carried out by several state parties which engage in, and oversee, the state's search for the truth. This is seen as the 'one case'[25] or 'unity of meaning'[26] approach because impartial public officials seeking the truth of a matter construct a single *dossier* containing all evidence and argument gathered. The unity of the argument means that criminal liability is assessed before trial; in the words of ICTY defense attorney Michael Karnavas, 'before indicting a suspect and putting him or her through the meat-grinding process of a criminal trial, the prosecutor in the civil law system will be virtually certain that the evidence gathered and available to the court will support a guilty verdict'.[27] Trials in civil law systems serve as moments of transparency to reveal the work of the state and are unavoidable (ie, a defendant's admission of guilt does not cancel the requirement that she face trial). Acquittals are rare, and in the event a defendant is acquitted, this decision may be appealed by the prosecutor. Finally, civil law views law and politics as antithetical; civil law processes are designed to limit subjectivity, understood as contradiction of the uniformity and predictability that constitutes the rule of law. From the administrative nature of judicial appointments and review, to the prohibition

[22] R.P. Burns, *A Theory of the Trial* (Princeton: Princeton University Press, 2001).

[23] G. Fisher, 'Plea Bargaining's Triumph' 109 *The Yale Law Journal*, 857–1087 (2000) (stating that ninety/ninety-five percent of cases were resolved through guilty pleas).

[24] C. Montesquieu, *The Spirit of the Laws* (1750), translated and edited by A.M. Cohler, B.C. Miller et al (Cambridge: Cambridge University Press,1989).

[25] K. Ambos, n 3 above.

[26] A. Garapon and I. Papadopoulous, *Juger en Amérique at en France*: *Culture Juridique Française et Common Law* (Paris: Odile Jakobs, 2004).

[27] M.G. Karnavas, 'Gathering Evidence in International Criminal Trials: The View of a Criminal Defence Lawyer', in M. Bohlander ed, *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007), 75-152.

that judges participate in political organizations, and extending to its treatment of a singular truth, the civil law is committed to engaging in a scientific, objective pursuit of justice.

2. Legal Traditions' Ideologies and Cultures

A central ideological distinction between common law and civil law systems is epistemological, and concerns the question of how best to reach truth.[28] It is important not to overstate this difference: some commentators would make truth 'seminal'[29] to the civil law or merely 'procedural'[30] to the common law. Both systems seek truth, because the substantive justice of imprisoning an individual resides in truth.[31] Rather, the epistemological divide between the two systems consists of the means of knowing. This divide has been categorized as the 'two case' versus 'one case' model,[32] or the 'dispute' versus 'the official investigation' model.[33] Common law criminal procedure is characterized by two sides (the prosecution and the defense), each an 'interested party' with a stake in the outcome of the contest. The defendant, whose liberty is at issue, is obviously an interested party. But the prosecution, too, though nominally charged with pursuing justice, tends to view convictions as 'wins' and acquittals as 'losses'.[34] At common law the prosecution and the defense separately assemble their own facts, witnesses, and arguments in order to present two competing cases, which come to a head at trial. The contest between the parties consists largely in the disclosure (or withholding) of information. The judge acts as a referee in this contest, assuring that procedural rules are followed and controlling the information available to the decision maker, the jury. As Mirjan R. Damaška notes, the binary

[28] S. Zappalà, n 13 above, 16; W. Pizzi and L. Marafioti, n 21 above. M.R. Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' 45 *American Journal of Comparative Law,* 839-852, 843 (1997).

[29] M. Farlie, n 7 above.

[30] S. Zappalà, n 13 above.

[31] J.v.H. Holtermann, ' "One of the Challenges that Can Plausibly Be Raised Against Them"?: On the Role of Truth in Debates about the Legitimacy of International Criminal Tribunals', in N. Hayashi and C. M. Bailliet eds, *The Legitimacy of International Criminal Tribunals*, (Cambridge: Cambridge University Press, 2016). Vladimir Tochilovsky locates the distinction in 'statutory obligation' where civil law judges are *statutorily obligated* to discover the truth, whereas common law judges are merely 'interested' in truth. V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above, 162.

[32] K. Ambos, n 3 above.

[33] M.R. Damaška, n 14 above.

[34] W. Pizzi, 'Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform' 54 *Ohio State Law Journal*, 1325-1373 (1993).

nature of the contest between prosecution and defense excludes the possible of representing a third interest, that of the victim.[35] This is in stark contrast with civil law traditions, where the truth is discovered through the studied construction, by disinterested parties, of all the relevant facts.

The two traditions imagine a very distinct role for the judge, what Mirjan R. Damaška calls 'separate ideas of officialdom'.[36] The civil law judge is a bureaucrat: positions are appointed by examination, and judges in civil law systems are both more numerous, and younger, than their common law counterparts.[37] The job of the civil law judge is decide 'correctly', which may be understood as uniformly; dissenting opinions are generally swallowed except in the highest courts, and judgments move up a hierarchical pyramid to be corrected as necessary.[38] The common law judge, on the other hand, is encouraged to 'individualize' justice.[39] This is operationalized through the production of carefully reasoned judgments, including concurring and dissenting opinions. The reasoning offered by these decisions may enter wider social conversations and direct social and political narratives, or styles of argument.[40] Thus the institutionalization of legal apparati translates into distinct legal cultures between the two traditions. Justice as idealized within the civil law tradition resides in the careful, measured adherence to formalities decreed by the legislature and institutionalized in judicial practice. Justice as idealized within the common law tradition resides in the strength of the argument made within a judicial determination.[41]

Commitment to one's legal culture (specifically, the understandings of how justice is served imagined through one's native legal typology)[42]

[35] M.R. Damaška, n 14 above.

[36] Ibid.

[37] M. Bohlander, *Principles of German Criminal Procedure* (Oxford: Hart Publishing, 2012).

[38] J. Merryman and R. Perez-Perdomo, n 13 above, 38; M.R. Damaška, n 14 above.

[39] M.R. Damaška, n 14 above, 19.

[40] J. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, (1964) 1986); M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transaction Publishers, 1997).

[41] These are ideal types. Note that the actual practice of justice in both systems would recognize both of these ideal types as important: common law lawyers would reject the suggestion that law for them is not 'measured', and civil law lawyers would reject the notion that strength of argument should be absent from law.

[42] For a thorough definition of legal culture see K. Klare, 'Legal Culture and Transformative Constitutionalism' 14 *South African Journal of Human Rights*, 167 (1998): 'By legal culture I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies developed by participants in any given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other contexts (eg in political philosophy), are deemed outside the professional discourse of

appears moral, even quasi-religious.[43] In the nineteenth century, Max Weber characterized the common law system as 'irrational',[44] and contemporary sources suggest little has changed regarding the distrust that legal practitioners show for typologies not their own. Even those practitioners positioned at legal crossroads – practitioners working in hybrid international systems, or comparativists interested in legal systems outside their own – exhibit great difficulty overcoming a bias towards their primary understanding of how justice, fairness, and rule of law are practiced. Interviews conducted by the author with ICTY personnel confirmed these deep-rooted biases playing out in ICL practice. One civil-law-trained employee in the ICTY's Office of the Prosecutor (OTP), considering the deep differences he noticed between how different chambers at the ICTY work, explained:

> 'Some (ICTY procedural) rules make more sense to you, so you apply them. The rest you ignore. As you're reading through the rules, you pick the ones you like, that make sense. Everybody does this. OTP, defense, judges – they all do. This is wrong – people should come to the ICTY to learn. But instead they import some things and not others.'[45]

Even where lawyers trained in one tradition seek to praise practices borrowed from the other, the prejudices emerging from their native typology emerge. Consider one common-law-trained attorney in the OTP, on the 'value' of civil law procedure:

> 'One of the benefits of working at the ICTY is that I see how stupid many common law things are. The civil law is totally intolerant of many stupid technical arguments why evidence shouldn't be admitted.

lawyers? What enduring political and ethical commitments influence professional discourse? What are understandings of and assumptions about politics, social life and justice? What inarticulate premises (are) culturally and historically ingrained in the professional discourse and outlook.' (internal citations omitted).

[43] 'To common law ears, the strange cluster of the words 'the Appeals Chamber convicted him' sounds blasphemous.' G. Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' 1 *Bepress Legal Series*, 45 (2006).

[44] For civil-law-based Max Weber, Anglo-American law was 'empirical justice', where formal judgments are rendered not 'by subsumption under rational concepts, but by drawing on 'analogies' and by depending upon and interpreting concrete 'precedents' '. M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, in G. Roth and C. Wittich eds (Berkeley: University of California Press, 1978). As Alan Hunt notes, '(Weber's) picture of the development of the common law is of a gradual stripping away of the irrational elements and their replacement by legal formalism which does not in itself rid the system of its irrationality.' A. Hunt, *The Sociological Movement in Law* (London: Macmillan, 1978), 123.

[45] Interview May 2005 ICTY The Hague OTP.

> Civil law lets in everything, and the judge can decide what weight to give things. This is very good at getting at the truth. Because the role of a good defense attorney is to stop the truth from getting out. A good defense attorney just needs to throw enough obstacles in front of the prosecutor so that he hasn't proved his case, and he's won. That's not good for truth. In order to advance reconciliation, you don't want to use technical argument to exclude evidence. You want to let the truth get out.'[46]

For this OTP employee, legal practice was still very much based in an adversarial typology, and civil law procedure had appeal because of what it might permit him 'to win'. Opinion remains divided even at the highest judicial eschelons. Although ICTY Justice Antonio Cassese called the hybridity 'felicitous' in the *Erdemović* case,[47] other judges at the ICTY are less sanguine.[48]

Of course, problems of transposition and translation are only magnified for practitioners without experience of other legal cultures.[49] This has ramifications regarding equality of arms, an imbalance to which common law processes are quite sensitive.

[46] Ibid.

[47] *Prosecutor* v *Dražen Erdemović*, case n IT-96-22, 7 October 1997, (United Nations - International Criminal Tribunal for the former Yugoslavia), Appeals Chamber, Separate and Dissenting Opinion of Judge Antonio Cassese para 5.

[48] A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC', in A. Cassese, P. Gaeta et al eds, *The Rome Statute of The International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 1445; P.M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court' 5 *The Washington University Journal of Law and Policy*, 87-118, 90, 104 (2001) (discussing problems arising from hybrid cultural practices, where judges from either system 'apply what comes naturally' and where defence counsel trained in civil law systems produce ineffective cross examinations because they are unfamiliar with the practice).

[49] The defence attorney in the *Kupreskić* et al, case n IT-95-16 (United Nations – International Criminal Tribunal for the former Yugoslavia), for example, admitted to being entirely confused by ICTY investigation techniques: 'We (…) asked the investigators to come to Vitez and not to interview only one side (…) It was first time that I come across the problem of 'my witnesses and your witnesses', because in the area in which we worked, we usually had witnesses of the court, a person who has to tell the truth regardless of whether he is speaking in favour of the Defense or the Prosecution. He conveys what he saw and what he heard.' *Kupreskić* Trial Transcript (27 August 1998), available at www.icty.org, Defense Attorney Radovan, 1220:11- 1221:3. See also R.L. Lerner, 'The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises' 3 *University of Illinois Law Review*, 791-856, 791, 819 (2001) (detailing the difficulties of explaining how the adversarialness of US proceedings colors all forms of evidence and inquiry for a French judge and prosecutor).

3. Is Either Tradition 'Better' for International Criminal Procedure?

Both civil law and common law search for truth: does one system do it better, or is one system better positioned to function for ICTs? ICL is characterized by particularities which distinguish it from domestic criminal law.[50] Thus, arguably, the rationales applied to strengths and weaknesses of procedure within the two traditions must be reconfigured when applied to the international realm. For example, the presumption of innocence that obtains domestically, permitting defendants to remain free pending trial barring extenuating circumstances, is necessarily different at ICL, where ICTs do not enjoy police powers and can have great difficulty procuring defendants. Likewise, relaxing rules of evidence is sometimes argued as essential in ICL practice, where chaotic conditions make the collection of evidence in relation to a crime difficult or render it non-existent.

The strength of the civil law is seen as its written, multi-party investigation, where police, prosecutor, and judicial official are all charged explicitly with finding the truth of a crime, a process which translates legally into finding *all* evidence, both incriminating and exculpatory.[51] This means that the substantial resources of the state are (at least in theory) at the service or the defense as well as the prosecution. The one-case approach imagines that a defendant gets what is coming to him, but not what shouldn't be. The written nature of civil law procedure also curtails the defendant's capacity to 'get off on a technicality', as it permits fewer surprises. As applied to ICL, inquisitorial traditions are argued to serve ICL's ends because of a desire for ICL procedures to produce objective history.[52]

The weakness of the one-case approach hinges on the capacity of the state to represent 'justice' that includes a defendant's right not to stand falsely accused or convicted. Civil law pre-trial investigations hinge on

[50] C. Warbrick, 'International Criminal Courts and Fair Trial' 3(1) *Journal of Conflict Security Law*, 45-64 (1998); F. Mégret and F. Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' 25(2) *Human Rights Quarterly*, 314-342 (2003); M. Langer, n 15 above; F. Mégret, 'Beyond Fairness: Understanding the Determinants of International Criminal Procedure' *UCLA Journal of International Law and Foreign Affairs*, 37 (2009).

[51] There are common law commentators who concur. See J.H. Langbein, 'The German Advantage in Civil Procedure' 52 *University of Chicago Law Review,* 823-866 (1985); R. Burns, 'The Rule of Law in the Trial Court' 56 *DePaul Law Review*, 307-334 (2006).

[52] R. May and M. Wierda, 'Evidence before the ICTY', in R. May, D. Tolbert et al eds, *Essays on the ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Amsterdam: Kluwer, 2001), 253; R.E. Rauxloh, 'Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining' 10 *International Criminal Law Review*, 739-770 (2010); R. Wilson, *Writing History in International Criminal Tribunals* (Cambridge: Cambridge University Press, 2011).

individuals representing the state impartially. Some (common-law-trained) academics argue it is unrealistic to imagine that the state's investigators can remain impartial,[53] finding that civil law processes 'require (…) an inordinate amount of faith in the integrity of the state and its capacity to pursue truth unprompted by partisan pressures'.[54] In the case of ICL, where the scale of atrocity, human suffering, or both, is so high, where 'the very seriousness of the charge means that only limited analogies may be made with domestic processes at large'[55] is the impartiality of investigators taxed too heavily to be believed?

More critically, the civil law model presumes, for the purposes of justice, a certain homogeneity of understanding, where all parties to the case, from the defendant to the state representatives, share expectations regarding justice.[56] Heterogeneous cultural expectations present challenges to criminal trials in any legal tradition,[57] but common law traditions at least open a space for debate about heterogeneity of meaning, from the use of a lay jury which has the capacity to 'nullify' the law as dictated by the judge[58] to the adversarial training that teaches liberal constructions of analogy and empowers every lawyer to seek to perform wizardry through the law.[59] Civil law traditions do not possess these same spaces or tools, and are thus arguably particularly challenged in adjudicating across heterogeneous cultures, ideas, or interpretations.

The question then remains, would common law processes perform better? Common law procedures are often referred to as 'friendly for the defence', because to secure acquittal (which is generally unappealable) the defence need only introduce reasonable doubt into the prosecution's case. Common law is criticized for its sensitivity to inequality of arms issues: the 'fight' that characterizes common law processes cannot be fair when both sides are not equipped for it. In domestic systems, a central obstacle to equity at arms is financial; what sort of representation can a defendant

[53] See for example P. Keen, 'Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals' 17(4) *Leiden Journal of International Law*, 767-814, 773 (2004).

[54] N. Jörg, S. Field and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?', in P. Fennell, C. Harding et al eds, *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995), 46.

[55] C. Warbrick, n 50 above.

[56] B. McKillop, *Anatomy of a French Murder* (Anandale: Hawkins Press, 1997).

[57] See A. Renteln, *The Cultural Defense* (Oxford: Oxford University Press, 2004) (discussing problems of adjudicating cases where US law criminalizes conduct which constitutes a non-criminal norm in a party's culture of origin).

[58] See C.S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham: Carolina Academic Press, 1998), 167-185.

[59] K. Carlson, 'Found in Translation: The Value of Teaching Law as Culture' 5 *Drexel Law Review*, 407-421 (2013).

afford? Michael Karnavas, a defense attorney at the ICTY, states that inequality of resources between prosecution and defense has characterized ICTY practice.[60] Moreover, in the international arena, resource questions extend beyond the defendant's financial capacity to hire a competent lawyer, and include international politics and evolution of ICL procedure and judging itself. William Schabas argues that the difficulties procuring evidence from uncooperative states might argue in favor of defendants being better served by an inquisitorial system.[61] As Martin Shapiro notes, all law necessarily serves a sovereign.[62] As Jan Klabbers observes, for international organizations that sovereign is the body of states constructing them. ICL already, problematically, holds individuals accountable for actions made possible (or sometimes even mandated) by a collective.[63] Is it possible to equip an individual defendant for a 'fair fight' when the opponent is 'humanity'?

Thus the critical question should be not which tradition offers greater 'efficiency' but rather, whether either system offers resources to subvert Jean François Lyotard's *différend* paradox, where 'to accept a method or criterion of settlement is already to have accepted the position of one's adversary'.[64] Does either system provide meaningful tools to permit the international organization that is an ICT to escape the principle-agent model identified by Jan Klabbers in order to meaningfully include the interest of third parties?

III. Criminal Law Practice

This section describes and contrasts select elements of domestic criminal pre-trial and trial procedure within civil and common law systems in order to tie the procedural mechanisms used in both systems to the animating epistemological logics discussed above. Even where both systems share forms, roles, rules, and goals, it is problematic to compare any element from one system against its partner in the other without considering what a

[60] Michael Karnavas, a defense attorney at the ICTY, describes precisely this issue at work in ICTY practice. M.G. Karnavas, n 27 above. Payment to defence counsel was also the topic of the 1999 UN report suggesting reforms to ICTY practice, discussed in Part III.

[61] See W. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 4th ed, 2011), 252.

[62] M. Shapiro, *Courts* (Chicago: University of Chicago Press, 1986).

[63] P. Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1995); M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

[64] M. Koskenniemi, 'Between Impunity and Show Trials' 6(1) *Max Planck Yearbook of United Nations Law*, 1-35, 17 (2002).

rule, or practice, means within a system, and what purpose the rule or practice serves. Thus imbalances will obtain where, for example, practitioners apply the civil law's 'ease of conviction' without similarly incorporating the civil law's front-loaded, state-balanced investigation procedure.

As discussed above, a central distinction between the two systems is evidenced by the purpose of the trial: at civil law, the trial showcases the work of the state to the public (where the defendant's guilt has been determined in the pre-trial phase); at common law, the trial is the site where guilt or innocence is determined. The forms taken by pre-trial and trial procedures fit these distinct purposes.

1. Pre-Trial

Pre-trial investigations begin in both systems with a crime and police investigation. When the investigation is sufficiently advanced, the prosecutor is brought in. At common law, the prosecutor has discretion as to whether or not to press charges against the accused, as well as to what the content of such charges should be;[65] this is the beginning of the 'bargain' with the defense which will, in the vast majority of cases, preclude the case going to trial. In most civil law systems, such prosecutorial discretion is substantially curtailed.[66] In civil law systems, the 'grade' of the crime determines whether

[65] There is a vast literature on prosecutorial discretion. See eg, F.W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (Boston: Little Brown, 1970); K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969). K.L. Levine, 'The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload' 55 *Emory Law Journal*, 691-732, 697 (2006) identifies two 'filters' of discretion, the first at the macro-level (which relies on the understood purpose of a statute to distinguish between 'real' and 'technical' crimes), and the second at the micro-level (which includes 'office policy, resource allocation, and the multitude of decisions prosecutors must make in each case against the backdrop of discretion exercised by other criminal justice actors').

[66] There is also a significant English-language literature on prosecutorial discretion, or lack thereof, in the civil law, focusing largely on Germany and France. German civil law, for example, is said to mandate prosecution through application of the *Legalitätsprinzip*. Other authors, however, dispute this mandatory prosecution theory, citing the German law's *Opportunitätsprinzip*, a principle of expediency, which permits prosecutors not to move forward on a case based on the triviality of the offense. This is still quite distinct from US-styled prosecutorial discretion, as any application of *Opportunitätsprinzip* must be justifiable on 'rational' grounds and can be reviewed by higher courts on this ground. See M.R. Damaška, 'The Reality of Prosecutorial Discretion: Comments on a German Monograph' 29 *American Journal of Comparative Law*, 119-138 (1981) (reviewing T. Weigend's book, *Anklagepflicht und Ermessen. Die Stellung des Staatsanwalts zwischen Legalitäts-und Opportunitätsprinzip nach deutschen und amerikanischen Recht* (Baden-Baden: Nomos, 1978)); see also J.H. Langbein, 'Controlling Prosecutorial Discretion in Germany' 41 *University of Chicago Law Review*, 439-467 (1974); and the exchange between John H. Langbein, Lloid L. Weinrib, Abraham S. Goldstein and

there will be an administrative hearing or whether an independent investigating arm of the state will be assigned to the case.

A central feature of the civil law pre-trial investigation is the responsibility of the arms of the state investigating to seek *incriminating and exculpatory* evidence regarding subjects of inquiry. This process is overseen by other, separate state entities, also charged with investigating the truth. This might be, as in France, the *juge d'instruction* (investigating judge), the *Ermittlungsrichter* (intermediate judges) in Germany, or the *giudici per le indagini preliminari* (judges of preliminary inquiry in Italy).[67] In the event that a defendant is believed to be responsible for a crime, a charge is brought against her, at which time the entirety of the dossier is made available to her. The defense is entitled to the full benefit of the information contained in the dossier; civil law hews to the theory that open investigations are the best methods of ascertaining the truth of events. Finally, at civil law, the victim of a crime may join the case, not as a witness for the state (as at common law) but as an actual party to the criminal case. Such participation begins in the pre-trial stage of the proceedings.

At common law, the prosecutor receives the police investigation, and determines whether to bring a charge and if so what charge to bring. While ostensibly an arm of the state, the common law prosecutor is an adversarial party. This plays out, in the investigation stage, in the prosecutor's requirement to *turn over* to the defense any exculpatory evidence she finds during her investigation, but not to *seek out* such exculpatory evidence. After an investigation, the prosecutor brings a charge. Charge inflation is typical. Charge inflation is an effective technique to encourage a defendant to plead guilty to a lesser charge and thus to dispense with the necessity of a trial.

The central distinction between the pre-trial process in the two systems is its purpose. At civil law, pre-trial procedure is designed to determine the likely guilt of the party charged. The standard of proof is 'intime conviction' the 'inner certainty' of the trier of fact.[68] This standard is the same across all stages of the proceedings, from pre-trial through the trial,

Martin Marcus in the *Yale Law Journal* 1977 and 1978. M. Bohlander, n 37 above, 25-27 (showing that only twenty-three point four percent of criminal charges were actually indicted using data from the German prosecution service in 2006).

[67] See discussion in D. Salas, 'The Role of the Judge', in M. Delmas-Marty and J. Spencer eds, *European Criminal Procedures* (Cambridge: Cambridge University Press, 2006), 488-541 (regarding how the German and Italian models differ from the French *juge d'instruction* and are designed to prevent the concentration of power that one finds in the French model).

[68] P. Ricouer, *Le Juste, entre le légal et le bon* (Paris: Esprit, 1991). Michael Bohlander finds that the level of certainty for the civil law judge is the same as the common law's 'beyond a reasonable doubt' standard. M. Bohlander, n 37 above, 8, 32.

which is distinct from the common law, which uses a *prima facie* standard at pre-trial, before a Grand Jury, to determine whether or not to go forward, and a 'beyond reasonable doubt' standard at the trial phase of criminal proceedings. At civil law, the resources of the system are concentrated on determining whether or not further system resources should be expended – clearly, neither the state nor the defendant benefits from prosecuting an innocent party. Defendants imagined guilty on the balance of all evidence are sent on to trial, where an official determination of guilt is virtually assured.

At common law, the guilt of the party charged is determined at trial. Trials, however, consume substantial state resources, and are largely avoided. In addition to the work of the prosecutor in preparing for trial, there is the selection and employment of a jury, counsel for indigent defendants, and the trial itself, an affair that can range from less than a day to several years. These costs must all be borne by the state. Moreover, the unscripted, oral trial process before a lay jury makes outcomes uncertain and trials carry a high likelihood of acquittal. Jury trials, the nearly mythic centerpieces of common law, are thus in fact comparatively very rare occurrences; only a tiny fraction of the criminal offenses committed in common law systems are ever adjudicated by a judge and jury. We should therefore understand that the purpose of the pre-trial process at common law is to seek to avoid trial. This avoidance, however, is not obtained by expending additional state resources, as in the civil law tradition, to determine the defendant's guilt during an investigative phase and therefore *to try only guilty parties*. Instead, common law systems use prosecutorial discretion and, in some systems, plea bargaining to cull criminal charges from proceeding to trial.

2. Trial

As detailed above, a central facet distinguishing the *trial* in common and civil law criminal procedure begins with the *pre-trial* apparatus, which sets up what kind of truth finding (ascertaining the truth, as at common law, or confirming the truth, as at civil law) the trial is designed to produce. At common law, the trial is the proving ground, where the majority of the 'action' happens.[69] At civil law, the action happens during the investigation preceding the trial, and the trial is the transparent element

[69] In fact, if one considers pretrial motions at common law to be arguments about how the trial will be conducted (including discovery, which determines the information that is known and included, as well as motions regarding the inclusion and exclusion of expert testimony, evidence, and witness participation), then we can say that the trial comprises not the majority of the action but the entirety of the action at common law.

of the process that allows the public to observe the judicial branch in action.[70]

The different role played by trials in the two systems is furthermore demonstrated through the different demands on the participating parties through the roles they are required to play in both systems. Common law proceedings are understood to represent a contest between two sides, in which prosecution and defense square off, with the judge as neutral arbitror. In this conception of the trial, the intervention of judges should be limited to guiding the parties regarding the tools they are allowed to bring or use in the contest. Judicial participation is limited in part by the inferior familiarity of judges with the case. At trial, the case is laid out before the judge in its specifics for the first time; the parties are the experts, and the judge is a level removed. But judicial participation is also limited for reasons of neutrality and legitimacy: any further, or more direct, intervention on the part of judges – such as questioning a witness – is understood to threaten the objectivity of the proceedings by allowing the finder of law (the judge) to potentially influence the views of the finders of fact (the jury). The jury, after hearing the cases presented by the two opposing sides, and upon being instructed on the applicable law by the judge, retires to confidentially determine the guilt of the accused. This determination must usually be unanimous.

Civil law trials, by contrast, are generally overseen by a three-judge panel. Judges direct the process and enjoy a much more active role than their common law counterparts, questioning witnesses directly, and demanding further evidence, investigation, or witness testimony where they deem necessary. The dossier containing all relevant facts of a case is provided to the judges before trial, allowing the judge to become an 'expert' in the case beforehand. At the end of the trial, the judicial panel convenes and determines the guilt of the accused, by majority vote.

The role of the defendant is also very different in the two systems. At common law, the defendant enjoys a right to silence because of the possibility of self-incrimination. This right means that no negative inference may be drawn from the defendant's unwillingness to address the court. As a principle, the right to silence enforces the prosecution's burden to prove its case on its own, and ensures that the defendant is treated as 'innocent until proven guilty'. While defendants at common law are permitted to take the

[70] Michael Bohlander describes the German trial thus: 'Although the trial is from a traditional perspective the dramatic culmination of the struggle between prosecution and defence, and in Germany it is fair to include the court in that tug-of-war, much of what happens at trial will have been predetermined to a large degree – and mostly irreversibly so at the pre-trail stage – by the investigations of the police, the prosecution, the examining pre-trial judge and sometimes also the defence'. M. Bohlander, n 37 above, 67.

stand and speak in their defense, such statements are open to cross-examination by prosecutors, all of which may be considered by the jury in making its determination. Thus structurally, defendants are encouraged to remain silent, as their silence may not be used to make the case against them, whereas their participation may.

At civil law, defendant participation may be demanded by the judge (although it is not technically mandatory) because the defendant is not permitted, as a party with an interest in the case, to act as a witness for himself. No element of the defendant's testimony may therefore be used as a factual component to strengthen the dossier. With judges checking facts and law, as well as pronouncing the sentence, a defendant's participation can usually only help his case, by shedding light on his motivation or the context of his action. While technically 'innocent until proven guilty', defendants at trial in civil law in fact carry the burden of proving their innocence at the moment of trial by showing some misstep made in the investigation. The upshot is that most defendants do address the court at civil law, which serves to add legitimacy to the proceedings because when a defendant participates in the case against him this signals his consent.[71]

IV. The ICTY's Peculiar Hybrid: 'An Adversarial Court with Continental Flavors'[72]

The first established and most accomplished international criminal court of the modern era is the ICTY. Operational for more than twenty years, the ICTY has issued dozens of judgments and thousands of procedural determinations. ICTY procedure is particular to that court and need not be replicated or adapted by other *ad hoc* tribunals or the permanent International Criminal Court. Yet the longevity and productivity of ICTY practice make it a suitable case study to consider the problem of procedural hybridity, because this very practice of hybridity is ongoing in international criminal courts, though their procedural particulars may look distinct.

The ICTY was designed on an adversarial procedural model. Its rules of procedure were assembled by a largely American team,[73] and early ICTY practitioners hailed mostly from common law jurisdictions.[74] Yet as the ICTY endured, increasing in size and beginning the work of trying cases,

[71] M. Shapiro, n 62 above.

[72] Interview with defense counsel before ICTY, The Hague, May 2005.

[73] V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above.

[74] J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University Of Chicago Press, 2003).

its procedure adopted several mechanisms borrowed from civil law systems. These practices were pronounced more 'efficient', and embraced as more familiar by the growing number of practitioners at the ICTY originating from civil law systems. It is nonetheless an error to read additions of procedural rules practiced by civil law systems as a sign of the 'inquisitorial drift' of the ICTY.[75] The adversarial calculus of the ICTY did not change with these evolutions. Instead, reforms introducing practices culled from civil law sought to increase the ICTY's capacity to meet the challenges of securing convictions in chaotic evidentiary circumstances. Yet *securing convictions of the accused* is a prosecutorial function, with common law and civil law systems differing significantly regarding how an accused becomes, and remains, someone against whom a conviction must be secured. This section discusses the evolution of ICTY procedure towards a structure facilitating conviction.

1. The ICTY at Its Inception

When the Rules of Procedure (ROP) of the ICTY were drafted in 1994 by the first ICTY judges, the particular make-up of the court staff, as well as the influence over the Tribunal exerted behind the scenes by the United States, dictated that the ostensibly 'hybrid' procedure of the Tribunal, intended to represent a mixture of both common and civil law, leaned decidedly toward the common law and owed a clear debt to US jurisprudence in particular.[76] The Prosecutor's office, while situated in The Hague in the same building as the Tribunal, is not subject to administrative control in the same way that a typical civil law prosecutor would be.[77] Under the 1994 ROP the OTP investigates and draws up indictments.[78] As an 'independent body', the OTP brings the charges she sees fit against a defendant. Unlike in civil law systems, the OTP is not constrained by an

[75] R. Vogler, n 2 above (lamenting the 'inquisitorial drift' of ICTs when other courts around the globe are rather turning towards adversarialism in making reforms).

[76] C. Bassouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New Brunswick: Transaction Publishers, 1995), 872; V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above, 157-160.

[77] As was the case with the IMT, the institutional space-sharing raises concerns regarding objectivity, because the two bodies are not perceived as sufficiently independent. (Author interviews ICTY defense counsel, The Hague, May 2005). At common law the adversarial nature of the process requires a clear separation between judges and prosecutors. At civil law, structural distinctions are not as sharp, because both the prosecutor and the judge are working towards the same goal and thus can be understood to share interests to a certain degree.

[78] The OTP closed new indictments in 2004 as part of the ICTY's winding down strategy.

external body that considered the validity of the case as a whole. This pre-trial work hews closely to the procedure of adversarial systems: the OTP is required to hand over, but not to seek out, exculpatory evidence.[79]

Once drafted by the ICTY Prosecutor, an indictment is reviewed by a chamber of judges at the ICTY, who apply a relaxed standard of proof like that of the Grand Jury in the US. The ICTY Chamber looks at the indictment only for proof that the charges brought, if true, constitute criminal offenses.[80] As with a hearing before a grand jury in the US, suspects before the ICTY may not contest the evidence that may result in an indictment. Furthermore, during the review of the indictment itself, the reviewing judge hears not the defendant but only the Prosecutor, who may present new information to the court.[81] Civil law systems, in contrast, typically allow an indicted person to contest the evidence against him contained in the indictment.

This means that, as at common law, the first real chance a defendant before the ICTY has to prove his innocence before an objective body is at trial. The trial itself follows a strictly common law calculus. While ICTY judges are permitted a greater role than their common law counterparts in that they are permitted to question witnesses and even request additional witnesses, the ROP ensure that the trial remains the space at which truth would be proven in a process where judicial control is limited by judges' inferior access to information. As at common law, acquittals are common: of the one hundred and sixty-one individuals indicted by the ICTY, eighteen have been acquitted.[82]

The Rules of Procedure originally drafted by the ICTY (1994) took the fundamental elements of common law procedure as described above and made two significant, civil-law based alterations:[83] (1) majority determination of guilt by judicial panel (instead of unanimous determination of guilt by separate fact finder, as is common to most common law systems) and (2) the possibility for the OTP to appeal acquittals.[84] These two hybrid additions

[79] M.G. Karnavas, n 27 above; M. Harmon and M. Karagiannakis, 'The Disclosure of Exculpatory Material by the Prosection to the Defense under Rule 68 of the ICTY Rules', in R. May et al eds, *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Amsterdam: Kluwer Law International, 2001), 322 (noting that Rule 68 requires that the prosecution disclose the existence of exculpatory evidence to the defence, but not the evidence itself).

[80] M. Shahabuddeen, n 1 above, 131.

[81] Statute of ICTY, Rule 47D.

[82] ICTY available at http://www.icty.org/sid/24 (last visited 24 May 2016). An acquittal rate of ten percent would be remarkable in a civil law system.

[83] See C. Bassouni and P. Manikas, n 76 above, 955 (where it is argued that ICTY procedure 'selectively incorporate(d) civil law concepts into a predominantly common law framework') quoted in F. Mégret and F. Hoffman, n 50 above.

[84] In addition to appealing, the OTP under Rule 99(B) is permitted to request the arrest and detention of the acquitted accused pending the appeals hearing. ICTY Rules

would appear to increase the power of the prosecution, first by lessening the weight necessary for it to obtain conviction (majority rather than unanimity), and second by giving the OTP 'a second bite at the apple' through the right to appeal.

2. Adding Civil Law Procedure 'for Efficiency': The 1999 Reforms

Since the ICTY's inception, there has been much discussion of civil law systems' benefits in terms of 'efficiency',[85] and the reforms made to ICTY procedure have, generally speaking, taken more from civil-law generated processes than common law.[86] In 1999, concerned with cost and inefficiency in the two *ad hoc* Tribunals operating under United Nations mandate, the Security Council commissioned an Expert Group to report on the work of the ICTY and ICTR and to submit recommendations as to how this work could be strengthened. The one hundred twenty-six page report articulated fourty-six precise recommendations. In 2000, the ICTY and ICTR responded to the Expert Report's Recommendations, agreeing with and adopting most of them.[87]

The procedural suggestions made by the Expert Report mostly called for an increase in civil law methods, on the principle that 'Some civil law models can doubtless deal with criminal law cases *more expeditiously* than the common law adversarial system'.[88] The Expert Report further justified this by observing that, 'Since the accused before the Tribunals are from civil law backgrounds, it could hardly be objectionable to them'.[89]

Broadly speaking, the Expert Report pushed three central reforms, each of them ostensibly drawing from civil law procedural methods. First,

of Procedure and Evidence adopted pursuant to Art 15 of the Statute of Tribunal, as amended on 6 October 1995 ('ICTY Rules of Procedure').

[85] G. Sluiter, 'Beyond the Written Law: Why International Criminal Tribunals Function the Way They Do', Paper delivered at the International Law and Society Conference, Berlin, July 2007; W. Pizzi, 'Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals', 4(1) *International Commentary on Evidence*, 1051 (2006).

[86] Not all reforms of ICP have moved Tribunals in an 'inquisitorial' direction. For example, plea bargaining, a specialized process among some common law systems, was adopted by the ICTY and ICTR. This article, however, is interested in looking at how an 'evolution' of practice from an adversarial conception towards an inquisitorial decreases defendant's rights. Thus adoptions of common law procedure would, arguably, 'fit in' to a model designed under a common law ideological impetus.

[87] Some recommendations had already been put into effect. Others were adopted following the Expert Report's recommendations. Still others, objected to in the ICTY Commentary, were eventually adopted. (See in this regard Recommendations regarding limiting expenses to Defense Bar).

[88] A/54/634 page 32, emphasis added.

[89] Ibid.

the ICTY created the role of a 'pre-trial judge', a case-manager designed to expedite cases. The central proposed reform was the institution of a 'pre-trial judge' à la the *juge d'instruction* who serves in some civil law systems.[90] The goal was to streamline information by encouraging parties to stipulate to uncontested facts, and to create a dossier that would assist trial judges in being better informed when the case came to trial. In its Recommendation 9, the Expert Report suggested that pre-trial judges should enjoy a 'more interventionist role, *inter alia*, including authority to act for the Trial Chamber (…) and making a pre-trial report to the other judges with recommendations for a pre-trial order establishing a reasonable format in which the case is to proceed'.[91] While certainly unknown at common law, the ICTY's pre-trial judge is not in fact a counterpart to the civil law's *juge d'instruction*, with that position's inherent mandate to investigate exculpatory evidence. Studying the impact of the reforms, Máximo Langer found that the addition of a pre-trial judge has made little impact on ICTY efficiency, because ICTY pre-trial judges do not have the capacity enjoyed by the *juge d'instruction* to radically alter charges or impact the case.[92]

Second, the reforms gave ICTY judges more power to limit interlocutory appeals, which the report encouraged. Interlocutory appeals are a problem at the ICTY due to their high number and their capacity to delay cases (the Expert Report noted that there were more than five hundred pre-trial motions in 1997 and 1998). At the same time, interlocutory appeals are part of the 'game' played in the adversarial process, categorized by the UN Expert Report as follows:

> '(M)ore of a combat situation between two parties than the protection of international public order and its values under the control of the court … This, coupled with the presumption of innocence and the principles relating to self-incrimination, results in accused, as is their right (under the ICTY Statute and human rights law) being uncooperative and insisting upon proof by the Prosecutor of every element of the crime alleged. From the standpoint of an accused, this represents optimum use of defense counsel.' (UN Expert Report (1999) para 67)[93]

[90] Specifically, the *juge d'instruction* is a central figure in French criminal cases that meet a certain requirement of gravity. Michael Bohlander notes that there is no such role in Germany criminal law, and that even in French criminal law, the *juge d'instruction* is being phased out.

[91] UN Expert Report para 83.

[92] M. Langer, n 15 above.

[93] See also para 84 regarding Defense Counsel reluctance to accept stipulations.

The Expert Report cited as evidence of efficacy that counsel for the accused was 'cooperative'[94] and Chambers obtained witness statements in advance of trial, and the Trial Chamber 'exercised considerable control over the length of courtroom testimony and the trial was completed in about three months'.[95] The Report does not specify the case, whether or not 'cooperation' was entailed, or the outcome for the defendant.

Finally, and perhaps most significantly, the reforms permitted greater use of written witness statements at trial, a procedure designed to cut down on the lengthy, costly process of examining live witnesses. Observers agree that in civil law systems there is a wider use of written statements than at common law.[96] Although initially stating a preference for 'live testimony' in its Rules of Procedure, the ICTY reforms pushed for an increased use of written witness statements.[97] The ICTY currently advocates a 'no preference alternative'.[98] Rule 92 *bis* essentially replaced Rule 94 *ter*, which had been even more permissive with respect to admission of written statements.[99]

The OTP, in its response to the UN Expert Group, suggested that efficiency demands would be met by permitting 'rulings during trials on matters of fact proved to the satisfaction of the Chambers, or in relation to using the record of prior testimony to create rebuttable presumptions of fact that shift the evidential burden in the course of the trial'.[100]

At issue in the increase of the use of written witness statements in place of live testimony is fundamentally a question of the right of the

[94] The characterization of defense counsel engaging in 'uncooperative' methods, when exercising the practices, the adversarial system requires as an element of the protection of defendants' rights, suffers a more direct assault under the Expert Report in its consideration of Defense Counsel fees. While steering away from such blunt language in the body of its report, in its Recommendations section the UN Expert Report (1999) suggests that 'In order to reduce the potential for obstructive and dilatory tactics by assigned defense counsel, the amount of legal fees allowed might properly take into account delays in pre-trial and trial proceedings deemed to have clearly been caused by such tactics.' ((UN Expert Report (1999), 'Recommendations', 90 para 5)).

[95] Ibid fn 23.

[96] P.M. Wald, n 48 above. Y. McDermott, 'The Admissibility and Weight of Written Witness Testimony' 26(4) *Leiden Journal of International Law*, 971-989 (2013).

[97] Written witness statements Rules 73*bis* and *ter*.

[98] G. Gordon, n 43 above, 40; M. Farlie, n 7 above.

[99] Ibid. See *Prosecutor* v *Dario Kordić and Mario Čerkez*, Appeals Chamber Judgment, case n IT-95-14/2-Y, 18 September 2000, (United Nations – The International Criminal Tribunal for the former Yugoslavia) (Appeals Chamber decision overruling Trial Chamber's admission of statement of deceased witness implicating accused that was not given under oath, never subject to cross-examination, uncorroborated by other evidence, and was verbally translated by an interpreter from Croatian to English before it was written down in English by an investigator whose native language was Dutch).

[100] Response to UN Expert Report (1999) para 43.

defendant to challenge accusations brought against him. The ICTY procedure now permits the Trial Chamber to rule on whether or not previous witness testimony (and other facts) have been sufficiently established to be brought in as written statements, and not oral testimony. This case-by-case analysis, however, does not address structural fairness issues at stake. At civil law, these fairness issues are addressed largely by permitting the defendant access to the dossier compiled against him, and by collecting the evidence in that dossier as a neutral party, ie where both inculpating and exculpatory evidence is collected.[101]

While each of these three amendments to ICTY procedure does, on its face, draw on civil law procedure, none of them preserves the meaningful characteristics that these processes possess at civil law, features that serve to balance the state's interest in deterrence, punishment, and social control and the defendant's interest in due process.

3. ICL and the Presumption of Innocence

The presumption of innocence is at the heart of both the civil and the common law systems' capacity to deliver justice: it is a fundament of rule of law, because it requires the state to affirmatively prove the guilt of an individual (rather than casting a charge at an individual, and requiring that she disprove the charge). The presumption of innocence is often the element of a legal tradition that practitioners schooled in that tradition cite as the central benefit, where the assumed critique is that the other system is less able to recognize and/or protect the presumption.[102]

The ICTY recognizes the presumption of innocence of defendants before it,[103] and like other common law systems, links the presumption of innocence to acquittals.[104] As noted, over ten percent of all indictments at the ICTY have resulted in acquittal, most of which 'have come about in

[101] It should be noted, however, that even civil law systems are instituting increased oral procedures regarding witness testimony, in part in response to the human rights dictates of the ICCPR.

[102] See J. Merryman and R. Perez-Perdomo, n 13 above, 132 (discussing common law lawyers' belief that civil law traditions do not include a presumption of innocence); M.R. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Procedure: A Comparative Study' 121 *University of Pennsylvania Law Review*, 546 (1973) ('That continental criminal law has discarded guilt-presumptive devices while common law courts frequently operate with them is by now a cliché of comparative law'); see M. Bohlander, n 37 above, 7 (arguing that the presumption of innocence 'is stronger under German law than under English law and models based on the English understanding, because it attaches until the conviction has become final, that is until the last avenue of appeal has been exhausted').

[103] Art 21(3) of the 1993 ICTY Statute.

[104] http://www.icty.org/sid/9984 (last visited 24 May 2016).

cases in which the evidence presented by the Prosecution was either insufficient to establish that specific crimes occurred, or insufficient to demonstrate that the accused bore criminal responsibility for the commission of the crime'.[105] In the case of guilt by finding of the majority, this follows a civil law model whereby a panel of judges sits in judgment of both law and facts. Where civil law systems generally use 'lay judges' to constitute two-thirds of the judicial panel, the ICTY in contrast employs only professional judges. Thus the ICTY judicial mechanism is entirely devoid of a 'community' element, the peerage that civil law systems achieve by employing lay judges and common law systems through the use of a jury. Furthermore, as the ICTY jurisprudence has developed, there have been an increasing number of majority decisions. This means that situations obtain that one cannot find at civil law. In the event of a majority decision at civil law, one judge has not been convinced to the level of *intime conviction*. What the presence of majority findings of guilt should be understood to mean for the standard 'beyond a reasonable doubt' is an open question. It would seem that any doubt that can be held by a professional judge faced with all the evidence would be able, legally speaking, to constitute the sort of 'reasonable doubt' that would give pause to her colleagues.

In summary, the procedural history of the ICTY permits a snapshop of the problem of hybridity in an international legal institution. Drawing procedure from two divergent cultural systems has permitted the legitimization of certain procedural applications because they *originate* in an acknowledged, rule-of-law serving system, instead of addressing a more fundamental question, which is what function such procedure serves in the *actual* hybrid system where it is practiced. The final section observes the response of the ICTY when its practices are challenge to complete the argument that international criminal tribunals are so beyond rule of law constraints as to earn the label post rule of law.

V. Post Rule of Law: Hybridity and the Operationalization of ICL

The preceding sections have reviewed the significance of cultural and theoretical impulses underlying criminal practices in the common and civil law traditions (Part I), and has traced these impulses through examples

[105] Ibid. Recall that within the common law tradition where the trial is a contest, acquittal can function as a demonstration of the presumption of innocence (ie acquittals are to be expected, and a system not returning acquittals would be suspect). Within the civil law tradition, where trial should check the work of the state, acquittal demonstrates anomalies (which are then considered for correction by a higher court).

of their interpretation in domestic criminal procedure (Part II) and on to the hybrid procedure of the ICTY (Part III). This final section concludes the article's argument that the practice of hybridity as currently operationalized by ICTs is 'post rule of law'.

The argument that ICP is *post* rule of law is not designed as a critique of individual procedures as violating rule of law practices. The ICTY's rules were hastily assembled, in marked contrast to the deliberate construction of hybridity at the ICC, for example.[106] ICL is a young discipline and its institutions face steep learning curves; some room for experimentation, for trial and necessary error, must be permitted. Rather, the argument that ICL as operationalized by ICP is 'post rule of law' is based in an analysis of hybridity itself – as practiced by ICTs – as *deliberately* operating outside of rule of law constraints. ICTs as post rule of law institutions articulate the value of the rule of law, operate in its shadow, are legitimized by it, and deliberately resist rule of law constraints as intolerably inflexible to the task set for them.

As previous sections have detailed, criminal processes rest within and represent operationalizations of ideologies regarding the application of criminal sanctions in service to a state. Comparative law scholars have long cautioned that borrowing a practice outside of the contextualization of that practice risks losing meaning, fairness, or both. Yet these cautions, long iterated in comparative law scholarship, have been slow in coming to ICL. At ICL, the synthesis of procedure is 'pragmatic' rather than 'balanced or fused'.[107] This 'pragmatism' results in what John Jackson calls 'procedures that maximize the volume of relevant evidence and provide opportunities for testing its probative value' which are preferred because they 'are likely to achieve higher levels of accuracy than procedures which limit the flow of relevant information and do not provide opportunities for testing it'.[108]

[106] V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above, 160.

[107] M. Findlay, 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals' 50 *International and Comparative Legal Quarterly,* 26-53 (2001).

[108] J.D. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy' 7(1) *Journal of International Criminal Justice*, 17-39 (2009) (arguing for a procedure that increased equality of arms and maintains 'the principle of adversarial procedure' as a means of testing evidence); see also J.D. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment' 68(5) *Modern Law Review,* 737-764 (2006) (discussing the hybridization of practices from common and civil law traditions at the European Court of Human Rights).

1. One Example of Post Rule of Law Practice: Sentencing at ICTs

It is widely recognized that sentencing at ICL is theoretically underdeveloped and empirically understudied.[109] As the International Criminal Law Services' manual entitled 'Sentencing' notes, 'Sentencing is essentially a discretionary responsibility of the judges at the international tribunals. There are no guidelines or scales for the various crimes, as there might be in domestic jurisdictions'.[110] ICTY case law emphasizes this approach as well, with myriad judicial findings emphasizing the complete discretion of the Chambers in imposing the appropriate sentence.[111]

Sentences at ICL are perhaps best characterized as 'predictably irrational'.[112] The 'confusing, disparate, inconsistent, and erratic' sentencing policy of the ICTY,[113] in particular, has been characterized as a form of 'Russian roulette'.[114] In addition to problems regarding uniformity and predictability, the content of sentences has been criticized. Some

[109] M. Dumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' 1 *Northwestern University Law Review*, 1-74 (2005); J. Meernik and M. King, 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis' 16 *Leiden Journal of International Law*, 717-750 (2003); R. Henham, 'Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research' 5(3) *Journal of International Criminal Justice*, 757-778 (2007); S. D'Ascoli, *Sentencing in International Criminal Law: The Approach of the Two ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Oxford: Hart Publishing, 2011).

[110] International Criminal Law & Practice Training Materials: Sentencing available at http://wcjp.unicri.it/deliverables/docs/Module_13_Sentencing_and_penalties.pdf (last visited 24 May 2016), 1-76.

[111] Discretion in sentencing is unquestioned in ICTY jurisprudence. See *Stakić*, Trial Chamber, case n IT-97-24 (United Nations - International Criminal Tribunal for the former Yugoslavia), para 884; *Delalić*, Appeals Chamber, case n IT-96-21-A (United Nations - International Criminal Tribunal for the former Yugoslavia), para 758 (which states that a pattern of sentences does not exist yet). See also *Prosecutor* v *Miroslav Deronjić*, case n IT-02-61, 30 March 2004 (United Nations – International Criminal Tribunal for the former Yugoslavia), (where Judge Schomburg recommended a twenty-year sentence in his dissenting opinion; the Majority awarded a ten-year sentence). This includes discretion in determining concurrent or cumulative sentences. *Delalić*, Appeals Chamber, para 771; *Prosecutor* v *Tihomir Blaškić*, case n IT-95-14, 29 July 2004 (United Nations – International Criminal Tribunal for the former Yugoslavia), available at www.icty.org ('*Blaškić* Appeals Chamber') paras 721-722 (which describes types of convictions that are impermissibly cumulative).

[112] U. Ewald, ' 'Predictably Irrational': International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices' 10(3) *International Criminal Law Review*, 365-402 (2010).

[113] M. Drumbl, n 63 above, 11.

[114] O. Olusanya, *Sentencing War Crimes and Crimes Against Humanity under the International Criminal Tribunal for the Former Yugoslavia* (Groningen: Europa Law Publishing, 2005), 139.

commentators critique sentencing as too aggressive because it comes at the end of the liability phase and is not reserved for its own procedure.[115] Others criticize ICTY sentences as too lenient, particularly given the gruesome nature of the crimes in question.[116]

There are few guidelines as to sentencing stated in the ICTY statute[117] or rules of procedure.[118] Instead, guidelines for sentencing, such as they exist, have been articulated through ICTY case law. For example, in its cases, the ICTY has established that it has discretion to consider other potentially mitigating factors,[119] which it has defined as voluntary surrender,[120] guilty plea,[121] expression of remorse,[122] good character with no

[115] P. Wald, 'ICTY Judicial Proceedings - An Appraisal from Within' 2(2) *Journal of International Criminal Justice*, 466-473 (2004).

[116] J. Ohlin, 'Proportional Sentences at the ICTY', in B. Swart et al eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011).

[117] As regards sentencing guidelines, the ICTY Statute states, in full:

'1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners' (Art 24 Penalties).

[118] The Rules of Procedure add little to the statute's bare skeleton, except to note that mitigating and aggravating circumstances shall also be considered. The Rules address only one mitigating circumstance: 'substantial' cooperation with the Prosecutor. ICTY Rules of Procedure Rule 101(B)(ii).

[119] *Prosecutor* v *Radislav Krstić*, case n IT-98-33, 2 August 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia) (*Krstić* Trial Chamber), para 713.

[120] See eg, *Kupreskić*, Trial Chamber, paras 853, 860, 863; *Prosecutor* v *Drago Josipović, Vladimir Šantić, Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić & Dragan Papić,* case n IT-95-16-A, 23 October 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia), available at www.icty.org, para 430; *Kunarac*, Trial Chamber, para 868; *Prosecutor* v *Biljana Plavšić*, case n IT-00-39&40/1-S, 27 February 2003, paras 82-84.

[121] See, eg *Kupreskić*, Appeals Chamber, para 464; *Prosecutor* v *Goran Jelisić*, Appeals Judgment, case n IT-95-10, 5 July 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia), para 122; *Prosecutor* v *Duško Sikirica, Damir Došen & Dragan Koludžija*, case n IT-95-8, 13 November 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia), paras 148-151, 192-193, 228; *Prosecutor* v *Stevan Todorović*, case n IT-95-9/1 (United Nations – International Criminal Tribunal for the former Yugoslavia), paras 75-82; *Erdemović* Sentencing Judgment II para 16(ii); *Plavšić* Sentencing Judgment paras 66-81.

[122] See, eg *Sikirica* Sentencing Judgment paras 152, 194, 230; *Todorović* Sentencing Judgment paras 89-92; *Erdemović* Sentencing Judgment II para 16(iii); *Plavšić* Sentencing Judgment paras 66-81.

prior criminal convictions,[123] and the post-conflict conduct of the accused. And although the sole reference to Yugoslav law made by the ICTY statute regards the practice of sentencing in the former Yugoslavia, ICTY chambers have treated this statutory reference as more of a suggestion than a rule.[124] Moreover, in making reference to Yugoslav sentencing practice, Chambers have also made quite free with the *substance* of the practice. Thus, the Chamber in Babic, without citation to Yugoslav law, held:

> 'The Trial Chamber has found that Babic (sic) participated in a JCE whose objective – the forcible and permanent removal of non-Serb populations from the SAO Krajina – was carried out through persecutory acts of murders, deportations or forcible transfers, imprisonment, and destruction of property (…). The commission of this crime would have attracted the harshest sentence in the former Yugoslavia.'[125]

The law of the former Yugoslavia provides for either criminal sentences of up to twenty years, or the death penalty. The death penalty, however, is not utilized by international tribunals, and thus it was suggested that life imprisonment should replace the Yugoslav death penalty tradition in sentencing before the ICTY.[126]

Academics and commentators have made various propositions regarding a hierarchy of crimes or other sentencing guidelines that would increase uniformity and predictability in international criminal law

[123] See, eg *Krnojelac* Trial Judgment, para 519; *Kupreskić* Trial Chamber, para 478; *Kupreskić*, Appeals Chamber, para 459; *Prosecutor* v *Zlatko Aleksovski*, Trial Chamber Judgment, case n IT-95-14/1, 25 June 1999 (United Nations – International Criminal Tribunal for the former Yugoslavia), para 236; *Erdemović* Sentencing Judgment II, para 16(i).

[124] See *Prosecutor* v *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* case n IT-96-23, 22 February 2001 (United Nations - International Criminal Tribunal for the former Yugoslavia) ('Kunarac Trial Chamber'), para 349, 377; *Prosecutor* v *Zejnil Delalić, Hazim Delić, Zdravko Mucić, Esad Landžo*, case n IT-96-21, 20 February 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia) ('*Delalić* Appeals Chamber'), para 818; *Prosecutor* v *Milomir Stakić*, case n IT-97-24, 31 July 2003 (United Nations – International Criminal Tribunal for the former Yugoslavia), available at www.icty.org, ('Stakić Trial Chamber') para 887 (national sentencing 'will (…) be considered, although in itself is not binding'); *Prosecutor* v *Darko Mrđa, Sentencing Judgment*, case n IT-02-59, 31 March 2004 (United Nations – International Criminal Tribunal for the former Yugoslavia), paras 121, 122, 129 (holding that national sentencing practices are 'merely indicative').

[125] *Babić* Sentencing Judgment para 50.

[126] Some opponents, most notably Mahmoud Cherif Bassiouni, argue that this violates the principle of *nullum crimen nulla poena*. See W. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' 7 *Duke Journal of Comparative and International Law*, 461-518 (1997).

sentencing.[127] So far, the ICTY has categorically rejected such suggestions.[128] Some commentators have supported this approach. Uwe Ewald, for example, argues that there is legal significance (ie precedent) to the scattered World War II jurisprudence regarding sentences and their fulfillment, arguing that 'the patterns of sentence at the Nuremberg and Tokyo trials as well as the so called twelve succession Trials in Germany already show that diversity in international sentencing is an obvious feature from the outset'.[129] In essence, Uwe Ewald argues that there is 'precedent' to find unpredictability (euphemistically referred to as 'diversity') in international sentencing. Ewald's 2010 article, grounded in seven years' practice in the ICTY OTP, sets a dangerous course for ICTs. For Uwe Ewald, sentencing irregularity is not an error to be addressed or corrected, but rather a deliberate practice to be sheltered as part of the identity of ICTs. Uwe Ewald references the notion of proportionality in sentencing, originating with the social theorist Cesare Beccaria, but dismisses such a theoretical underpinning for ICL as naught but 'humble legal principles' that cannot 'provide a sufficient ground for conceptualizing and operationalizing the complexity of factors "behind" international sentencing decision-making'.[130] In essence, Uwe Ewald would claim a space outside of rule of law constraints for ICTs.

What makes sentencing at ICL an example of post rule of law practice is not that there is measurable discrepancy in sentencing between ICTs, or even within ICTs; discrepancy can be the mark of growing pains, lack of unifying processes, etc. Measurable discrepancy could be accident or error at ICL, which ICTs could address and reform. Rather, sentencing at ICTs is demonstrably post rule of law because ICTs have not embraced error as a moment for reform, but have rather determined that rule of law concerns do not apply to them.

VI. Conclusion

The article argues that the operationalization of ICL through ICTs challenges the project of ICL, when understood as a training ground for liberal, democratic governance, or rule of law modeling. As Jan Klabbers

[127] A. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' 87(3) *Virginia Law Review*, 415-501 (2001).

[128] *Prosecutor* v *Radislav Krstić*, case n IT-98-33, 19 April 2004 (United Nations – International Criminal Tribunal for the former Yugoslavia) ('*Krstić* Appeals Chamber'), para 242 (the Appeals Chamber rejected as inappropriate the setting down of a definitive list of sentencing guidelines).

[129] U. Ewald, n 112 above, 373.

[130] Ibid.

argues, accountability to third parties is a structural problem of all international organizations.[131] International organizations practicing criminal justice, however, face doubled structural challenges as regards accountability, as failures of 'objectivity' through service to particularized interests threaten the legitimacy of the systems themselves. The article has argued that proclaiming 'hybridity' and instituting procedures, regardless of their legitimacy in their systems of origin, is insufficient to guarantee objectivity, and thus legitimacy, for ICTs. ICL practitioners and theorists must begin a more serious consideration of the methods and costs associated with hybrid procedures. This consideration must begin by more rigorously insulating ICL practice from ICL's particular political structures and aims.

[131] J. Klabbers, n 11 above.

Essays

Rethinking the Juridical System. Systematic Approach, Systemic Approach and Interpretation of Law

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Abstract

The juridical system is not the essence of the things, it is an artificial organisation of elements, following a certain idea. It is conceived to settle conflicts, in order to find the solution that is more consistent with that original idea. In the juridical perspective, the logical coherency of the system becomes the necessary guarantee for non-arbitrary decisions. The present work is aimed at verifying this thesis, through the diachronic analysis of some juridical system models, also taking into account the systemic approach.

I. Thesis

'The idea of an abstract structure, coherently based at the root of a history or of a development, cannot be detached from the idea of the model. This idea is more related to the level of invention than to the level of discovery. Therefore, the word "system" embodies ideals of knowledge, and allows to formulate a complex of hypothesis about the real. At the same time it denotes the stake in the most disparate conflicts – both scientific and political conflicts – concerning the intellectual and practical control of the real'.[1]

The system is not the essence of the thing, but is the artificial organization of some elements following a certain idea. It is conceived to settle conflicts, in order to find the solution that is more consistent with that original idea. In the perspective of jurists, 'the value of the "internal" juridical system as a logical and deductive system properly lies in its pretended capacity of producing juridical rules which guide the application of law. The concrete decisions take the form of logical and systematical

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[1] I. Prigogine and I. Stengers, 'Sistema' *Enciclopedia* (Torino: Einaudi, 1981), XII, 1023. See also S. Jensen, *Systemtheorie* (Stuttgart: Kohlhammer, 1983), 9: 'there is no system in the reality (...) systems are architecture of our reason'.

deductions'.[2] The logical coherency of the system becomes a necessary guarantee for non-arbitrary decisions.

The present work is aimed at verifying this premise, through the (rapid) diachronic analysis of some models of juridical systems, starting from the French codification, as the moment in which the law began to be considered as an autonomous system.[3] My analysis will be properly conducted at the level of models of the system historically proposed and politically (and/or ideologically) justified. So, I will consider the way in which those systems/models have been historically represented, but it is obvious that the real dynamics of power and the corresponding hierarchies of the sources of law are hardly ever coherent with these representations. The thread of my research will be the relationship between the system and the interpretative processes, conceiving this relationship as the moment that connects the creation of the law to the application of the law itself – that is the moment in which the 'law in the books' becomes 'law in action'.

II. The System as a Model to Settle Conflicts

The relation between law and system officially originated as a solution to the necessity to organise juridical material: to guarantee its knowability, to guarantee its logical foundation.[4] A law systematically organised is a law which can be known and coherently applied. Furthermore, it is a law which removes the political choice and places it outside of (or before) the juridical.[5]

[2] F. Modugno, 'Sistema giuridico' *Enciclopedia del dir*itto (Roma, Treccani, 1993), XXIX, 3. The idea of the law as an instrument to settle conflicts is quite common, above all in common law countries. In these areas, 'law is always conceived as a judge while in civil law countries often coincides with the State': G. Tarello, 'Introduzione', in L.M. Friedman ed, *Il sistema giuridico nella prospettiva delle scienze sociali* (Bologna: Il Mulino, 1978), 10 (original edition: *The Legal System. A Social Science Perspective* (New York: Russel Sage Foundation, 1975)). In this sense, we can affirm that every juridical decision (of the judge, of the administration, of the parliament) properly is the solution of a contrast between different claims.

[3] Following A.J. Arnaud, *Essai d'analyse structurale du code civil français: la règle du jeu dans la paix bourgeoise* (Paris: LGDJ, 1973), Italian edition by F. Caroccia, *Il codice civile nella pace borghese. Saggio di analisi strutturale del codice civile francese* (Napoli: Edizioni Scientifiche Italiane, 2005), 191-192.

[4] Several studies are being conducted about the relationship between law and the system. For a first approach, see M.G. Losano, *Sistema e struttura nel diritto, I. Dalle origini alla scuola storica* (Milano: Giuffrè, 2002; 1st ed, Torino: 1968); as well as F. Modugno, n 2 above, 2.

[5] 'The systematic concept of the law allows to conceive the research of the law as a merely cognitive process, which ignores the creative dimension. The existence of a system with a practical relevance resolves the problem of the policy of law and of the implementation

Only from the beginning of the XIX century the aspiration to the order interlaced with the conscience (although so far vague) of the interpretative dimension of the law,[6] and with the need to deny, or in any case to control, this dimension. This is especially true in certain countries, where the freedom of the interpreter is related to risk of arbitrariness.

Such a notion of the system is not limited to satisfying the legal knowability and to ensuring the global normative coherency. In addition, it also goes so far as to select the sources of law in every country: the construction of the system becomes the basis of a certain way of conceiving the interpretation of the law (that is the law). So, the system enters in the political and institutional space, where it proposes a particular representation of that space.[7]

It is necessary, at this point, to clarify what exactly I mean when I say the juridical system is fundamentally an instrument to settle conflict, following a certain ideology. The risk of misunderstanding is very high. Thus, I will say immediately that I do not intend to propose the image of the substitution – imposed from above (from a more or less occult, more or less legitimate power) – of one model for another, of one ideology for another one. However, it is true that 'the juridical system in its entirety, and in the long term, exactly reflects the distribution of power in society'.[8] In this sense, the juridical system is really the output, or the mirror, of a particular way to conceive a balance of power (in other words of a particular ideology). It is also true, in my opinion, that every juridical rule (every norm) is the solution of a conflict, in which the claim, or the interest, of the majority inevitably prevails, but in which also (in general) the action of the minority leaves its trace.[9] Thus, it is not the research of the 'implicit ideology of the norms as an ideology of the social victorious forces',[10] but

of the law by separating them clearly. Juridical science and the jurisprudence are made politically unsuspecting': D. Grimm, 'Review of W. Canaris, Systemdenken' *Archiv für die civilistische Praxis* 171. Bd., 268 (1971).

[6] 'Modern doctrines of interpretation move from two big schools of jurisprudence, which flourished at the beginning of the XIX century: the French Exegetical School and the German Historical School': G. Tarello, 'Orientamenti analitico-linguistici e teoria dell'interpretazione giuridica' *Rivista trimestrale di diritto e procedura civile*, 9 (1971).

[7] Ibid 9-10. The author emphasises the strong ideological significance of the operations both of Exegetical and Historical schools. The German Historical School, in particular, would use the term 'interpretation' 'in order to conceal the distinction between description of a reality and propaganda for a method'.

[8] G. Tarello, 'Introduzione' n 2 above, 16.

[9] L.M. Friedman, n 2 above, 498: 'In whole systems of rules, judicial, or legislative, or both, it is much less likely that one side totally prevails and another loses out. The legal system will probably reflect all social forces in proportion to their influence and power'.

[10] G. Tarello, 'Introduzione' n 2 above, 16.

it is the attempt to make the current balance of power more transparent, regarding every single decision.

III. The Origins: The French Model

In 1804, the *Code Napoléon* represented the first experiment in order to implement the abstract model of the juridical system.

The completeness and the self-sufficiency of the law are assumed.[11]

Consequently, if the law (or even better the sequence of the juridical norms) does not provide the prompt solution for a case, the interpreter will not give up. The system becomes the instrument through which the juridical order guarantees its own survival and makes it possible to resort to the grammatical interpretation, or the logical interpretation, or the extensive interpretation. This theoretical model requires a strong political will, which guarantees a particular social organisation, following new schemes for new values. The law, the codes, the *systems* of the code are instruments for implementing this model.[12]

The judge does not create law for the simple reason that he cannot do it. He applies the political will (converted in the legislator's command) in an apparently neutral way, within a universe that does not know the void. The fullness of the law (that is the completeness of the juridical system, the absence of juridical gaps) prevents the judge from taking the place of the political power in its activity of law-making.[13] It is precisely for this

[11] The relationship between judges and the legislator, which characterises this model, is perfectly described in the preparatory works of the code civil. On 4 ventose Year XI (February 23, 1803) (23 February 1803), when Portalis presents the draft of the Preliminary Title of the Code ('De la publication, des effets et de l'application des lois en général'), he expressly admits that the idea of a perfect and complete code is a mere illusion: '*C'est une sage prévoyance de penser qu'on ne peut tout prévoir* (...) *il est donc nécessairement une foule de circonstances dans lesquelles un juge se trouve sans loi. Il faut donc laisser alors au juge la faculté de suppléer à la loi par les lumières de la droiture et du bon sens*'. Then, in the face of the protests following his words, he worns: '*nous raisonnons comme si les législateurs étaient des dieux, et comme si les juges n'étaient pas même des hommes*'. The solution is given: '*mais en laissant à l'exercice du ministère du juge toute la latitude convenable, nous lui rappelons les bornes qui dérivent de la nature même de son pouvoir* (...) *une loi est un acte de souveraineté, une décision n'est qu'un acte de juridiction ou de magistrature*': P.A. Fenet, *Recueil complet des travaux préparatoires du Code civil, VI* (Paris: Videcoq, 1836), 358-361. See also Arts 4 and 5 of the Code.

[12] As A.J. Arnaud, *Essai* n 3 above, has demonstrated.

[13] The system is always complete given that what is not disciplined is simply irrelevant from a juridical point of view: there are cases in which 'juridical norms don't exist and should not exist': S. Romano, *Osservazioni sulla completezza dell'ordinamento statale*, VII (Modena: Pubblicazioni della Facoltà di Giurisprudenza della Regia Università di Modena, 1925), 11, now in Id, *Lo Stato moderno e la sua crisi* (Milano: Giuffrè, 1969), 173.

reason that the analogical process will be historically structured as a process aimed to fill the residual spaces, in the twofold premise of the absence of a norm directly related to the case and, at the same time, of the existence, *inside the system*, of norms or principles which could be adapted to – which could cover – the case in question.[14]

There is no coincidence between system and interpretation here. These two terms are situated in two parallel planes, in a model where the system is a necessary precondition to the interpretation, but the interpretation is totally unnecessary to the existence of the system. The interpretation is not necessary, when the text of the norm is sufficiently clear (the clarity of the norm becomes – historically necessary – a guarantee against the abuses). However, if there remains a doubt, the interpreter can always make a decision without betraying the theoretical model: he can use logical connections which link legal rules to each other, or he can expand the semantic horizon of a certain word.[15]

The system guarantees the success of this operation. It guarantees the coherent and reciprocal connection of the norms and, at the same time, the possibility of finding the principle (first of all, the logical principle) – the ultimate reason which gives global coherence to those norms. In other words, it is always possible to find a solution for any particular case inside the system. That is, the system prevents the interpreter (the judge) from occupying the void, or getting out of the system itself, from breaking its homogeneity by arbitrary decisions, with the risk of betraying the original political project.

IV. The German Model: '*Das einzige Geschäft des Richters ist eine reine logische Interpretation*'[16]

The German approach to the juridical system confirms and improves the French model, but it presents some relevant differences.

Legal interpretation is always an activity aimed at explaining (not at

[14] N. Bobbio, 'Analogia' *Novissimo Digesto Italiano* (Torino: UTET, 1974), I, 601, 602.

[15] Reference to the concrete case, in the Exegetical approach, is only aimed to confirm the truth of the system. The analysis of judicial decisions is the mere repetition of the descriptive part of the articles of the code, rather than the assessment of real situations, in order to explore the possible sense of a norm: see G. Tarello, 'Orientamenti' n 6 above, 11-12.

[16] 'The only task of the judges is a purely logical interpretation': F.C. von Savigny, *Juristische Methodenlehre* (Marburg: 1802/1803), edited by G. Wesenberg, under the title *Juristische Methodenlehre, nach der Ausarbeitung des Jakob Grimm* (Stuttgart: Koehler, 1951).

creating) juridical reality.[17] The self-sufficiency and the completeness of the system are confirmed: the system is constructed through a deductive logical process.

However, if the Exegetical School identified the system with the code and the code with the law itself, the German historical school brakes the banks of the codified text. The system is designed as a wider and more complex reality, giving logical coherence to the ' "real" discipline of juridical relationships'.[18]

The German system is a 'perfect organic unity': the task of the jurists is to discover the connections, which reciprocally link all juridical elements in a coherent whole.

Interpretation becomes a necessary tool not only for the knowledge of the law,[19] but also for the construction (thus, for the existence) of the system itself. It is a necessary step, which opens the road for new research and elaborations: this research and elaborations are the authentic dimension of the juridical science.[20]

Law becomes a productive science: the jurists create because they know the internal legal structure. However, the product of this creative activity properly marks the boundary line of the juridical experience. It is not a case of the XIX century being opened by the arrival of the system of the *civil code*, and closed by the construction of the system of the BGB. The BGB was an elegant, sophisticated structure. However, it was created by the jurists *for* the jurists – that is, destined to make law a technical science, which could only have been known by the few who possessed its technical instruments. The system was born as a model aimed at making knowable the sources of law and at controlling their application; it becomes a scientific instrument, which could (only) be understood and, more importantly, controlled by the same priests that had created this system.

The ideological significance of this operation is self-evident. To say that the interpretation is a scientific work means that all studies of juridical phenomena conducted by non-jurists are anti-scientific; it means to reserve the elaboration of the juridical organisation to a specific professional and social class, establishing the primacy of the doctrine and the ancillary role

[17] 'The law was considered a reality which preexists the interpretation, and the interpretation was the process of recovering the real sense of that preexistent reality': G. Tarello, 'Orientamenti' n 6 above, 10.

[18] Ibid 10.

[19] Ibid 13: '(Law) always requests an intellectual apprehension, hence it must always be submitted to the interpretation of the juridical science'.

[20] F. Viola, 'R. von Jhering e la conoscenza del diritto', in F. Viola, V. Villa and M. Urso eds, *Interpretazione e applicazione del diritto tra scienza e politica* (Palermo: CELUP, 1974), 24.

of the jurisprudence; it means to affirm the irrelevance of the aims belonging to the legal interpretation and to the social class of the interpreters, excluding the possibility of a widespread control.[21]

The definitive rift between juridical and social systems (or, if preferred, between *Sollen* and *Sein*) is fixed. The German systematic approach isolates the law: the 'Is' is forced into artificial schemes, in order to dialogue with the 'Ought'. Reality in itself does not have a juridical significance: the concrete social relationships can be considered and classified only if reduced into these schemes.[22] Interpretation is necessary to retrace the links between these schemes, to retrace the will of the legislator inside the law, following a rigorous process which reflects, with its logical coherence, the logical coherence of the system.[23] When Savigny constructs for the first time the interpretative process as an ordered application of a precise sequence of predetermined criteria,[24] he precludes the interpreter from every possible evaluative space, from every consideration of a reality which could be different from the juridical one.[25] Thereafter, with the Pandectistic school, law definitively becomes a logical product, axiologically neutral, which ignores any connection to external elements of the system and to its consequences in social reality.[26]

Nevertheless, the system and its interpretation are not yet reciprocally necessary. The system confers scientific dimension to the interpretative process, allowing the verification of the interpretative result following logical principles (thus, it allows the control of both the legislator and the interpreter itself). At the same time, absence of law becomes a possible scenario. But, the system prevents that this absence becomes a legal vacuum:

[21] G. Tarello, 'Orientamenti' n 6 above, 12-14.

[22] See F. Viola, 'R. von Jhering' n 20 above, 26: 'All that was already in the Savigny's theory and, above all, in his doctrine of juridical institution as a typical entity existing above the concrete social relationship'.

[23] '*Rekonstruktion des dem Gesetz innewohnenden Gedankens*': F.C. von Savigny, *Sistema del diritto romano attuale* (1840-1849), V. Scialoja ed, (Torino: Utet, 1886), I, § 33, 220-224.

[24] Ibid. Savigny lists the grammatical, logical, historical and finally systematic canons. This latter is referred 'to the deep connection which links all institutes and all juridical rules in a big whole', following the project 'which was in the mind of the legislator' (§ 33). It should be noted that Savigny introduces this reference to the 'mind of the legislator' immediately after excluding reasons of law from valid interpretative canons.

[25] '(...) in fact, he clearly wants that will of the legislators does not interfere with juridical science': G. Tarello, 'Orientamenti' n 6 above, 13.

[26] F. Modugno, n 2 above, 4. The same opinion is expressed by sociologists: see J. Carbonnier, *Sociologie juridique* (Paris: PUF, 1978), 347.

the gap can always be filled through a set of interpretative instruments, or, at least, through the analogy (which is conceived as a distinct step).[27]

The system is, at the same time, the precondition and the product of the interpretation; but the interpretation is not sufficient for the system.

V. From the Myth of the Legislator to the Myth of the Judge: The System, the Space, the Time

The jurist of the XX century inherited from the XIX century a model, with two possible variants (the French legislative one, and the German doctrinal one), neither of which was able to dialogue with the new world.

The XIX century-system is a system intrinsically atemporal: the chronological dimension does not belong to it. It is composed of norms, or institutions, supposed to last for forever. The juridical norm is created to aspire to be eternal: 'law goes against the time'.[28]

The XIX century system, though, is a system strongly characterised from a spatial point of view.[29] The territory of the State is the material limit of the validity of the norms – that is, limiting the efficacy of the system which organises these norms. Law and the model of system fully coincide with each other. In this sense, the system is *excluding*, since the being of a juridical system in the space excludes the existence of extra-systemic norms and/or different juridical systems in the same space.

The ideological model is the bourgeois liberalism. In this theoretical model 'the social order (is) the natural result of the encounter of the individual economic forces in the market'. Law can be limited to 'guarantee every producer the same formal freedom',[30] within a horizon where the stable will of the legislator guarantees property, private autonomy,

[27] Ibid 603. Analogy is expressly mentioned in the Italian and Austrian civil code, while it does not appear either in the French or German code. Notwithstanding that, Norberto Bobbio clearly affirms that also in these last systems analogical process is not only logically possible, but also juridically valid, since it is a condition of existence and of the functioning of the system.

[28] A. Longo, *Tempo e interpretazione della Costituzione*, draft text. The author explains: 'Why? Because law is a canon. Law cannot be contaminated with the flow, with the change. Norm must oppose the change. It is crystallised, it is always the same'.

[29] 'It once was easier to ignore the law. Law was a space (…). Power was: occupy the space (…). The game of the new law was completed, when law gained the hegemony over communications produced in national spaces': P. Femia, 'Il giorno prima. Comune, insorgenza dei diritti, sovversione infrasistemica', in VVAA eds, *Il diritto del comune. Crisi della sovranità, proprietà e nuovi poteri costituenti* (Verona: Ombre Corte, 2012), § 2.

[30] L. Mengoni, 'Problema e sistema nella controversia sul metodo giuridico' *Jus*, 6 (1976).

juridical subjectivity. The conflict is settled formally, ensuring its players the parity of the starting conditions.

Since the beginning of the 'short century',[31] these three elements have been questioned. The system resists: it is perfected, in its sophisticated Kelsenian version, or it is transformed, changing its function and consequently its symbolic (*rectius* ideological) meaning.

We know the relevance of Jhering's theories in that transformation.

With Jhering, the 'exterior' system becomes 'internal'.[32] It is no longer a mere deductive logical sequence starting from rational principles, but a construction which reflects the internal structure of juridical matter, allowing its evolution. Jhering distinguished the structure of law from its function, and pointed out that that function influences the structure. Hence, the teleological analysis becomes necessary: for these reasons, Jhering is considered as the author who signed 'the transition from the constructionism to the juridical sociologism, that is, in fact, from the XIX to the XX century'.[33]

The social dimension of the law is (re)discovered.[34] The life beyond the form, we could say: at the beginning of the XX century, the jurist has the awareness of the finitude of his world, but he is still hoping for immortality. Judges come to his aid; jurisprudence becomes 'the element that conciliates he necessary stability and cohesion of juridical principles

[31] As it is known, this expression is usually used in order to define the XX century (in particular, the period between the years 1914 and 1991). See for example E. Hobswam, *The Age of Extremes: The Short Twentieth Century, 1914-1991* (London: Michael Joseph, 1994).

[32] The scientific work of R. von Jhering is usually distinguished in two phases. The first one was marked by the first edition of the *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1852-1865), 10. Auf., Darmstadt: 1968), and coincided with the birth of the Begriffjurisprudenz. The second phase was marked by the publication of *Lo scopo nel diritto* (1877) (Italian version edited by M.G. Losano, Torino: Einaudi, 1972), and coincided with the development of the *Interessenjurisprudenz* and the *Freirechtsbewegung*: see M.G. Losano, *Sistema e struttura del diritto* n 4 above, 216-219.

[33] Ibid 217.

[34] It is necessary to remember the contribution of Gény, Saleilles, Duguit, in this process. They confer a decisional power to the interpreter (to the judge), opening the way for a reflection about (new) social purposes to which law must respond. The system resists and remains orderly, logical, coherent and self-sufficient. But it is the result, not the premise of the interpretation. See, in particular, F. Gény, *Méthode d'interprétation et sources en droit privé positif* (Paris, 1st ed, 1899; Paris: F. Pichon et Durand-Auzias, 2nd ed, 1919), with preface by R. Saleilles; Id, *Science et technique en droit privé positif,* 4 voll (Paris: Sociètè du Recueil Sirey, 1914-1915 and 1921-1924); Id, *Méthode d'interprétation et sources en droit privé positif* (Paris: A. Chevalier-Marescq, 1899), fn 81 bis. More recently, Ph. Jestaz, 'Une image française de la loi et du juge', in Y. Blais ed, *François Gény. Mythe et réalités, 1899-1999* (Paris: éd. Blais, Dalloz et Bruylant, 2000; now Paris: Dalloz, 2005), 37.

and evolution of rules … in order to adapt them to the requirements of life'.[35] The judge acts as the Socratic *δαίμων*: he connects the metaphysical world of the juridical system to the earthly world of the facts of life.[36]

The notion of the system irreversibly changes: 'the XX century does not ask the theory of law for an instrument to organise a disorderly set of rules: it asks for help to decide concrete cases'.[37]

The context requires it. Facing increasingly frequent and rapid political, economic, social changes, law should organise and rethink itself, in order to provide adequate responses. The juridical science becomes necessary to give judges concrete tools in order to solve concrete problems in concrete cases, rather than to make laws knowable or logically coherent. The abandonment of the rule in its literal wording becomes legitimate.

The system is transformed according to the new ideology. Jurisprudence is the cornerstone of this new model: the myth of the omnipotence of the legislator gets irremediably resized out of the matter. If the reality changes, law also must change: the judges are the instrument of this transformation.[38] The traditional model required a rigid contraposition between the political and interpretative step, between the production of the law (*legis latio*) and the application of the law (*legis executio*), giving the legislator only the function of production.[39] Although, between the end of the XIX and the beginning of the XX century, conflict settlement becomes an operation

[35] See A.J. Arnaud, *Critique de la raison juridique. 1, Où va la sociologie du droit?* (Paris: LGDJ, 1981), about the role of Raymond Saleilles in the foundation of the sociology of the law.

[36] L. Duguit, *Les transformations générales du droit privé depuis le code Napoléon* (Paris: Alcan, 1912), 6-9: '*Le système juridique civiliste était d'ordre métaphysique; le système nouveau qui s'élabore est d'ordre réaliste*'.

[37] From a 'system to know' we move on to a 'system to do': M.G. Losano, *Sistema e struttura nel diritto* (Milano: Giuffrè, 2002), in particular 'Introduzione' to vol 2 (*II: Il Novecento*), and to vol 3 (*III: Dal Novecento alla postmodernità*). Losano adopts the distinction, proposed by N. Luhmann, between 'systems of concepts' and 'systems of actions': see N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart: Verlag W. Kohlhammer, 1974), Italian translation by A. Febbrajo, *Sistema giuridico e dogmatica giuridica* (Bologna: Il Mulino, 1978).

[38] This does not involve a value judgment on the models concerned. To say that conceptual interpretation is more conservative and interpretation in the light of social aims and interests is more progressive, does not mean to give a value judgment. 'Conservative' and 'progressive' are used in this context in their descriptive sense: N. Bobbio, *Giusnaturalismo e positivismo giuridico* (Milano: Comunità, 1965; now Roma-Bari: Laterza, 2011), 77-79.

[39] See B. Windscheid, *Die Aufgabe der Rechtswissenschaft, in Gesammelte Reden und Abhandlungen* (Leipzig: Duncker, 1904), in particular § 14. Law is 'the decision adopted by the State', based on the pursuing reasons and purposes, while application of law merely is 'the result of a sum, in which factors are juridical concepts'.

to be performed on a case by case basis, in light of the data concretely available for the interpreter.

But opening a social dimension of the law means returning the law to its own historical dimension. Instances of solidarity do not deny the territorial dimension of the law.[40] However, the only 'chance of survival for law is to distinguish the notion of law from the notion of positive law, to make it something wider, a scientific discipline able to adapt itself to historical changes'.[41] Through the judicial interpretation, law now deals with history.

Interpretation and the system are not the same thing, but interpretation *is necessary* for the survival of the system.

VI. Legal Certainty or Justice (in Individual Cases)?

The nineteenth century is a Janus-faced creature. It forces the jurist to choose between the natural aspiration of the law in accordance with its logical and systematical dimension, and the authentic historical and changeable structure of the reality.[42]

At the theoretical level, the ideological battle is entirely focussed on the question of the sources of law. We are dealing with the political problem of creating norms (*legal certainty*, which entrusts to the legislator the definition of the idea of justice; or *justice*, concretely implemented by judges in each individual case).[43]

But history humiliates law and deprives it of all alternatives, showing that research of the legal reason (and law itself) could become a blind and uncontrolled implementation of the political power. The totalitarianisms leave, as their legacy, the fall of the illusion that laws, or judges, can do something.

The solution is the awareness of the interpretative question: the problem shifts from the law itself to the way in which law is interpreted (and applied).[44] The juridical solution is not exact, or true. It is simply reasonable,

[40] See P. Femia, 'Il giorno' n 29 above, § 5: 'the French solidarism of Léon Duguit is building on persons (not on subjectivities) (…); it changes, but does not deny the State'.

[41] R. Saleilles, 'Le code civil et la méthode historique', in *Livre du Centenaire du code civil* (Paris: Société des études législatives, 1904), I, 127.

[42] P. Grossi, 'Pagina introduttiva' *Quaderni fiorentini per la storia del pensiero giuridico*, 1 (1973).

[43] F. Modugno, n 2 above, 13.

[44] '(…) in the modern European juridical culture, every application of the laws (or, as it is too often said, of 'norms') presupposes or implies the interpretation of the laws themselves. There are no jurists, today, who thinks that it could be possible (…) to apply

in light of the available arguments. The interpretative activity is no longer a logical but a semantic operation.[45]

The next step is the construction of a complex model, balancing both dogmatic and problematic approaches. The topic is not conceived as a technique to make decisions, but rather to make hypotheses of rational solutions, while the dogmatic is necessary to verify the coherence of these solutions with the system.[46] System and the problem coexist. The former is aimed at controlling the juridical material 'beyond its immediate givenness', in order to make it 'concretely usable';[47] the latter one is aimed at preventing 'the processes of conceptual hardening of the legal system'.[48]

In this way, the ancient theme of the control over the interpretative activity re-emerges. The tragic experiences of the twentieth century have shown that the logical coherence of the decision does not give sufficient guarantees. The new solution is the verification of the conditions on which the interpreter bases his choice. The possibility of evaluating the premises – both factual and legal – of the decision is the condition to making the norm adequate to social reality. The possibility of understanding this evaluation makes these premises rational (in the sense of the reasonableness).[49]

We must still define the criteria that make this evaluation possible.[50] The solution, which identifies them not only in the law but also in the extra-legislative context, allows the definitive opening of the system to the society – that is, the transformation from the law as an autonomous and isolated system to the law as a system which constitutes, among other systems, society. It signs the birth of law as a sub-system of the Social System.

a law without interpretation, that is, without giving it a significance': G. Tarello, 'Orientamenti' n 6 above, 5.

[45] See, at least, H.G. Gadamer, *Wahrheit und Methode* (Tübingen: Mohr, 1960), and in G. Vattimo ed, *Verità e metodo* (Milano: Bompiani, 2001); C. Perelman, 'Le raisonnement juridique' *Les Etudes philosophiques*, 133-141 (1965), now in Id, *Diritto, Morale e Filosofia* (Napoli: Guida, 1973), 147-156; Id, 'Le raisonnement juridique et la logique déontique', in Id, *Etudes de logique juridique*, 4 (Bruxelles: Bruylant, 1970), 133; and T. Viehweg, *Topik und Jurisprudenz* (München: Beck, 1953), and in G. Crifò ed, *Topica e giurisprudenza* (Milano: Giuffrè, 1962).

[46] L. Mengoni, n 30 above, 33.

[47] N. Luhmann, *Sistema* n 37 above, 45.

[48] L. Mengoni, n 30 above, 38.

[49] F. Modugno, n 2 above, 9.

[50] It is obvious that it is impossible, here, to speak about the legislative or extra-legislative basis of the evaluative process, about principles, about the connection between principles and norms. On these topics, see, eg, the works of J. Esser, in particular *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr, 1956).

VII. One System, No System, a Hundred Thousand Systems

The end of the twentieth century coincides with the end of illusions.

Law loses its immortal condition. It is no longer a body of universal institutions, but a contingent product of a certain equilibrium of powers. It is fragile and changeable as any human equilibrium.

Law loses its own territoriality. It no longer has any defined spatial dimension. It still remains a more or less ordered set of rules, but these rules don't have any place; they are produced by different subjects at different levels. The *When* replaces the *Where*: the time of the law materialises and aims at replacing its space. We imagined a law without time in order to control the space. Instead, we produced a law inexorably linked to a time (and so to an end), but devoid of any spaces, or more exactly lost in space.

Law, finally, loses its rationality. Legal interpretation needs a leap of faith. In order to interpret, in order to force the judge to overcome the ambiguity of norms or the legal vacuum, it is necessary to recognise the legislator as a *reasonable* subject.[51] However, since the second half of the twentieth century, the faith on the legislator's rationality declines, confronting the proliferation of rules that often contradict each other.

How could the system survive all of this?

For jurists, the juridical system fundamentally remains the hope for an organised and logically coherent set of dispositions and institutions. It aims to be rational, linked to a territory which defines its limit of validity (civil law systems, common law systems) and based on the idea of legal stability (given that stability is the essential condition for predictability, and thus for legal certainty).[52] But a system as such does not coincide anymore with law. It is necessary also to take into account all juridical rules produced outside the system (for example, foreign sentences, standard

[51] N. Bobbio, 'Analogia' n 14 above, 603.

[52] See the definition of the juridical system proposed by J. Carbonnier, n 26 above, 346-347: '*Pour la sociologie du droit,* (…) *un système juridique* (…) *c'est pratiquement un droit national* (…) *ou* (…) *c'est le droit d'une société globale. Partout où la sociologie constate l'existence d'une société globale,* (…) *il est permis de postuler la présence d'un système juridique correspondant.* (…) *Il faut avoir égard à l'idée que (l'idée de système) recouvre, qui est une idée importante: savoir, qu'un droit est un ensemble, que ses éléments composants* (…) *sont liés entre eux par des rapports nécessaires*'. It is obvious that common law systems are considered systems in this first sense: in his work, Carbonnier himself quotes R. David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1964). As it is known, the question was specifically studied by T. Parsons (in particular, 'On Building Social System Theory: A Personal History' 99(4) *Daedalus (The Making of Modern Science: Biographical Studies)*, 826, 868 (1970)). Parsons reached the conclusion that, if one assumes a definition of the juridical system as a deductive logical system, common law could be qualified as a system. In fact, it is also possible to find in common law the logical connection which links norms to the principles, although with an inductive, not deductive reasoning, from particular to general.

clauses in globalised markets). If law becomes the mirror of the complexity of the reality, the jurists can simply accept that, trying to keep that complexity up with the system. Law and the system separate again. However, law must keep aiming at the system, *ad infinitum*, in order to survive – in order to make sense –.[53]

For the philosophers (or for the sociologists), the system becomes a mechanism that processes social data. It becomes a system of communications, which translates into juridical language all languages, instances and interests, coming from the infinite other subsystems of the System. The system develops strategies in order to reduce environmental complexity; it entirely coincides with law, or, even better, law, in its entirety, is a system.[54] But such a process of translation of all extra-systemic (extra-juridical) logics into a juridical language requires reflecting on the possibility of ensuring that extra-systemic logics (extra-juridical logics) take over at the juridical system, becoming sources of the law themselves. Once again, the problem of controlling the law-making process is perceived as essential.

At this point, the question is if, in the juridical world, the systemic approach actually is something new, compared to the systematic approach.[55] In other words, how compatible are these two models? The Luhmann theory attempts to answer this question.[56] Niklas Luhmann distinguishes three phases within the evolution of the concept of the system. In the first phase, the classical notion of the system is represented through the contraposition between the parts and the whole, where the whole is something more than its parts. However, the reason for this partial non-coincidence of the whole and its parts is not explained. Consequently, a first

[53] 'The juridical system exists only to offer legal certainty (or if preferred: to reduce the complexity of the problem of acknowledging the legitimate power). It is an (imperfect) organisation of certainties, a (necessary) machine to protect power from the infinite discussion about its legitimacy (...). All that is not certain achieves a juridical dimension through the structural junction with this organisation of certainties': P. Femia, 'Benito Cereno in Bucovina', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* (Milano: Giuffrè, 2013), 92.

[54] In a theoretical horizon where the systems theory is the condition for the definition of the juridical norm: eg, J. Raz, *Il concetto di sistema giuridico: un'introduzione alla teoria del sistema giuridico* (Bologna: Il Mulino, 1977); Id, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (London: Oxford University Press, 1970).

[55] The question is posed by M.G. Losano, *Sistema e struttura nel diritto, III. Dal Novecento alla postmodernità* (Milano: Giuffrè, 2002), 223.

[56] Ibid 315-321, where Losano analyses the opinions expressed by Luhmann in *Rechtssoziologie* (Opladen: Westdeutscher Verlag, 3rd ed, 1987). About Luhmann, and particularly about the concept of subjective rights in the systemic theory, see also P. Guibentif, 'Rights in Niklas Luhmann's Systems Theory', in A. Febbrajo and G. Harste eds, *Law and Intersystemic Communication. Understanding 'Structural Coupling'* (London: Ashgate, 2013), 255.

'change of paradigm' (which is an evolution, not a contradiction of the first model) becomes historically and logically necessary: the system/environment distinction substitutes the parts/whole distinction. The system is influenced by the environment: it is now defined as a set of 'a more or less high number of system/environment differences'.[57] It was closed, it becomes open. In the third phase, the open system becomes self-referential. This last change of paradigm allows for conceiving the system as an organism, which changes itself through the binomial identity/difference (so, the question rises about the possibility of conciliating the systemic opening to the environment with its self-referential closure).[58]

Hence, we could affirm that there is an evolution, not a breakdown, from the systematic to the systemic approach. This is exactly the evolutionary itinerary, which separates the juridical and the sociological perspective. Jurists and sociologists are destined to work from different planes: the plane of validity for the jurists; the plane of efficacy for the sociologists. In the sociological perspective, the juridical system *exists*, it *is* the juridical reality: it is not its mere representation, nor a model (on the contrary, this was our initial thesis). The juridical system is not a whole, opposed to single parts, but a whole that relates to another wider whole (system/environment).[59] The jurists are bound by the interest, in the sense that they should assume that every norm corresponds to an interest which has already been selected by the legislator. At this level, the jurists can only take note of the legislator's choice. Their task is simply to give an order to the normative material, building the juridical system (dogmatic). On the contrary, at the general theory level, jurists are authorised to proceed through abstractions, building a scientific system (legal theory). In both cases, however, it is not the same phenomenon analysed by sociologists: it should be an error 'to consider these classification tools as if they were the legal system'.[60]

Legal dogmatics and legal theory are not deleted but confined to a particular logic which does not coincide with the systemic logic. After all, that is not so distant from the Kelsen point of view, when, tracing the difference between fact and law (between *Is* and *Ought*), he argued that 'sociologists observe the law from outside; jurists from inside'.[61]

[57] M.G. Losano, *Dal Novecento* n 55 above, 315.

[58] The answer of Luhmann is that the system of the law is open from an epistemological point of view and closed from a normative point of view: see N. Luhmann, *Rechtssoziologie* n 56 above. In the final part of the volume (Schluss: Rechtssystem und Rechtstheorie, 356-357), Luhmann clearly affirms: '*Das Rechtssystem ist ein normativ geschlossenes System (…) Zugleich ist das Rechtssystem ein kognitv offenes System*'.

[59] M.G. Losano, *Dal Novecento* n 55 above, 346.

[60] N. Luhmann, n 37 above, in particular 67.

[61] H. Kelsen, in M.G. Losano ed, *La dottrina pura del diritto* (Torino: Einaudi, 1966), 13-15.

Given this distinction, we have to respond to a second question. In which measure is systemic approach useful for the systematic model?[62]

My answer is that these two models are mutually complementary.[63] The systemic theory (perhaps) does not respond to the practical questions which jurists have to confront every day. But it has the virtue of giving them predictive capacity and a wider horizon.[64] The systemic theory forces the juridical system to reflect on the consequences of juridical decisions – that is, to reflect on its own function.

There is more.

If the apparently unavoidable condition of our existence as jurists is an infinite reproduction of the tragic and impossible choice between legal certainty and equity, the theory of systems, in its last version, seems to provide a way out. It proposes to go beyond the level of a merely descriptive analysis, trying to critically identify those social processes which could have the power to transform the current social order in order to build the 'just

[62] 'Hence, my impression is that law is useful for the supertheory; however, I don't think that supertheory is useful to the law' (M.G. Losano, *Dal Novecento* n 56 above, 339).

[63] P. Guibentif, *Foucault, Luhmann, Habermas, Bourdieu. Une génération repense le droit* (Paris: LGDJ, 2010).

[64] Juridical dogmatics is oriented to the input that is, to the past, to the juridical decision as it is (juridical positivism). On the contrary, sociology is oriented to the output that is, to the possible consequences of juridical decisions. Recent history of law is marked, according to Luhmann, by this constant tension between input and output: N. Luhmann, *Sistema* n 37 above, 59-63. The image of the scheme immission/emission (input/output) is relatively frequent within the literature about relationships between law and the social system. In the same period it was used, for example, by L.M. Friedman, n 2 above. This last author limits his research to the pretensions of the society regarding the law (input) and to the consequences that law produces in the society. To explain this idea, Losano uses the image of the law as a 'black box'. 'It is possible to study what the box receives from and transmits to the social environment, but the content of the box itself is unknown or intentionally ignored' (M.G. Losano, *Dal Novecento* n 55 above, 320). However, the risk precisely lies in the fact that the content of the black box is unknown. It is possible to accept the description of the system as a process answering to the request of complexity; however, it is necessary to advise that this is not a neutral process (that is: the juridical discourse is not a merely technical discourse). This is even more essential, since the Luhmannian system is an ontological (not epistemological) system. It is a system in which choices are able to modify the reality, but, at the same time, a system in which the will of the decision-maker (as a factor influencing the decision) is neutralised and the juridical rationality does not coincide with the ethical rationality (just/unjust). It is not an accident if the main accusation against systemic theory properly is that it transforms all into a technical question, removed from public control. In this perspective, see, for example, J. Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann', in J. Habermas and N. Luhmann eds, *Theorie der Gesellschaft oder Sozialtechnologie. Was leistet die Systemforschung?* (Frankfurt: Suhrkamp, 1971), 142-290, in particular 145.

order'.[65] Along this itinerary, the critique of values (as a refuse of the traditional conflicts-settlement model and as a guarantee of 'differentiated spaces of social autonomy') and the critique of the State (as a recognition of the specific risks arising not only from the political level, but also from other social systems) become essential in the juridical dimension.[66]

In the same perspective, it is affirmed that rights 'don't exist *before* in an external place, from which the political must transfer them inside the law (through an extralegal constituent process), nor in an internal place, where jurists will have to look for them (building their nice arguments, weights and balances). Thus, rights are not outside (to claim) nor inside (to argue). They are *intrasystemic self-subversions*, breakpoints of the system that are not contained nor controlled *ex ante* by the system itself'.[67]

Justice is placed *inside* the legal system, as well as the political moment. Some authors come to represent this political moment not as an isolated system, but as an 'internal event of every system', which can implement 'a series of categorical redefinitions, changing the system from the inside'.[68]

This continuous process of categorical redefinition could allow the fight, against the destructive action of the powers, and prevents the use by dominant powers of the same categories in order to justify their own dominance.[69] The solution proposed is not to replace one model with another one, but to conceive a system that opens to differences and absorbs them.

VIII. Looking for the Answer

[65] A. Fischer-Lescano, 'La théorie des systèmes comme théorie critique' *Droit et Société*, 645-665 (2010). The author notes a parallelism between the Teubnerian idea of contradiction as driver for social development and the Hegelian dialectic. His perspective brings the Teubnerian version of the Systems theory closer to the critical Marxist tradition. Teubner himself inserts his theory into a wider theoretical perspective and admits that, in some aspects, this version of the systemic theory 'renews the classic theories of alienation'. He expressly quotes Foucault, Agamben, Lyotard, until Derrida: G. Teubner, 'La matrice anonima. Quando "privati" attori transnazionali violano i diritti dell'uomo' *Rivista critica del diritto privato*, 9, 17 (2006).

[66] A. Fischer-Lescano, n 65 above, 661.

[67] P. Femia, 'Il giorno' n 29 above, § 9, thinking about the concept of self-subversion proposed by G. Teubner, 'Selbstsubversive Gerechtigkeit: Kontingenz-oder Transzendenformel des Rechts?' *Zeitschrift für Rechtssoziologie*, 9 (2008).

[68] P. Femia, 'Il giorno' n 29 above, § 2. The same idea is confirmed and clarified by this Author in 'Benito' n 53 above, 102: 'Politics and society are not systems; they are transcendent functions, conditions for the existence of the systems and the quality of their performance'. On the contrary, Teubner considers politics as a system in itself: see, in particular, A. Fischer-Lescano and G. Teubner, *Verfassungsfragmente. Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Berlin: Suhrkamp Verlag, 2012).

[69] P. Femia, 'Il giorno' n 29 above, § 11.

Is it possible, now, to find some answers?

In my opinion, there is no doubt that law and interpretation are equivalent. At least, it is necessary to take into account the interpretative dimension of the law. If one accepts this assumption, the system, both as a systematic and as a systemic construction, becomes a necessary element in the juridical scenario. Even if one does not share the idea of the intrinsic systematic nature of the law (and I actually think law does not have such a nature), the point is that juridical interpretation must be (also) systematic. The system is essential for the interpretation of the law, and so, for law. At the same time, the interpretative process becomes essential for the system. Legal interpretation changes its own identity: analogy is now assumed as a fundamental step, establishing a reciprocal dialogue between norms and principles, and ensuring to retrace the logical coherence of the norms.[70]

The system has not disappeared. It has reproduced itself and multiplied its functions.

It remains the only instrument known to jurists to slow the continuous flow of history (and of law, which is a part of history). The system still needs to reduce the complexity of the real, giving an order and a form to chaos. However, at the same time, it has a new and different meaning, which takes into account this complexity and communicates with it, turning social instances into juridical language. The systemic theory gives the jurist the suggestion of a system which responds to the call for justice by constantly transforming itself. Such a system constantly redefines, from the inside, the balancing values – that is, the binary codes at the basis of systemic operations. It is not rational in itself (and it is not in itself a source of law), but it is open to difference: 'order is the issue, not the substance of the law'.[71]

But – last question –, is the systemic approach still sufficient (as well as necessary), face to the above mentioned process of the gradual disconnection between law and its paradigmatic image?

The tragedy of law, its true limit, is its need to become practical norms. Law has to continuously and concretely define what is just, what is valid,

[70] N. Lipari, 'Morte e trasfigurazione dell'analogia', in G. Gabrielli et al eds, *Liber amicorum per Dieter Henrich* (Torino: Giappichelli, 2012), I, 36, 39. In the same volume, see also P. Rescigno, 'Tra ordinamento e sistema', 51. The utility of the distinction between interpretation and integration is therefore denied. In this process, analogy is not a solution for legal vacuum, but an expression and an instrument of cohesion of the system.

[71] P. Femia, 'Voltare le spalle al destino: sistema aperto o aperture sistematiche? Nota di lettura', in C.W. Canaris ed, *Pensiero sistematico e concetto di sistema nella giurisprudenza sviluppati sul modello del diritto privato tedesco* (Napoli: Edizioni Scientifiche Italiane, 2009), 190-192.

what is lawful. Conflict is the structural and ineluctable condition of a pluralist society.[72]

We come back to our initial thesis. For jurists, the system is not (it cannot be) the structure of the reality, but a model to settle conflicts. If one accepts such a premise, it becomes necessary to admit that, from the jurist's point of view, the traditional model leaves open a number of situations, in which the settlement of different interests or different claims is not ensured by the current tools (eg surrogate motherhood). However, the systems theory seems not to be the answer. It leaves the jurist alone with his old categories, desperately trying to give urgent solutions to new problems. Traditional paradigms gave him the illusion that he could manage the complexity, building different models for different ideologies (in the sense explained at the beginning of this article). On the contrary, the modern (maybe one could say postmodern) paradigm gives him the distressing consciousness that 'there is no dictator, but a network of subjects situated in a number of places of the social systems. And every subject works from the inside in order to corrupt the systems themselves. The dictatorship of the global age will be diffused and constitutional'.[73]

The systems theory traps the jurist in a scenario where the apparent absence of the system is a new model of system, having an opaque inspiring ideology. We are conscious, however, that the identification of this ideology is the unavoidable condition for a transparent selection of protecting situations.

Is it possible to find a different solution? Those who claim the constituent force of civil society[74] suggest to simply and definitively take note of the difficulty of this process of definition. This would be the premise 'to introduce in the system new discourses of invalidation (…) or validation (…)'. 'A multitude of subjects, conscious of the transnationality of fundamental rights' replaces traditional hierarchies and is opposed to global powers:[75] the

[72] J.G. Belley, *Conflit social et pluralisme juridique en sociologie du droit* (doctoral dissertation, Université de droit, d'économie et de sciences sociales de Paris, 1977): the key of the social life is not the order, which recalls integration and unity, but the conflict, which suggests plurality.

[73] P. Femia, 'Il giorno' n 29 above, § 11.

[74] Ibid in particular § 7.

[75] P. Femia, 'Benito' n 53 above, 38, 65. It is impossible, now, to exhaustively report the debate on the Teubner proposal of the social constitutionalism. Thus, the short following bibliography is only a partial reference to the works inspiring this article: D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992); C. Thornhill, 'Niklas Luhmann and the Sociology of the Constitution' 10 *Journal of Classical Sociology*, 315-337 (2010); G. Teubner, *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili* (Roma: Armando Editore, 2005), edited by R. Prandini, who signs the afterword to the Italian edition, titled 'La "costituzione" del diritto nell'epoca della globalizzazione. Struttura della società-mondo e cultura del diritto

problem of the State is simply by-passed. 'Pre-social', 'pre-juridical' and 'pre-political' situations are transformed in 'technical rights', through 'self-preserving processes' which ignore the 'free decision' of the democratic legislator.[76] Thus, the law-making process is withdrawn from the choice between private/public monopoly. However, it is still subjected to 'public control and public debate': the 'development of reciprocal controls between the spontaneous and organised sphere' is the guarantee of transparency and democracy.[77]

This is a fascinating proposal. But it leads to two objections, at least. First, it always presupposes a political choice (that is, the identification of the ideology bringing to the positivisation of certain rights). Then, it can be admitted only from a perspective of the *claim*, not of the *exercise* of rights.[78] But the claim cannot be the structural (physiological) condition of the system, in my opinion.

I do not have, however, alternative answers: only the awareness that the research is not concluded.

IX. Conclusion

From the jurist's point of view, the discourse about the system essentially is a discourse about the problem of the sources of law –, that is, a

nell'opera di Gunther Teubner'; G. Teubner, 'Societal Constitutionalism without Politics? A Rejoinder' 20 *Social & Legal Studies*, 247-252 (2011); Id, *Nuovi conflitti costituzionali* (Milano: Mondadori, 2012. The second chapter of the original German edition is absent in the Italian version); Id, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' 31 *Law and Society*, 763-787 (1997), translated in Italy under the title 'I molteplici corpi del re: l'autodecostruzione della gerarchia del diritto', in Id, D*iritto policontestuale. Prospettive giuridiche della pluralizzazione dei mondi sociali* (Napoli: La città del sole, 1999), 71-112. In Italy, besides works of P. Femia and R. Prandini, see also L. Zampino, *Gunther Teubner e il costituzionalismo sociale. Diritto, globalizzazione, sistemi* (Torino: Giappichelli, 2012); G. Allegri, 'L'Europa al bivio. Un rompicapo per il costituzionalismo democratico e sociale', review of C. De Fiores, *L'Europa al bivio. Diritti e questione democratica nell'Unione al tempo della crisi* (Roma: Ediesse, 2012), available at http://www.diritticomparati.it/2013/01/leuropa-al-bivio-un-rompicapo-per-il-costituzionalismo-democratico-e-sociale.html (last visited 24 May 2016). For a critical approach, N. Irti, *Diritto senza verità* (Bari: Laterza, 2011); Id, 'Tramonto della sovranità e diffusione del potere', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* n 53 above, 3.

[76] G. Teubner, 'La matrice' n 65 above, 21-22.

[77] G. Teubner, *La cultura del diritto* n 75 above.

[78] In fact, with particular reference to the question of fundamental rights, Teubner admits: 'Justice of human rights can be formulated only in negative. It aspires to remove unjust, not to create just situations': G. Teubner, 'Ordinamenti frammentati e costituzioni sociali' Lectio Magistralis in occasion of the honoris causa degree, University of Macerata, 30 April 2009, now in *Rivista giuridica degli studenti dell'Università di Macerata*, 45, 57 (2010), and in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* n 53 above. The same concept was already affirmed in Id, 'La matrice' n 65 above, in particular 36.

discourse about the construction of possible models able to govern conflict, or to ensure the political balance among different powers which constitute juridical reality.[79]

In pursuing the balance between legal certainty and justice, in searching for a model which could implement the idea of the justice itself, the jurist relies on the system, making different political choices. His only problem is to invent tools, which ensure the solidity of every choice, of every model, of every system, by removing possible interferences as anti-systemic (unconstitutional?) elements.

The construction of new theoretical models, aimed at reducing the level of the complexity of modern society, is not precluded. However, the political solution to the problem of the identification of the sources of law (that is, the political solution to the eternal problem of the power legitimacy) still remains undefined.[80] The current difficulty of the *juridical* building of a legal system entirely lies in the definition of the balance of powers – that is, in the definition of the processes (not only procedures) able to respond to the call for justice, or able to define the idea of justice itself.[81]

[79] It would be necessary to reflect on the problem of legal pluralism, about the exact meaning of the expression 'juridical rule': about the line between law and social phenomenon. All depends on the validity criterion adopted (the requirements for belonging to the system). This criterion could be the respect of a more or less fundamental norm (the Kelsenian Grundnorm); a set of normative criteria (N. Bobbio, 'Ancora sulle norme primarie e secondarie' *Rivista di filosofia*, 35 (1968), now in Id, *Studi per una teoria generale del diritto* (Torino: Giappichelli, 1970), in particular 186-187); the behaviour of certain institutions (the doctrinal criterion proposed by J. Raz, *Il concetto di sistema giuridico* n 54 above, 266); and so on. The list could be very long. In conclusion, we can simply recall the Ehrlich's research on legal pluralism (in particular E. Ehrlich, *Beiträge zur Theorie der Rechtsquellen, I, Das ius civile, ius publicum, ius privatum* (Berlin: Heymanns, 1902); more in general, Id, *Grundlegung der Soziologie des Rechts* (Berlin: Duncker & Humblot, 1913). See also A. Febbrajo, 'E. Ehrlich: dal diritto libero al diritto vivente' *Sociologia del diritto*, 137-159 (1982), a very important introduction to Ehrlich's theories).

[80] Where 'Politics is not a system, but an internal event of every system (law, economy, culture, health etc.)': P. Femia 'Il giorno' n 29 above, § 2.

[81] 'The formal concept of justice should not be refused and not even mocked. On the contrary, it should be present in every debate about the just and the unjust, since every juridical system, positive or natural, divine or human, must have it': N. Bobbio, *Giusnaturalismo* n 38 above, 21.

Essays

Instances of Civil Law in North American Common Law Tradition: Cause and Consideration in Quebec and Louisiana Civil Codes

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Abstract

A practical comparison between the two main legal system families can profit from some unique instances of civil law that lie in the vast North American continent. Reference is made to Quebec, for Canada, and Louisiana, for the US. Both locales are part of federal states ruled mainly by common law. The Canadian and US legal systems embed civil codes that refer to and define a requirement for the validity of the contract, the cause, that European civil codes mentioned, but did not dare to define. The first Italian Civil Code, enacted in 1865, was consistent with the Napoleonic Code: the paragraph called 'upon the cause of contracts' contained section 1119 and section 1120, which read 'An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect' and 'A contract is valid, although its cause is not expressed', following quite literally what section 1131 and section 1132 Code Napoleon stated. In the second and current generation of the Italian Civil Code, enacted in 1942, the rules changed in wording and now cause is referred to the contract (without any explanation of its meaning) and no more to the obligation. After 1942, therefore, scholars and Courts started to refer to the concept of cause, also (or exclusively) as the due control of the legal system on the lawfulness of the legal operation the parties to the contract are seeking, and on the practical results they wish to achieve. Following these paths, the meaning of the term cause also lost its certainty in the civil law systems themselves and often became a duplication of the concept of object (or subject matter): the concept of cause has lost its clarity to the extent that, given a proposal of European restatement or uniform codification, it is doubtful whether it would be worth maintaining the concept or not. In such a situation, the provisions in the Louisiana and Quebec Civil Codes that mention and even define the cause are of great interest also for the civil lawyer from different points of view.

I. Two Instances of Civil Law within Canadian and US Common Law Territories: Quebec and Louisiana

A practical comparison between the two main legal system families can profit from some unique instances of civil law that lie in the vast North

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American continent. Reference is made to Quebec, for Canada, and Louisiana, for the US.

Both Quebec and Louisiana are part of federal states ruled mainly under common law systems. The Canadian and US legal systems embed civil codes that refer to and define a requirement for the validity of the contract, the *cause,* which European civil codes mention but do not define. Therefore, taking a glance at them may be of some interest also for an Italian scholar.

As law school students, during the late 1980s, we were taught that *cause* and *consideration* perform quite a similar task, but that they are specific to different legal systems, and therefore they do not coexist within the same framework, thus relinquishing any comparison between them on a merely theoretical point.

On the one hand, it is true that the doctrine of *consideration* is very complex; on the other hand, the concept of *cause* is mostly ambiguous, because European civil law code drafters did not involve themselves in definitions. This is why the matter seems difficult to address.

II. Louisiana Civil Code of 1870 and the First Louisiana Civil Code Digest of 1808

The US took possession of Louisiana on 20 December 1803, some months after completion of the Louisiana Purchase from France.[1] At the

[1] It is worth mentioning that the object of the Purchase was far more extensive than the actual State of Louisiana: it included land from fifteen present US States and two Canadian provinces: Arkansas, Missouri, Iowa, Oklahoma, Kansas, and Nebraska; the portion of the western part of Minnesota of the Mississippi River; a large portion of North Dakota and South Dakota; the Northeastern section of New Mexico; the northern portion of Texas; the area of Montana, Wyoming, and Colorado east of the Continental Divide; Louisiana west of the Mississippi River (plus New Orleans); and small portions of land within the present Canadian provinces of Alberta and Saskatchewan.

'The Louisiana Purchase encompassed 530,000,000 acres of territory in North America that the United States purchased from France in 1803 for $15 million (…) Since 1762, Spain had owned the territory of Louisiana, which included 828,000 square miles. The territory made up all or part of fifteen modern US states between the Mississippi River and the Rocky Mountains (…) France acquired Louisiana from Spain in 1800 and took possession in 1802, sending a large French army to St. Domingue and preparing to send another to New Orleans. (…) In addition to making military preparations for a conflict in the Mississippi Valley, Jefferson sent James Monroe to join Robert Livingston in France to try to purchase New Orleans and West Florida for as much as $10 million. Failing that, they were to attempt to create a military alliance with England. Meanwhile, the French army in St. Domingue was being decimated by yellow fever, and war between France and England still threatened. Napoleon decided to give up his plans for Louisiana, and offered a surprised Monroe and Livingston the entire territory of Louisiana for $15 million. Although this far exceeded their instructions from President Jefferson,

time, the Napoleonic Code had not yet been enacted and in the new territory the laws of Spain were still in force. There was a huge number of provisions (more than twenty thousand laws and eleven different codes), with many conflicting statements: a situation of chaos that resembles what would also be depicted, some years later, in the main novel of Alessandro Manzoni, '*I promessi sposi*' ('The Betrothed').[2]

The new State needed to choose between common and civil law tradition systems and two parties opposed: William C.C. Claiborne, a former lawyer from Tennessee, appointed as commissioner of the US to take possession of Louisiana, wanted to establish English common law in the new State, while Edward Livingston, a New York lawyer who emigrated to Louisiana in 1803, opposed it and stood as a champion for the civil law system, with the support of a large part of the population because, as it has been noted:

> 'Their experience with Spanish judicial proceedings had left them with little or no respect for the courts, and they were afraid of the common law system where the decisions of the courts became law, and where they would be required to search through English jurisprudence to determine what laws applied. They preferred to continue to be governed by the laws of Spain, with which they were familiar, where all enforceable laws were required to have some statutory origin, and where the decisions of the courts did not assume the status of laws but were considered merely as judicial interpretations of statutory provisions'.[3]

> 'In 1806, the first Legislature of the Territory of Orleans convened and, apparently siding with Livingston, promptly adopted an act providing that the Territory of Orleans should be governed by the Roman and Spanish laws which were in effect at the time of the Louisiana Purchase (…) On June 7, 1806 (…) the Legislature adopted a resolution appointing James Brown and Louis Moreau Lislet 'to compile and prepare jointly a Civil Code for the use of this territory'. (…) They completed the work assigned to them in less than two years, and the civil code which they prepared was formally adopted by the legislature on March 31, 1808 (…) The official title given to the code of laws which was adopted in 1808 was 'Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its

they agreed.' ('Louisiana Purchase, 1803', Office of the Historian, United States Department of State, available at https://history.state.gov/milestones/1801-1829/louisiana-purchase (last visited 24 May 2016)).

[2] A. Manzoni, *I Promessi Sposi (The Betrothed)*, edited by C.W. Eliot, *The Harvard Classics*, Vol 21 (New York: PF Collier & Son, 1909-14).

[3] J.T. Hood jr, 'The History and Development of the Louisiana Civil Code' 19 *Louisiana Law Review*, 21 (1958).

> Present System of Government.' Although these compilers described their work as a digest of the laws then in force, it actually was a complete civil code, divided into three books, each of which was broken down into titles, chapters and articles, similar to our present code, except that in numbering the articles a new series of numbers was used in each title (…) The Civil Code prepared by Brown and Moreau Lislet, however, was not based on the Spanish law, as the legislature had directed, but it was based instead on the then newly adopted French Code, the Code Napoleon'.[4]

On the topic of requirements for the validity of the contract, the 1808 Louisiana Civil Code Digest resembles the Code Napoleon.

Section IV of the Digest was dedicated to the *cause* and reads: 'Art 31. – An obligation without a cause, or with a false or unlawful cause, can have no effect. Art 32. – An agreement is not the less valid, though the cause be not expressed. Art 33. – The cause is illicit when it is forbidden by law, when it is *contra bonos mores* (contrary to moral conduct) or to public order'.

It is easy to pick up, in the above-mentioned wording, the echo of Arts 1131-1133 Code Napoleon ('Art 1131. – An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect. Art 1132. – An agreement is nevertheless valid, although its cause is not expressed. Art 1133. – A cause is unlawful where it is prohibited by legislation, where it is contrary to public morals or to public policy'). These articles, half a century later, would have given the wording to Arts 1119-1122 of the Italian Civil Code, enacted in 1865.

This first Louisiana Digest was, then, substituted in 1825:

> 'On March 14, 1822, the legislature adopted a resolution appointing Moreau Lislet, Edward Livingston, and Pierre Derbigny 'to revise the Civil Code (of 1808) by amending the same in such manner as they will deem it advisable, and by adding unto … (it) … such of the laws that

[4] Ibid 23-26: 'No satisfactory explanation has been offered to this date as to why this was done. It is probable, however, that these two attorneys and the legislature had a high regard for the codification experience in France, not only as to form but also as to content, since both the French and the Spanish systems had many common sources in Roman law, and for that reason they may have used the Code Napoleon as a model without any intent to displace the Spanish law. This theory is supported by the fact that there are many differences between the Code Napoleon and the Louisiana Code of 1808, due largely to the fact that there were incorporated into the Louisiana Code a substantial number of Spanish laws, which had not been included in the French Code. The Louisiana Code contained 2127 articles, a little less than the number contained in the Code Napoleon'.

are still in force and not included therein.'(...) The title of this completed code, as promulgated, is 'Civil Code of the State of Louisiana.' Included in it were provisions originating from Spanish law which were not contained in the Code of 1808. It also contained some provisions from territorial statutes, and others from common law sources. There were a total of 3,522 articles, in this code, more than one and one-half times as many as were contained in the Code of 1808'.[5]

A third and last revision finally gave rise to the current Civil Code of 1870:

'Changes brought about by the Civil War, together with the adoption of a new constitution, made it necessary to again revise the Civil Code. Consequently, the legislature, in 1868, authorized a joint committee to select one or more commissioners to revise the Civil Code. John Ray, of the Monroe Bar, who already had been selected to revise the general statutes of the state and the Code of Practice, also was commissioned to revise the Civil Code. Ray thereupon employed three attorneys to assist him in this undertaking, and he and his assistants submitted a project of a revised civil code which was printed in English in 1869. The revised code which they proposed was adopted as Act 97 of the Legislature of 1870, and it was given the official title of "The Revised Civil Code of the State of Louisiana". The Civil Code of 1870 is substantially the Code of 1825, except for the elimination of all articles relating to slavery and those which had been repealed, and the incorporation of all acts passed since 1825 amending the Civil Code or dealing with matters regulated by the Code'.[6]

As it was noted:

'The Louisiana Civil Code is not simply an adaptation of the Code Napoleon. Neither is it a 'digest' of the Spanish laws which were in force in 1808, as the title of the code adopted during that year seems to indicate. It includes many provisions having a basis in common law, but the common law system does not prevail in this state – despite arguments advanced by some to the contrary. The simple truth of the matter is that Louisiana has developed a legal system of its own, and although grounded on civil law, it must be classified as sui generis'.[7]

Referring to *cause*, the Civil Code of 1870 repeats as follows the rules

[5] Ibid 29-30.
[6] Ibid 31-32.
[7] Ibid 33.

contained in the Digest and taken from Code Napoleon:

> 'Art 1966. – No obligation without cause: An obligation cannot exist without a lawful cause; Art 1968. – Unlawful cause: The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy; Art 1969. – Cause not expressed: An obligation may be valid even though its cause is not expressed; Art 1970. – Untrue expression of cause: When the expression of a cause in a contractual obligation is untrue, the obligation is still effective if a valid cause can be shown'.

Moreover, the lawmakers of the 1870 Code also included a definition of *cause* that is coherent with the one afterwards adopted by Quebec Civil Code: in fact, Art 1967 of the Louisiana Civil Code (LCC), titled 'Cause defined; detrimental reliance' reads (first para): 'Cause is the reason why a party obligates himself'.

III. Quebec Civil Code and the Role of Civil Law Scholarship in Its Drafting

As E. Fabre-Surveyer, a prominent Judge of the Superior Court of the Province of Quebec, pointed out in a speech delivered on 8 April 1938, at the Dedication of the Law Building of the Louisiana State University law school, 'The position of the civil law in Quebec might well have been very different had not the Code of Louisiana been a successful experiment. In Louisiana the civil law was codified in 1808; the Civil Code of Quebec did not come into existence until 1866. Hence the experience of Louisiana in codifying and applying French civil law in America, extending over half a century, was of inestimable benefit to the framers of the Quebec Code'.[8]

The Civil Code of Lower Canada (CCLC)[9] was enacted in 1866 and covered all areas of private civil law, mostly based on and inspired by the

[8] E. Fabre-Surveyer, 'The Civil Law in Quebec and Louisiana' 1 *Louisiana Law Review*, 649 (1939): 'It is true that during the first half of the nineteenth century other countries had modelled their law on the Civil Code of France; but distance and difference of language made their work less valuable to Quebec than the experience of Louisiana. In 1857, the law decreeing the preparation of a civil code for Quebec stated that 'the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada'.

[9] Lower Canada was the name of the southern part of the present-day province of Quebec between 1791 to 1841.

1804 Code Napoleon.[10] The preamble of the Act, passed in 1857, ordered the drafting of a Code, claiming that:

> 'The said Commissioners shall reduce into one Code, to be called the Civil Code of Lower Canada, those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character (...)'.[11]

The need to reduce chaos to order was so evident in 1859, while the Commission for the codification was at work, that M. Désiré Girouard, later a prominent member of the Supreme Court of Canada, could say:

> 'There is nothing more uncertain than the actual law of Lower Canada, nothing more confused than the state of Canadian law'.[12]

Therefore, in the words of Judge Edouard Fabre-Surveyer,

> 'The Civil Code of Quebec may (...) be said to be a younger brother of the Louisiana Code - at least of the Louisiana Civil Code of 1825'.[13]

Like the Code Napoleon, the Civil Code of Lower Canada did not define *cause,* although it required it for the enforceability of the obligation. Art 982 CCLC mandated that: 'It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object'.

Art 984 of the Civil Code of Lower Canada is also of some interest, because it placed *cause* and *consideration* on the same level: in fact, it stated that: 'There are four requisites to the validity of a contract: Parties legally capable of contracting; their consent legally given; something which forms the object of the contract; a lawful cause or consideration'. It is easy to note that the wording used in Art 984 CCLC is quite the same of

[10] R.A. Macdonald, entry 'Civil Code' *The Canadian Encyclopedia*, available at http://www.thecanadianencyclopedia.ca/en/article/civil-code/ (last visited 24 May 2016): 'The 1866 Code was the fruit of a Codification Commission created in 1857 to consolidate, in a bilingual statement, all civil laws in Canada East. For doctrine, the commissioners relied heavily on the works of the great French jurist Pothier, to a lesser extent on various commentaries on the Code Napoléon and occasionally upon the text of the Louisiana Civil Code. They derived the majority of the Code's rules from the Custom of Paris, brought to New France in 1663'.

[11] E. Fabre-Surveyer, n 8 above, 650.

[12] As reported by E. Fabre-Surveyer, n 8 above, 651.

[13] Ibid 649.

Art 1108 Code Napoleon,[14] except for adding, as fourth requirement, the word *consideration* to *cause,* as if they were synonyms.

In conclusion, while the requirement of *cause* is present in the Civil Code of Lower Canada (Arts 982 and 984), it is not defined, although it is associated with the word *consideration*.

Some decades later, in a well known Supreme Court of Canada case (Stephanie Brenda Bruker *Appellant* v Jessel (Jason) Benjamin Marcovitz *Respondent* and Canadian Civil Liberties Association *Intervener*) decided in 2007, the Court was asked to ascertain if an agreement with religious implication could be regarded as a contract under the *Civil Code of Lower Canada* (applicable to the claim) and could ground a damages claim. In that decision, the Supreme Court pointed out that:

> 'In the instant case, the appellant argues that the respondent must pay damages because he breached an obligation resulting from clause 12. Article 982 C.C.L.C. says the following about the obligation: 982. It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object. (...) It must therefore be determined whether clause 12 constitutes a contract in Quebec law. For this purpose, it is necessary to consider the requirements for 'validity' of a contract. According to art. 984 C.C.L.C., a contract must meet four conditions: (...) Cause is not defined in the C.C.L.C., but it is defined in the Civil Code. According to the Minister's commentaries that were published when the Civil Code was enacted, the definition in art. 1410 C.C.Q. is the one that was accepted by commentators and the courts at the time of the reform. Art. 1410 C.C.Q. reads as follows: 1410. The cause of a contract is the reason that determines each of the parties to enter into the contract. According to the commentators, the cause of a contract has an objective aspect. It is the element that justifies the contract's existence. For each party, the objective cause of the contract is the other party's undertaking. But this information is not very helpful. Where a synallagmatic contract is concerned, the cause, defined as the other party's undertaking, is of no assistance in determining whether the contract is valid. What is relevant above all is the subjective aspect, namely the reason why a party enters into the contract. Whether considered in light of its objective aspect or its subjective aspect, the cause need not be mentioned in the

[14] Art 1108 Code Napoleon reads as follows: 'Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A definite object which forms the subject-matter of the undertaking; A lawful cause in the obligation'.

> contract. In view of the words of art. 984 C.C.L.C. ('(a) lawful cause or consideration'), the courts concern themselves with the cause of a contract only when its lawfulness is contested'.[15]

In other words, the Supreme Court interpreted the requirement of *cause*, which the former Code (the Civil Code of Lower Canada) does not define, the same way as the more recent Quebec Civil Code defines it.

The Quebec Civil Code (QCC), in force at the time of the decision (2007) was enacted in 1991 and became mandatory on 1 January 1994. From that time it replaced the Civil Code of Lower Canada.[16]

The drafting of the actual Civil Code of Quebec was a long-lasting task, started in 1955 and completed in 1994:[17] it was inspired and created by the Law Reform Commission, led by the prominent Canadian scholar Roderick Macdonald. The role of the Civil Law scholarship in such a drafting during the late 1970s was emphasized by Macdonald himself, who chose 1977 as a cutoff point for completion of the (first) draft:

'Two related reasons sustain this choice: first, the Civil Code Revision

[15] *Bruker* v *Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54, paras 163-168.

[16] N. Des Rosiers, 'Book Review: Quebec Civil Law: An Introduction to Quebec Private Law, by J.E. C. Brierley and R.A. Macdonald (eds)' 33 *Osgoode Hall Law Journal*, 206 (1995).

[17] 'In 1955, the Government of Québec embarked on a reform of the Civil Code with the passage of the Act respecting the revision of the Civil Code. The Civil Code Revision Office was established to direct the project and it created a number of committees to make recommendations on the reform of various areas of the civil law. Consultations were held on the reports produced by the Office and the committees which were subsequently incorporated into a final report tabled in the Québec National Assembly in 1978 in the form of a Draft Civil Code with commentaries. After receiving the report, the government held public consultations on family law, which it considered a priority. The reforms proposed in this field were passed into law in December 1980. Bills to reform the law of persons, successions and property were later introduced in the National Assembly in 1982 and 1983 before ultimately being consolidated into a single bill which was enacted in April 1987.Between December 1986 and June 1988, broad consultations were held on three draft bills: one dealt with real security and publication of rights, a second draft bill dealt with obligations and a third dealt with evidence, prescription and international private law. During this period, a number of amendments were made to the family law provisions of the Civil Code of Lower Canada and the Civil Code of Québec to address the pressing needs of the day. The new provisions dealt with arbitration law reform, co-ownership and emphyteusis, the establishment of family patrimony and reform of public curatorship and the protective supervision of persons of full age. The articles governing international adoption, which had been substantially amended in 1983 and 1987, were again revised in 1990. The new draft Civil Code of Québec was tabled in the National Assembly on December 18, 1990. It was passed on December 8, 1991, and came into force in 1994', (A Short History of the Civil Code Reform, available at http://www.justice.gouv.qc.ca/english/ministere/dossiers/code/code-a.htm) (last visited 24 May 2016).

> Office submitted its report and wound up its various study committees in 1977; second, a major private law research group, the Quebec Research Centre for Private and Comparative Law was established at the same time'.[18]

In the first draft of the Code, completed in 1977, the concept of *cause* was repelled. The Report on the Quebec Civil Code explained:

> 'In chapter I of Title One on contracts, having made a study of Quebec positive law and foreign legislation, it was decided to abolish the cause as a necessary condition to the formation of a contract. This measure was seemingly justified by the fact that the so-called objective cause is so little used in Quebec positive law and it was considered that this concept was sufficiently compensated for by other provisions relating to the object of obligations, to consent, to the object of a contract, to formalism, to revision for unforeseen events, to abusive clauses, to the exception of inexecution, to resolution, to impossibility of execution and to indivisibility, so as to fulfill the traditional role played by the concept of cause'.[19]

On the contrary, the definitive version of the Code, in force since 1994,[20] mentions the requirement of *cause* for the validity of the contract and

[18] R.A. Macdonald, 'Understanding Civil Law Scholarship in Quebec' 23 *Osgoode Hall Law Journal*, 573-608, 604 (1985).

[19] *Report on the Quebec Civil Code - Civil Code Revision Office* - Volume II, Tome 2 *Commentaries* - 1977 Bibliotheque nationale du Quebec, 554-555. On 1955 'Quebec legislature decided to revise systematically the Code with a view to giving renewed expression to the general law and to render it more in step with the social, political and economic realities affecting private law relations in Quebec. The Civil Code Revision Office was created in that year. Its first chairman was the Hon. Thibaudeau Rinfret, former Chief Justice of the Supreme Court of Canada, who was replaced in 1961 by an advocate, André Nadeau, and, then, by Professor Paul-André Crépeau of McGill University in 1966. The task before the C.C.R.O. was an enormous one: to update the 1866 Code by rethinking it in its entirety, to recast the relationship between the Civil Code and an increasingly complex body of statutory law, and finally to articulate the basis for reform and revision in each of the areas that a new code might touch upon. Rather than proceeding with the whole recodification at once, the C.C.R.O. was called upon by the government to work in stages, with some important parts of its effort culminating in major modification to the body of Quebec private law, enacted during the course of its mandate and thereafter. The end goal was to provide the Quebec legislature with a draft code that was to replace completely the Civil Code of Lower Canada. This draft was completed in 1977, and the resulting publication contains explanatory notes not unlike the codifiers' reports published in 1865 just before the enactment of the Civil Code of Lower Canada' (History of the C.C.R.O. available at http://digital.library.mcgill.ca/ccro/history.php (last visited 24 May 2016)).

[20] 'The Civil Code of Québec was enacted on 4 June 1991 by chapter 64 of the Statutes of Québec. It came into force on 1 January 1994 under the authority of Décret 712-93. While available in many commercial editions, the only official version is that of S.Q.

contains several doctrinal definitions, among which is *cause*, which appears strictly connected to the doctrine of *consideration*.

IV. Doctrine of *Consideration* in Canadian and US Legal Tradition

Consideration is the requirement to enforce a promise under common law, on the basic assumption that, due to the natural selfishness of every human being, a promise can be regarded as serious – and therefore binding – only if made in return for, or in relation to, a detriment of the promisee. Using the words of Benjamin N. Cardozo, *consideration* must consist of three elements: (a) The promisee must suffer legal detriment; (b) The detriment must induce the promise; (c) The promise must induce the detriment.[21]

Canadian scholars add that 'a bargain is not formed merely by mutual assent. There must be some exchange of values. Something must be given or promised'.[22] They note that the final purpose of the doctrine of

1991, c. 64, as amended. The provisions of the new code of 1991 are complemented by those of An Act respecting the implementation of the reform of the Civil Code S.Q. 1992, c. 57. The Ministry of Justice has also released a publication entitled Commentaires du Ministère de la Justice (Quebec City: éd. off., 1993 (vol. 1 & vol. 2), 1994 (vol. 3) (no English version available) in which brief indications of the acknowledged sources of the new provisions and some explanatory comment upon them are provided. Figuring prominently among the cited sources in this text is the Report on the Québec Civil Code/Rapport sur le Code civil du Québec of 1977/78 of the Civil Code Revision Office. It must be observed that during the period between the release of the Report of the Civil Code Revision Office (1977/78) and the enactment of the new code (1991), the government of Quebec carried on with its consideration of the appropriate legislation to adopt. In other words, the Draft Civil Code of the Office was never adopted as such, saving only those portions of it that constituted Book Two (The Family) of the first Civil Code of Québec enacted in 1980. During this 12 year period, governmental jurists re-fashioned much of the original Draft in its organization, style and content.' (The Final Report, available at http://digital.library.mcgill.ca/ccro/final_report.php) (last visited 24 May 2016).

[21] J.D. Calamari and J.M. Perillo, *The Law of Contracts* (St Paul: West Publishing, 3rd ed, 1987), 187-188.

[22] S. Waddams, *The Law of Contracts* (Aurora, ON: Canada Law Books, 5th ed, 2005), § 118, 82. We can add that *consideration* must be present and not merely declared in the recitals of the contract: 'in all commercial agreements, the statement or declaration (of an existing *consideration*) is unnecessary; it adds nothing to the enforceability of the agreement and does not change a court's approach to its interpretation. *Consideration* (in the technical sense now being examined) will be supplied by the promises made by the parties or by the payment of the price by one of them. If the agreement is not a commercial one and, for example, involves a gratuitous promise to transfer land or to make a gift, the recital or declaration that there is consideration will not transform the promise into an enforceable commercial agreement' (J. Swan, *Canadian Contract Law* (Toronto: LexisNexis Canada, 1st ed, 2006), 33). However, they are aware of the ambiguity and uncertainty that the long history of the doctrine of *consideration* shoulders. It also

consideration is to protect legitimate reliance – 'the protection of reliance can be achieved both by contract and by tort':[23] therefore the involvement of the concept of *consideration* occurs only if the claim is raised in a contract, but the need for protection is wider. A more modern approach in Canadian doctrine on promise enforceability can therefore focus on the protection of the parties' *reasonable expectations*:

> 'the questions which any court that is asked to enforce a promise must consider (are) : (i) will the promisor be caught by surprise if the promise is enforced? (ii) will the promisee be similarly caught if the promise is not enforced? (iii) will either party be unjustly enriched if the promise is either enforced or refused enforcement? (…) The common law has dealt with the pervasive risk of surprise by adopting the standard of reasonableness: the belief of the party who runs the risk of being surprised has to be reasonable. The promisor's expectation that the promise will not be enforced has to be reasonable, as has the promisee's expectation that it will be enforced'.[24]

Although other tools exist to ascertain whether a promise must be enforced or not (ie the abovementioned 'risk of surprise' beyond reasonable expectation in the court's decision, that appears to be another way to name the protection of a grounded reliance), the traditional common lawyers' approach remains moored on *consideration*. And, as appears clear from Cardozo's doctrine, the doctrine of *consideration* remains more focused on the *promise* than on the *contract*, although the statement of (c) above – requiring that a promise must have induced the detriment of the promisee – refers to a *contract* because it means, as was affirmed, 'that the offeree must know of the offer and intend to accept'.[25]

happens that the approach to use contractual remedies in any dispute brings a precedent not suitable in other cases: for example 'those who have expectations, even reasonable expectations, of another's generosity, i.e. willingness to make a gift, will, when their expectations are disappointed, sometimes make their case on a promise to make a gift. (…) Because these claims have nothing in common with a claim arising in a commercial relation, their treatment as contractual claims with a careful analysis of the extent to which the requirements of a bargain were met appear almost ludicrous. Again, the use of such case as authorities on the doctrine of *consideration* tends to create awkward, if not bad, precedents' (Ibid 19).

[23] Ibid 24, adding: 'Anyone who relies on a promise may incur detrimental reliance in two principal ways: (i) money may be expended in preparation for the other's reciprocal performance; or (ii) opportunities to make other deals or other arrangements may be foregone'.

[24] Ibid 23.

[25] J.D. Calamari and J.M. Perillo, n 21 above, 189.

In effect, contracts – and in particular bilateral contracts – are borne in mind by common lawyers when drafting the doctrine of *consideration* and weighting its consequence, as they say:

> 'The essence of consideration, then, is legal detriment, that has been bargained for by the promisor and exchanged by the promisee in return for the promise of the promisor'.[26]

Thus, on the one hand, a simple contract is a bargain and must be supported by *consideration*; on the other hand, the promisee that seeks remedy in law can obtain it only if the detriment he has suffered justifies the enforceability he requires: in other words, he will obtain damages only if his reliance upon the promise was justified.

That was quite the same approach which the French codification reflected on Code Napoleon – which led in turn to most of the European private law codes, including the first Italian one, enacted in 1865, after completion of the reunification of the country. In fact, French Code lawmakers speak of contract, but have in mind the obligation and seek the reason – the justification for the obligation itself – finding it in what was named as *cause*.

Section 1108 of the Code Napoleon – which is still in force with the same original wording – reads:[27] 'Four conditions are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A certain object forming the matter of the contract; A lawful *cause* in the bond', where the bond is an English barrister's translation of the French word *obligation* (the *obligation*). But the *obligation* – its etymology explains[28] – is the equivalent of a legal promise, and the *cause*, therefore, is the reason in *consideration* of which the legal system gives its sanction to the obligation, to the promise.

Regarding the Code Napoleon's requirement of a *cause*, it is also important to bear in mind that a contract was primarily considered a means to acquire property (section 711)[29] – and indeed was the main means to do so – so it was of the essence that an obligation, such as that of transferring ownership of a property, be counterbalanced by a *cause*.

[26] Ibid.

[27] According to the translation *By a Barrister of the Inner Temple* (London: William Benning, 1827).

[28] '*Obligatio est iuris vinculum quo, necessitate, adstringimur alicuius solvendae rei, secundum nostrae civitatis iura*' (*Institutiones Justiniani,* I. 3,13 Pr), where in Latin *vinculum* means 'binding'.

[29] Section 711 Code Civil : '*La propriété des biens s'acquiert et se transmet par succession, par donation entre vifs ou testamentaire, et par l'effet des obligations*'.

Therefore, the Code Napoleon requires a *cause* because it refers to a synallagmatic contract that involves an obligation – a *promise* – that implies a detriment in the counterpart (ie a conveyance of a property). That is why section 1131 NC reads: 'An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect', and the convergence between the unenforceability of a promise lacking *consideration* and section 1131 French Civil Code is evident.

Because the contract borne in mind in drafting the discipline in the Code Napoleon is bilateral,[30] we can easily comprehend why section 1132 NC reads: 'An agreement is nevertheless valid, although its cause is not expressed'– that is, because the *cause* is implicit in the *mutual* promises. The usual reciprocal justification of the mutual promises contained in contract also explains why the unilateral promise – the one that is not embedded in a contract, but 'stands alone' – is now regarded with distrust by the Italian Civil Code: section 1987 reads, 'A unilateral promise of performance is not binding except in specific cases permitted by law'.[31]

Civil Code makers are however more familiar than common law practitioners with an abstract approach and their training is based on the idea of a code – born out of the French *Enlightenment Movement* – as a book summarizing all the duties and rights of a private citizen with respect to others.

Civil Code makers prefer generalizations more than practical examples and therefore they regroup every bilateral agreement in the category of the contract, in some cases in spite of common economic sense. As was reported, Napoleon himself, attending a work session of the Committee drafting the Civil Code, showed surprise and even concern listening to the commissioners defining a gift as a contract, although the donor receives no benefit for himself from the donation, but only a detriment or a disposal. In the case of a gift, defined by section 894 NC[32] – the evident lack of justification for the disposal of the property is balanced by the solemnity of the deed made before a public notary.

In other words, if we wish to return to the reason underlying the requirements of *consideration* or *cause*, we may discover the strict

[30] As defined by section 1102 as 'A contract is synallagmatic or bilateral where the contracting parties bind themselves mutually towards each other'.

[31] The only cases permitted by law are set forth by section 1988, according to promisee only a relief in the proof of a legitimate *cause* of the promise, but allowing the promisor to prove the lack of any *cause*. Section 1988 ICC states: 'A promise of payment or the acknowledgement of a debt exonerates the person in whose favor it is made from the burden of proving the underlying obligation. Such obligation is presumed, subject to contrary evidence'.

[32] Section 894 NC: 'A gift inter vivos is a transaction by which the donor divests himself now and irrevocably of the thing donated, in favour of the donee who accepts it'.

parallelism between them: on the one hand, they both ensure protection of the promisor against a disposal not counterbalanced by an income (the detriment of the counterpart); on the other hand, they assure a grounded and legitimate reliance[33] of the counterpart seeking remedies to enforce the promise or the obligation.

In addition, we can note that the two main legal systems (common law and civil law) have developed alternative ways to enforce simple promises – those that lack *consideration* or a sound *cause* – like in the case of a gift: a special form of expression of consent that guarantees the necessary attention and reflection of the promisor on the promise and the obligation into which he wants to enter. We refer, in the civil law world, to the requirement of the intervention of a public notary with witnesses at the execution of the deed and, in the common law one, to the special form that consists of the *deed under seal*. As already stated:

> 'the essence of the law regarding deeds is that it provides a method for making promises enforceable that depends solely on the fact that the writing that records the parties' promises (or perhaps the promise of one person only) is completed with a certain prescribed formality. What is equally important in light of the general concerns that underlie the enforcement of any promise, is that the necessary formality should be something that brings home to the person making the promise the significance of what he or she is doing'.[34]

The achievements which both legal systems seek with such formal prescriptions are the same: full consciousness and awareness of the donor of the detriment that he is causing himself without any *consideration* or relevant *cause* that counterbalances it.

But since the time civil lawyers lost the root of the concept of *cause,* problems have arisen in managing the concept of *cause* itself and even in communicating on these concepts between the two legal systems.

To give an example familiar to me, the first Italian Civil Code, enacted in 1865, was consistent with the Code Napoleon: the paragraph called 'upon the cause of contracts' contained section 1119 and section 1120, which read 'An obligation without cause or with a false cause, or with an

[33] We would say '*affidamento*', in Italian.

[34] J. Swan, n 22 above, 121. We must point out, however, that due to the complication of the doctrine of *consideration*, deeds under seal are used (more in the past, than nowadays) also to enforce promises or contracts that are not gratuitous, but do not consist in the simple exchange of promises between two parties (ie options, irrevocable offers, rescheduling of debts, amendments of modifications of a previous contract or promise).

unlawful cause, may not have any effect' and 'A contract is valid, although its cause is not expressed', following quite literally what its section 1131 and section 1132 stated.[35]

In the second, and current, generation of the Italian Civil Code (ICC), enacted in 1942, the rules changed in wording and now the *cause* is mentioned in number 2 of section 1325 – which sets out the requirement for a valid *contract* – but without any explanation of its meaning.

The 1942 ICC mentions the requirement of *cause* for contracts and not for obligations. After 1942 scholars and Courts have started to use that concept as a means to control the lawfulness of party autonomy and the results the parties wish to achieve. Following these paths, the meaning of the term *cause* also lost its certainty in the civil law systems, and the term often became a duplication of the concept of object (or subject matter).[36]

Some Italian scholars – aware of the legal comparison – proposed to return to the root of the concept – *cause* as a reason for the binding promise – as the only way to give it back an understandable meaning,[37] but nowadays the concept of *cause* (mentioned in section 1325, second part, ICC) is often used, in courts, as a *general clause* (or *general provision*) to challenge the validity of contracts whose outcomes are not acceptable to the parties to them.

When the contract is of prejudice to the *public interest*, courts may state that the *cause* is unlawful (section 1346 ICC) – and in that meaning *cause* has lost any connection with *consideration* – but they may also declare, with the same result (nullity of the contract) that the object (or the subject matter, used as a synonym) of the contract is unlawful or contrary to public policy and therefore null as per section 1325, no 3, and 1418, no 2, ICC.

When, on the contrary, the contract is of prejudice to the position of one of the parties to it (ie it affects only *private interest*), the lack of *cause* is the tool courts use to deny validity to the contract. Consider the case, for

[35] Section 1131 NC: 'An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect'; Section 1132 NC: 'An agreement is nevertheless valid, although its cause is not expressed'.

[36] For example, G. Alpa and V. Zeno Zencovich, 'Italian Private Law' *The University of Texas at Austin - Studies in Foreign and Transnational Law*, 162 (2007), translate the word *cause,* requested as per section 1325, no 2, ICC, as 'the object (that) is the outcome that the transaction is calculated objectively to produce' and therefore speak about the *object* (section 1325, no 3, ICC) as 'subject matter (that) is whatever the declarer is making disposition of, in other words the content of the legal transaction'.

[37] R. Sacco and G. De Nova, 'Il contratto', in R. Sacco ed, *Trattato di diritto civile* (Torino: Utet, 3rd ed, 2004), I, 790 following the paths of G. Gorla, *Il contratto. Problemi fondamentali trattati con il metodo comparativo e casistico* (Milano: Giuffrè, 1955), I; G. Gorla, 'Consideration' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 176.

example, of a derivative swap contract entered into in OTC (over the counter) negotiations, allegedly to provide coverage for a risk of change to which one party is already exposed, but in effect drafted by the financial professional in a manner rendering it incapable of covering such a risk: in that case courts often declare a lack of *cause* and dismiss the request to enforce the contract.

In conclusion, in some civil law jurisdictions the concept of *cause* has lost its clarity to the extent that, given a proposal of European restatement or uniform codification, it is doubtful whether it would be worth maintaining the concept or not.

In such a situation, the provisions which mention – or even define – *cause*, in the Louisiana and Quebec Civil Codes, remind us about the origin of the concept and recall its scope, and are of great interest also for the civil lawyer, from different points of view. Firstly, QCC refers to the *cause* of the obligation as a balance of the promise itself. Section 1371 QCC reads:

> 'It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence'.[38]

Secondly, both Codes consider the *cause* implicit when promises are mutual, as section 1380 QCC states: 'A contract is synallagmatic, or bilateral, when the parties obligate themselves reciprocally, each to the other, so that the obligation of one party is correlative to the obligation of the other'[39] following Art 1908, Louisiana Civil Code (*Bilateral or synallagmatic contracts*) that tells: 'A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other'.

Thirdly, both codes did not refuse to state a definition of the concept: section 1410 QCC reads, 'The cause of a contract is the reason that determines each of the parties to enter into the contract', as previously section 1967 LCC, titled 'Cause defined; detrimental reliance' has stated: 'Cause is the reason why a party obligates himself', using quite the same words.

[38] Section 1371 : '*Il est de l'essence de l'obligation qu'il y ait des personnes entre qui elle existe, une prestation qui en soit l'objet et, s'agissant d'une obligation découlant d'un acte juridique, une cause qui en justifie l'existence*'.

[39] Section 1380 : '*Le contrat est synallagmatique ou bilatéral lorsque les parties s'obligent réciproquement, de manière que l'obligation de chacune d'elles soit corrélative à l'obligation de l'autre. Il est unilatéral lorsque l'une des parties s'oblige envers l'autre sans que, de la part de cette dernière, il y ait d'obligation'.*

Moreover, section 1412 QCC provides, better than any other definition given by Italian scholars after the 1942 ICC,[40] a definition of the *content* of the contract, ie the object, useful to ascertain its lawfulness in relation to the public and general interest, stating:

> 'The object of a contract is the juridical operation envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract'.

The above-mentioned section 1410 QCC and section 1967 LCC provide the only given legislative definition of *cause*, to the best of my knowledge. Such definition seems remarkable because it includes both the counter-obligation typical of bilateral contracts, and also the interest of the promisor that supports the unilateral contract not intended to be a gift: for example the case of an employer providing transportation for his employees without charging them but not as a gift.

In conclusion, North American civil codes have achieved, in my opinion, the significant result of reminding civil lawyers of the origin and meaning of the concept of *cause* and of giving a discipline of the contract that harmonizes with the one provided by common law for the rest of North American states or provinces.

[40] E. Betti, *Teoria generale del negozio giuridico* (Torino: Utet, 1955), 169, proposed a definition of *cause* of the contract – different to the one of *cause* of the obligation – that sounded as follows: 'cause is the social and economic goal or aim sought by the contract (or by the juridical operation)', a definition that is not other than the one of the object of the contract.

Essays

Rationality and Counterfactual Legal Analysis

Antonio Estella de Noriega*

Abstract

The aim of this article is to argue that counterfactual legal analysis should be used as a primary method in judicial interpretation of legislation. The article examines this issue assuming a rationality setting in which law is understood as a credibility device. Judges should show deference to the legislator when counterfactuals have been foreseen by the latter; in contrast, they might substitute their own judgment for the legislator's choices when the latter has not devised a counterfactual situation, and the norm is not an equilibrium from a 'law as credibility' perspective.

'Bad promises are better broken than kept'.

Abraham Lincoln
April 11, 1865.[1]

I. Introduction

We often rely on counterfactual thinking, as in 'if I had married Tony instead of Philip, I would have been happier'. The famous Woody Allen counterfactual statement (had I met God, I would have told him not that he is evil – just that he is an underachiever) is but another proof of this. In more general terms, the arts, like movies, or novels, or paintings, can be seen as fictional counterfactuals – as stories of what could have happened if we had been different people. We sometimes want to be those people – if only we could live those alternative stories.[2]

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[1] Collected works of Abraham Lincoln available at http://quod.lib.umich.edu/l/lincoln/lincoln8/1:850?rgn=div1;singlegenre=All;sort=occur;subview=detail;type=simple;view=fulltext;q1=april+11+1865 (last visited 24 May 2016).

[2] For example, as for novels, this is precisely the point that is made by J. Cercas, *El punto ciego: Las conferencias Weidenfeld 2015* (Barcelona: Penguin Random House Grupo Editorial España, 2016). Cercas argues: '*Es mentira (…) que las novelas sirvan solo para*

Counterfactual thinking is a rather sophisticated kind of thinking. It requires a certain level of psychological and neuronal development. In an interesting article on the relationship between law and the brain, Abigail A. Baird and Jonathan Fugelsang[3] give evidence of the (to a certain extent) counterintuitive finding that adolescents are less capable of counterfactual thinking than adults, due to their relatively less mature brains.[4] Counterfactual thinking is therefore complex.

That we use counterfactual thinking all the time (to surmise what could have been if we had done something different) and that this kind of thinking is demanding, does not necessarily provide for a good argument in favour of its being used in social sciences; however, as we know, counterfactual thinking *is* used in the social sciences. History – as an academic discipline – is a prime example of this. In fact, it can be argued that serious counterfactual thinking is born in history.[5] However, it is not restricted to this discipline: political science, economics, sociology and even psychology, all rely on counterfactual thinking. But the question is: what about law?

The idea that counterfactual thinking must be used, and in fact is used, in the legal realm is not entirely new. However, it is rather restricted to what is called the 'evidence-finding-and-giving' phase of judicial activity. The aim of this contribution is to argue that counterfactual thinking is also fit for legal interpretative purposes. Not only this – the aim of this article is to show that counterfactual thinking should be a primary method for approaching judicial interpretation of legislation.[6] The question that this paper will address is therefore the following: can counterfactual legal interpretation be enlarged beyond the evidence-finding-and-giving phase of the judicial process? If so, how can this be done?

To this end, I shall proceed as follows. In the next section, Section 2, I

pasar el rato, para matar el tiempo; al contrario: sirven (...) para hacernos como nunca hemos sido'. ('It is untrue that novels only serve the purpose of having a good time; on the contrary, they serve the purpose of making us as we have never ever been').

[3] A. Baird and J. Fugelsang, 'The Emergence of Consequential Thought: Evidence from Neuroscience', in S. Zeki and O. Goodenough eds, *Law and the Brain* (Oxford-New York: Oxford University Press, 2004), 245-258.

[4] This is counterintuitive since one would tend to think that adolescents are more prone than adults to delusional thinking, to imagining parallel and fictional worlds. Fictional worlds are not counterfactual, but they are made of them.

[5] See P. Tetlock and A. Belkin, 'Counterfactual Thought Experiments in World Politics: Logical, Methodological and Psychological Perspectives', in P. Tetlock and A. Belkin eds, *Counterfactual Thought Experiments in World Politics. Logical, Methodological and Psychological Perspectives* (Princeton: Princeton University Press, 1996), 1-38, 3: 'There is nothing new about counterfactual inference. Historians have been doing it for at least two thousand years'.

[6] This could be applied as well to private contracts, but I shall not deal with this point in this article.

will show the basic structure of counterfactual thinking, in general terms. In Section 3, I will show and discuss a number of examples in which counterfactual thinking is used by the courts. Sections 4 and 5 will deal with the question of how counterfactual thinking can be extended from the evidence-giving phase of a trial to the analysis of the equilibrium path of a given norm. Finally, the concluding section of this article, Section 6, will provide a very simplified version of this paper's argument as well as some final remarks.

II. The Structure of Counterfactual Reasoning

Let us now fine-tune what we may understand by counterfactual reasoning. The first point to be made is that counterfactual reasoning has a link with facts. This is why it is of no surprise that where this kind of reasoning has made most headway has been in history as an academic discipline. Therefore, the first thing that we need to have is a certain set of facts which are proved, or deemed to be true. I shall refer to them as 'F'.

The second thing that is needed to make sound counterfactual reasoning is a consequence. Therefore, given F, a particular consequence is produced. I shall refer to this consequence as 'C'.

If we tie together the two previous elements, what we have is the following structure:

given F, then C

This is where counterfactual reasoning operates, or impacts upon. To start with, the question that counterfactual reasoning tries to solve is the following: how do we know that F produced C? How can we be sure of that? Though a truism, it is worthwhile remembering that we are speaking here not of natural sciences or physics but *of the course of human events*. Therefore, the ultimate proof that F produced C in social sciences is very difficult to obtain, if not, in many cases, impossible. This is even more so the case in situations of multi-causality, where there are multiple causes that could have produced a particular consequence. What we want to isolate is which cause, or which causes, *directly* produced C.

Therefore, one of the ways that we can ascertain whether F produced C is to ask about the alternative courses of actions that could have produced C. This is what we call counterfactual reasoning. Counterfactual reasoning is therefore a thought experiment in which we inquire about the alternative factual cause or causes that could have produced a given outcome. Thus, the structure of a counterfactual thought experiment is the following: if F1 had happened, would C have happened as well? If the

answer we give to this question is positive, then F is false. On the contrary, if the answer we give to this question is negative, then F would be true.

Let us give an example to shed some light on what can be seen as a very obscure and cold discussion. A very good example is provided by the decision taken by the US government, at the end of the Second World War, to drop two atomic bombs on Japanese soil. This has been deemed to be one of the most contested decisions ever. In fact, it spurred a social movement in the US – and beyond – of anti-war and anti-atomic energy sentiments, among other things. The main way of justifying this decision by the US government was to say that if the atomic bombs had not been dropped on Hiroshima and Nagasaki, then the war would have ended much later, and the toll of lives (of American lives, of course, but also of other countries' lives) would have been much higher. In other words, the costs of dropping the bombs were much lower than the costs of not doing so, and the benefits of doing so much higher than the benefits of not doing so.

However, this is, as is known, very controversial. How do we know this to be true? How do we know that if the bombs had not been dropped, the imperial army would not have been defeated in a question of months? Ulterior research on the issue[7] shows that in fact the Japanese army was already very weak when the bombs were dropped, and that there were movements within the Japanese government (not the least important those of the Emperor Hirohito himself)[8] to stop the war as soon as possible. Maybe, if the bombs had not been dropped, the outcome would have been

[7] See, in particular, G. Gentile, *How effective is Strategic Bombing? Lessons learned from World War II to Kosovo* (New York-London: The New York University Press, 2001).

[8] See the United States Strategic Bombing Survey Summary Report (Pacific War) of 1 July 1946, available at http://www.anesi.com/ussbs01.htm#teotab (last visited 24 May 2016). This is the Report on Strategic Bombing in Japan that Paul Nitze (director and then as Vice Chairman of the Strategic Bombing Survey) presented to the US Senate Committee on Atomic Energy, after the Second World War. The report is, precisely, a fascinating counterfactual-policy exercise, as shall be shown in the next footnote. As regards the Emperor Hirohito's role in shortening the war, the report says on page 26: 'On 20 June (1945) the Emperor, on his own initiative, called the six members of the Supreme War Direction Council to a conference and said it was necessary to have a plan to close the war at once, as well as a plan to defend the home islands. The timing of the Potsdam Conference interfered with a plan to send Prince Konoye to Moscow as a special emissary with instructions from the cabinet to negotiate for peace on terms less than unconditional surrender, but with private instructions from the Emperor to secure peace at any price. Although the Supreme War Direction Council, in its deliberations on the Potsdam Declaration, was agreed on the advisability of ending the war, three of its members, the Prime Minister, the Foreign Minister and the Navy Minister, were prepared to accept unconditional surrender, while the other three, the Army Minister,

very similar to that obtained with the dropping of the bombs, since, for example, Japan was exhausted, both psychologically and economically, as a result of the previous war years. Due to exhaustion (F1), the war would have ended anyway (C). If this were true, it would render F false, or at least, revisable.[9]

At this point it is necessary to introduce some restrictions to the way in which we carry out counterfactual experiments. This point has been raised by Jon Elster and it is worth remembering here. Jon Elster[10] argues that counterfactual reasoning has to be plausible. According to Jon Elster, plausibility means, at the very least, internal consistency between the antecedent and the consequent, and historical possibility.[11] As regards the first – internal consistency – the rules of logical reasoning apply here. The second aspect – historical possibility – is more important, as it implies that the counterfactual story has to be as close as possible to the factual one. If we said that Japan would have surrendered and the Second World War ended had Martians attacked Earth, this might be true, but it is not very plausible as a counterfactual. To do this, we would first and foremost have to ascertain that there is life on Mars; secondly, that the Martians are developed enough as to make quick trips to Earth; thirdly, that the Martians have an army; fourthly, that they have motives to attack Earth; and so on and so forth. In contrast, the counterfactual, 'had the Americans not dropped the bombs, but just kept engaging in conventional warfare, the war would have also ended in a question of months', seems much more plausible. The Americans had the capacity to do this and it also seems that

and the Chiefs of Staff of both services, favored continued resistance unless certain mitigating conditions were obtained'.

[9] This is made clear in the Report mentioned in n 8 above. On page 26, it is said: 'Based on a detailed investigation of all the facts, and supported by the testimony of the surviving Japanese leaders involved, it is the Survey's opinion that certainly prior to 31 December 1945, and in all probability prior to 1 November 1945, Japan would have surrendered even if the atomic bombs had not been dropped, even if Russia had not entered the war, and even if no invasion had been planned or contemplated'.

[10] J. Elster, *Making Sense of Marx* (Cambridge: Cambridge University Press, 1985).

[11] P. Tetlock and A. Belkin, n 5 above, 18, add to internal consistency and historical possibility (or to what they call the 'minimal re-write rule') the following four conditions: clarity, theoretical consistency, statistical consistency and projectability. As for clarity, this raises a more general point on methodology: this article belongs to the analytical tradition, which has clarity as one of its main pillars, as is known. Therefore it would be redundant, in my opinion, to add this condition. As regards theoretical consistency, I think that it could be subsumed into the first condition (logical or internal consistency). As for statistical consistency, it is irrelevant, in principle, for our discussion on legal counterfactuals. And as regards projectability, it is difficult to see the difference between this condition and plausibility or the minimal rewrite rule, since historical consistency means that the new facts (F1) have to have some connection with reality (in fact, the larger the link, the better).

one of the plans they were considering was precisely to keep engaging in conventional warfare against Japan.[12]

III. Counterfactual Thinking in Law: The US Jurisprudence on Habeas Corpus

Let us turn now to the use of counterfactuals in the legal world. As is known, counterfactual reasoning is currently being used by the US courts. More generally, the US legal context is the legal tradition in which the debate around the use of counterfactual reasoning in legal interpretation has made most headway.[13] In this section, I shall simply show how US courts, and in particular, the US Supreme Court, is making use of counterfactual reasoning, through the analysis of three hallmark cases on habeas corpus. These cases are the following:

- *Harrington, Warden* v *Richter* (19 January 2011)
- *Cullen, Acting Warden* v *Pinholster* (4 April 2011)
- *Greene, Aka Trice* v *Fisher, Superintendent, State Correctional Institution at Smithfield, et al* (8 November 2011)

I shall review these three cases below. But before I do so, it is important to make two points. First, all these cases originate in the context of the so-called US 'habeas corpus' law procedure, which implies a revision by a different court of the sentence that another court gave on a particular penal case (most of which involve the death penalty). Second, the applicable law to these cases is the AEPDA, the Antiterrorism and Effective Death Penalty Act of 1996, which modifies the previous legislation on habeas corpus. In particular, Art 2254 d) of title 28 of the United States Code under AEPDA states that habeas corpus shall not be granted unless the previous sentence:

> '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

[12] See, again, United States Strategic Bombing Survey Summary Report (Pacific War) of 1 July 1946, n 8 above.

[13] See, in particular, A. Burns, 'Counterfactual Contradictions: Interpretative Error in the Analysis of AEDPA' 65 *Stanford Law Review*, 203-239 (2013); R. Strassfeld, 1992, 'If...Counterfactuals in the Law', Case Western Reserve University, School of Law, Faculty Publications, Paper 373. The discussion is though not limited to the US context: for an example in the Dutch legal context, see N. Nivelle, 'Counterfactual Conditionals in Argumentative Legal Language in Dutch' 18(3) *Pragmatics*, 469-490 (2008).

or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding'.

Therefore, counterfactual arguments are very much connected to the '(un)reasonableness' clause included therein.[14]

1. *Harrington, Warden* v *Richter* (19 January 2011)

The facts of this case are the following. A shooting occurred in the domicile of a drug dealer by the name of Johnson. According to Johnson's account, Richter and Branscombe (with whom Johnson had been smoking marijuana some hours before) shot Johnson and his colleague Klein. According to Richter's account, he was not involved in the shooting. However, once he was arrested, he later admitted that he had been involved in the shooting but only to dispose of the guns that Branscombe had used to shoot Johnson and Klein. Richter's lawyer did not present expert testimony on serology. Richter was found guilty in first instance and sentenced to life without parole. On appeal, his conviction was confirmed. Furthermore, the California Supreme Court denied his petition for review. Richter later petitioned the California Supreme Court for a writ of habeas corpus. He argued that his lawyers should have presented expert testimony on serology and that this caveat affected the final outcome. His was a classical counterfactual reasoning: had his lawyers presented serology evidence, he would have been found innocent of the murder and the sentence mitigated. Habeas corpus writ was initially denied, but the Court of Appeals granted relief. Finally, the Supreme Court of the United States reversed the Court of Appeals decision and denied the writ of habeas corpus.

The US Supreme Court used a counterfactual-like reasoning at some points in its judgement. A first clear example of this would be the following:

'With respect to prejudice – says the Court – a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

[14] There is already abundant literature on reasonableness and the law. See: P. Craig, 'The Nature of Reasonableness Review' 1 *Current Legal Problems*, 1-37 (2013); C. Sunstein, 'Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms' 74 *University Chicago Law Review*, 1895-1909 (2007); C. Sunstein, 'The Myth of the Balanced Court' 18(9) *The American Prospect*, 28-29 (2007). For the Italian legal context, see G. Perlingieri, *Profili Applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015).

> different. A reasonable probability is a probability sufficient to undermine confidence in the outcome". It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding". Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable" '. (page 15, syllabus)[15]

In this paragraph, the Court uses the well-known, in US law, 'but-for' clause. In my opinion, the 'but-for' clause is the closest expression to a traditional counterfactual-like kind of reasoning in law: had it not been for this, then the outcome would have been different. In *Richter*, this amounts to arguing that had the lawyer provided serology evidence, then Richter's line of argument would have been proven, and therefore he would not have been found guilty of Klein's murder. However, in this case, what the Court is saying is that the challenger has to 'demonstrate' *with a high degree of probability* that this would have been the case; in other words, the challenger should demonstrate that the counterfactual is plausible. How this should be done is something that the Court does not say. But what is clear is that we are here in the world of evidence: the challenger would have to provide evidence that the counterfactual is true or at least plausible.

A second example would be the following:

> 'The Court of Appeals opinion for the en banc majority rests in large part on a hypothesis that reasonably could have been rejected. The hypothesis is that without jeopardizing Richter's defense, an expert could have testified that the blood in Johnson's doorway could not have come from Johnson and could have come from Klein, thus suggesting that Richter's version of the shooting was correct and Johnson's a fabrication. This theory overlooks the fact that concentrating on the blood pool carried its own serious risks. If serological analysis or other forensic evidence demonstrated that the blood came from Johnson alone, Richter's story would be exposed as an invention. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense. (Strickland, supra, at 691). Here Richter's attorney had reason to question the truth of his

[15] According to the Court, this probability was not demonstrated by the habeas corpus petitioner. A similar line of argument is used here: 'With respect to defense counsel's performance, the Court of Appeals held that because Richter's attorney had not consulted forensic blood experts or introduced expert evidence, the California Supreme Court could not reasonably have concluded counsel provided adequate representation. This conclusion was erroneous' (page 16, syllabus).

> client's account, given, for instance, Richter's initial denial of involvement and the subsequent production of Johnson's missing pistol'. (page 18, syllabus)[16]

In this paragraph, the counterfactual is also very clearly made by the Court. For the Court, in effect, the argument is that had serology evidence been given, then the outcome could have been different. However – and this is the point for the Court here – what this argument fails to see is that pursuing this strategy also had its own risks: basically, to reach the contrary outcome to the one Richter was arguing (that the blood came from Johnson alone and not from both Johnson and Klein). If this had been the case, then Richter's argument would have been destroyed. This is an interesting case of a counterfactual, since what the Court is doing here is to destroy the first counterfactual (had serology been done, then the outcome would have been different) with a second one (but what if serology had been done, with the outcome being the same). The second counterfactual helps the Court to identify the risks implicit in the strategy of using serology evidence. In principle, this counterfactual is a real thought experiment, which is not linked with giving further evidence or not. However, the Court does not say anything about the question of how real that risk – the risk that the serology evidence would have destroyed Richter's main line of argument – was, which clearly remits us to an evidence-giving (at least in probabilistic terms, as in the first paragraph) problem.

Finally, the partially dissenting opinion of Justice Ginsburg is interesting also as regards the use of counterfactuals. In Ginsburg's opinion:

> 'In failing even to consult blood experts in preparation for the murder trial, Richter's counsel, I agree with the Court of Appeals, "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U. S. 668, 687 (1984). The strong force of the prosecution's case, however, was not significantly reduced by the affidavits offered in support of Richter's habeas

[16] In the same vein: 'Under §2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fair minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. The opinion of the Court of Appeals all but ignored "the only question that matters under §2254(d)(1)". Lockyer v. Andrade, 538 U.S. 63, 71 (2003)' (page 12, syllabus). And again: 'The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under de novo review: Because the Court of Appeals had little doubt that Richter's Strickland claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it' (page 12, syllabus).

> petition. I would therefore not rank counsel's lapse "so serious as to deprive [Richter] of a fair trial, a trial whose result is reliable." For that reason, I concur in the Court's judgment'.

This counterfactual is interesting since what Ginsburg is saying is that if serology tests had been done, then the outcome would have been more or less the same. Thus she agrees with the Court of Appeals that serology is a test that, in this case, should have been done – which proves a bad counselling praxis – but that even if it had been done, the outcome would not have been so decisive as to challenge the conclusion, which is that Richter was guilty of murder. Again this remits us to an evidence-finding problem.

2. *Cullen, Acting Warden* v *Pinholster* (4 April 2011)

The facts of this case are the following. Scott Lynn Pinholster, together with two other accomplices, broke into a house with the purpose of committing burglary and brutally killed two men who interrupted the robbery. A jury found Pinholster guilty and sentenced him to death**.** The California Supreme Court (twice) denied habeas corpus to Pinholster, but the federal District Court reversed and granted relief. The Court of Appeals of the Ninth Circuit affirmed. Pinholster argued that his lawyers had failed to 'adequately investigate and present mitigating evidence, including evidence on mental disorders'. For example, a psychiatrist diagnosed Pinholster with bipolar mood and seizure disorders. Had this been done, the outcome would have been different, he argued. However, the Supreme Court reversed. Justice Sotomayor gave a long dissenting opinion in this case.

The first example of the use by the Court of a counterfactual is the following:

> 'The Court also required that defendants prove prejudice. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. That requires a "substantial," not just "conceivable," likelihood of a different result. Richter, 562 (…)'. (page 17, syllabus)

Again, the Court uses here the 'but-for' clause, much in the same vein as it did in *Richter*. As was said before, the 'but-for' clause is the closest we have to classical counterfactual reasoning.

A second example is this one:

> 'There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict'. (page 29, syllabus)

Here the Court is saying that the additional evidence that Pinholster gave in the case (testimonies of his psychologically undermined condition, due to a de-structured infancy in which he was brutalised by his father, and similar episodes) does not amount to affecting the outcome with a 'high probability'. Again, the Court fails to define what a high probability would be (reasonableness test), but this clearly remains within the realm of evidence-finding and -giving.

The third example is given by Justice Sotomayor's dissenting opinion. Her lengthy opinion is full of counterfactual reasoning, but the major point that she makes is well summarised by the following:

> 'In sum, the evidence confirmed what was already apparent from the state-court record: Pinholster's counsel failed to conduct an adequate mitigation investigation, and there was a reasonable probability that at least one juror confronted with the "voluminous" mitigating evidence counsel should have discovered would have voted to spare Pinholster's life. Ibid. Accordingly, whether on the basis of the state- or federal-court record, the courts below correctly concluded that Pinholster had shown that the California Supreme Court's decision reflected an unreasonable application of Strickland'. (page 42, syllabus)

The interesting aspect of Sotomayor's counterfactual reasoning is that through this approach, she gets to exactly the opposite conclusion than the majority of the Supreme Court. In her opinion, the evidence that Pinholster gave at a later stage of the process did constitute mitigating evidence. If this evidence had been given at the beginning of the process by his counsel, there would have been, according to Sotomayor, a 'reasonable' probability that at least one juror would have voted against applying capital punishment on Pinholster. Again, we do not know the factual basis of this argument, but it seems of a rather empirical kind: it would seem as if Sotomayor had, for example, statistical evidence that when certain evidence (evidence on mental disorders) is given, then jury unanimity in applying capital punishment in a murder case would fall apart. We still remain in the realm of evidence-giving and -finding here.

3. *Greene, Aka Trice* v *Fisher, Superintendent, State Correctional Institution at Smithfield, et al* (8 November 2011)

The facts of this case are the following. Eric Greene, together with four accomplices, robbed a grocery store in North Philadelphia (Pennsylvania). During the robbery, one of the men shot and killed the grocery store's owner. A jury convicted Greene of murder. He appealed to the Pennsylvania Supreme Court, which dismissed the application. Green then filed a writ for habeas corpus at the District Court for the Eastern District of Pennsylvania, alleging, inter alia, that the introduction of his non-testifying co-defendants' statements violated the Confrontation Clause. Had they not confessed, the outcome would have been different, according to Greene. The District Court denied the petition. However, the Court of Appeals granted relief. The US Supreme Court then reversed.

The clearest example of a counterfactual reasoning being used in this case is the following:

> 'Where intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, [an order granting the petition, vacating the judgment below, and remanding the case (GVR)] is, we believe, potentially appropriate'. Lawrence v. Chater, 516 U. S. 163, 167 (1996) (per curiam) (page 7)

In other words, what the Court is using here is a very classical argument in counterfactual terms. This argument is as follows: if there were new evidence which, with a high probability, could alter the ultimate decision in a given litigation, then this evidence should be taken into account. Once again, evidence is the key issue here.

In conclusion, all this shows, firstly, that the Supreme Court regularly uses counterfactual analysis in its rulings. The second point the previous analysis shows is that the issue of counterfactual reasoning is rather connected to the fact-finding or evidence-giving part of the trial. In effect, all of these cases are cases in which the question posed is whether new or different or further evidence should have been given in a particular process. The Court has to be persuaded that had this evidence been given, then the outcome would had been altered with a high probability (that is, then the outcome could have been different to a reasonable scale). When the Court is convinced of this point, then it grants habeas corpus, and vice-versa. The counterfactual reasoning is therefore key for the final decision that the Supreme Court reaches, but on the other hand it is always directly linked to the evidentiary phase of a given trial.

IV. Extending the Use of Counterfactuals: Rationality and Law as Credibility

My aim in the remaining sections of this article is to extend the use of counterfactual legal reasoning from the realm of trial evidence to the realm of the factual basis upon which norms rest. That is, what I am proposing is to enlarge the use of counterfactuals. The argument is that counterfactual reasoning should become a primary legal technique that should be used in legal interpretation.

To bring the argument home, I first of all need to make two preliminary points: one on what I understand by rationality and the law, and the other on what I call 'law as credibility'. Then, I will move on to the question of how to enlarge counterfactual analyses of law.

1. Rationality and the Law

When I refer to rationality and the law I am not referring to the usual sense in which rationality is used in legal jargon. For example, Paul Craig[17] analyses how the principle of rationality is being used by the English courts to control for administrative decisions. In turn, Patrick Birkinshaw[18] traces the roots of rationality to other principles and legal concepts that are employed in different legal traditions than the English one. Their common point is that a rationality check looks at the intrinsic logic of the reasoning that a given agency is making to support a particular decision that it has taken. If the courts unearth an illogical step in the agency's reasoning, they will annul the decision, but they will preserve it if it is logical.[19]

My approach is rather different. When I speak of rationality and the law, I am only setting the analytical framework, or the premise, of a much wider debate in which the idea of law as credibility can be better understood.

[17] P. Craig, 'Proportionality, Rationality and Review' *New Zealand Law Review*, 265-301 (2010).

[18] P. Birkinshaw, *European Public Law: The Achievement and the Challenge* (Alphen aan den Rijn: Wolters Kluwer, 2nd ed, 2014). See A. Estella de Noriega, 'Book review: *European Public Law: The Achievement and the Challenge*, Second Edition, by Patrick Birkinshaw' 22(2) *European Public Law*, 397-404 (2016).

[19] Paul Craig cites Lord Diplock here: rationality review is limited to a 'decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it' (*Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374 at 410). Though the author argues in favour of a broader understanding of rationality, I think that the only way to differentiate between a rationality review and a reasonableness review is that the first one looks at the intrinsic logic of the reasoning that an agency gives to adopt a decision, while the second one, more broadly, relies on a balancing exercise of (to a certain extent) contradictory aims.

If we do not clarify what this framework is, then the idea of law as credibility is difficult to understand. Therefore, the framework I envision is the following.

The basis of my analysis stems from rational choice and game theory. As is known, for these intellectual traditions, the basic unit of analysis is the individual. This basic framework is then applied to collective agents, such as institutions. The legislator, the executive, the courts, all of them, are taken as if they were one individual. The main reason for this exercise of analytical reductionism is that it allows the attribution of preferences to these actors and also the capacity to develop strategic plans to attain such preferences. It also allows attributing motivations to institutions, which is the key point in this discussion.

Therefore, institutions, like individuals, have preferences, develop strategies to attain those preferences, and have motives to act. In my particular framework, a number of important points have to be made, which are all of relevance for a legal discussion. First, as for preferences, I understand, as in Marx,[20] that they are exogenously induced.[21] This means that institutions, like individuals, do not set their utility functions in complete freedom, but that they are very much constrained by exogenous forces to set up their utility functions. If we prefer a less ambiguous word, individuals' preferences are pre-determined, to a large extent at least. The second point that I wish to make here is that individuals cannot be deemed to be super-humanly clever in enacting strategies: they have a limited capacity to devise and build strategies. And above all, they suffer from many problems of information, which make their strategies very imperfect and rather simple in the majority of cases. The third point regards motives. In a very schematic version of rational choice, the basic individual's motive is egoism. However, we know from game theory experiments in laboratories and from behavioural economics that the truth is somewhat more complex: individuals are not only driven by sheer egoism. In my opinion, they are driven by self-interest – which is a much more complex notion. I understand self-interest as the production of a feeling of warm-glow, of internal welfare. Individuals attempt to increase this feeling as much as they can, and this can explain, for example, altruistic behaviour.

Let us apply this framework to law. The first point to be mentioned is that I see the relationship between institutions and the people as a game

[20] K. Marx, *The eighteenth Brumaire of Louis Bonaparte* (London: George Allen & Unwin, 1926), translated from German by P. Eden and P. Cedar.

[21] 'Man makes his own history, but he does not make it out of the whole cloth; he does not make it out of conditions chosen by himself, but out of such as he finds close at hand. The tradition of all past generations weighs like an alp upon the brain of the living': K. Marx, n 20 above, chapter I.

in which both have particular preferences, strategies, and motives. As in Hobbes,[22] people establish institutions to overcome their state of nature. However, as in Rousseau,[23] once they establish institutions, they start mistrusting them. They are not sure that institutions will attend to the objectives for which they were set up (which is basically to help to reduce the problems that collective action involves). Here is an example: in a state of nature which is dominated by violence, the people decide to set up institutions which have the monopoly of violence. They decide to withdraw all weapons from the society and give them to the institutions, so that people will not kill each other anymore. However, the institutions have their own preferences: for example, to become wealthy. They do this because it makes them feel well. And they use strategies to attain this objective. Thus, institutions, once the guardians of peace, use the weapons that the society gave them to dominate the people with the purpose of becoming wealthy. As the people know this, and are mistrustful of what the institutions can do once they have the weapons, they establish a number of safeguards to try to make sure that this will not happen. In my opinion, the most important of these safeguards, the most refined and complex one, is law. Law is a basic tool to make sure that the institutions will do what they are supposed to do. Law's main function is, therefore, to overcome the problems of trust that exist between the people and the institutions.

2. Law as Credibility

Trust, or rather, the lack of it, is therefore the basic problem in the relationship between the people and the institutions. As Elster puts it, trust is an essential element in human intercourse, it is 'the lubricant of society'. Without trust, cooperation is impossible, and without cooperation we get back to a state of nature. We therefore need trust-giving technologies.[24]

[22]'Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man'. T. Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998), chapter XIII, 8.

[23] 'It therefore appears to me incontestably true, that not only governments did not begin by arbitrary power, which is but the corruption and extreme term of government, and at length brings it back to the law of the strongest, against which governments were at first the remedy, but even that, allowing they had commenced in this manner, such power being illegal in itself could never have served as a foundation to the rights of society, nor of course to the inequality of institution'. J.J. Rousseau, *A discourse upon the origin and foundation of the inequality among mankind* (electronic resource) (Farmington Hills, Michigan: Thomson Gale, 2005), 30.

[24] See: A. Estella de Noriega, 'Law as Credibility: an outline' *Il Foro Napoletano*, I, 40-63 (2015); Id, 'Law as credibility: the case of Presidential Term Limits' 2(1) *European Journal of Legal Studies*, 116-142 (2008).

From this perspective, systems such as morals, religion, customs, politics, and even culture acquire a different light. They can be seen[25] as different technologies that humans have created to overcome, or at least mitigate, the problems of mistrust. Law is therefore, as has been said before, one of these technologies, and in fact, it can be seen as the most sophisticated technology that man has ever created to deal with trust problems. The point is that when law performs this role well, it has no paragon with its alternatives.

The game between the institutions and the people therefore starts with a promise that is made by an institution. To simplify things, let us assume that this 'institution' is the President of a State, Abraham Lincoln. As is known, Lincoln once said that 'bad promises are better broken than kept'. In my opinion, this statement exemplifies very well the origin of the mistrust of the people towards the institutions. It may be more pragmatic (and even just) that bad promises be broken rather than kept but, then, a question immediately arises: who decides when a promise is a bad promise? The answer is clear: for Lincoln, it is the one who made the promise – himself.[26] Precisely because the people know this – that political institutions can use this subterfuge to break promises – they mistrust them. Therefore, in Time 1, political institutions use law to convince the people that their promises are good promises, and that they will stick to their commitments. If in Time 2 they repent, too bad: they made a law, which is a way to objectify whether the promise was actually bad or good. Now, with their commitment encapsulated in a norm, it is no longer for the political institution to decide whether that promise was bad or good. It is for the legal system to decide it, and in the last instance, to its judicial bodies, who are, in turn, the servants of the people.

Let us develop to some extent several points that have been made before. The first thing to be said is that for this structure to work, law has to have technical superiority as a trust-giving technology if compared to its alternatives (morals, religion, etc). I give a number of examples to make clear how this model works. For example, if I am an anti-abortion politician and I promise that if I win the next election, I will do my best to ban abortion. To make my promise credible, I publicly show my Catholic faith and I let the people see me going to church every Sunday. As leader of the party, I could have included a point in my party's platform saying

[25] I owe this point to Philip Pettit. They 'can be seen' as institutional technologies, which of course does not bar other interpretations and constructions of what they are.

[26] As it clearly stems from Lincoln's own words: 'As to sustaining it, my promise is out, as before stated. But, as bad promises are better broken than kept, I shall treat this as a bad promise, and break it, whenever I shall be convinced that keeping it is adverse to the public interest. But I have not yet been so convinced'. For referencing, see n 1 above.

that I will ban abortion once in power. However, I feel I do not need to do so: people will trust me due to the fact that they all know about my Catholic fervour. In this setting, morals, or religion, play a wider role than politics in making commitments more credible.

A second example, in which law is involved, would be the example of presidential term limits. As is known, in the US, presidential term limits are established by the Constitution. However, in Spain, they are not. In the US, once a President finishes her second mandate, there is no discussion about whether she will run for a third term: the US Constitution prohibits it. However, in Spain, presidential term limits are a political commitment which is, with time, becoming a sort of political custom. However, when the second term of a Primer Minister is coming to an end, a debate arises as to whether she will run for a third mandate. This was the case with Aznar (who established the term-limitation precedent) and with Zapatero (who followed it). In fact, until a successor is appointed, the debate goes on. What this example shows is that law is a better alternative than political pacts, or political customs, in giving credibility to term-mandates limits. The bottom line is that if law is involved as an instrument to give credibility to commitments, and another instrument is preferred, then this would be a signal that law is not performing its function well. In other words, this would be a signal of a legal system malfunction.

A second point that is important to be made in this context is that, contrary to what is usually assumed by political scientists who have considered the topic of law as credibility,[27] credibility through law cannot be made equivalent to rigidity. True, law is preferred to its alternatives (morals, religion, politics, and so on) because it is more rigid than them. But inside the legal realm, the rigidity element is not enough to explain why there are different kinds of norms, and also a normative hierarchy among them. If law were equal to rigidity, without any qualification, then it would only make sense to have one kind of norm – for example, constitutional norms. However, as we lawyers know, there is a rich normative variety in developed and modern legal systems. From this perspective, the question is: if a political actor were to encapsulate a given commitment in a norm, why should she choose the constitution, or a law, or a regulation for this purpose?

The answer to this question is that credibility does not stem only from rigidity, but, more nuancedly, from an equilibrium between rigidity and flexibility. An equilibrium is defined as a situation in which there are no

[27] See, for example, R.D. Keleman and T. Teo, 'Law and the Eurozone Crisis', APSA 2012 Annual Meeting Paper (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107426 (last visited 24 May 2016).

incentives to change.[28] Further, the fact that different kinds of norms establish different equilibrium points between rigidity (R) and flexibility (F) is what explains the very existence of – and the need for – different types of norms in the legal system.

From this perspective, the Constitution, which is at the top of the normative pyramid, is the most rigid norm and the least flexible one; laws would be less rigid than Constitutions and more flexible, and so on and so forth down the normative pyramid. An important insight which is derived from this model is that the least rigid and most flexible form of law would be private law (contracts). However, to be law, all norms have to fulfil the following condition:

$$R > F$$

This means that even the most flexible form of norms, which are private law norms (contracts), still have to be more rigid than flexible; otherwise they would not be norms. If they were more flexible than rigid, we would be in the realm of morals, politics, religion and the like. I shall leave for another moment the crucial question of what the relationships are in terms of rigidity and flexibility of these other alternatives to law, but it is obvious that an answer to this acute problem cannot be given in general terms: it all depends, among other things, on the context, and above all on the cultural context, in which morals, politics, religion and the like take place.

V. Counterfactual Legal Interpretation

[28] I am thinking here of a Pareto equilibrium. Pareto optimality is a measure of efficiency. In a game composed of a determined number of players, an outcome is a Pareto optimum if there is no other outcome that would make all of the players at least as well off as in the previous outcome, and one better off than in the previous outcome. Therefore, collectively, there are no incentives to look for another outcome. If a situation is a Pareto equilibrium, then it can only be modified by hurting at least one player. It follows that a Pareto-improvement denotes a situation in which at least one player can be made better off with the new outcome (while the rest of the players remain the same). It is important to differentiate a Pareto equilibrium from a Nash equilibrium. A Nash equilibrium is an outcome in which all the players in a game have no incentive to modify their strategy, if taking into account the strategies of the rest of the players in the game. Therefore, an outcome can be a Nash equilibrium without being a Pareto optimum. Many times, Nash equilibriums are sup-optimum equilibriums from a Pareto efficiency perspective. This means that although there is room for improvement collectively, there is no room for doing it individually, if taking into account the available strategies of the rest of the players. For a very good and general summary of both concepts see K. Binmore, *Game Theory. A very Short Introduction* (Oxford: Oxford University Press, 2007).

1. Theoretical Aspects

To summarise the main points that were made in the previous section, we may conclude by saying that in a rationality setting, the main purpose that law serves is to give credibility to the commitments that political institutions make. Further, credibility can be defined as the equilibrium point between rigidity and flexibility that is found in any given norm. If the norm is an equilibrium from this perspective, it will be credible. If not, it will not be credible and therefore it will be subject to challenge.

This is the point upon which our discussion on counterfactuals impacts. In this setting, in a law as credibility setting, the main function that judges play is to try to ascertain if a given norm is an equilibrium or not. Remember that an equilibrium was defined before as a situation in which there are no incentives to change. To do this judges use a number of techniques of legal interpretation. The point is that one of the techniques is, or should be, counterfactual legal interpretation, but understood in a broader sense than what was shown in Section 3 above. This means that counterfactual interpretation should be done not only in the realm of evidence-finding and -giving, but, more broadly, in the realm of the factual basis upon which a norm rests.

The basic structure of a norm is a factual antecedent and a legal consequent. Given a factual assumption, then the norm extracts a given legal consequent. *If F, then C.* This is very similar to the basic causal structure that we set up in Section 2 of this paper. In the legal realm, the production of a given factual assumption unchains a given legal consequent. In this sense, there is a relationship between cause and effect that is not dissimilar to the relationship between independent and dependent variables that occurs in the rest of the social sciences.

When establishing a given factual assumption, the legislator may or may not have thought of the alternative courses of action to the one chosen, in alternative factual bases. We know that it is impossible that the legislator considered all possible alternative courses of action to the one it actually chose as a factual basis for drafting a norm. But it is also clear that the legislator might have thought of many of them. This being the case, my proposal is that the primary role that the judge should play should be to ascertain whether the legislator took into account these other alternative courses of action to find out whether the norm is an equilibrium or not.

This enlarges and restricts, at the same time, the role of judges in the power game between themselves and the legislator and the executive. Based upon a certain vision of democracy, which connects with what is called neo-republicanism, government is 'of the people, by the people, and

for the people', as Lincoln said in his Gettysburg Address.[29] This means that in a representative democracy, there are many doubts as to the democratic legitimacy of judges, who are, particularly in the continental legal tradition, but civil servants who are not democratically elected. There is and there always should be a suspicion as to the role of servants of the people that judges play. Like other institutions, they have their own particular preferences, motives and strategies. But unlike other institutions, the people cannot expel judges from power as readily as they can do with the government and the parliament, which is through vote. Still, we also know that for the system to work, and in particular, for the law as credibility system to work, we need an independent institution (independent from the legislator and the executive) to make autonomous judgements on the law. This is why judges' role, when judging the laws, should be very entrenched; on the other hand, the system should also have enough flexibility for it to be stretched when it is clear that the law is not performing well its function of credibility-giver.

Judges should therefore restrict their analyses on law to whether a certain norm is an equilibrium or not. To do so, they have to inquire into the factual basis of a given norm. And one of the ways to do this – a privileged one – is through counterfactual analysis.

More in particular, the steps that a judge has to take in order to ascertain whether a given norm is an equilibrium or not are the following (see Table 1 hereinafter). Step number one would be to find out if the legislator took into account a counterfactual situation. If the answer to this question is affirmative, then the second step should be to ascertain whether the norm is an equilibrium or not from a credibility perspective. If it is, then the norm would be fit from a credibility perspective – and therefore the case would end there. If instead it is not, then the judge can indicate the solution that, according to her, would generate an equilibrium point; however, the judge can simply *indicate* this solution to the legislator, but she cannot impose it. In this case, the judge would have to show deference to the legislator and could not, for example, in the case of constitutional review of legislation, strike down the norm. It would be for the legislator to do the job and put the norm back in equilibrium.

Another possibility is that the judge finds out that the legislator did not take into account the counterfactual situation. She would then, as a second step, have to determine whether, *taking into account the counterfactual situation*, the norm is still an equilibrium. It might be the

[29] See P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (New York: Cambridge University Press, 2012) and Id, *Republicanism: A Theory of Freedom and Government* (Oxford-New York: Oxford University Press, 1997).

case that if the legislator did not take into account the counterfactual, then the norm is still an equilibrium; however, with a high degree of probability, this will not be the case. In other words, the fact that the legislator did not take into account the counterfactual would be a primary indication that the norm is not an equilibrium. If, in fact, the judge finds out that the norm is not an equilibrium, then, in this case, she should give the solution to the case at hand that she finds is an equilibrium from a credibility perspective. If we are in the domain of constitutional review, she should not only strike down the norm in question, but give a solution for the case which has a regulatory bearing. This is to say that the norm cannot be an equilibrium for that particular case *and only for that case*; it has to try to fix an equilibrium point from a general perspective. In credibility terms, it makes no sense to speak of such a thing as the '*giustizia del caso concreto*'. This puts another brake upon the judge's discretionality when making legislation.

2. An Example: Case Re E (A Minor) (Wardship: Medical Treatment) of 21 September 1990

Let us shed some light on the previous discussion. I will illustrate it with a particular case which arose in the English legal jurisdiction: Re E (A Minor) (Wardship: Medical Treatment) of 21 September 1990.[30] As evidence of the closeness that exists between legal counterfactuals and fictional counterfactuals, it is interesting to note that this case inspired one of the most well-known novels of Ian McEwan, titled *The Children Act*.[31] The facts of the case are simple. 'A', a minor of almost sixteen years old, was hospitalized since he was discovered to suffer from leukaemia. The doctors prescribed him a blood transfusion, which he refused due to his being a Jehovah's Witness. Because his case was desperate, the hospital applied for a Court's order to oblige him to receive the blood transfusion. The lawyer of the parents of A cited in support of the child's refusal Art 8 of the Family Law Reform Act 1969, which said:

> 'The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian'.

[30] Family Court Reports/1992/Volume 2/Re E (A Minor) (Wardship: Medical Treatment) – [1992] 2 FCR 219.

[31] I. McEwan, *The Children Act* (London: Jonathan Cape, 2014).

The parents' lawyer argued that since the minor was about to turn sixteen, then this article should apply to the case at hand. In fact, the minor refused to receive the treatment. Lord Ward, the Court of Appeal's judge of the case, in fact interviewed the child and he confirmed his refusal. In addition, Lord Ward did not deny that, as the minor was so close to the age of sixteen, Art 8 of the Family Law Reform Act 1969 should apply. However, in his judgement, Lord Ward said that the well-being of the minor overrode any other concern, in particular, the concern for the protection of his human dignity. More in particular, his precise words were the following:

> 'The circumstances required the court to make a decision. In doing so, the court must regard the child's welfare as the first and paramount consideration. The judgment of what the child's welfare dictated was to be exercised objectively. But regard had to be paid to the position of this child as a boy of growing maturity living in the religious society that he did. Whether or not he was of sufficient understanding to give or withhold consent was not the issue before the court. The child's wishes were an important factor and, as he was nearly 16, a very important matter which weighed heavily in the scales. He appreciated the consequences if not the process of his decision to refuse a medical intervention which might save his life. He was close to the time when he might be able to take such a decision. Therefore, the court should be slow to interfere. But it should consider to what extent his refusal of treatment was the product of his full and free informed thought. The influence of the teachings of the Jehovah's Witnesses was strong and powerful. The child might assert his views but his volition had been conditioned by very powerful expressions of faith. It could not be said that at the age of 15 his will was fully free. The risk of serious infection from a blood transfusion was infinitesimal and not a risk which would have stood in the father's way but for his religious convictions. Therefore, when balancing the wishes of the father and son against the need for the chance to live a precious life, it had to be concluded that their decision was inimical to the child's well-being. As a result, the hospital would be given leave to treat the child as they considered necessary, including the administration of blood transfusions'.

Stemming from the facts of the case, it is clear that Art 8 of the Family Law Reform Act 1969 had not foreseen this kind of situation when it was drafted. The norm was passed thinking in a very particular factual situation: that of contradictory views between the minor and her parents or guardians as regards her consent for medical treatment. The aim of the norm is therefore clear: it is to protect the will of the minor. Therefore, given

a contradiction (factual basis of the norm), more weight should be given to the will of the minor than to the decision of her parents or guardians (legal consequent).

But, what if the will of the minor put at risk her own health? And what if there was no contradiction and the will of the parents, guardians, and minor matched? This was not clearly in the mind of the legislator when the norm was drafted. In other terms, the legislator was not thinking of the Jehovah's Witnesses' refusal of blood transfusions and similar cases when it was enacted. Though Lord Ward does not say it openly, he is in fact making a counterfactual legal analysis in his decision. If this were the case, that the minor put at risk her own life in a particular case, then 'the child's welfare (would become) the first and paramount consideration'. By doing so, Lord Ward would be overriding Art 8 of the Family Law Reform Act 1969 and applying another principle, that of the child's welfare. In fact, this case, and similar cases, prompted a reform by the legislature of Section 1 of the Children Act of 1989, to take into account the principle according to which 'the child's welfare is the court's paramount consideration' in courts' decisions on children's rights.

Let us analyse this case more closely and from the perspective of game theory. In reality what we have here are two contradictory interests that cannot be weighed: that of the minor and that of the medical doctor. In the game between the minor and the doctor, the minor wants her will to be preserved, and the doctor wants life to be preserved. The judge is the third player in this game: she has to decide whether the minor's preference should be preserved or whether the doctor's preference should be preserved. As said above, the judge also has her own preferences, strategies, and motivations. She is inspired, in particular, by self-interest, which was defined before as an increment of her feeling of internal well-being. If the judge let the minor die, then she would feel bad with more probability than if the minor were to feel well. Knowing this, the judge has an interest in changing the law. Protecting the minor's will at any price is not an equilibrium. Therefore, the judge changes the law so that a new equilibrium emerges: the will of the minor shall be protected unless the minor's life is put at risk. In this game, it is very clear that at least two players (the doctor and the judge) have incentives to modify the previous legal equilibrium. The fact that the judge is supported by one of the players in the game makes it possible to make an alliance and defeat the minor. In the new equilibrium, only one player would have incentives to change, and two would have not. This means that the new equilibrium would be sub-optimum and therefore unstable: the minor could always try

to convince the legislator so that a new, bolder norm, protecting minors' will, be passed.[32]

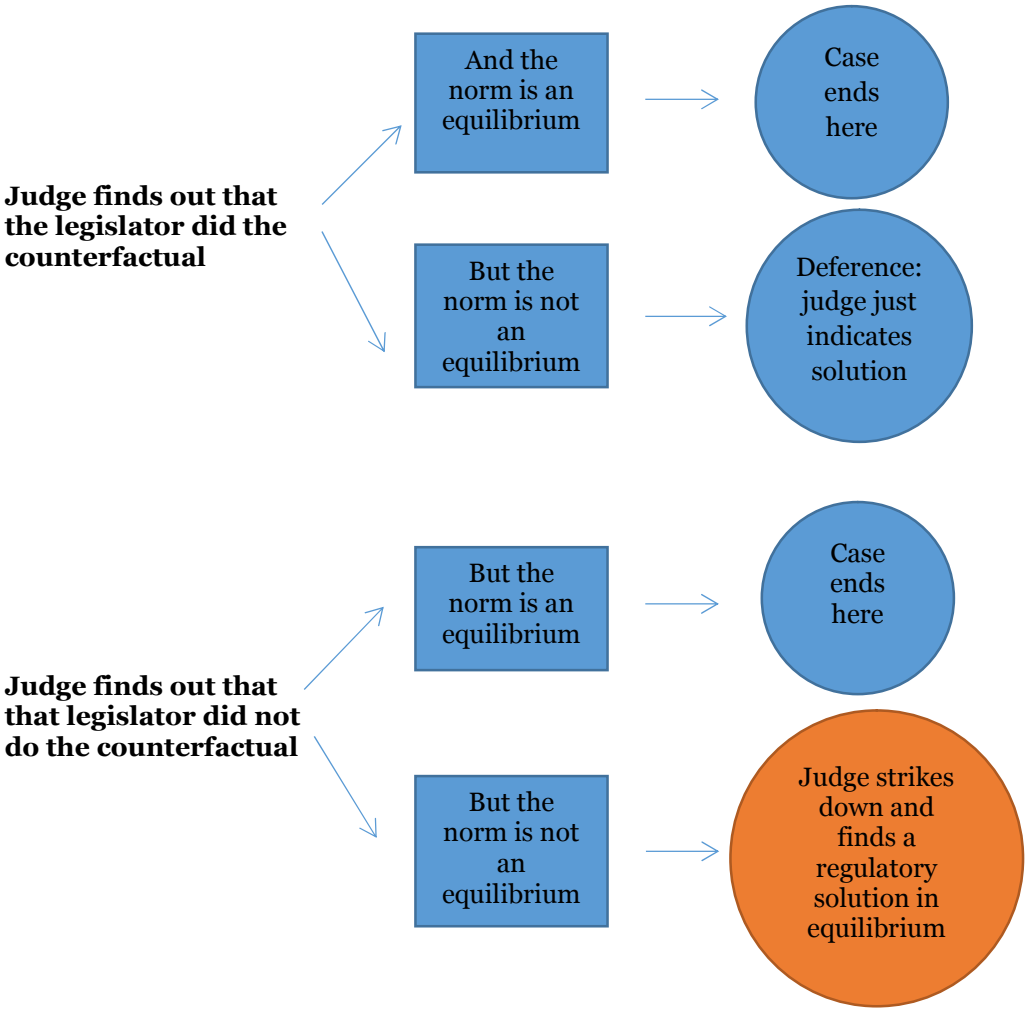
From a more general perspective, we could say that the problem with the previous legislation (with Art 8 of the Family Law Reform Act 1969) was that it was not credible enough. Had the legislator made the counterfactual, integrating a situation in which the life of a minor was put at risk by her own decision, then it is clear that a judge would have tried to protect her life even 'from herself', as Ward puts it in his judgment. In other words, it is not very credible to think that a judge would have simply relied on the minor's will to adopt a decision that would surely have endangered her own life.

VI. Conclusions

I will not attempt to summarise what has been argued above. The main argument can be, instead, simplified in the following way: counterfactual thought experiments should not only be limited to the evidentiary phase of a trial, but should be enlarged to try to ascertain whether a norm is or is not an equilibrium from a credibility perspective. Finally, it would be important not to see counterfactual thought experiments in law as a blank check for judges to substitute the judges' preferences for the legislator's discretion. If correctly understood, counterfactual thought experiments can enlarge judges' margin of manoeuvre as much as they can restrain it, as the final outcome of the case analysed in Section 5, above, seems to suggest.

[32] The minor would have a second alternative, which would be to wait (if he could) until he is not a minor anymore, when he turns eighteen. Thus, according to the UK legislation, in this case the situation is very clear and the will of the adult has to be preserved, even if it puts at risk her own life. In fact, and in an unprecedented dramatic turn, this is what happened in the case at hand: 'A' suffered from a new illness a time after, and he refused, again, a transfusion. He died, accordingly. This proves that in this case, the new equilibrium was sub-optimum. The full story is told here: http://www.theguardian.com/books/2014/sep/05/ian-mcewan-law-versus-religious-belief (last visited 24 May 2016)

TABLE 1: COUNTERFACTUAL THOUGHT EXPERIMENTS AND LAW



Essays

Directive 2014/104/EU on Antitrust Damages Actions. Some Considerations from the Perspective of Italian Law

Andrea Nervi*

Abstract

European Parliament and Council Directive (EU) 2014/104 of 26 November 2014 introduces a common regulation for claims for damages caused by infringements of competition law. The implementation of the Directive in the Italian legal system may face some issues from a civil law perspective. One of these issues is the role of the judge in the evaluation of the claim for damages, especially in consideration of the restrictions deriving from the decisions issued by competition authorities. This new role of judges corresponds to a significant evolution in the field of tort liability. Another issue refers to the notion of damages adopted in the Directive and the identification of the interests protected. Within this framework, it is noteworthy that the European legislator has explicitly excluded any overcompensation of the harm caused by the infringement of competition law. However, regardless of this choice, the quantification of the harm remains an open issue. The Directive mainly considers a certain kind of prejudice: the overcharge paid by the victim of the infringement due to the existence of a cartel agreement. When the victims are located at different levels within the same distribution chain, the existence of the harm and its quantification may be problematic. This problem, known as 'passing on', is addressed by the Directive very differently from the solutions adopted in the US. Finally, the essay contains some considerations on the private enforcement of competition law and the role that civil liability may play in this regard.

I. The Directive: Premises and General Framework

European Parliament and Council Directive (EU) 2014/104 of 26 November 2014 (hereinafter, 'the Directive') is a destination, although perhaps not a final one, of a path whose preparatory steps can be traced with a fair degree of precision.

The first step was the *Courage*[1] judgment handed down by the Court of Justice of the European Union (hereinafter, CJEU). With that judgment, the

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[1] Case C-459/99 *Courage Ltd* v *Bernard Crehan* (European Court of Justice 20 September 2001) available at www.eur-lex.europa.eu.

CJEU first recognized the principle according to which a party who complains of harm arising from an infringement of competition law is entitled to compensation for the harm thus suffered, even if the injured and the infringing parties are linked by a contractual relationship within the sphere of which the alleged harm arose.

The judgment is significant for at least two reasons: first, it overcomes the principle of *nemo auditur suam propriam turpitudinem allegans*,[2] since the claim for damages may be legitimate regardless of the pre-existence of a contractual relationship between the infringing and the injured parties – a relationship considered irrelevant.[3] In this regard, civil liability represents a tool of general scope, and is therefore suitable to meet a need for protection even in terms of correcting, from the outside, the rules created within the contractual environment. Second, resorting to a framework of tortious liability enhances the position of the judge, who is now called upon to perform a leading role in the application of the rules of fair competition.

The latter aspect mentioned above, then developed in legislation within the sphere of Council Regulation (EC) 1/2003 of 16 December 2002, concerns the application of the rules contemplated by Arts 81 and 82 of the Treaty (now Arts 101 and 102 TFEU). Within the framework of a redistribution of duties and functions among Community institutions and national States, European law has expressly stated that national courts 'shall have the power to apply Articles 81 and 82 of the Treaty' (Art 6). Furthermore, to guarantee the uniform application of Community competition laws, Art 16 of the Regulation places a restriction on national judges, who are not allowed to take decisions that conflict with decisions already issued by the European Commission in application of the antitrust provisions. However, there is no statement on restrictions deriving from decisions on competition adopted by national authorities.

The development of the legal provisions and case law outlined above has had significant reverberations in Italy, also due to its interconnection with a provision of the Italian Antitrust Authority on an issue towards which the public is highly sensitive: the well-known case of the cartel between civil liability insurance companies for motor vehicles. The case triggered considerable litigation on claims for damages, which often ended up before the Supreme Court.

In this regard, in 2005, the Court of Cassation sitting *en banc* gave a

[2] The value of this point is illustrated by P. Iannuccelli, 'Il rinvio pregiudiziale e il *private enforcement* del diritto antitrust dell'UE' *Diritto dell'Unione Europea,* 715 (2012).

[3] See, in particular, para 24, worded as follows: 'any individual can rely on a breach of Art 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision'.

first important systematic statement,[4/5] which overcame the existing restrictive attitude and recognized the existence of a legally qualified interest in the competitive balance of the market, and entitled all parties, whether consumers or rival undertakings, to that interest.[6] Once this position was adopted, it was a short leap to recognize a general entitlement to file action for compensation, if the interest in question was harmed as a consequence of behaviour contrary to competition law.

Precisely within the sphere of the Italian litigation arising downstream of the provisions on third-party vehicle insurance, the CJEU was again called upon to decide certain questions of interpretation, and thus had the chance to specify the statements it had made in *Courage*.[7] Indeed, in *Manfredi*,[8] the Court emphasized on several occasions that the full application of the relevant provisions of competition law could not disregard the contribution given by national courts, which must consider themselves vested with full jurisdiction to decide claims for damages based on alleged breaches of Arts 81 and 82 of the Treaty (now Arts 101 and 102 TFEU). Similarly, therefore, the Court emphasized the need to extend, to the greatest possible degree, the right to file actions for compensation deriving from antitrust infringement, precisely because these 'bottom-up' initiatives (ie filed by market actors who directly suffered from the consequences of the unlawful deed) could contribute towards improving the application of competition law in Europe.[9]

[4] Corte di Cassazione 4 February 2005 no 2207, *Giurisprudenza italiana*, 1675 (2005). The systematic opening was then confirmed by Corte di Cassazione 2 February 2007 no 2305, *Foro italiano*, 1097 (2007).

[5] *Ex multis*, see L. Castelli, *Disciplina antitrust e illecito civile* (Milano: Giuffrè, 2012), 130.

[6] On the differentiation between consumers and rival entrepreneurs in antitrust cases, however, see P. Iannuccelli, 'Il *private enforcement* del diritto della concorrenza in Italia, ovvero può il diritto antitrust servirsi del codice civile?' *Rivista delle società*, 731 (2006), who recalls that the relevant notion is that of the 'user', which includes all those who avail themselves, either directly or indirectly, of the products that constitute the subject matter of the illicit agreement or of the sanctioned behaviour.

[7] P. Iannuccelli, 'Torniamo al Trattato! Per il superamento della distinzione tra *public* e *private enforcement* nel diritto della concorrenza' *Concorrenza e mercato*, 83 (2014), examines the relationship (which is not necessarily linear) between the two decisions.

[8] Joined Cases C-295/04 to C-298/04: *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA* (C-295/04); *Antonio Cannito* v *Fondiaria Sai SpA* (C-296/04); *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA* (European Court of Justice 13 July 2006) available at http://curia.europa.eu/.

[9] See paras 90-91: '(90) As was pointed out in paragraph 60 of this judgment, the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. (91) Indeed, the existence of such a right strengthens the working of

With *Manfredi*, therefore, the CJEU focuses on the potential of the so-called private enforcement as a 'second pillar' in the application of competition law, placing it alongside the traditional tool of the activity performed by the European Commission and the national authorities (the so-called public enforcement). At the same time, however, the CJEU displays awareness of the fact that, at European level, there is no uniform regulation of liability in respect of compensation;[10] indeed, in the decision recalled here, the CJEU's attention is caught by the problems inherent in overcompensation and, in any case, by the possibility of drawing on the profit that the transgressor has obtained by means of the illegal action.[11]

In the view of the CJEU, the absence of uniform discipline is an important issue; indeed, if Member States proceed in a scattered manner with respect to compensation for damages deriving from infringements of competition law, the practical consequence will be that the incisive effect of actions brought for compensation will vary from country to country and, with this, the observance of competition law on the part of market operators.[12] In other words, with *Manfredi*, the CJEU clearly invites European lawmakers to adopt a common discipline for actions brought for compensation for damages due to infringements of competition law, to foster its uniform application at European level.[13]

Directive 104/2014/EU thus constitutes the answer given by the European legislator on the subject, after a fairly lengthy period of prior preparation.[14] It can already be stated that, from its very beginning, the Directive has adopted a minimalist approach[15] to the accumulation of problems arising in respect of compensation for damages caused by breaches of competition law; Art 1 para 1 is emblematic in this respect, stating that:

the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the National courts can make a significant contribution to the maintenance of effective competition in the Community (Courage and Crehan, cited above, paragraph 27)'.

[10] See para 72.

[11] See paras 92-94.

[12] See also G. Villa, 'La Direttiva europea sul risarcimento del danno antitrust: riflessioni in vista dell'attuazione' *Corriere giuridico*, 301 (2015).

[13] To the same effect, see also G. Taddei Elmi, 'Il risarcimento dei danni antitrust tra compensazione e deterrenza. Il modello americano e la proposta di direttiva UE del 2013' *Concorrenza e mercato*, 211 (2014).

[14] This paper does not discuss the intermediate steps consisting in the Green Paper entitled 'Damages actions for breach of the EC antitrust rules' {SEC(2005) 1732} and the White Paper on Damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}. On this subject, see E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale nella Direttiva 2014/104/UE' *Annali Italiani del Diritto d'Autore della cultura e dello spettacolo*, 34 (2015).

[15] Or a 'short step', ibid 35 (author's translation).

'(*t*)*his Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law* (…) *can effectively exercise the right to claim full compensation for that harm* (…)' (author's emphasis).

The text begins by stating the purposes pursued by the European lawmakers, which certainly appear demanding and ambitious: indeed, the aim is to overcome the current fragmentation of the legislative framework to reach a standardized regulation of compensation for damages deriving from antitrust breach. This will make it possible to develop an effective system of private enforcement of competition law.[16] This system can then interact regularly with the consolidated system of public enforcement, thereby improving the overall functioning of the relevant European and national law.

This paper will focus on certain problems of major interest strictly from the point of view of civil law. It is worth stating here that this analysis does not cover all the questions raised by the Directive, which also concern other legal spheres – in particular, procedural law and administrative law. In addition, with regard to the civil law issues, this paper does not follow the sequence of the provisions set out in the Directive.

II. Is an Infringement of Competition Law (Still) a Tort?

For the purposes of this analysis, the starting point concerns the choices made in the Directive on the relationship between national judges and the authorities appointed to apply competition law provisions. As mentioned above, Regulation 1/2003 established a first restriction when it provided that national judges, when deciding cases relating to Arts 81 and 82 of the Treaty (Arts 101 and 102 TFEU), must adhere to the decisions already taken by the European Commission and must avoid conflict with its activities (Art 16).[17]

The Directive seeks to introduce a similar restriction into relations between national competition authorities and national judges,[18] but places it

[16] See L. Castelli, n 5 above, 92, who focuses on the scarce development, in Europe, of a system of private enforcement relating to infringements of competition law.

[17] The problematic nature of this provision is clearly reported by R. Rordorf, 'Il ruolo del giudice e quello dell'Autorità Nazionale della Concorrenza e del Mercato nel risarcimento del danno antitrust' *Le Società*, 785 (2014).

[18] The innovative nature of the provision is evident upon a mere consideration that prior to its introduction, the letter of the law precluded that a national judge could be restricted to the inquiries carried out by a competition authority (other than the European Commission); see L. Castelli, n 5 above, 110.

within a scheme that can be summarized as follows (Art 9): once the national authority has ascertained the existence of an infringement of competition law, the court seised of a relating claim for compensation cannot cast doubt on the facts as resulting from the decision of the administrative authority. The restriction is therefore effective if the court seised and the competition authority belong to the same Member State; if the judge and the authority belong to two different states, the competition authority's decision is simply *prima facie* evidence, which may be particularly reliable but not binding for the purposes of deciding upon the claim for damages.[19]

The provision did not fail to give rise to some perplexity among scholars of European law,[20] especially if one considers that, compared to solutions that already exist in some national legal systems, it constitutes a step backwards in the pursuit of European integration.[21] From the point of view of civil law, however, the provision deserves attention for other reasons: in particular, pursuant to the assumption that an infringement of competition law is always a non-contractual offence, the provision prompts questions on the role that judges are required to perform in cases of applications for protection submitted by a party who complains of harm to his interest in the competitive balance of the market.

In general terms (ie disregarding the specific aspects of competition law), judges have performed a crucial role in the application and evolution of tortious liability. This observation is particularly relevant to the Italian situation, in view of its intermediate position between the systems featuring the typical aspects of tort (the German model) and those that stand out for their atypical traits (the French model); the mediation between the two extremes is ensured by the provision on undue harm ('*danno ingiusto*').

Summarizing a highly articulated conceptual path in extremely brief

[19] R. Nazzini, 'The Effect of Decisions by Competition Authorities in the European Union' *Italian Antitrust Review*, 91 (2015).

[20] B. Caravita di Toritto, 'Overview On The Directive 2014/104/EU' *Italian Antitrust Review*, 49 (2015).

[21] Pursuant to German competition law (s.33(4) Gesetz gegen Wettbewerbsbeschränkungen (GWB)), national courts must respect the decisions adopted by national competition authorities, whether these are German or of other Member States. On this subject, see M. Siragusa, 'L'effetto delle decisioni delle Autorità nazionali della concorrenza nei giudizi per il risarcimento del danno: la proposta della Commissione e il suo impatto nell'ordinamento italiano' *Concorrenza e mercato*, 299 (2014); and A. Rocchietti March, 'Il risarcimento del danno da illecito antitrust', in A. Catricalà and E. Gabrielli eds, *I contratti nella concorrenza*, *Trattato di diritto dei contratti* directed by P. Rescigno and E. Gabrielli (Milano: Utet, 2011), 491.

terms,[22] judges must identify the legally relevant interest that deserves protection, ascertain the harm, and allocate to another party the remedial consequences deriving from the harm caused. It is superfluous to note that this is fundamental to the proper functioning of the society, and it is precisely in this regard that it is possible to appreciate the value of the provision enshrined in the Italian Constitution according to which 'judges are subject only to the law'.[23] For the purposes of this discussion, the constitutional provision means that, when deciding upon tort cases, judges encounter no restrictions other than those imposed by the provisions and principles of the legal system.

With regard to the Directive's provision, interpreters are induced to check whether the approach summarized above can also be confirmed with regard to infringements of competition law.

In this regard, it is worth recalling that competition law consists – if the situation is considered in detail – of provisions whose scope is very general, and the application of which to a given market situation requires specialist notions as well as an attentive knowledge of the individual cases at hand.[24] It is also worth noting that the core of competition law (ie the provisions on agreements and on abuse of a dominant position) were included in the original European treaties adopting the suggestions and the wording of experts in United States competition law.[25] These provisions therefore reflect an approach specific to common law systems, which means that their implementation in non-common law systems may encounter certain difficulties.[26]

In any case, it is evident that, in this development from the abstract to the concrete level, those who actually implement the law enjoy a wide margin of discretion. To give a basic example, suffice it to consider that there is also no shortage of debate on how to identify the relevant market,

[22] Of an extremely prolific literature, it is worth reading the contributions of M. Barcellona, 'L' "ingiustizia" del danno e il doppio regime della responsabilità', in U. Carnevali ed, *Dei fatti illeciti*, *Commentario del Codice Civile* directed by E. Gabrielli (Milano: Utet, 2011), in particular 75-76, and of C. Scognamiglio, 'L'ingiustizia del danno (art. 2043)', in C. Scognamiglio ed, *Illecito e responsabilità civile*, I, *Trattato di diritto privato* directed by M. Bessone, (Torino: Giappichelli, 2005), X, 65-68.

[23] Art 101 para 2 of the Constitution of the Italian Republic.

[24] Already clearly illustrated by L. Raiser, 'Antinomie nel diritto sulle limitazioni della concorrenza', in Id, *Il compito del diritto privato* (translated by M. Graziadei) (Milano: Giuffrè, 1990), 243, who warns of jurists' need for economy.

[25] On this subject, see G. Amato, *Il potere e l'antitrust* (Bologna: Il Mulino, 1998), 8; C. Osti, 'Antitrust: a Heimlich *manoeuvre*' 11 *European Competition Journal*, 221, 237 (2015).

[26] That this was a traumatic event in respect of the approach traditionally adopted by (at least continental) European legal systems is emphasized by L. Raiser, 'La costituzione economica come problema giuridico', in Id, *Il compito del diritto privato* n 24 above, 39.

in terms of geography or product, and on the consequences of this regarding the existence or not of a cartel agreement or a dominant position. Considering the Italian national situation alone, a case brought before an administrative court against a decision of the Italian Antitrust Authority may certainly yield a different result from the decision of said authority.

Returning to the question of the role of judges in infringements of competition law, the traditional approach appears to be confirmed as regards the 'stand-alone' lawsuits for compensation, ie claims brought in the absence of a provision issued by the competition authority. Certainly, in such applications for protection, judges fully maintain their prerogatives, in the terms briefly illustrated above.

However, at least from a statistical viewpoint, it can be easily seen that the stand-alone cases constitute a very small minority, compared to the alternative model represented by the 'follow-on' lawsuits. These, on the other hand, are filed pursuant to a decision issued by the national competition authority (and possibly after the subsequent proceedings before the administrative court).

In these cases, the court seised of the compensation claim is effectively 'expropriated' of its power to inquire into the existence of the breach, since it is obliged to respect the inquiry carried out by the administrative authority appointed to apply competition law. The restriction is stringent if the European Commission is involved and when the competition authority and the court are of the same country; it is less so, but nevertheless incisive, if the inquiry was carried out by the competition authority of a different Member State, because in this case the evidence is *prima facie* proof (ie evidence which appears to be obvious and thus which at a first glance cannot be doubted).[27]

According to certain legal scholars, the inquiry carried out by the competition authority into the existence of the infringement does not affect the court's power regarding the *proprium* of the claim for compensation, since the existence of the damages (understood as the harm of which the

[27] This issue is dealt with for the first time in the two judgments of the Corte di Cassazione 13 February 2009 no 3638, *Giustizia civile Massimario*, 235 (2009) and no 3640, *Foro italiano*, I, 1901 (2010) (Hon Marina Tavassi as reporting judge for both); critical comments on the subject can be found in the reasoning of the Corte di Cassazione 28 May 2014 no 11904, *Responsabilità civile e previdenza*, 1219 (2015). On this, see M. Tavassi, 'Le azioni di danno antitrust nella giurisprudenza italiana', in G.A. Benacchio and M. Carpagnano eds, *Il private enforcement del diritto comunitario della concorrenza: ruolo e competenze dei giudici nazionali* (Padova: Cedam, 2009), 151; critical considerations in A. Frignani, 'La Cassazione prosegue l'erosione del diritto di difesa nelle cause risarcitorie antitrust *follow-on*', in G.A. Benacchio and M. Carpagnano eds, *L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea* (Napoli: Edizioni Scientifiche Italiane, 2014), 79.

plaintiff complains) must be ascertained regardless, as well as the entity of the harm and its causal link with the wrongdoing.

This hypothesis is open to possible criticism if one examines the Italian scenario and, in particular, the disputes triggered by the decision relating to motor vehicle insurance for third-party liability. Indeed, an examination of the judgments handed down by the Court of Cassation shows – at least in the opinion of this author – a progressive evolution towards reducing the judge's power of assessment and decision-making: there appears to have been a shift from an affirmation of the principle according to which the harm must be proven by the plaintiff,[28] towards an acceptance of the hypothesis according to which the existence of the harm and the related compensatory amount can be presumed to be proven[29] on the basis of

[28] This appears to be the attitude displayed by the Corte di Cassazione 2 February 2007 no 2305, n 4 above, according to which: 'The judge cannot omit to assess all the elements of proof offered by the insurer to contrast the presumptions, or to demonstrate that the causal sequence followed was broken by one or more different facts which alone were enough to cause the damage, or to ascertain that those facts, together with the illegal agreement, have taken on the nature of equivalent (and, therefore, concurrent) causes in the production of the damage. (…) The insurer had indeed attached a series of documented circumstances (see supra in the part illustrating the reasons for the claim) tending precisely towards confirming the aforementioned proof. Which circumstances the impugned judgment completely ignored, exclusively and uncritically resting on the mere content of the administrative provision, almost as if to endorse the aberrant thesis according to which the damage is *res ipsa*.

A hypothesis that is all the more unsustainable if one takes into account the fact that the antitrust provision in question (and the judgments of the administrative courts that have confirmed it) merely ascertains the illegality of an exchange of information, and that the alteration of the competitive situation and the consequent increase in the prices to the end consumer is merely a possibility' (author's translation).

It is no coincidence that the Court, with this decision, sustained the claim brought by the insurance company.

[29] Thus, for example, see also Corte di Cassazione 10 May 2011 no 10211, *Foro italiano*, I, 2675 (2011): 'If it is true that the antitrust authority has imposed punishment only pursuant to Art 2, para 2, of legge no 287 of 1990, recognizing an agreement that could falsify the competitive balance, instead of a cartel agreement on the levels of the premiums, there is no doubt that the abnormal increase in the premiums for motor vehicle third-party liability policies, during the period of the agreement, has created, on one hand, a premise for judging the behaviour illegal and, on the other, the doubtless ascertainment of its effect, to the detriment of the users of the insurance services', to then conclude that: 'The insured party who brings a claim for compensation for damages pursuant to Art 33 of legge no 287 of 1990, has the right to avail itself of the presumption that the premium has been unduly increased by effect of the conspiratorial behaviour and that the amount of the increase (therefore the entity of the harm sustained) is no less than the average level of 20 per cent: and pursuant to the investigation carried out by the antitrust authority (…)'.

In the wake of the latter, see, *ex multis*, Corte di Cassazione 20 June 2011 no 13486, *Giustizia civile*, I, 1793 (2012); Corte di Cassazione 18 August 2011 no 17362, *Giustizia civile Massimario*, 1175 (2011); Corte di Cassazione 20 December 2011 no 27554, available

nothing more than the decision of the national competition authority.[30] In the latter case, therefore, the lawsuit for damages is reduced to the defendant (a company belonging to a cartel) having to convince the court that the presumption has been borne out, demonstrating the inexistence of any compensation-worthy harm sustained by the plaintiff.[31]

If this was the position in case law prior to the Directive's enactment, it is difficult to believe that a step backwards may be taken after the content of Art 9 is transposed into a provision of Italian law.[32]

In a provoking or disillusioned tone, scholars have stated that, in the law on infringements of competition law, judges are destined to become the fair liquidator of harms ascertained in another venue.[33] The statement certainly has some truth, insofar as it notes that the judge's role has practically lost all purpose, save for that of ordering the payment of compensation for harms deriving from the infringement of competition

at www.ilforoitaliano.it (last visited 24 May 2016); Corte di Cassazione 9 May 2012 no 7039, *Giustizia civile Massimario*, 577 (2012); Corte di Cassazione 9 May 2012 no 7045, available at www.ilforoitaliano.it (last visited 24 May 2016); Corte di Cassazione 22 May 2013 no 12551, *Giustizia civile Massimario* (2013); Corte di Cassazione 28 May 2014 no 11904, n 27 above; Corte di Cassazione 12 June 2014 no 13360, available at www.ilforoitaliano.it (last visited 24 May 2016); Corte di Cassazione 6 May 2015 no 9131, available at www.ilforoitaliano.it (last visited 24 May 2016).

Aside from third-party vehicle insurance disputes, several different positions may be identified. For example, according to the Corte di Cassazione 10 September 2013 no 20695, *Giustizia civile Massimario* (2013): 'The damage caused by abuse of a dominant position is not res ipsa, but damage-consequence, different from and in addition to the distortion of the rules of competition. As such, it must be proven independently in accordance with the general principles of tort liability.'

[30] To this effect, see also M. Siragusa, n 21 above, 310. Recalling precisely the Corte di Cassazione 10 May 2011 no 10211 n 29 above, it is possible to register a change of direction with regard to the probative value of the antitrust authority's provision, which no longer concerns the illegal fact alone, but also the assessments of the damages worthy of compensation. This topic is also discussed in L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno', in U. Carnevali ed, n 22 above, 350-352. In particular, the author emphasizes that the case of damage *in re ipsa* risks causing confusion between public enforcement (the protection of competition by public institutions) and private enforcement (enforcement by one party against another); however, the two levels must remain distinct, as shown by the existence of several authorities appointed to provide for the respective types of surveillance. Recently, see also V. Vozza, 'RC Auto e intese anticoncorrenziali: la presunzione legale del provvedimento sanzionatorio' *Danno e responsabilità*, 162 (2015).

[31] On this subject, R. Nazzini, n 19 above, 93-94.

[32] L. Panzani, 'Binding Effect of Decisions Adopted by National Competition Authorities' *Italian Antitrust Review*, 101-102 (2015), states that there should be some reflection on the compatibility with the right of defence, in light of Art 117 of the Constitution, as well as with the case law of the European Court of Human Rights. To the same effect, see also K. Wright, 'The Ambit of Judicial Competence After the EU Antitrust Damages Directive' 43 *Legal Issues of Economic Integration*, 4 (2016).

[33] To this effect, see A. Frignani, n 27 above, 86; similarly, K. Wright, n 32 above, 11 and the references contained therein.

law. Upon closer consideration, the legislative framework outlined by the European Commission (first by means of Regulation 1/2003 and then as reinforced by the Directive) clearly reveals the possibility of the court disagreeing with the conclusions reached by the competition authorities.

The result is an overall situation in which the judge's duty, except for rare cases in which – if the expression may be allowed – he or she 'dares' to decide a stand-alone case, is reduced to a task supporting and downstream of the competition authority. From this point of view, the integration of private and public enforcement does not appear to occur in an equal or balanced manner, but rather that private enforcement has a merely ancillary role:[34] in proceedings for damages, to complete the sanctions imposed on those responsible for the infringement.

Turning our attention to Italian law and the possible consequences of the Directive's implementation, reflecting upon the relationship between the national courts and the competition authority raises certain questions of significant systematic import. These questions regard not only the relationship between the courts and the public administration, or the relevance and the (non-)restrictive nature that administrative decisions and/or judgments of the administrative court may assume within the sphere of a civil lawsuit.

Indeed, the issue runs deeper and concerns the very notion of tortious liability arising when competition law is broken. The Directive reveals the inference that the relationship between the court and the law is no longer direct, but is mediated by the competition authority, which – in the intentions of the European legislator – is in fact the entity that was institutionally appointed to transform the abstract letter of the law into concrete action;[35] this competence is admittedly not exclusive, as the path of stand-alone actions remains open (at least formally), but it can hardly be denied that this competence is pre-eminent in nature.

Placing this concept within the normal schemes of tortious liability, it must be maintained that an infringement of competition law corresponds to harming a legally qualified interest in the fair competition of the market, although to the extent and in the manner ascertained by the specifically appointed authority. In simpler terms, the legal rule requires (almost necessarily) completion by the administrative authority, on whose decision the civil court can no longer cast doubt, not even to appreciate the

[34] In the same vein, see also M. Libertini, 'Il ruolo necessariamente complementare di "*private*" e "*public enforcement*" in materia di antitrust', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: Il Mulino, 2009), 174.

[35] On this subject, see E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* (Napoli: Jovene, 2008), 48.

legally relevant interest.

At this point, one is entitled to wonder whether an infringement of competition law can still be considered the expression of a tort (ie a non-contractual wrong), if this expression refers to a mutual interference of two independent legal spheres, a source of prejudice whose measurement and assessment the courts are called upon to decide, on the basis of the general clause of Art 2043 of the Civil Code. The theoretical alternative is to consider an infringement of competition law as an administrative wrong to be decided upon by an administrative court. In this scenario, once the existence of the infringement has been declared, the civil court's duty is actually reduced to a mere ascertainment of the harm of which the individual complains, without prejudice to the importance of the abovementioned presumptive reasoning.[36]

Thus, there appears to be a 'de-jurisdictionalization' of the infringement of competition law.[37] This conclusion may be reached on the basis of certain precise indications emerging from the evolution of the issue before national courts of civil law. On one hand, it is necessary to recall the principle (accepted by the highest courts) according to which the decisions issued by the competition authority can certainly be questioned in a civil court, but only weakly, as the court cannot replace its own assessment for that given by the authority, when the motivation of the latter cannot be considered unreasonable, illogic or inconsistent.[38]

On the other hand, considering litigation for compensation in the civil courts, it is possible to notice the total obliteration of the tort's subjective profile: once the infringement has been ascertained by the appointed authority (and therefore in the course of administrative proceedings), the problem of verifying the existence of the element of responsibility (ie negligence or a malicious intent) before the civil court no longer arises, nor does the possibility of recognizing an alternative criterion for connection, based on the schemes of strict liability or *sub specie* corporate liability. For that matter, the letter of the law itself is uncertain regarding the qualification of infringements of competition law in respect of the aforementioned debate on the nature of the liability.[39]

[36] See G. Villa, n 12 above, 306.

[37] In similar terms, see E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 39, who uses the expression 'the administrativation of civil law protection'.

[38] Last, see Corte di Cassazione-Sezioni Unite 20 January 2014 no 1013, *Giustizia civile Massimario* (2014); on this subject, see M. Siragusa, n 21 above, 314. Critical considerations are given in A. Frignani, n 27 above, 81.

[39] In the first meaning (tortious liability, or subjective responsibility), for example, see L. Castelli, *Disciplina antritrust e illecito civile* n 5 above, 170, who also emphasizes the deterring function; A. Genovese, *Il risarcimento del danno da illecito concorrenziale* (Napoli: Edizioni Scientifiche Italiane, 2005), 109; also, A. Rocchietti March, n 21 above,

This leads to the question of the actual nature of the infringement of competition law and its position within the legal system. For the moment, the question remains open. It can only be observed that the answer probably consists in maintaining its position within the sphere of tort law, in consideration of the indications that the system offers today; in an attempt to project our observation into the future, however, the answer may well differ, if one considers the special attention that the European lawmaker reserves to the binding nature of the decisions adopted by competition authorities.[40]

III. The Notion of Damages Adopted by the Directive

The analysis of the Directive in terms of civil law must now shift its focus to the notion of damages proposed therein (Art 3 para 2). The provision's wording strictly adheres to the well-known differential thesis, since the harm is identified as the difference between (i) the situation complained of by the party which brings the action for compensation and (ii) the situation in which said party would be if there had been no infringement of competition law. The ancillary documents prepared by the European Commission[41] mention the 'counter-factual' method, which – as may be known – is one of the techniques developed for determining the harm resulting from an infringement of competition law.[42]

The essential factor is the exclusive attention given by the European legislator to the assets of the victim of the infringement. From this point of view, the harm corresponds to the harm suffered by said victim, and – conforming to the traditional categories of civil law – is qualified as actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*), as well as

513. In the second meaning, instead, see G. Alpa, 'Illecito e danno antitrust. Un dialogo tra le Corti nazionali e la Corte di Giustizia dell'Unione europea' *Contratto e impresa*, 1237 (2015), who states that in a breach of competition law, the responsibility is objective, consisting of breaching provisions which prescribe certain specific behaviour; this therefore leads to an inversion of the burden of proof.

[40] The risk of a short circuit occurring is evident, if one considers that the European Commission is recognized the right to bring legal actions for damages deriving from agreements investigated and ascertained by itself. This is what happened with the Case C-199/11 *Europese Gemeenschap* v *Otis NV et al* (European Court of Justice Grand Chambre 6 November 2012) available at www.eur-lex.europa.eu.

[41] See, in particular, the Communication from the Commission on quantifying harm in actions for damages based on breaches of Arts 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), para 9.

[42] For an introduction at scholarly level, see L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 201, and the references therein; E. Brodi, 'Illecito antitrust e risarcimento del danno in alcuni recenti casi di abuso di posizione dominante' *Rivista delle società*, 1452 (2008).

interests. Thus, a recent legal scholar is perfectly correct when stating that the Directive unhesitatingly adopts the prospect of compensating for the harm deriving from an antitrust infringement.[43]

Fully consistently with the above, immediately after discussing the notion of damages, the text takes pains to clarify that all forms of overcompensation of the harm suffered, as punitive or multiple damages, are to be excluded. The European legislator thus makes a specific ideological choice, which is significant in two different aspects. First, there is a clean break with the approach adopted in the United States, where – as may be known – punitive and/or overcompensatory damages is common for antitrust infringements.[44]

Second, the Directive thus demonstrates its intention to eliminate the broader debate on the purposes of the compensation awarded for infringements of competition law; in particular, it denies that such compensation can seek not only to restore the losses of which the victim complains, but also to reduce the profit obtained by the infringing parties.[45]

The choice adopted is singular, if one considers that, on a traditionally similar subject such as the protection of industrial and intellectual property rights, the same lawmaker did clearly envisage the possibility of the compensation awarded resulting in a curtailment of the profit that the offender obtained due to the infringement.[46] Italian scholarship had also argued in favour of the possibility of 'disgorgement'.[47] The legislator drafting the Directive, however, appears to be convinced that the entire problem of compensation can be managed exclusively from the

[43] Thus writes E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 54. Critical considerations on this legislative choice are made in F.P. Maier-Rigaud, 'Toward A European Directive on Damages Actions' 10(2) *Journal of Competition Law & Economics*, 354 (2014).

[44] This is widely observed in United States scholarship. See, for example, E.D. Cavanagh, 'Detrebling Antitrust Damages in Monopolization Cases' *76 Antitrust Law Journal*, 97, 120 (2009); A. Mitchell Polinsky, 'Detrebling versus Decoupling Antitrust Damages: Lessons From The Theory of Enforcement' 74 *Georgetown Law Journal,* 1231, 1232 (1986). See P. Iannuccelli, 'Torniamo al Trattato!' n 7 above, 103.

[45] The prospect has been discussed repeatedly in the specialized literature. See, for example, E. Elhauge, 'Disgorgement As An Antitrust Remedy' 76 *Antitrust Law Journal*, 79 (2009), who expresses a favourable opinion on the use of the remedy. In Italian legal literature, similar thoughts are expressed in M. Scuffi, 'I poteri inibitori e risarcitori del giudice nazionale antitrust', in G.A. Benacchio and M. Carpagnano eds, *I rimedi civilistici agli illeciti concorrenziali - Private Enforcement of Competition Law* (Padova: Cedam, 2012), 50; and M. Tavassi, n 27 above, 129. A different opinion, however, is expressed by A. Genovese, n 39 above, 133, who denies the possibility of subtracting the profit deriving from the breach of competition law from the party who obtained it in the process of managing a business.

[46] See European Parliament and Council Directive (EC) 2004/48 of 29 April 2004, and Art 13 and para 26 of the recitals of the same.

[47] See citations n 45 above.

point of view of the damaged party. To this end, the two traditional tools of actual loss and loss of profit are used,[48] in the apparent belief that they are sufficient to cover all the potentially negative consequences that may derive from antitrust infringements.

In this author's opinion, this much confirms the minimalist approach pervading the entire Directive. The impression is further reinforced by the fact that the provision mentioned contains no substantive indications on the quantification of the compensation. Indeed, Art 17 ends up being merely a provision that refers back to national legal systems; the only significant passage is a methodological indication that expresses some hope in the reinforcement of forms of collaboration between the courts and the competition authorities,[49] upon the clear assumption that the latter are better able to provide useful elements on the quantification of the harm. Again, therefore, the effective venue of the decision-making appears to be outside the courts of civil law, as confirmed – in Italy – by the most recent opinions of the Court of Cassation.[50]

[48] Critical considerations are given in A. Genovese, 'Funzione e quantificazione del risarcimento. Considerazioni relative al danno da illecito antitrust', in M. Maugeri and A. Zoppini eds, n 34 above, 226-227. The author recalls that this technique for quantifying compensation is based on contractual damages. Its transfer to the sphere of antitrust damages is highly problematic, because it requires the identification of a loss that accrues in a structurally and functionally different context. Indeed, there is not only a problem of real wealth being destroyed, but also the need to identify the injured party's economic potentials that are prejudiced by the wrong.

[49] Indications to this effect were already given in M. Tavassi, n 27 above, 138. More recently, see B. Caravita di Toritto, n 20 above, 51, with reference to Art 213 of the Code of Civil Procedure.

[50] See the recent Corte di Cassazione 4 June 2015 no 11564, *Foro amministrativo*, 2200 (2015) in which it is stated that: 'The judge is required to make effective the protection of private subjects who bring actions before the civil court against alleged breaches of competition law (in the cases contemplated by legge no 287 of 1990, Arts 2 onwards), taking into account the informative asymmetries existing between the parties as regards access to evidence, also by means of an interpretation of the procedural rules as being functional to the pursuit of the correct implementation of competition law. It is an objective that can be pursued by means of the suitable use of the tools of investigation and discovery that the rules of procedural already contemplate, by an extensive interpretation of the conditions established by the procedural code on the exhibition of documents, the request for information (see also Art 15 of Regulation 1/2003) and, above all, by the technical expertise requested by the Court, for the exercise – also upon the court's initiative – of the powers of inquiry, acquisition and evaluation of data and information useful for reconstructing the reported case of anti-competitive practices, in respect of the principles of debate and without prejudice to the burden of proof bearing on the plaintiff (see Art 2 of Regulation 1/2003) to indicate in a sufficiently plausible manner serious evidence demonstrating that the case reported may alter freedom of competition and harm the plaintiff's right to enjoy the benefit of commercial competition'.

From a systematic and civil law point of view, the Directive's approach as summed up above, is worthy of analysis, especially due to the elements that were not included in the legal provisions introduced. In particular, two aspects are significant: the quantification of the harm that can be compensated and the identification of the applicable compensation techniques.

In scholarship, it has been authoritatively observed that the quantification of harm is a crucial problem,[51] insofar as regulation of this aspect expresses the purposes pursued by the law through the obligation to compensate. Indeed, in cases of antitrust infringements, the determination of the *quantum* of compensation implies a reflection on the interest underlying the obligation to compensate. Indeed, the latter ends up being a movement of wealth, which must be adequately justified according to principles of law; this is all the more true in the case of the Directive, which envisages compensation by means of payment of an equivalent value in cash.[52]

Briefly, therefore, judges must face the following question: what is really compensated, when the competition law infringer is obliged to pay the damage? The question must bear in mind that, generally, the infringement affects interests whose legal relevance may appear unclear at times,[53] or at least not always corresponding to the usual schemes familiar to the traditional jurist.

The Italian Supreme Court has answered this question, identifying the interest as consisting in the competitive balance of the market.[54] The answer is formally not subject to criticism, but probably incomplete when economic value is attributed to that interest and thus quantifies the harm caused.

One difficulty probably lies in the fact that the harm in question accrues in a context (ie the market or the field of competition) in which the interference between distinct legal spheres must be considered to be

[51] Thus M. Libertini, 'La determinazione del danno risarcibile nella proposta di direttiva comunitaria sul risarcimento del danno antitrust. Alcune osservazioni preliminari' *Concorrenza e mercato*, 265 (2014).

[52] This is discussed in A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 155-158.

[53] On this subject, see ibid 106. On the assumption that the adjudication of conflicts relating to competition law depends on a general clause, the author notes that this approach is functional to both the complementary nature of the disciplines (means) and the objective protection of competition (end). Pursuant to the principle of free competition, a competitor's aggressive action to take over the market position of another entrepreneur is never illegal *ex se*; in a competitive system, indeed, a company's market position is not protected as such, but only against certain 'methods' of aggression. See also E. Brodi, n 42 above, 1460.

[54] See the judgments listed n 4 above.

entirely physiological,[55] and not merely occasional, as may instead be inferred in traditional comments on tortious liability. This approach allows us to understand why, at least as regards the *an* of the compensation, the mediation of the competition authority is deemed necessary: it is this authority's assessment that enables distinction between cases in which the interference is legally irrelevant from those in which it is illicit and the source of harm is worthy of compensation.

Nevertheless, the question of the *quantum* of compensation remains open. From the theoretical point of view, it may appear relatively simple to base the problem on the actual loss or the 'dry' economic loss suffered by a party due to the distortion of the market functioning rules.[56] The paradigm case is the increase in prices as an effect of a cartel among various undertakings. It is no coincidence that the Directive focuses precisely on this case,[57] as will be illustrated further below.

Even remaining within the sphere of economic loss, the problem certainly becomes more complicated when considering the case when the increased price prevents a party from buying a certain good or service, perhaps replacing it with a substitute, which however influences profit or even harms the existing dominant position.[58] In this case, the determination of the harm sustained necessarily requires probabilistic estimates which are

[55] See A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 90, in which it is observed that antitrust law conceives competition conflicts as conflicts between subjects holding equal and contrary interests; consequently, each entrepreneur has an interest in the possibility and maximum profitability of the business initiative. Previously, to the same effect, see M. Barcellona, 'Funzione compensativa della responsabilità e private enforcement della disciplina antitrust' *Contratto e impresa*, 136 (2008). In this regard, problematic aspects are discussed in L. Raiser, 'Il diritto soggettivo nella dottrina civilistica tedesca', in Id, *Il compito del diritto privato* n 24 above, 125.

[56] See, however, A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 153. After identifying certain critical factors ((i) the company's assets do not show all decreases in value sustained; (ii) the company's value, understood as an economic entity that can be valued, is an investment; (iii) it is difficult to envisage the causal processes developed by means of the unfair competition), the author deduces that the representation of the harm caused by unfair competition as a real, albeit differential, economic harm is approximate and questionable. She therefore concludes that the remedy of compensation, if applied to illegal unfair competition, is a weak and unreliable instrument of protection.

[57] See F.P. Maier-Rigaud, n 43 above, 358.

[58] See the example offered by F. Denozza and L. Toffoletti, *Funzione compensatoria ed effetti deterrenti dell'azione privata nel diritto antitrust*, in M. Maugeri and A. Zoppini eds, n 34 above, 204: those privy to an agreement conspire to delay the introduction of an innovative process or product into the market; this leads to a range of private costs, such as benefits lost in terms of improved quality, safety or environmental protection that the new productor process would have generated. The quantification of this prejudice is difficult and, consequently, there is a risk of the damages being less than the company's full loss.

inevitably approximate.

If one then examines the loss-of-profit scenario, the problem assumes an even trickier profile.[59] In particular, in this context, there is a clear need to differentiate the position of the consumer (ie the party extraneous to the competition) from that of the undertaking, especially the undertaking that is a competitor of the infringing party (or parties) and that operates in direct contact with the latter(s). In this regard, the assessment of the harm complained of in terms of loss of profit inevitably requires reconstructing the situation that the market of reference would have been in if the breach had not been committed and thus of the profit that the undertaking could have gained.

If the above is correct, it cannot be denied that the compensation for loss of profit in the case of an infringement of competition law requires an analysis of the expectations that an undertaking can legitimately nourish when approaching and operating on the market, and of the extent to which such expectations can be protected by law through payment of compensation. Observant scholarship[60] has answered this question, placing, at the centre of the protection offered by compensation, the interest in the competitive advantage and, more precisely, the interest of the single undertaking in exploiting a competitive advantage over their rivals; harming this interest generates prejudicial effects on the income prospects of the undertaking suffering the harm.

According to its premises, this scholarship traces the harm back to the loss of chances and entrusts it to the judge's equitable assessment.[61] The prospect of a fair assessment of the damage is also confirmed by Italian case law,[62] thus attesting the great difficulty of quantifying the prejudice.[63]

In this regard, the Directive does not provides any constructive contributions. This is probably consistent with its essentially procedural value, since the objective pursued by European law aims mainly at standardizing the procedural rules on claims for damages due to infringements of competition law. As for this purpose, the substantive

[59] To the same effect, see also F.P. Maier-Rigaud, n 43 above, 348.

[60] A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 176.

[61] See Ibid 228-236. In the same vein, see also M. Libertini, 'La determinazione del danno risarcibile' n 51 above, 270.

[62] See, for example, Tribunale di Milano 27 December 2013 no 16319, available at www.iusexplorer.it, regarding a case of abuse of a dominant position.

[63] On this subject, see L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno' n 30 above, 362; E. Brodi, n 42 above, 1455-1456, who also recalls that the institution raises the problem of separating the evaluation of the causal link between the material profile and the legal profile.

issues, such as that discussed above on the amount of the compensation, still depend on the sensitivity of individual national legal systems.

This conclusion is confirmed by a document issued at the same time as the Directive, but that does not have force of law:[64] a Practical Guide on 'Quantifying Harm in Actions for Damages', in which the European institutions express some hesitation on the suitability of the concept of loss of profit to cover a series of potential harms deriving from breaches of competition law, such as those caused by the exclusion of a company from a certain market.[65] Indeed, the Guide states that the Directive does not prejudice the possibility of structuring the claim for compensation differently, basing it, for example, on the loss of chance or on harm to a company's economic reputation, if these forms are contemplated by the applicable national laws.

Quantifying the harm thus also remains an open problem, especially since the operational indications that will arise in practice do not exist yet. It is highly likely that this evolution will not be guided by the courts but rather by the competition authorities, as already occurred in the issue of motor vehicle third-party liability insurance.

Before drawing some conclusions on the notion of damages, it is worthy to briefly mention the second aspect referred to above: the protective techniques contemplated by the Directive. In this regard, it must be noted that, in determining the role of judges on matters of infringements of competition law, the European legislator considers only the possibility of compensation by equivalence (in the form of cash), ignoring techniques of specific redress.[66] This choice is undoubtedly significant, especially to the extent that bars on practising are included therein, as well as court orders resulting in an action and that – with reference to the Italian legal system alone – are contemplated by legal provisions existing alongside antitrust provisions, such as that on the abuse of economic dependence (Art 9 of legge no 192 of 18 June 1998).

On this point, the Directive is silent.[67] The aforesaid measures cannot thus be considered forbidden or *contra legem*; they are simply extraneous to the harmonization pursued by European legislation, and will thus continue

[64] The Practical Guide on 'Quantifying Harm in Actions for Damages Based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (which accompanies the Communication mentioned n 41 above), SWD(2013) 205, § 183.

[65] It is frequently stated in legal literature that breaches of competition law may have been eliminated, or at least underestimated, by the Directive: see eg E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 38.

[66] On the importance of these protective techniques see M. Libertini, 'La determinazione del danno risarcibile' n 51 above, 271.

[67] On this subject, K. Wright, n 32 above, 8.

to be disciplined by national legal systems.

A potentially problematic aspect emerges at this point in the relations between judges and competition authorities: can judges issue a prohibition provision or an order to take action against a market operator, also if this measure may interfere with proceedings pending before the competition authority? If the proceedings are pending before the European Commission, the answer is provided in Art 16 of Regulation 1/2003, which clearly forbids the judge from interfering.

However, there is no similar explicit indication for cases in which the proceedings are pending before a national authority. Theoretically, therefore, the risk of interference cannot be excluded, and could occur if – for example – the judge and the competition authority issue conflicting precautionary provisions as to the behaviour that given market operator should adopt.

IV. The Enforceability of the Claim for Compensation; The 'Passing-On' Problem

As mentioned above, the Directive mainly considers a certain kind of prejudice: the overcharge paid by the victim of the infringement due to the existence of a cartel agreement (Art 12). The problem is then placed within the context of more or less complex vertical distribution chains, within the sphere of which the overcharge may 'slide' downwards[68] and thus tend to shift from to another operator of the chain.[69] However, this transfer can vary greatly from one case to another, both in terms of the *an* and of the *quantum*.[70]

This problem is familiar to the debate developing in the United States, where antitrust legislation has now been applied for over one century. In extremely brief terms, according to the rules in force in the US, the only party entitled to file a claim for damages is the direct purchaser, ie the operator that interacts directly (without any mediation) with the antitrust infringer,[71] as in the case of a company that abuses its dominant position or that belongs to a cartel.

The operating rule summarized above is the result of two successive cases before the federal Supreme Court. The former[72] prohibited raising the exception of 'defensive passing-on', establishing that the defendant in

[68] This image is also found in F.P. Maier-Rigaud, n 43 above, 345.

[69] On this subject, see L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 160.

[70] In this regard, see also A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 207.

[71] See G. Taddei Elmi, n 13 above, 198, who emphasizes the efficiency reasons underlying this approach.

[72] *Hanover Shoe Inc.* v *United Shoe Machinery Corp*. 392 US 481 (1968).

a claim for compensation (ie the subject who committed the alleged infringement) can no longer argue that the plaintiff transferred the extra cost to the distribution chain downstream. Thus, the infringing party cannot maintain that there is no harm to be compensated because the harm was transferred by the plaintiff to another subject. The reasoning gives the impression that the Supreme Court intended to prevent judges from having to investigate the distribution chain's actual structure, with the risk that the deterrent effect of the claim for damages[73] would be weakened.

However, the second decision,[74] (apparently) symmetrically with the first,[75] excluded the possibility for indirect purchasers to claim damages from infringing party, under the assumption that this could lead to duplication or multiplication of claims for damages.

Therefore, at federal level at least, litigation on damages deriving from antitrust infringements is limited to disputes between parties who operate in direct contact with each other[76] within the distribution chain. However, if the analysis is extended to state-court level, the overall picture is much more complex;[77] for that matter, scholarly debate spares no criticism for the arrangement adopted at federal level, precisely regarding the system's basic choices.[78]

Compared to the situation briefly described above, the Directive made

[73] See the following emblematic citation from the Hanover Shoe judgment: 'Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness'. See also E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 43.

[74] *Illinois Brick Co.* v *State of Illinois* 431 US 720 (1977).

[75] The symmetry emerges from the following part of the reasoning: '(W)e conclude that, whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants'.

[76] Since 'the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers, rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it', as stated by the Supreme Court in the Illinois Brick decision.

[77] It has been observed that federal antitrust law protects competition, while common tort law protects competitors; this is noted by E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 270. On this subject, see also L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno' n 30 above, 341, who recalls that, at state level, it is possible to pass on the prejudice, thus endowing indirect purchasers with the right to bring actions for damages.

For an introduction, see A.I. Gavil, 'Thinking Outside the Illinois Brick Box: A Proposal for Reform' 76 *Antitrust Law Journal,* 97, 167 (2009).

[78] See, for example, E. Elhauge, n 45 above, 83, and A.I. Gavil, n 77 above, 171. Both scholars note that the Supreme Court's approach has a dissuasive effect, in the sense that direct purchasers tend to be reluctant to bring action against his habitual business counterpart.

diametrically opposite choices.[79] First, it avoided placing limits on the right to bring actions, recognizing to all market operators the right to do so, without distinguishing between direct and indirect purchasers (Art 12). Second, it contemplates the possibility for defendants in lawsuits for damages, to 'paralyse' the claims brought against him by raising the exception of the transfer of the overcharge downstream in the distribution chain; it remains understood that the defendant bears the burden of proof in any case (Art 13). Finally, to favour claims from indirect purchasers, the Directive has established, in their favour, a presumption of the existence of the harm sustained, if certain circumstances exist that link the overcharge of their purchase to the infringement of competition law that has emerged (Art 14).

There are several possible explanations for the radical difference of the European approach. On one hand, the provision of a generalized right to claim damages extended to all operators of the distribution chain is consistent with the Directive's basic objective, namely to favour bringing actions for damages on part of market operators, to complement the activity of the relevant appointed authority. Therefore, it would probably be contradictory if, when intervening with an innovative discipline, barriers preventing application to the judicial authority were to be contemplated at the same time. Conversely, this problem does not arise in the US, where the antitrust attitude within the judicial environment[80] has always been widespread and private enforcement has thus had a pre-eminent role, compared to public enforcement.

On the other hand, the precautions and limitations surrounding claims in the US (at least at federal level) are linked to the punitive or sanctioning nature of the damages awarded. This means that the entity of the obligation imposed upon the infringing party can be much greater than the actual harm suffered by the plaintiff in the lawsuit for damages. In such a context, there is a clear risk that several claims for damages may overlap. If all claims are sustained, an 'overloading' of compensation would result and, consequently, a definitive expulsion of the infringing operator from the market.

[79] Thus G. Taddei Elmi, n 13 above, 228; M. Carpagnano, 'Le regole (proposte) sul *passing on* e azione degli acquirenti indiretti' *Concorrenza e mercato*, 275 (2014).

[80] On this subject, see D.J. Gerber, 'Private Enforcement of Competition Law. US Experience and European Plans', in G.A. Benacchio and M. Carpagnano eds, *Il private enforcement del diritto comunitario della concorrenza* n 27 above, 35-38, where even the consolidation of the widespread use of litigation has created uncertainty on the functions and objectives of competition law; M.A. Sittenreich, 'The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions' *78 Fordham Law Review*, 2701, 2706 (2010).

In Italian scholarship, see E. Brodi, n 42 above, 1446.

This risk does not appear to exist in the (future) European scenario, given the specific ideological choice according to which the sole issue considered by the legislator is the restoration of the harm suffered by the victim, excluding all punitive or overcompensatory purposes. At least in theory, therefore, even in the case of several claims for damages brought by subjects linked at different levels of the distribution chain, the infringing party will always be required to make up for the harm caused, according to its concrete quantification, and if necessary as per an equitable evaluation.[81]

However, the possibility of several concurrent claims for damages remains legally relevant, to the extent that it can lead to a misalignment between the entity of the harm and that of the compensation awarded as a result of the legal action.[82] As appropriately observed,[83] regulating the concurrency between the various claims requires an in-depth knowledge of how the distribution chain operates in practice and, above all, of the mechanisms for shifting the value between operators; this implies the possession of specialist skills that are not easily available in ordinary civil claims.[84]

The legislator of the Directive is manifestly aware of the problem. The consequence of the answer provided in Art 15, however, is that the ultimate decision is again left to national legislators. The only methodological indication consists of an invitation to take into account any other decisions that may have already been made regarding the same antitrust infringement, or any other legal proceedings pending on the same issue.

This indication has significant consequences for procedural law, which are extraneous to this discussion. It must be noted, however, that the Directive poses another limitation in the operational sphere assigned to judges seised of a claim for damages deriving from antitrust infringements. Let us consider the following example: in the context of a rather complex distribution chain, two operators at different levels bring claims for damages separately, complaining that they have each suffered harms deriving from the overpricing due to an upstream agreement in the same chain. The judgement of the action brought by Operator A is given before that of the claim brought by Operator B. According to the Directive, therefore, in quantifying the damages, the court seised by B should take into account

[81] A positive evaluation of the choices adopted by the Directive in this regard can be found in R. Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' *Maastricht Journal of European and Comparative Law*, 18 (2013), who considers it reinforcement of the deterrent effect of claims for damages.

[82] The risk is also appreciated by G. Taddei Elmi, n 13 above, 229.

[83] Thus V. Mouta Pereira, 'Passing-on of Overcharges: Will the National Courts Lead the Way Forward?' *Italian Antitrust Review*, 113 (2015).

[84] Critical considerations are available in F.P. Maier-Rigaud, n 43 above, 344.

what was recognized to A in the distinct and separate claim brought by the latter.[85]

The example generates the impression that the Directive tends to separate claims for damages, favouring 'one-to-one' litigation and without favouring forms of aggregation of claims for damages. This impression is significantly confirmed in the statement made at para 13 of the recital, according to which '(t)his directive should not require Member States to introduce collective redress for the enforcement of Articles 101 and 102 TFEU'.

This is another ideological choice destined to create a gap between the experiences of Europe and of the United States. In the latter, as may be very well-known, the importance and relevance of antitrust litigation is a precise consequence of the use of class actions.[86] In Europe, the position of national legal systems regarding class actions is still extremely diversified, which may have an important effect on the establishment of an efficient system of private enforcement in antitrust matters.

V. What is the Position of Private Enforcement?

The last observation made above clarifies that the Directive has made different choices compared to the US, as far as compensation for damages caused by infringements of competition law are concerned.[87] This could be due to the fact that in Europe, the law tends to create its own system of private enforcement, which takes into account specific European factors and sensitivities in this context.

Continuing with this line of reasoning, it is obvious, as noted above, that in Europe the role of public enforcement on competition issues is decidedly predominant, because of well-known historical events.[88] The central position of this pillar does not appear to be affected whatsoever by the Directive, which rather appears to be based on a need to introduce new means of protection because of an expansion towards the relationships between undertakings and consumers.

The chosen vehicle for this purpose is civil liability, which, however, is

[85] On this subject, also G. Villa, n above 12, 308; G. Taddei Elmi, n 13 above, 230.

[86] In general terms, see B.J. Rodger, 'Institutions and mechanism to facilitate competition private law enforcement across the EU: Specialist Courts and follow-on actions' *Concorrenza e mercato*, 141 (2014).

[87] The picture is summarized in G. Taddei Elmi, n 13 above, 186.

[88] On this subject, see E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 184, which recalls the 'political' aim of achieving the integration of domestic markets by means of actions from above. See also D.J. Gerber, n 80 above, 43.

shaped and adapted to the specific purposes pursued by the European legislator. The scholar of civil law who pays attention to systematic data cannot help noticing the particular role that tortious liability is called upon to perform in a typically contractual environment.[89] Indeed, it is clear that a breach of competition law taken into consideration by the Directive is performed, at least prevalently, by means of the stipulation of contracts: not only agreements through which an understanding between cartel members is formalized, but also – and especially – the contracts stipulated by the victims of the infringements (direct and indirect purchasers) with the companies infringing competition law with cartel-type agreements or the abuse of a dominant position.

At least from the point of view of the European legislator, therefore, an infringement of competition law cannot be grounds for a specific remedy on the contractual level. The victim of the infringement is protected entirely on the non-contractual level, by means of an award of compensation that should somehow 'correct the distortion' of a contract stipulated in a context of altered competitiveness. According to this approach, therefore, the remedy overrides the underlying contractual situation, leaving the functioning and effectiveness of the contract unaltered.[90]

This means that the claim for compensation can be filed relatively easily and quickly by any potentially interested subject. This explains the choice on the entitlement to bring actions and on the burden of proof, especially in the 'follow-on' cases. Upon further consideration, these very choices are found in the Directive's premises, ie those precedents of scholarship and case law which prompted the indication to favour the development of initiatives which, arising from below, would stimulate market players to call for strict observance of the antitrust provisions. In view of this objective, a claim for compensation that is easy to bring, by almost any party, could – at least upon first sight – be a useful tool.

However, aside from these apparent initial openings, it must be recognized that the Directive imposes certain important restrictions on the full potential of civil liability. Such restrictions are the result of rules that limit the obligation to compensate to the harm effectively sustained

[89] On this subject, see G. Guizzi, 'Contratto e intesa nella disciplina a tutela della concorrenza', in A. Catricalà and E. Gabrielli eds, *I contratti nella concorrenza* n 21 above, 25, who emphasizes the fact that, for competition purposes, the contract is considered as an event, ie a fact that influences another fact, to be included among the competitive conditions of the relevant market.

[90] The Italian jurist notes the consequences of the distinction between rules of validity and rules of liability, in the wake of two notes on the Corte di Cassazione 19 December 2007 no 26724, *Foro italiano*, I, 784 (2008) and no 26725, *Giustizia civile*, 2775 (2008).

by the (allegedly) injured party,[91] and the absence of stimuli towards forms of aggregation of the many victims of an infringement of competition law,[92] which generally – and notoriously – affects a number of subjects.[93]

These limits may considerably affect the deterrent effect of the claim for damages, in the form contemplated by the Directive; consequently, one may seriously doubt the suitability of the Directive to foster observance of competition law on part of the market players. Bluntly, it is highly doubtful that cartel companies or companies in a dominant position can be induced to cease their behaviour because of the threat of a claim for damages brought pursuant to the Directive.[94]

More realistically, the claim for damages outlined by the Directive appears destined to perform a complementary role with respect to the measures (sanctions, prescriptions, orders on behaviour, etc) to be imposed by the relevant competition authorities within the sphere of public enforcement; in other words, thanks to the Directive, court action against an infringement of competition law will no longer be limited only to the assessment by the competition authority, but can develop further in a civil lawsuit. In particular, civil law protection is now also available[95] to restore

[91] On this subject, E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 50; P. Iannuccelli, 'Torniamo al Trattato!' n 7 above, 96.

[92] This profile is also examined by M.A. Sittenreich, n 80 above, 2724-2725.

[93] *Ex multis*, see E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 181; L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 27. See also A. Rocchietti March, n 21 above, 507, who – with reference to the case of a price cartel – identifies the following categories of damaged parties: direct customers of the cartel members; indirect purchasers (assignees of the direct customers, to the extent that the overcharge has been transferred); customers of companies that are in competition with the cartel members but are not privy to the agreement, to the extent that they have aligned their own prices to the cartel; customers who, unwilling to participate in the price war of the cartel, have decided either to not make the purchase or to buy something different; suppliers of the cartel members who, because of the price increase, have suffered a reduction in demand; suppliers of services that are complementary to the goods sold by the cartel, to the extent that the cartel leads to a reduction in the offer on the market.

[94] In the same vein, see also C. Osti, 'Un approccio pragmatico all'attuazione giudiziale delle regole di concorrenza nell'ordinamento italiano' *Concorrenza e mercato*, 292 (2014). In US scholarship, see M.A. Sittenreich, n 80 above, 2708 (with reference to the preparatory works of the Directive).

[95] E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 338, observes that, with regard to the right to claim damages, the remedy intercepts only a fraction of the damaging sequence triggered by the competition breach. Although the intrinsic plurality of the nature of the offence is expressed through a series of market relationships, which all suffer from the alteration caused to the competitive dynamics, civil liability is capable of covering only the initial steps of this propagating mechanism, while actually, it can immediately be seen that the harm was caused by the

the harm that individual market parties (undertakings and consumers) have sustained due to the breach committed.[96] The compensatory action contemplated by the Directive does not appear to be capable of doing more than this.

To shift the discussion to the level of the trends identifiable within the legal system, it appears logical to maintain that, at least for the time being, private enforcement does not have the same legal strength as public enforcement, but rather plays an ancillary and subsidiary role.[97]

This statement is based on various points. One may recall the regulation of access to the relevant documentation, but this is a subject which – at least in the opinion of this author – interests mainly scholars of procedural and administrative law. Another point which deserves more attention here ensues from observing the environment in which the action for damages must be pursued, if the infringing company has adhered to a programme for leniency with the relevant competition authority.[98] As may be known, in the logics of public enforcement, these programmes are particularly important because they enable illicit behaviour to be revealed, especially when such behaviour consists of the formation of cartels of companies, and thus favour the authority's intervention in adopting the measures envisaged specifically for the case in hand.

However, it is evident that the clemency programmes would lose attractiveness if the 'repentant' company remained exposed to the risk of a claim for damages like its fellow cartel members, without obtaining any benefit from participating in the clemency programme.[99] A facilitation

illicit conduct and was the reason for the protection that should have been afforded by the provision breached.

[96] A similar evaluation in P. Iannuccelli, 'Il *private enforcement* del diritto della concorrenza in Italia' n 6 above, 753, assigns to civil law protection, in the competition environment, the function of guaranteeing an adequate level of distributive justice.

[97] Thus already P. Cassinis and G. Galasso, 'Il ruolo dell'Autorità Garante della Concorrenza e del Mercato tra *public* e *private enforcement*', in G.A. Benacchio and M. Carpagnano eds, *I rimedi civilistici agli illeciti concorrenziali* n 45 above, 25.

[98] In the CJEU's case law, the problem is well-known; however, in the absence of precise indications of law, the prevailing tendency has been to defer the problems to the national courts, on the basis of a case-by-case assessment. See Case C-536/11, *Bundeswettbewerbsbehörde* v *Donau Chemie AG* et al (European Court of Justice 14 June 2011) para 34 and Case C-360/09, *Pfleiderer AG*. v *Bundeskartellamt* (European Court of Justice 14 June 2011) available at http://curia.europa.eu/.

[99] The trend towards conflict between the discipline of private enforcement and leniency programmes is widely discussed in scholarship. See A. Montanari, 'Programmi di clemenza e azione risarcitoria nella direttiva europea sul risarcimento del danno: convivenza possibile?' *Concorrenza e mercato*, 129 (2014); L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 95; M. Meli, 'I programmi di clemenza ("*leniency*") e l'azione privata', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* n 34 above, 248; E.A. Raffaelli and M. Brichetto, *Public e private antitrust enforcement: auspicabili ma difficili sinergie*, in G.A. Benacchio and M.

has therefore been contemplated in the Directive: that company is released from joint liability. This company, in fact, would otherwise be exposed to claims for damages, which could be filed by all direct or indirect purchasers of all the undertakings adhering to the cartel. The repentant company's liability to pay damages is therefore limited to the prejudice caused to its 'own' direct or indirect purchasers (Art 11, para 5) – an evident derogation from the principle of joint liability. This is a crucial limit, especially if one considers the possible extent of the liability of damages for infringements of competition law, at least according to the most recent indications given by the European institutions, with reference to the case of the 'umbrella effects'.[100]

Questions of detail aside, this digression confirms that the Directive displays an ambivalent attitude towards tortious liability: on one hand, it values it; on the other, it limits it, according to the consequences to which it may lead in the case of the application of competition law, which is always based on a public enforcement logic.

This can be explained by a desire, on part of the European legislator, to adopt a prudent attitude. On one hand, said legislator is certainly aware

Carpagnano eds, *L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea* n 27 above, 154.

The critical nature is clearly apparent to the CJEU too, since it has been called upon to decide access to the relevant documentation. On this subject, see P. Iannuccelli, 'Il rinvio pregiudiziale e il *private enforcement* del antitrust dell'UE' n 2 above, 719, with references to the Pfleiderer judgment n 98 above.

[100] Thus, see Case C-557/12, *Kone AG et al* v *ÖBB-Infrastruktur AG* (European Court of Justice 5 June 2014) available at http://curia.europa.eu. The decision clearly reflects the strained interpretation of the provisions of Austrian national law on the causal link. See, in particular, paras 33-34: '(33) The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets.

(34) Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied'.

On this subject, see E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 56; L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 149-154, who observes that, in case of umbrella effects, the damages must be compensated by those who participate in the agreement. This liability is justified by the causal link between the damage sustained by the victim and the risks created by the formation of the cartel.

of the persisting differences on this point at national level and, on the other, of the radical difference compared to the situation in the US.[101] Nor is it possible to presume that the Directive should not be read in experimental terms, as if its objective were to test the gradual introduction, 'in small doses', of compensation for damages caused by infringements of competition law.

VI. Towards a Sub-System of Liability Involving Compensation for Infringements of Competition Law

In conclusion, there is a systematic aspect worthy of being emphasised from the perspective of civil law exquisitely. With the Directive, the European legislator addresses civil liability to endow the private enforcement of antitrust law with value, in an attempt to enhance this pillar with respect to the importance of public enforcement, the central position of which is however never placed in doubt. It cannot be denied that, upon this view, civil liability must perform a function that is not only private (ie having the purpose of protecting idiosyncratic interests), but that also regards interests of public or general importance.[102] Indeed, it may be known that the application of competition law and the deterrence and sanctioning

[101] A provoking observation is given in M. Barcellona, 'Funzione compensativa della responsabilità e private enforcement della disciplina antitrust' n 55 above, 143, according to whom the application of the system of punitive damages to the private enforcement of competition law transforms consumers into bounty hunters: the system of punitive damages would lead to the risk of arbitrary transfer of wealth and to the reallocation of resources in an economically inefficient manner.

[102] An interesting comment in E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 36, which links the protection of fair competition to the constitutional notion of social usefulness. This helps to explain the difficulties encountered in affirming, in this sector of the law, the strictly civil-law types of protection, such as those regarding contractual invalidity or claims for damages. On this subject, see also L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 27, which essentially distinguishes two levels of relevant interests: on one hand, there is a public interest in the correct functioning of the market; on the other, once a breach of this interest is ascertained, it is also possible to verify whether the behaviour has harmed the interests of individuals (consumers or rival entrepreneurs). A similar opinion is given in F. Scaglione, 'Il mercato e le regole della correttezza', in F. Galgano ed, *Trattato di diritto commerciale e diritto pubblico dell'economia* (Padova: Cedam, 2010). See also F. Longobucco, *Violazione di norme antitrust e disciplina dei rimedi nella contrattazione "a valle"* (Napoli: Edizioni Scientifiche Italiane, 2009), 204. The author recognizes the particular social and organizational function that civil liability is called to perform in competition legislation: as regards remedial action, tortious liability stimulates a reaction to the wrong on the part of the victim, and thus conforms to and regulates the market within a paradigm that tends towards a critical compensation of the damaged party

of its breaches have always constituted a priority of European law, since its very evolution.

In Italy, civil liability has been used to pursue the aim of protecting not only private interests but also (and to the same extent) public interests. At least from a cultural point of view, the most interesting example is probably the environment.[103] To reducing a complex legal itinerary to an extreme summary, after a lively debate in scholarship and case law, in 1986[104] the legislator adopted legislative rulings that endowed civil liability with an important role for remedying the consequences of environmental wrongdoing.

For various reasons, however, this legal model was not particularly effective, if one merely considers the exiguous number of decisions taken by the courts. After twenty years, therefore, the legislator intervened again[105] to change the overall approach, to attribute a pre-eminent role to the public administration and to the exercise of authoritative powers; it relegated civil liability to the background, an ancillary and subordinate position.

This apparent lack of success may have various explanations; for example, the objective difficulties encountered by judges in ascertaining the existence of environmental contamination, but also the absence of tools for aggregating the parties that bring claims for damages (indeed, environmental damage also harms several parties), as well as the enduring uncertainty on the profile's subjective offence, with its unsolved ambiguity between traditional and strict liability and the relevant implications for the possibility of insuring against the damage sustained. However, a background contradiction remains between, on one hand, the use of a claim of civil liability to remedy a public law offence, and on the other its continuing use purely to obtain compensation, punitive purposes being excluded.

To draw an initial comparison between environmental liability (past) and antitrust infringement (future), the Directive probably provides a solution for the first problem, in the sense that it contains indications for ordinary judges and administrative authorities to interact with each other

(whether a consumer or a rival); the ultimate purpose is to make the victim indifferent to the wrong committed.

On this question, in general terms, see also M. Maugeri, 'Risarcimento del danno e diritto antitrust: le prospettive comunitarie', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercat*o n 34 above, 154.

[103] This connection is shared by E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 374-376. See also U. Salanitro, 'Tutela dell'ambiente e strumenti di diritto privato', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* n 34 above, 381-382. In general terms, see L. Raiser, 'Antinomie nel diritto sulle limitazioni della concorrenza' n 24 above, 255.

[104] Legge 8 July 1986 no 349, Art 18.

[105] Art 298-*ter* and following of decreto legislativo 3 April 2005 no 152.

in constructing the damages case and the consequent obligation to compensate;[106] in this sense, therefore, the judge seised of the civil liability action is no longer alone in the investigation, which can be difficult.

However, the Directive does not appear to offer significant indications for the other problems arising in the historical vicissitudes of environmental liability in the Italian legal system. With regard to the collective aspect of compensable damages, this has already been discussed. With regard to the subjective profile of the infringement, it does not seem possible to doubt that, for the purposes of compensation, the infringement should be considered as either malicious intent or negligence. The recognition of strict liability is contrasted with the *per absurdum* argument, according to which it is conceptually unacceptable to even hypothesize an insurance against such damages.[107]

Even without reaching these extremes, it appears difficult to outline how undertakings could internalize the costs of the infringement of competition law. This result seems to be precluded by the broad discretion enjoyed, on one hand, by competition authorities in ascertaining the existence of the breaches and, on the other, by the judges in quantifying the compensable damages, in view of the widespread resort to techniques of an equitable nature.[108]

Infringements of competition law thus appear destined to remain within the traditional avenues of liability. Although, at a first glance, this conclusion may give cause for peace of mind, it also outlines a possible scenario of fragmentation of the system. The fact that the offence derives (or tends to derive) from a prior investigation carried out by the competition authority, and the importance of the equitable powers held by the judge,[109] are factors that can determine the evolution of the Directive's subject, in the sense that it turns antitrust infringements into 'an island unto itself' in the already complex context of civil liability.[110] In particular, the operating

[106] This might enable, *inter alia*, coordination of the various interests underlying an infringement of competition law, as well as the initiatives pursuing such interests; see E. Brodi, n 42 above, 1450.

[107] The question is analysed by L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno' n 30 above, 346.

[108] In both Italian and US scholarship, the hypothesis is discussed according to which, in matters of antitrust, the damages need not be quantified precisely, since – for the purposes of the law – a calculation based on presumption (and therefore necessarily approximate) is sufficient. See A.I. Gavil, n 77 above, 170; A. Mitchell Polinsky, n 44 above, 1236; A. Genovese, 'Funzione e quantificazione del risarcimento' n 48 above, 244.

[109] Mentioned in V. Mouta Pereira, n 83 above, 114.

[110] This is the result hoped for by F.P. Maier-Rigaud, n 43 above, 360. See also G. Villa, n 12 above, 302, 303.

choices outlined (or even only suggested) in the Directive seem to favour the identification of operators – in both administrative and legal fields – that are specialized in the application of competition law, almost as if this sector were isolated, or could be isolated, from the legal system as a whole.[111]

Whether this result is positive or negative is too complex to explore here, also because of the wide range of opinions that may exist in this regard.[112] The problem will only be mentioned, in the hope that the national legislator, and especially the operators who will be called upon to implement the discipline analysed herein,[113] are aware of it.

[111] Comments are also made in C. Osti, n 94 above, 296, who reports the existence of a democratic deficit in the application of competition law. In particular, this application is relegated to a public authority (a bureaucratic body that is conditioned by political choices in any case (in terms of the appointment of the top executives or funding for the performance of institutional activities)), which leaves the citizens and companies that suffer due to certain types of behaviour without remedies.

A discussion is also expounded in M. Libertini, 'Il ruolo necessariamente complementare di "*private*" e "*public enforcement*" in materia di antitrust' n 34 above, 172-174, who recognizes that the administrative action on competition matters is necessarily selective, since the authority has the discretion to select the cases and sectors in which to intervene. In this author's opinion, however, this is a positive solution, since the pursuit of the public interest thus defined is protected in the typical situation of legitimate interests; consequently, the strictly private interests are sacrificed to the competition authority, as occurs for those of owners in environmental or landscape issues.

A different evaluation was expressed by F. Denozza, *Antitrust* (Bologna: Il Mulino, 1988), 9, according to whom antitrust law must not be a tool of industrial policy; this implies that its application cannot be entrusted to an administrative authority having final decisional powers. The administrative authority must be biased in its functions and must not be a judge: it is useful for it to be active in bringing dubious cases before the ordinary jurisdiction.

[112] An interesting observation is made by M.A. Sittenreich, n 80 above, 2739: 'antitrust litigation is in essence an exchange between rational financial actors. Each party responds to economic incentives potential plaintiffs are more likely to sue when their probability of success is higher, litigation costs are lower, and potential damages are higher; potential defendants will more likely abandon certain conduct if the probability that a lawsuit will be brought, the probability of losing that suit, the litigation costs, and the potential damages are higher' (reprocessing the thought of S.C. Salop and L.J. White, 'Economic Analysis of Private Antitrust Litigation' 74 *Georgetown Law Journal*, 1001 (1986)).

[113] In the background, the issue of the duties and functions of private law within the framework of the overall legal system remains. Specifically regarding the issues discussed herein, see L. Raiser, 'La Costituzione e il diritto privato', in Id, *Il compito del diritto privato* n 24 above, 191. See also A. Douglas Melamed, 'Afterword: The Purposes of Antitrust Remedies' 76 *Antitrust Law Journal*, 359 (2009).

Italian European Lexicon

Training Young Lawyers in the European Mediation Framework: It's Time to Devise a New Pedagogy for Conflict Management and Dispute Resolution

Luigi Cominelli*

Abstract

Mediation as a dispute resolution method is being rediscovered today in Western legal systems. Modern jurisdictions now tend to promote mediation according to a 'formal legislative approach', based on recommendations issued by international organizations, in response to the pressure of public opinion that shows discontent with constant crisis in the justice system. The EU Directive of 2008 on civil and commercial mediation has in vague terms imposed the obligation to ensure the quality of mediation services, and by declaring as desirable only a certain level of training for mediators, it has left it up to member states to decide whether to make accreditation compulsory. In such a framework, where there is likely to be a further push towards regulation, we need to discuss what the basic skills of a mediator are. The point is that the mediator's professionalism is not easily pigeonholed in a set of disciplinary skills. The mediation model that the European Union has sought to promote and regulate is highly legal, but good mediation skills are not necessarily the same as the ones required to earn a degree in law and then pass the bar exam. University education must not necessarily train mediators, but rather form professionals who should be aware of the skills needed in mediation, or who know enough about mediation to direct their clients to mediation when the need arises. In order to prepare for anticipated future disputes and discern when to negotiate and when to fight, it becomes important to simulate conflict experientially, and to field-test what works in managing it, and when possible, in solving it. Simulating conflict using audio recordings, videos, and feedback reports allows the teacher to make the learner relive what happened: decisive moments, what could have been said differently or better, what should have not been said, posture, signs of nervousness, proxemics, all that which makes us feel more comfortable or uncomfortable in a situation. Empirical research using a socio-psychological paradigm has shown, for example, that mediators are assessed as effective when they are able to create an atmosphere of trust in mediation meetings, adapting flexibly to the situation, and transmitting energy, optimism and a non-judgmental attitude.

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I. Introduction

Mediation as a dispute resolution method is being rediscovered today in Western legal systems, and in all systems that are influenced by them. Despite being the oldest method involving the intervention of third parties in disputes, mediation has been virtually marginalized by the rule of law principle and by the construction of a contemporary judiciary power.[1] Modern jurisdictions now tend to promote mediation according to a 'formal legislative approach',[2] based on recommendations issued by international organizations,[3] and giving in to the pressure of public opinion, tired of the constant justice crisis.[4] In recent years, a growing number of States have introduced specific normative frameworks for various forms of mediation, and particularly for civil and commercial mediation.[5]

Mediation, as a method of dispute resolution, has been theorized and debated upon in legal theory and deontology,[6] as well as in legal sociology[7]

[1] J.P. Bonafé-Schmitt, *La Médiation: Une Autre Justice* (Paris: Syros-Alternatives, 1992).

[2] N. Alexander, 'Mediation and the Art of Regulation' 8 *Queensland University of Technology Law and Justice Journal*, 1-23, 4 (2008).

[3] European Commission Green paper on alternative dispute resolution in civil and commercial law (COM/2002/0196 final); EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA); Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Res. 12/2002); Recommendation adopted by the Committee of Ministers of the Council of Europe on Mediation in penal matters, no R(99)19, 15 September 1999.

[4] W.K. Olson, *The Litigation Explosion. What Happened When America Unleashed the Lawsuit* (New York: Penguin, 1991); G. De Palo and G. Guidi, *Risoluzione alternativa delle controversie. ADR. Alternative Dispute Resolution nelle Corti Federali degli Stati Uniti* (Milano: Giuffrè, 1999); S. Chiarloni, 'Strumenti per migliorare l'efficienza della giustizia civile a legislazione invariata', in C. Beria D'Argentine ed, *La crisi della giustizia civile in Italia: che fare? – Atti del Convegno dell'Osservatorio 'Giordano Dell'Amore', 14-15 novembre 2008. Palazzo di Giustizia, Milano* (Milano: Giuffrè, 2009).

[5] Suffice it to note that among the jurisdictions providing forms of mandatory mediation for certain types of dispute are Argentina, Australia, Canada, Croatia, Egypt, India, Japan, Italy, Lebanon, Rwanda, plus some of the most populous US states. Twenty-one of the sixty jurisdictions examined in the latest treaties also provide forms of compulsory mediation by order of a judge: M. Schonewille and F. Schonewille, *The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World* (The Hague: Eleven International Publishing, 2014).

[6] L. Fuller, 'Mediation. Its Forms and Functions' 44 *Southern California Law Review*, 305 (1971); C. Menkel-Meadow, 'Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)' 83 *Georgetown Law Journal*, 2663-2696 (1995).

[7] T. Eckhoff, 'The Mediator, the Judge and the Administrator in Conflict-Resolution', in B.M. Persson Blegvad ed, *Contributions to the Sociology of Law* (Copenaghen: Munksgaard, 1992), 148; J. Kurczewski, 'Dispute and Its Settlement', in M. Cain and K. Kulcsar eds,

and in the philosophy of law.[8] It has also been highlighted that mediation and interest-based negotiation are a legacy of the legal realism movement.[9] In a way, the mediation revival is a critique of a system of dispute management that has become 'the worst example of legal constructivism'.[10]

The ways of resolving disputes, which in some cases can only contain and manage the conflict, rather than resolve it, have been analyzed from many points of view in the social sciences, and lend themselves to an analysis which is by definition multidisciplinary, as we will better explain. This, however, requires the jurist to make an effort of epistemic adaptation. Lawyers trained in a formalist temper refer instinctively to a conflict theory based implicitly on the assumption of scarcity, on bilateralism and dualism, on compelled and strategic forms of competition and on mistrust of direct communication.[11] This model was completely unchallenged until a few decades ago. The more optimistic reorientation that followed in the social sciences – starting in the 1970s and the 1980s – and that is bearing fruit only now, shifted from dualism to sharing, by exploring the themes of integrative bargaining, peace keeping, creative problem solving and social cooperation.[12] This particular interpretation key might explain at least partially why a non-adjudicative method such as mediation is becoming a relevant topic for lawyers.[13]

II. The Mediation Revival

Non-adjudicative methods of dispute resolution, often referred to in legal *vulgata* as 'alternative dispute resolution' (and that in lawyers' view include the adjudicative method of arbitration), have been gradually reintroduced in the Italian legal system through company law conciliation in 2003 (Decreto Legislativo 17 January 2003 no 5) and, more importantly, with the legislative decree on civil and commercial mediation in 2010

Dispute and the Law (Budapest: Akadémiai Kiadó, 1983); G. Simmel, *Il Mediatore* (Rome: Armando Editore, 2014).

[8] G. Cosi and M.A. Foddai, *Lo spazio della mediazione: conflitto di diritti e confronto di interessi* (Milano: Giuffrè, 2003).

[9] C. Menkel-Meadow, n 6 above, 2677.

[10] E. Resta, 'Giudicare, Conciliare, Mediare' *Politica Del Diritto*, 541-575, 545 (1999).

[11] C. Menkel-Meadow, 'The Case for Mediation: The Things That Mediators Should Be Learning and Doing' 82 *Arbitration: International Journal of Arbitration, Mediation and Dispute*, 22-33, 24 (2016).

[12] R. Axelrod, *The Evolution of Cooperation* (New York: Harper Collins, 1984); M. Deutsch, *Distributive Justice: A Social-Psychological Perspective* (New Haven and London: Yale University Press, 1985); P. Singer, *A Darwinian Left. Politics. Evolution and Cooperation* (New Haven and London: Yale University Press, 2000).

[13] F.E.A. Sander, 'Varieties of Dispute Processing', in R. Wheeler and A. Levin eds, *The Pound Conference: Perspectives on Justice in the Future* (Rochester: West, 1979).

(Decreto Legislativo 4 March 2010 no 28). The mediation revival has brought the process of training and professionalization of mediators[14] to center stage.

The mediator's activity is improperly referred to as a profession, because it is not assisted (nor hindered) by the guarantees of a thoroughly regulated professional register. In order to act as mediators with the privileges of Decreto Legislativo 4 March 2010 no 28, candidates must undergo accreditation training, and become affiliated with a registered mediation provider. Notwithstanding the problem of the mediator's professional status, the issue of training and skills in conflict management is the most relevant. From my personal experience, law school freshmen immediately comprehend the appeal of mediated solutions, even if they miss the importance of the relationship with the client. But, for the majority of would-be mediators, these skills must be created or reinforced in mature adults, and they pose first of all an andragogic problem. We are presently facing the issue of how to train professionally accomplished lawyers, when this may also signify deconditioning mental patterns and automatic reflexes.

The EU Directive of 2008 on civil and commercial mediation[15] has imposed in vague terms the obligation to ensure the quality of mediation services, and by declaring only a certain level of training for mediators as desirable, it has left it up to member states to decide whether to make accreditation compulsory.[16] All member states have established measures to promote mediator training (more through regulation than with funding), but educational standards fluctuate greatly in Europe, with accreditation or certification programs varying from thirty to three-hundred hours. The most frequent choice is to provide a concentrated training program of forty to fifty hours. By all accounts, minimum training required for accreditation is not sufficient to form good mediators. In Italy, the problem was solved by making mediation providers responsible for selecting the best accredited mediators on the market, and verifying that they comply with continuing education requirements.

It should also be recalled that mediation practice is still allowed, even in civil and commercial matters, outside of the regulation of Decreto Legislativo 4 March 2010 no 28, which implemented the EU directive in Italy. This is already the case for family mediation, where training and

[14] G. De Palo and L.R. Keller, 'The Italian Mediation Explosion: Lessons in Realpolitik' 28 *Negotiation Journal*, 181 (2012).

[15] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, 3–8.

[16] M.C. Reale, 'La mediazione civile e l'Europa' *Sociologia del diritto*, 95-120 (2014).

accreditation follow best practices. It would be completely contrary to the nature of mediation to prevent a mediator, who might be perhaps accredited abroad, to play a role as facilitator in the resolution of disputes between Italian subjects or in Italy. The mediator might be engaged directly by the parties to the dispute who are not interested in the advantages bestowed by Italian legislation. It is currently not possible to predict whether a public international accreditation process, or mutual recognition of the existing accreditation mechanism in each European country subject to the directive, will be established.

III. Mediator Skills

In such a framework, where there is likely to be a further push towards regulation, we need to discuss what basic mediator skills are. The point is that the mediator's professionalism is not easily pigeonholed in a set of disciplinary skills. The mediation model that the European Union has sought to promote and regulate is highly legal. In most cases, disputes are brought to mediation only once legal advice has been requested, and when positions have been already framed and subsumed under some legal right. At that point, it is clearly more difficult to return to speak of the parties' needs and interests. The lawyer who cares about her client will certainly do so, but this behavior is seen as an extra, going beyond ethical obligations. If she does, it is thanks to her humanity, and not necessarily as an exercise of her professional skills. The assessment of needs and interests, and the ability to effectively convey these issues, are the bulk of the mediator's skills.

The political choice of granting *ex lege* accreditation as mediator to all Italian attorneys is in a sense a signal that the topic has not been understood. This choice was then wisely tempered by the decision to subject them to the same training requirements as all mediators. A good mediator can also be a good lawyer, and in the vast majority of cases this is helpful, because it gives him *gravitas* that he would not otherwise have. Perceived legal expertise is especially useful in breaking down the initial wall of distrust between the parties.[17] Besides, any mediation can start even after a lawsuit is filed, in which case it is even more useful that the dispute be mediated by someone who knows what will happen if the parties do not settle, and who is aware that mediation is a negotiation 'in the shadow of the law'.[18] But the mediator's core business is something different. Good

[17] S.B. Goldberg and M.L. Shaw, 'Who Wants to Be a Mediator?' 16 *Dispute Resolution Magazine*, 24-29 (2010).

[18] R.H. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The

mediation skills are not necessarily the same as the ones required to earn a degree in law and then pass the bar exam. First, to manage a conflict and hopefully resolve a dispute, we need communication abilities, empathy and an understanding of psychological dynamics that has been defined as 'emotional intelligence'.[19] This set is a complex mix of psychology, expressive arts, cognitive science and theology. In reconstructing the identity of the intellectual fathers of the dispute resolution field, Carrie Menkel-Meadow identified social psychologists and organization studies scholars[20] as a first choice. It is quite difficult to find so many varied skills in the official résumé of a single individual. In recent years, most of the young students having taken part in the Italian Mediation Competition, organized by the University of Milan and by the Chamber of Arbitration in Milan, are law students, although students in economics or cognitive sciences also join in. However, the few university degrees specifically dedicated to training mediators have strong ties with psychology, peace studies and international relations, rather than with law.

The process of legalization and formalization of ADR and mediation[21] calls for a serious debate. Let me return to what we asserted above. When we refer to mediation in Italy today, we refer mainly to civil and commercial mediation, which represents the larger volumes of mediated disputes. Certainly family mediation, not to mention criminal or social mediation, have different reference models. In many cases, family mediation is actually marriage counseling, with no direct or obvious legal consequences. The 'dispute resolution professional' is at the crossroads of many disciplines, and practices a method which one might define as an 'applied science'.[22] The careers of several mediators are eclectic, each with its own style and idiosyncrasies. Mediation is a 'sensibility' about how to approach others and the world in general,[23] and is an all-encompassing method, because it requires the mediator to plunge into a totalizing phenomenon such as conflict.

IV. Training University Students in Conflict Management

Case of Divorce' 88 *The Yale Law Journal*, 950-997 (1979).

[19] D. Goleman, *Intelligenza Emotiva* (Milano: BUR, 1999).

[20] C. Menkel-Meadow, 'Chronicling the Complexification of Negotiation Theory and Practice' 25 *Negotiation Journal*, 415-429, 423 (2009).

[21] T.J. Stipanowich, 'Arbitration: the "New Litigation" ' 1 *University of Illinois Law Review*, 1-59 (2010); J. Nolan-Haley, 'Mediation: The "New Arbitration" ' 17 *Harvard Negotiation Law Review*, 61-95 (2012).

[22] C. Menkel-Meadow, 'Mothers and Fathers of Invention: The Intellectual Founders of ADR' 16 *Ohio State Journal on Dispute Resolution*, 35 (2000).

[23] C. Menkel-Meadow, 'The Case for Mediation' n 11 above, 24.

Besides mastering the scant legislation that governs mediation in each domestic system, what can be useful for students in training? Conflict management skills begin to form at a very young age, often in the family and at primary or secondary school. The aim of tertiary education then, is to strengthen some of the soft skills that are common to all professions, or to eliminate some dysfunctional tendencies (hyper-sensitivity, nervousness, insecurity). In order to promote citizens' confidence in mediation services, it is quite obvious that clarifying the powers and establishing some sort of core curriculum for the mediator would certainly be helpful. It is also true that standardization implies renouncing the flexibility which in some cases is so essential in treating a 'social creature' like conflict. Mediation is a process with an affinity with international diplomacy. The procedural rules are minimal and remain in the background: there are certain protocols or traditions, but codifying the process beyond a certain limit is likely to be counterproductive, because communicating and interpreting interests require a strong degree of flexibility.

The example of private sessions between the mediator and one of the parties (or *caucus*) is particularly interesting. So-called *transformative* mediators do not use separate sessions, or use them as little as possible, that is, they try to hold all mediation meetings in the presence of both parties. Since they are mostly oriented to healing the broken relationship, it would not make sense to separate the disputants. On the contrary, other mediators who are more settlement-oriented may even decide not to have the parties meet until they have both decided to proceed beyond the first informative session, and to initiate true mediation itself, and in any case, once mediation has officially started, they may suggest the parties meet separately with each of them when an impasse is reached. Each choice has its pros and cons, and most mediators are usually able to modify their habits pragmatically to adjust to the nature of the conflict. However, it could also be argued that this discrepancy of standards might be perceived as a lack of professionalism, or as proof of the procedure's poor reliability. Keeping each party informed of what is happening, to explain the reason for this flexibility, can lead the mediator to address the situation,[24] but still does not solve the problem.

These are open questions. University education must not necessarily train mediators, but rather form professionals who should be aware of the skills needed in mediation, or who know enough about mediation to

[24] M. Schonewille and J. Lack, 'Mediation in the European Union and Abroad: 60 States Divided by a Common Word?', in M. Schonewille and F. Schonewille eds, *The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World* (The Hague: Eleven International Publishing, 2014).

direct their clients to mediation when the need arises. National and international moot mediation competitions engage students in the role of the party and counsel, while the role of the mediator is entrusted to a professional mediator, who facilitates the negotiation. Among the negotiator/mediator techniques that are teachable and that can be developed in a university classroom, are abilities to detect prejudice, appreciate socio-cultural diversity, master advanced communication techniques (oral or visual), investigate the interests of others, manage anger, deal with collective problems and interface with more than one person at a time.[25]

V. Building a Dispute Pedagogy

However, not everything can be taught to university students. Teachers and instructors, who are not necessarily pedagogues after all, feel a duty to rattle off all the knowledge produced so far on one particular matter, and still do not pay enough attention to skills. The lawyer is trained in an adversarial attitude, which is useful primarily in the judicial defense of the client: it is expected that in a trial, the only effective strategy is to be as convincing as possible on the merits of your position. Although professionals realize that most disputes are actually resolved on the basis of a reasonable balance between requests, and thus with an interest-based negotiation, they prepare for battle during most of their education. At the end of the trial, someone wins and someone loses, because litigation is necessarily a zero-sum game.[26] The clear delimitation of available legal remedies implies that the judge will simply cut the negotiation pie fairly, without inquiring about whether or not this satisfies the substantial interests of the parties. In fact, due to the way in which the legal profession is organized, lawyers make their living through advice or expert opinion only if their clients enter into a dispute, potential or actual. But lawyers do not need to necessarily trigger the conflict in legal forms to provide a remunerable service. We have still a long way to go on this idea. Recent empirical research conducted on over two-hundred mediators in civil and commercial matters found that the persons most effective in bringing the parties to an extra-judicial settlement were not necessarily those who had legal training.[27] In civil law jurisdictions, it is

[25] D.K. Crawford and R.J. Bodine, 'Youths, Education and Dispute Resolution', in M.L. Moffit and R.C. Bordone eds, *The Handbook of Dispute Resolution*, 475-486, 471 (San Francisco: Jossey-Bass, 2005).

[26] L. Riskin, 'Mediation and Lawyers' 43 *Ohio State Law Journal*, 29-60, 44 (1982).

[27] L. Cominelli and C. Lucchiari, 'Mediators with Italian Characteristics. Styles, Conflict

also believed that a pre-litigation settlement equals decreased revenues. On the contrary, the expert assistance of a negotiation professional is likely to generate a greater number of cases and build client loyalty, which could bring the lawyer other potential issues. With a constant litigation rate, a higher number of less contentious disputes could emerge without altering the lawyer's profitability, since this would allow the client to solve more problems that are usually abandoned or are taken somewhere else. Lawyers would find new clients through a cheaper legal advice and negotiation assistance model.[28] Negotiation theory claims that any dispute can be mediated, except for certain specific ones, which must be adjudicated so that the most important principles of law have a clear application in practice, and form the 'shadow' under which other disputes are resolved in mediation. We should reverse the traditional perspective of singling out criteria to identify disputes that *can* be mediated, such as the existence of lasting relationships, or the presence of a relational aspect. This is a rather subversive move on the part of lawyers. Instead, disputes *not to be mediated* would be only those in which the imbalance of forces between the parties is evident, when there is a public interest in an authoritative judicial interpretation and thus general principles of law or constitutional norms are being discussed, if there is an appreciable interest in establishing a binding precedent on a new issue, or, finally, whenever potential difficulties in the enforcement of the agreement that ends the dispute are foreseen. Defenders of the tradition will argue that we are surrendering to commodification of the law, but it is quite difficult to understand how the legal business can remain immune from upheavals in contemporary economy, and the commodification of services in general. Professionals must now justify their bills differently. In my opinion, the argument that promoting of-court settlements is basically a privatization of justice[29] has been convincingly refuted in the doctrine, by appealing to the right to decide on one's own disputes.[30]

VI. Building Conflict Management Skills

How does all this translate into pedagogy of mediation? The educational path generally starts in university, but could start earlier, with school and

Attitudes and Settlement Rates' (28 February 2016), available at http://ssrn.com/abstract =2739263 (last visited 24 May 2016).

[28] L. Riskin, n 26 above, 54.

[29] W. Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' 56 *The Modern Law Review*, 380-392 (1993); O.M. Fiss, 'Against Settlement' 93 *Yale Law Journal*, 1073-1090 (1984).

[30] C. Menkel-Meadow, 'Whose Dispute Is It Anyway?' n 6 above; E. Resta, n 10 above.

peer mediation programs. There are several social skills of emotional intelligence to be developed: self-awareness, self-discipline, motivation, creativity and empathy.[31] Though these skills seem rather obvious and not really central to professional training, they are basic relationship skills in the lawyer-client relationship, and can be exercised even by someone who is not naturally sociable. In law school education, the client as a person is a purely metaphysical concept, because academic excellence does not require interpersonal abilities of communication and negotiation.[32] Creativity is rarely perceived as pivotal among lawyers' basic skills,[33] but in any negotiation that is not reduced to a Dutch auction, creativity is essential to generating alternative options and overcoming the impasse that inevitably arises in a context of conflicting rights.[34] Family lawyers who deal with separation and divorce, for example, have to educate the ex-spouses in long-term conflict management.

In order to prepare for the dispute and discern when to negotiate and when to fight, it becomes important to simulate conflict experientially, and to field-test what works in managing it, and when possible, in solving it.[35] Simulating conflict using audio recordings, videos, and feedback reports allows the teacher to make the learner relive what happened: decisive moments, what could have been said differently or better, what should have not been said, posture, signs of nervousness, proxemics, all that which makes us feel more comfortable or uncomfortable in a situation. Reliving what happened in the conflict is a very powerful tool for identifying weaknesses and taking action.[36] Being scolded for a mistake is one thing, seeing oneself making that mistake has a completely different impact. Sports psychology identifies simulation and games as a means of improving performance. According to evolutionary psychology, the essential reason why children play and love to be told stories is because it allows them to prepare for life by mentally simulating what will or might happen. This type of practical training is therefore not a whim: it is helpful to repeat automatisms, especially to control oneself and not lose one's temper, when

[31] L.S. Schreier, 'Emotional Intelligence and Mediation Training' 20 *Conflict Resolution Quarterly*, 99-119, 100 (2002).

[32] J. Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (Vancouver, Toronto: UBC Press, 2008), 14-15.

[33] C. Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?' 6 *Harvard Negotiation Law Review*, 97-144, 114 (2001).

[34] R. Fisher and W.L. Ury, *Getting to Yes. Negotiating Agreement Without Giving In* (New York: Penguin, 1981).

[35] L. Riskin, n 26 above, 50.

[36] N. Ebner and K. Kovach, 'Simulation 2.0: The Resurrection', in C. Honeyman, J. Coben and G. De Palo eds, *Venturing Beyond the Classroom* (St. Paul, MN: Dispute Resolution Institute Press, 2010), 263-264.

one finds oneself in situations of stress and fatigue, which happens regularly in a cognitively strenuous event. After all, we are beings based on simple mechanisms. Some studies criticize classroom simulations, claiming that they obtain only marginal benefits in terms of real skills.[37] But the important thing, even in the classroom, is to reproduce the tensions of the real situation.[38] Professional life is probably another matter, but the tension you feel in student competitions such as ICC Moot Mediation[39] is palpable, and is quite comparable to that of real experiences. While simulated cases cannot be real and the involvement is not quite real, the pressure certainly is. In any case, simulations are more effective than purely frontal lecturing. Although they do not necessarily permit a deeper understanding of conflict dynamics, they do help students internalize the mechanisms needed to manage them.[40]

In fact, like most people, professionals are not at ease in conflictual situations. This is natural for all lawyers, who tend to cling to formalism to maintain a safe distance from the conflict, hoping that things will resolve themselves.[41] The tendency to refer exclusively to form to avoid the substance of the conflict is one of the reasons leading to overburdened litigation and legal constructivism in our social and legal systems. Professional mediators, above all, should seek to avoid being overwhelmed by the conflict, but at the same time avoid becoming too detached, by maintaining a level of involvement and empathy which reassures the client and keeps them involved in the resolution.

Last, we come to the psychological and cognitive skills that are not explicit in the traditional curriculum of conflict professionals: the ability to analyze problems and possible obstacles (especially cognitive biases) that prevent a consensual solution. Negotiating skills are historically disdained in the social sciences (perhaps a little less so in business studies). Scholars generally consider negotiation a natural gift that cannot be taught. This set of skills is beginning timidly to enter the curriculum of jurists.[42] A lazy negotiator becomes a *satisficer*, ie someone who settles for a halfway

[37] N. Alexander and M. LeBaron, 'Death of the Role-Play', in C. Honeyman, J. Coben and G. De Palo eds, *Rethinking Negotiation Teaching. Innovations for Context and Culture* (Saint Paul, MN: Dispute Resolution Institute Press, 2009), 179-197, 185.

[38] R. Smolinski and P. Kesting, 'World Championship in Negotiation? The Role of Competitions in Negotiation Pedagogy' 29 *Negotiation Journal*, 355-369, 361 (2013).

[39] G. Bond, 'Mediation and Culture: The Example of the ICC International Commercial Mediation Competition' 29 *Negotiation Journal*, 315-328 (2013).

[40] D. Druckman and N. Ebner, 'Games, Claims, and New Frames: Rethinking the Use of Simulation in Negotiation Education' 29 *Negotiation Journal*, 61-92, 65-66 (2013).

[41] L.S. Schreier, n 31 above, 110.

[42] C. Menkel-Meadow, 'Doing Good Instead of Doing Well? What Lawyers Could be Doing in a World of "Too Many" Lawyers' 3 *Oñati Socio-Legal Series*, 378-408, 391 (2013).

compromise. The definition of 'satisficer' derives from the work of Herbert Simon: the drive to maximize results in a negotiation is constrained by our cognitive limitations, which push us to be happy (satisfied) with a result which is just enough (suffice). The story of the Camp David peace agreements[43] illustrate how a negotiation in which one might simply try to 'split the baby in half', does not necessarily have to leave solutions on the table that might mutually satisfy all interests. These stories are impactful in the classroom, even when expressed in a purely scholarly way. Stories, examples and anecdotes catch our attention like few other methods can.

VII. Conclusion

The most farsighted members of the bar have realized that something is changing, and led the way through 'collaborative law' practices that apply interest-based systems of dispute resolution. When retained by a client, collaborative lawyers commit to not resort to litigation to resolve the problems. This is spelled out in a specific clause in the engagement agreement. The ability to learn mediation techniques and to rationalize negotiation techniques stems from the need to redefine the lawyer's tasks. It is now becoming commonplace in many countries to complain that there are too many lawyers on the market, and this raises a question about their function. The problem for a lawyer who is overly dependent on litigation is the risk of becoming irrelevant or socially dysfunctional in social perception, as in that of the business world, where the control of consumption and costs has become a priority.[44] It is also a growth and sustainability problem. We must provide the whole picture to prepare young lawyers for the future that awaits them. Clients are becoming more demanding and will not settle for standard solutions. In the age of internet and zero-cost information, deference to any professional is in danger, and the client always has a say in every choice.[45]

Adjudicative litigation is, and will remain for a long time, the most common mode of dispute resolution. In addition to disputes that should not be mediated, we must consider the psychological need that many clients have to delegate responsibility for the conflict,[46] and to vent their anger through a lawyer in an adversarial setting.[47] In these cases, bringing a dispute to mediation requires the lucky coincidence that both counsels

[43] R. Fisher and W.L. Ury, n 34 above.
[44] J. Macfarlane, n 32 above, 2.
[45] Ibid 130.
[46] Ibid 142.
[47] Ibid 155.

are sympathetic to the option. The niche that non-adjudicative methods occupy today, however, will hardly remain so marginal. The signs are already there, as evidenced by the recent statistics of the Italian Ministry of Justice.[48] Several countries are studying the Italian model, where compulsory mediation is tempered by a first mediation meeting at no cost for the parties, devoted to explaining how the process works and allowing them to decide whether to opt out of mediation.

The more structured and challenging courses dedicated to the profession of mediator are advanced university degrees that combine theory and 'black letter law', with relationship skills and communication.[49] Knowledge of underlying substantive law, that is, what the law says if we were to go to court, is undeniably a plus for the mediator. It is true that the mediator may not have to use this knowledge, but it is always better to have it. In any case, this knowledge is not necessarily monopolized by jurists. In certain areas, the non-lawyer may already have, or easily acquire, the legal concepts he needs to be a good mediator in a dispute with legal implications. This is not because he has to provide legal advice. It is enough for him to know when specific and thorough legal advice from a lawyer will be needed. In mediation, the law is one of the facts of the dispute. After all, no one would argue that psychologists have a monopoly on relational skills.

Therefore, emotional, relational and expressive skills that make a good mediator do not depend, or depend only in part, on a university or professional title. Empirical research using a socio-psychological paradigm has shown, for example, that mediators are assessed as effective when they are able to create an atmosphere of trust in mediation meetings, adapting flexibly to the situation, and transmitting energy, optimism and a non-judgmental attitude.[50]

Other qualities considered essential in successful mediators, besides legal expertise, are patience and persistence.[51] However, there is no consensus on the most appropriate style of mediation, whether facilitative (psychological-relational) or evaluative (legally-oriented problem solving).[52] Mediation is guided by practice. This does not mean that the mediator's talents cannot be educated or developed through exercise, starting in the

[48] Italian Ministry of Justice, Statistics on Civil and Commercial Mediation, 31 December 2015, available at https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202015.pdf (last visited 24 May 2016).

[49] B.M. Harges, 'Mediator Qualifications: the Trend Toward Professionalization' 78 *Brigham Young University Law Review*, 687, 709 (1997).

[50] K. Kressel, T. Henderson, W. Reich and C. Cohen eds, 'Multidimensional Analysis of Conflict Mediator Style' 30 *Conflict Resolution Quarterly*, 135-171, 160-161 (2012).

[51] S.B. Goldberg and M.L. Shaw, n 17 above, 24.

[52] N.A. Welsh, 'Institutionalization and Professionalization', in M.L. Moffit and R.C. Bordone eds, n 25 above, 487-506, 495.

classroom. There will probably be just a few mediators with pure natural talent, while many potentially good or excellent mediators only need to be discovered.[53] It may be even more important to let future lawyers experiment with different dispute management techniques. Unless a lawyer is familiar with mediation and with the situations in which mediation can be useful, it is unlikely he will recommend it to its clients,[54] because he does not fully understand its advantages compared to arbitration or direct negotiation. Is there any additional advice for university students? It is rare that students in training are already interested in a job as mediator where employment opportunities are still limited. Students whose interest has blossomed during a course in mediation or negotiation should perhaps be advised to specialize and become first good engineers, psychologists, lawyers or accountants, and then cultivate their talent for resolving disputes on the side. This is a profession that gives enormous satisfaction, but for now, we have to treat it as a second-level profession, to be combined with an existing professional background.

[53] B.M. Harges, n 49 above, 712.
[54] L. Riskin, n 26 above, 41.

Hard Cases

Uber and the Sharing Economy

Alessio Di Amato*

Abstract

Sharing economy is an economy system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the internet. It consists of two different business models. The first business model is the offering of goods or services by businesses through internet and/or mobile apps. In the second business model, business entities create a web platform where owners of goods (so called produsers) meet and conclude sharing agreements with people who want to share such goods (so called prosumers). In the latter business model produsers, with the help of business entities that organize web platforms, are competing with businesses. Such situation, which describes Uber's activity, originates doubts and legal disputes – like the one decided by the courts of Milan on spring-summer 2015 – about applicable rules to the economic relations existing among produsers, prosumers and businesses.

I. The Decisions Rendered by the Court of Milan

At the end of spring 2015, several radio taxi associations and taxi unions of Milan, Genoa, and Turin requested a cease and desist order against Uber from the court of Milan.[1] The Plaintiffs asserted that via the 'UberPop' mobile application, the California company was unfairly competing in the taxi market by enabling drivers to sell public transportation services at lower prices, without respecting the mandatory licensing requirements for professional drivers and cars. According to the Plaintiffs, an urgent decision was needed because due to the upcoming World Exposition 2015 in Milan and surrounding areas, there was a concrete risk taxi drivers could suffer considerable losses in profits.

By decision rendered by the court of Milan on 25 May 2015,[2] and con-

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[1] The claim was filed against Uber international B.V., Uber international holding B.V., Uber B.V., Raiser Operations B.V., Uber Italy S.r.l.

[2] L. Giove and A. Comelli, 'Il blocco dell'app UberPop: concorrenza sleale nei confronti del servizio pubblico di taxi – Il Commento' *Diritto Industriale*, III, 245-259 (2015); A. Palmieri, 'In tema di autotrasporto di persone: la vicenda di Uber Pop' *Il Foro italiano*, I, 2192-2194 (2015). See also D. Surdi, 'Concorrenza sleale e nuove forme di trasporto condiviso: il Tribunale di Milano inibisce "UberPop" ' *Rivista di diritto dell'economia*

firmed on appeal on 9 July 2015,[3] the Plaintiffs' request for an injunction was granted and Uber was ordered to immediately stop offering the UberPop service within the Italian market.

In both judgments, the courts rejected the defensive arguments asserted by Uber and several consumer associations, which joined in the proceedings as third parties in support of Uber's position.

Uber's main defensive arguments were:

i. Uber is only a web platform and does not provide taxi or transport services. It was asserted that the UberPop mobile application merely creates a web community between potential drivers and potential passengers and that Uber does not participate or interfere in these relationships;
ii. As a consequence of point i), Uber is not competing with taxi drivers and radio taxi services as it is acting in a completely different market;
iii. Therefore limiting Uber's access to the market would be in violation of the principles of Italian and European competition law.

The Italian courts first noted that the services provided by Uber could not be qualified as a marketplace wherein a matching tool is given to car owners to facilitate car sharing with other passengers. The courts observed that while in car sharing, carpooling or peer-to-peer services, the car is shared by the owner with other passengers who contribute to the costs of using and operating the car (eg, fuel, tolls, etc), UberPop allows drivers to sell transportation services to potential customers for profit. The courts also noted that Uber could not be considered a business entity completely extraneous to its drivers, as the latter are not free to negotiate prices with passengers, but are obliged to apply tariffs calculated by an algorithm (called *Uber Surge Pricing*) which, using a market price mechanism, increases tariffs when demand increases.

Based on this reasoning, the courts of Milan considered it to be undisputable that the market covered by Uber is exactly the same as that covered by taxis: the individual public transportation market where the customers' needs can be satisfied equally by either a taxi booked by radio service or by private cars booked by UberPop.

However, while in order to obtain their licenses and offer their services taxi drivers must bear considerable costs to satisfy the requirements

dei trasporti e dell'ambiente, 375-395 (2015); N. Rampazzo, 'Rifkin e Uber. Dall'età dell'accesso all'economia dell'eccesso' *Diritto dell'Informazione e dell'Informatica*, 957-984 (2015).

[3] A. Palmieri, 'In tema di blocco cautelare di un servizio di trasporto non autorizzato' *Il Foro italiano*, I, 2938 (2015).

provided by law (eg, medical exams, car inspections, insurance, etc), Uber drivers are not subject to these requirements. Therefore, Uber drivers can save costs and offer their services at a better price through predatory conduct which could stimulate the illegitimate poaching of passengers from taxi drivers to Uber drivers.

The Italian courts also denied that banning UberPop could be considered against the principles of Italian and European competition law. It was underlined that, as provided by Art 41 of Italian Constitution and Art 168 of the Treaty on the Functioning of the European Union, human safety is a value which prevails over the value of the free market. As the purpose of taxi regulation is mainly to protect the health and safety of customers, requirements must be set for taxis. For example, the cars used by the licensee drivers must be periodically controlled; the driver must pass periodical exams to verify his skill and his moral and physical integrity; and an insurance policy with adequate coverage for passengers is required.

The courts further observed that Uber has no such requirements for its drivers and in the agreement signed with passengers, it expressly states the California company is not part of the agreements between drivers and passengers. Moreover, passengers do not receive any information about the conditions of the cars, the age and experience of the drivers, or the level of insurance coverage for the car. Such lack of information – the courts of Milan commented – is worrisome when one considers the majority of Uber customers are young people, who usually tend to rely on the internet for hearing about fraud or other problems. The Italian courts added that the internet community usually becomes aware of the bad condition of a car or the poor skills of a driver only after an accident, when the unlucky passenger discovers the driver does not have proper insurance. This is an unacceptable risk – the Judges of Milan concluded – and demonstrates that the activity of Uber is against the law.

II. 'Ubergate'

The two decisions rendered by the courts of Milan during spring-summer 2015 are only the Italian chapter of a legal battle which taxi unions, taxi drivers, municipalities and government bodies are fighting against Uber all over the world. In fact, Wikipedia reports Uber is involved in at least one hundred seventy-three lawsuits in the world.[4]

[4] See 'Legal status of Uber's service', available at https://en.wikipedia.org/wiki/Legal_status_of_Uber%27s_service (last visited 24 May 2016).

In Europe, several courts or municipalities and governmental agencies have banned UberPop (recently renamed UberX).[5]

The Hamburg[6] and Berlin[7] courts have ruled that UberPop does not comply with the licensing requirements for taxi services provided by the 'Passengers Transportation Act' (*Personenbeförderungsgesetz*) and that an injunction against Uber does not violate the Trade Regulation Act (*Gewerbeordnung*).[8]

On 9 December 2014, as part of an injunction request by the Madrid Taxi Association, the Commercial Court no 2 of Madrid ordered the suspension and ban of Uber's activities,[9] affirming that Uber's activities were openly infringing passenger transportation rules.[10]

In March 2015, the Geneva Department of Security and Economy banned Uber's services in Geneva, stating Uber qualifies as a taxi dispatching center under Geneva Taxi law and fails to comply with the therein stated rules.[11]

UberPop was subject to similar decisions in many cities in the United States, where local transportation agencies have ruled against the California company's presence in their local markets. News of injunctive orders has been reported also from cities in Asia and Central and South America.[12]

The worldwide legal disputes involving Uber always have the same content: that Uber creates unfair competition for taxis because the company does not pay taxes or licensing fees; it endangers passengers; its drivers are untrained, unlicensed and uninsured or underinsured; passengers are not covered by insurance and in general, the company breaks the law.

Notwithstanding this adverse environment, Uber's turnover and value are increasing. Its value is estimated presently at sixty-two thousand five hundred billion US dollars, thanks to the revenue from the billions of transactions conducted daily by its one million one hundred thousand drivers

[5] R. Podszun, 'UBER – A Pan-European Regulatory Challenge' *Journal of European Consumer and Market Law*, 59-60 (2015).

[6] Verwaltungsgericht Hamburg 27 August 2014, Case 5 E 3534/14, *BeckRS*, 55424 (2014).

[7] Verwaltungsgericht Berlin 26 September 2014, Case 11 L 353.14, available at Juris.

[8] L. Wusthof, 'UBER in Germany' *Journal of European Consumer and Market Law*, 60-62 (2015).

[9] Juzgado de lo Mercantil no 2 Madrid, 9 December 2014 no 707/2014, *Asociación madrileña del taxi* v *Uber technologies Inc*, available in Spanish at www.poderjudicial.es (last visited 24 May 2016).

[10] B. Conde Gallego, 'UBER in Spain' *Journal of European Consumer and Market Law*, 62-63 (2015).

[11] J.K. Sommer, 'UBER in Switzerland' *Journal of European Consumer and Market Law*, 116-118 (2015).

[12] 'Legal status of Uber's service' n 4 above.

operating in three hundred fifty-one cities in sixty-four different countries.[13]

One of the reasons Uber's economic growth does not seem to be affected by its legal disputes is most likely that the company is providing services, different from UberPop, which do not fall – or only partially fall – within the above-described scenario.[14] Moreover, there is a strong consumer movement that supports Uber's activities.

As they have done in the Italian proceedings, consumer associations around the world often join legal proceedings as third parties in support of the California company. They assert that limiting access to the public transportation market is an unjustified 'government-granted privilege'[15] bestowed upon powerful taxi driver lobbies, that it is against the principle of free competition, and that it damages consumers by depriving them of the chance to access alternative and cheaper transportation services.

Consumer associations also allege UberPop is a system that allows people who own a car and have free time to earn money. Thus, Uber is an important source of income in a period where the economic crisis is limiting job opportunities. Additionally, Uber reduces consumers' incentives to purchase automobiles, almost certainly saving them money and reducing environmental damage.[16]

It has also been asserted that sharing economy businesses such as Uber create value in at least five ways:[17]

- by giving people an opportunity to use others' cars, kitchens, apartments, and other property, it allows underutilized assets of 'dead capital' to be put to more productive use;
- by bringing together multiple buyers and sellers, it makes both the supply and demand sides of its markets more competitive and allows greater specialization;
- by lowering the cost of finding willing traders, haggling over terms, and monitoring performance, it cuts transaction costs and expands

[13] See, B. Simonetta, 'Effetto Uber sul trasporto pubblico. Ecco l'eredità della startup da 62 miliardi di dollari' *IlSole24ore* (5 February 2016), available at http://www.ilsole24ore.com/art/tecnologie/2016-02-05/uber-vale-625-miliardi-$-e-apre-ad-altre-startup-094803.shtml?uuid=ACDtMEOC (last visited 24 May 2016).

[14] For example, UberBlack, which provides chauffeur services with rental cars. In Italy, UberBlack was challenged by taxi drivers, but not banned.

[15] T.W. Bell, 'Copyright Porn Trolls, Wasting Taxi Medallions, and Propriety of "Property" ' 18 *Chapman Law Review*, 799-814, 808 (2015).

[16] B. Rogers, 'The Social Costs of Uber' 82 *The University of Chicago Law Review Dialogue*, 85-102, 90 (2015).

[17] C. Koopman et al, 'The Sharing Economy and Consumer Protection Regulation. The Case for Policy Change' 8 *Journal of Business, Entrepreneurship & the Law*, 529-545, 531 (2015).

the scope of trade;
- by aggregating the reviews of past consumers and producers and putting them at the fingertips of new market participants, it can significantly diminish the problem of asymmetric information between producers and consumers;
- by offering an 'end-run' around regulators who are captured by existing producers, it allows suppliers to create value for customers long underserved by those incumbents that have become inefficient and unresponsive because of their regulatory protections.

The above-described movement which supports Uber and, more generally, the sharing economy, has stimulated the enactment of new regulations that cover the area of services offered by the California company and that overcome the issue of the compatibility of such services with competition law.

In Italy, the *Autorità Garante della Concorrenza e del Mercato* (AGCM), the Italian Antitrust Authority, highlighted that with respect to UberBlack,[18] ridesharing or carsharing services should be considered legal, as they promote competition in the individual public transportation market. With respect to UberPop, AGCM observed that the need of protect the safety of passengers should prevail over the competition value, exhorting the legislature to enact a 'minimum regulation' for web platforms which allow persons other than professional drivers to offer individual transportation services.[19]

Also, the *Autorità di Regolazione dei Trasporti* (ART), the Italian Transportation Authority, observed that services like UberPop are directed at a market partially different from the one where taxis and chauffeurs operate, providing a benefit not only for passengers, but also for the environment and traffic.[20] The Authority proposes modifying the existing Italian transport regulations by introducing a new category of transport services provided by persons other than professional drivers via web platforms.

In Europe, on 21-22 January 2014, the European Economic and Social Committee rendered an opinion on 'Collaborative or participatory

[18] See n 14 above.

[19] Autorità Garante della Concorrenza e del Mercato, 29 September 2015 Parere AS1222, *Legge quadro per il trasporto di persone mediante autoservizi pubblici non di linea.*

[20]Autorità di Regolazione dei Trasporti, 21 January 2015, *Atto di segnalazione al Governo e al Parlamento sull'autotrasporto di persone non di linea: taxi, noleggio con conducente e servizi tecnologici per la mobilità.*

consumption, a sustainability model for the 21st century'[21] which highlights that: 'collaborative or participatory consumption (…) represents an innovative complement to a production economy in the form of a use-based economy offering economic, social and environmental benefits. It also offers a way out of the economic and financial crisis, by enabling people to exchange things for others that they need (…). Given the complexity and importance of the emergence of collaborative or participatory consumption, the relevant institutions need, on the basis of the necessary studies, to regulate the practices carried out within these forms of consumption, in order to establish the rights and responsibilities of all the stakeholders involved. Firstly, collaborative or participatory consumption can meet social needs in situations where there is no commercial interest and, secondly, it can help, as a for-profit activity, to create jobs, while complying with the rules on taxation, safety, liability, consumer protection and other essential rules'.

Legislation has been adopted both to prevent and regulate the new transportation services.

Some of these laws are very strict and do not work in favor of Uber. On 1 October 2014, the French Government promulgated the *Thévenoud* Law,[22] which recognizes 'Transportation Service with Driver' as a distinct category from 'taxi service', but imposes heavy restrictions on companies that organize shared service transportation, making it an offense to organize a for-profit shared transportation service using drivers who are not taxi or professional drivers. On the basis of this law – whose compatibility with competition law has been contested by Uber to the European Commission – drivers providing UberPop services have been arrested and fined, and UberFrance's offices have been searched by twenty-five policemen.[23]

There is also legislation in the United States whose content is more favorable for Uber, including laws in Milwaukee, Seattle and California.[24]

III. The Business Models of the Sharing Economy

[21] European Economic and Social Committee 21-22 January 2015, 495th Plenary Session, *Rapporteur B. Hernàndez Battaler* 2014/C 177/01. See also European Parliament – Directorate-General for Internal Policies – Policy Department Structural and Cohesion Policies – Research for Tran Committee – Tourism and the Sharing Economy: Challenges and Opportunities for the EU 2015.

[22] Loi 1 October 2014 no 204-1104, relative to '*aux taxis et aux voitures de transport avec chauffer*'.

[23] P. Jougleux, 'UBER in France' *Journal of European Consumer and Market Law*, 112-113 (2015).

[24] E. Mitchell, 'Uber's Loophole in the Regulatory System' 6 *Houston Law Review*, 75-97, 94 (2015).

It is a common view that the internet and the sharing economy create new ways to do business, which cannot be understood and governed with classic economic concepts.[25]

It is noted that the traditional mechanisms of market distribution have been completely changed by the internet. The time and costs business firms bear to offer products and services to their customers have dramatically decreased. At the same time, customers benefit from an enormous quantity of information – including the important role played by customer reviews – which drive purchases and are easy to access.[26]

These aspects have exploded with the advent of mobile web applications that have made cellular phones and tablets efficient tools for searching and purchasing, hiring, lending, sharing, selling, exchanging, or bartering goods and services. This phenomenon has seen the advent of an 'economy system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the internet'.[27]

The idea that goods – mainly long-lasting goods with an idling capacity, as they do not need to be constantly used by owners – can be shared by different people with an access-based consumption model has been used for years in the timeshare market, which inspired Directive 94/47/EC of the European Parliament and the Council of 26 October 1994, on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

However, in recent times, mobile web technologies have made it extremely easy for owners to get in contact with consumers interested in paying a fee for sharing the utilization of properties or services so that, now, access has become the new form of ownership.[28]

It has been underlined that: 'collaborative or participatory consumption practice can apply to any aspect of daily life, such as:

- mobility (car-sharing, the rental and shared use of vehicles, including taxis, bicycles and parking places, and carpooling, which means filling empty car seats with other passengers going in the same direction),

[25] J. Kassan and J. Orsi, 'The Legal Landscape of the Sharing Economy' 27 *Journal of Environmental Law and Litigation*, 1-20 (2012); P. Aigrain, *Sharing: Culture and Economy in the Internet Age* (Amsterdam: Amsterdam University Press, 2012).

[26] G. Smorto, 'Verso la disciplina della sharing economy' *Mercato, concorrenza e regole*, 245-277, 267 (2015).

[27] See, eg www.oxforddictionaries.com/definition/english/sharing-economy (last visited 24 May 2016) stating: 'thanks to the sharing economy you can easily rent out your car, your apartment, your bike, even your wifi network when you don't need it'.

[28] S. Ranchordas, 'Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy' 16 *Minnesota Journal of Law, Science & Technology*, 413-475, 416 (2015).

- energy efficiency (shared use of household utensils),
- accommodation and areas for growing food (rental of rooms, shared housing, and urban and rural allotments),
- business (co-working or shared office space),
- communications (mobile platforms where users can buy and sell goods and services to people living in the same community),
- work (micro-tasks, hiring people for specific jobs, or 'handymen', where the best bidder is given tasks ranging from hanging pictures to assembling items of furniture),
- culture (bookcrossing and book bartering, and promoting cultural exchanges among young people from different countries),
- education (digital communities for learning languages),
- time and skills (time banks),
- leisure (sharing digitalized content),
- finance (loans between individuals, direct loans from individuals to small and medium-sized enterprises, crowdfunding or collective financing, crowdfunding for crowdbenefits),
- tourism (dining experiences in private homes), and peer-to-peer food swapping,
- art and also markets for bartering and donating clothing and items for children, repair and recycling of objects, …,
- promoting the use of renewable energies, where possible sharing energy surpluses through smart networks'.[29]

The sharing economy, regardless of the area of life where it is utilized, consists of two different business models, depending on who is offering the goods or the services and who is organizing the web platform where the goods or the services are offered.

The first business model is the offering of goods or services by businesses through the internet, mobile apps, or both. This model has become very popular for cars and bicycles. In this model, there are two parties, the users and the businesses, and one agreement between them.

In the second business model, business entities create a web platform where owners of goods (or performers of services) meet and conclude sharing agreements with people who want to share such goods (or services).

UberPop falls in the latter business model of the sharing economy.

The California company is defined as a transportation network company that enables ride-sharing transactions between drivers and customers, without owning any vehicles; rather, it connects passengers with nearby

[29] 'Collaborative or participatory consumption, a sustainability model for 21st century', Opinion of the European Economic and Social Committee, 21-22 January 2015.

drivers through a mobile phone application, much like a taxi dispatcher does.[30]

In such scenarios, business entities – like Uber – play the role of intermediary and their success is linked to the web platform. Because they charge a fee for each transaction between owners and users, the faster and more secure and precise the platform is in letting the customers find and obtain the goods or services, the more profits the company makes. In this model, there are three parties involved: the businesses which run the web platform, the owners of the goods to be shared, and the users of such goods. There are also three agreements: the agreement between the businesses and the users, the agreement between the businesses and the owners, and the agreement between the owners and the users.

The first business model does not create new legal issues. The service agreement concluded by the two parties is a B2C agreement that falls under consumer law, unless the fee paid by the user is lower than the minimum required to cover costs of the sharing organization. For example, several municipalities consider bike sharing an important tool to reduce pollution and traffic within the city[31] and qualify such services as public transportation, the price of which is fixed according to social and not economic criteria.

The application of the law to the second business model is more complex. One relevant legal issue concerns the liabilities suffered by the organizer of the web platform. Another legal issue concerns the rules of the agreement signed between the user and the owner of the good shared.

IV. Uber's Liability towards Passengers and Third Parties

In its proceedings around the world, Uber always claims to be completely independent from its drivers and consequently denies any liability towards passengers and third parties for illicit activities committed by its drivers.

Terms and Conditions of the agreement proposed by Uber to its passengers reads as follows: 'To avoid any doubts: Uber, itself, does not provide transport services and Uber is not a transport company. It is up to the service provider to offer transport services, which can be requested through the use of an application and/or service. Uber acts solely as an intermediary between you and the service provider. The transport services

[30] J. Davis, 'Drive at your own risk: Uber violates unfair competition laws by misleading Uberx Drivers about their insurance coverage' 56 *Boston College Law Review*, 1097-1142, 1103 (2015).

[31] See http://www.roma-n-bike.com/progetto.asp (last visited 24 May 2016).

on the part of the service provider are, therefore, governed by the contract (to be) concluded between you and the service provider. Uber will never be a part of that contract'.

Despite Uber's position and its Terms and Conditions, many courts, including the courts of Milan, have affirmed that Uber cannot be considered extraneous to the agreement signed between the drivers and the passengers and, for this reason, have concluded Uber is acting in the same market as taxis, as its intermediary services are part of the transportation service offered by its drivers.

The conclusion reached by the Italian Judges is correct.

It is a commonly accepted principle that, in the application of entrepreneurial risk, business entities are liable for the damages to customers and third parties caused by the activities of employees and outsourced entities that operate under the entity's control and instructions.[32]

For many years, European case law has held that when a business entity 'works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking'.[33]

While it is true that Uber does not take part in the decision of drivers and passengers to conclude the transportation agreement, it is also true that the content of such agreements and the conduct of drivers are substantially affected by Uber's instructions.

Uber fixes the method of payment (credit card), which is considered the hallmark of the company. Tariffs are not freely agreed by drivers and passengers but imposed by the California company and calculated by an algorithm, *Uber Surge Pricing*, created by Uber itself. Uber even has a policy that passengers need not tip the drivers.[34]

Even if Uber's hierarchical position to its drivers could not be considered as sufficient to recognize employee status,[35] it seems undisputable that

[32] P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961).

[33] Case 40/73 *Suiker Unie and others* v *Commission of the European Communities* (European Court of Justice 16 December 1975) available at www.eur-lex.europa.eu.

[34] On the Uber website it reads: 'When you arrive at your destination, just hop out — we'll automatically charge the credit card on file. And there's no need to tip'.

[35] On the website www.uberlitigation.com it is stated that '*O'Connor et al v. Uber Technologies, Inc., C.A. No. 13-03826-EMC (N.D. Cal.)* is a pending lawsuit against Uber Technologies, Inc. ("Uber") that has been filed by four drivers who have used the Uber App (the "App") on behalf of a Class of drivers who have used the App in California. The plaintiffs in the lawsuit allege that they and other drivers in California should be classified as employees, and that Uber has therefore violated sections of the California Labor Code by not reimbursing drivers for certain expenses and not passing along to drivers the part of the fare that they allege represents a tip. The court has certified a class

Uber is liable for the damages to passengers and third parties by its drivers as the drivers are part of the business organization set up and guided by Uber.[36]

A claim filed against Uber by the parents of a six-year-old pedestrian killed in San Francisco by an Uber driver – who did not have a passenger but was logged into the app and searching for fares – was settled.[37] However, because of this incident Uber had to review its insurance coverage. Originally, it only covered drivers after they had accepted a ride request and while they were transporting a passenger. Since then, Uber has expanded it to cover drivers during their entire time on duty under certain circumstances.[38]

V. The Relation between Passengers and Uber Drivers and Their Duty of Good Faith

An additional interesting and uncertain legal issue of the sharing economy is identifying the rules that govern the agreement concluded by the owner of the shared goods and the user when – like the drivers of UberPop – the owners are not a business entity.

Under definitions provided by Art 1.b of the Council Directive 93/13/EEC of 3 April 1993, on 'unfair terms in consumer contracts' and by Art 2.2 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, on consumer rights, the owner of the shared goods cannot be said to qualify as a producer or seller or trader as he is not 'acting for purposes relating to his trade, business or profession'.

Scholars refer to such subjects as *produsers* while the users of their goods are called *prosumers*.[39] It is also observed that when *prosumers* pay a fee to *produsers* for sharing their goods, a capitalist act between consenting adults takes place.[40]

Until the enactment of regulations or the advent of self-regulation,[41] such sharing agreements will fall in the category of C2C or P2P agreements

to pursue the reimbursement claim (as to vehicle-related and phone expenses, but not other expenses) and the tips claim, which include the misclassification question (ie, whether drivers are or are not Uber's employees)'.

[36] M. Macmurdo, 'Hold the Phone! "Peer-to-Peer" Ridesharing Services, Regulation and Liability' 76 *Louisiana Law Review*, 307-353, 332 (2015).

[37] J. Davis, 'Drive at your own risk: Uber violates unfair competition laws by misleading Uberx drivers about their insurance coverage' 56 *Boston College Law Review,* 1097-1142 (2015).

[38] T.G. Locks, 'Travelers Beware: Tort Liability in the Sharing Economy' 10 *Washington Journal of Law Technology & Arts*, 329-342 (2014-15).

[39] G. Smorto, n 26 above, 264.

[40] B. Rogers, n 16 above, 87.

[41] H.A. Posen, 'Ridesharing in the Sharing Economy: Should Regulators Impose

(eg agreement between private parties)[42] and will be governed by common contract law rather than consumer law.

Without detailed rules, the content of the obligations of the parties will be covered by blanket clauses, among which the duty of good faith will play an essential role.

The duty of good faith will impose that the private owners of goods provide users with adequate information about the quality of the goods, in order to let them decide whether to pay a sum to share it. A *produser* cannot be asked to provide the technical information of the goods, as required by consumer law. At the same time, he will have to transparently share any sensitive information about the goods that he knows (for example if he shares his home, if there is something material not working).

It is questionable if the duty of good faith also affects the required conduct of the *prosumer*. While consumer law does not create any specific duty for the consumer, there is a question whether the nature of the sharing agreements and their collaborative scope impose a duty to users to issue a review of the good or service.

A review is defined as 'a consumer's opinion and/or experience of a product, service or business'. Reviews can be found on specialist websites and on the websites of many retailers, retail platforms, booking agents, and trusted trader schemes (schemes helping consumers to select a trader).[43]

Recent studies have described the important function played by reputational feedback mechanisms – such as reviews or ratings –[44] in an internet economy.[45]

Other possible benefits of online consumer reviews include:

- enabling consumers to make faster and better buying decisions;
- ensuring (or boosting) competition among businesses regarding products and services that consumers value and therefore indirectly – with the feedback provided by consumers online – help bring up their quality;

Uber regulations on Uber?' 101 *Iowa Law Review*, 405-433 (2015).

[42] G. Smorto, 'I contratti della sharing economy' *Foro italiano*, V, 222-228 (2015).

[43] J. Valant, 'Online consumer service. The case of misleading or fake reviews', 2, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571301/EPRS_BRI(2015)571301_EN.pdf (last visited 24 May 2016).

[44] Other monitoring mechanisms has been developed to ensure quality. Uber allows passengers to see the GPS path of their rides so they can independently verify the driver took the shortest route. The firms also have the address and credit card information of every customer, which helps to ensure the safety of the drivers. This also permits all transactions to be cashless, reducing the incentive for theft. The result is more fully informed and empowered customers (C. Koopman et al, n 17 above, 542).

[45] G. Smorto, 'Reputazione, fiducia e mercati' *Europa e Diritto Privato*, 199-218 (2016).

- allowing consumers to narrow their search and identify reviews of particular relevance to them (for instance reviews filtered by age, social status or other criteria);
- bringing consumers' attention to a wider range of products and services that they might otherwise not have been aware of (and thus also allowing new business entrants and small businesses to benefit from online visibility).

It has been observed that 'information technology has facilitated the creation of countless reputational feedback mechanisms across the online ecosystem – such as product rating and review systems – that give consumers a more powerful voice in the economic transactions'.

Until now, the research has focused mainly on misleading or fake reviews originated by businesses and the way web platforms should handle these, so as to recognize reviews that are not genuine.

There has also been discussion on how to protect consumers from legal actions filed by businesses in the event of negative reviews and what actions businesses entities can adopt in the event of negative reviews.

However, in the internet economy, once it is ascertained that reputational information represents 'a secondary invisible hand' which can promote a more transparent and efficient market, it should be ascertained whether a review is not only an option but also a duty arising from the duty of good faith.

This conclusion seems to be even more correct for the sharing economy where the imbalance of power between a stronger party (business or professional) and a weaker party (consumer) is missing, as both parties – owner and user – are operating on a level playing field.

This is the concept of the sharing economy, which is grounded on relations inspired by collaboration instead of exchange or profit purposes, and which enhances the value of the reviews as a way to maximize the economic and, mainly, social value of the goods shared.

Until now, courts have been reluctant to find private users liable for bad reviews. However, if it is true that the success of the sharing economy depends on these reputational feedback mechanisms, reviews should be promoted also by affirming the liability of the users who do not fulfill the duty to provide a correct review.

Italy and *Kafalah*: Reinventing Traditional Perspectives to Accommodate Diversity?*

Anna Marotta**

Abstract

In September 2013, the Italian Court of Cassation introduced a new principle: in certain well-defined circumstances, local authorities cannot refuse to issue entry visas, for purposes of family reunification, to foreign minors taken under *kafalah* by Italian citizens residing in Italy. The Court was asked to determine whether it was possible to place Italian and foreign citizens on the same level in matters of *kafalah* and family reunification. Previously, foreign minors given under *kafalah* to Italian citizens by means of a measure granted by a foreign court were not entitled to entry visas for family reunification. The Court stressed that interpreting family reunification rules in a manner that denied Italian citizens the right to reunification with the child given to them under *kafalah* was not compatible with Italian constitutional principles and international conventions. This awareness guided the judge's reasoning and paved the way to acceptance of this debated institution.

I. Corte di Cassazione 16 September 2013 no 21108: The Facts

A long and complex case led the Italian Court of Cassation to the 2013 ruling on *kafalah*.[1] An Italian engineer had worked for many years in several African countries. In 2006, he decided to settle with his wife and his daughter in Rabat. In 2007, the engineer and his wife applied for custody of an abandoned child in accordance with Moroccan law. One year later, after the family had undertaken a series of initiatives in favour of orphaned and abandoned children, it was entrusted with an orphaned child under the Islamic institution of *kafalah*. The judicial measure was issued by the Court of Tangier on 16 February 2009. On 19 January 2010, the couple was authorized to apply for the child's passport and to leave Morocco. When

* Corte di Cassazione-Sezioni Unite 16 September 2013 no 21108, *Rivista di diritto internazionale*, 271-279 (2014); Corte di Cassazione 2 February 2015 no 1843, *Nuova giurisprudenza civile commentata*, I, 707-717 (2015).

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[1] Corte di Cassazione-Sezioni Unite, n * above.

the Italian engineer was posted to Kazakhstan for work, the rest of the family decided to return to Italy. They asked the Italian Consulate in Casablanca to issue, for the child, an entry visa for family reunification. On 4 February 2010, the visa was denied on the following grounds: *kafalah*, unlike adoption, was unsuitable to justify the request; the minor would not live with his foster parents; and the Court of Tangier would issue the authorization of expatriation.

The decision was challenged by the engineer before the Court of Tivoli, in conformity with decreto legislativo 25 July 1998 no 286, also known as *Testo Unico sull'Immigrazione*. The Italian court ordered the consular authority to issue the entry visa, on the grounds that the minor had been living with the Italian family since his birth and that the Moroccan court had allowed him to leave the country.[2]

Both the Italian Ministry of Foreign Affairs and the Italian Consulate in Casablanca appealed against the sentence. In 2011, the Court of Appeal in Rome overturned the ruling issued at first instance.[3] The Italian engineer appealed against the judgments, and the reasons for the appeal were illustrated in a memorandum. The public authorities cross-appealed against the judgment.

On 1 December 2011, in closed session, it was decided to refer the case file to the First President of the Court, in order to submit the issue to the Court's Joint Divisions. In particular, it was necessary to decide whether it was possible to give an extensive interpretation to the notion of 'relative' contained within decreto legislativo 6 February 2007 no 30, which sought to enforce Directive 2004/38/EC.

The cross-appealing authorities submitted a memorandum in which they asserted that, on 9 May 2011, the Juvenile Court in Rome had ruled on the adoption of the child[4] and the Italian Consulate accordingly issued the entry visa for family reunification. Thus, given that the matter at issue had ceased to exist, the petition was allegedly inadmissible due to mootness.

[2] Analogous application of Art 3 para 2 of decreto legislativo 6 February 2007 no 30.

[3] The Court of Appeal emphasized that Arts 2 and 3 of decreto legislativo 6 February 2007 no 30 were to be applied, instead of Art 28 of decreto legislativo 25 July 1998 no 286. The Court highlighted the following: the claim was intended to avoid the rules on international adoption; international adoption could not be granted in accordance with Italian law because Moroccan law did not approve it, and there was no relevant bilateral agreement between Italy and Morocco. Also, the minor could not be considered a 'relative' under Directive 2004/38/EC, in light of decreto legislativo 6 February 2007 no 30, because *kafalah* did not imply any legal representation. The Court of Appeal referred to Corte di Cassazione 1 March 2010 no 4868, available at http://www.procmin.milano.giustizia.it/FileTribunali/20320/Sito/Documenti/Giurisprudenza/Cassazione%20%20Civile/Sent4848_2010.pdf (last visited 24 May 2016).

[4] Art 44, *lett*. a) legge 4 May 1983 no 184.

However, the Court of Cassation stressed the importance of both examining and resolving a much-debated matter, to delucidate the principle of law.[5] Indeed, it was necessary to establish whether Italian citizens who resided in Italy and had custody of a child under a *kafalah* measure were entitled to obtain entry visas for family reunification.[6]

II. At the Heart of the Debate: Defining *Kafalah*, between Islamic Law and International Law

The institution of *kafalah* constitutes the basis of the whole judicial case. The current *kafalah* guardianship system is not an Islamic law construct.[7] In particular, it has only been introduced in recent years. The etymology of the word has two distinct meanings in Arabic: one meaning is 'to guarantee' (*daman*), and 'to take care of', from the root verb *takafala.*[8] In accordance with its first meaning, *kafalah* appears to be very close to the Western surety bond.[9] Consequently, the word has been used mainly in the field of business transactions and commerce. As for its second meaning, the word *kafalah* implies meeting all of an individual's basic needs (food, clothes, education). This latter meaning is that according to which the word is used in the Koranic verse 'and her Lord accepted her with full acceptance and vouchsafed to her a goodly growth; and made Zachariah her guardian'.[10]

Kafalah is best translated as foster parenting. Generally defined as 'the commitment to voluntarily take care of the financial support, of the education and of the protection of a minor, in the same way a parent

[5] Art 363 of the Code of Civil Procedure, as amended by Art 4 of decreto legislativo 2 February 2006 no 4.

[6] This issue was introduced with the petition. First, it censures the challenged measure on the grounds of its incompatibility with a judgement handed down by the Court of Cassation in 2008: Corte di Cassazione 20 March 2008 no 7472, *Rivista di diritto internazionale privato e processuale*, 809 (2008). Second, it criticizes having been mistakenly referred to another ruling of the Court of Cassation (Corte di Cassazione, n 3 above). Furthermore, it opposes the lack of grounds and the missing evaluation of a recent communication of the Commission to the Parliament and to the European Council of June 2009, establishing the conditions according to which it is necessary to interpret Directive 2004/38/EC.

[7] A. Cilardo, 'Il minore nel diritto islamico. Il nuovo istituto della kafala', in A. Cilardo ed, *La tutela dei minori di cultura islamica nell'area mediterranea. Aspetti sociali, giuridici e medici* (Napoli: Edizioni Scientifiche Italiane, 2011), 236.

[8] J. Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham, Maryland: Rowman & Littlefield, 2002).

[9] A. Cilardo, n 7 above, 236.

[10] Surat Al Imran, 3:36.

would for a child',[11] the institution of *kafalah* is the main tool available to protect abandoned children in several Muslim countries. It constitutes a form of legal guardianship by which the *kafil*, the foster father or the foster mother, assumes responsibility to support the *makful*, the foster child, until he or she reaches adulthood, without creating any legal parent-child status.[12]

Taking care of homeless and orphaned children is very important in Islam. The Qur'an devotes much attention not only to orphans, but also to the weak and the poor. This is due to the changes that Arabic society was undergoing at the time of the Prophet Muhammad.[13]

Generally, *kafalah* is often considered as analogous to Western adoption. In Western jurisdictions, adoption is the practice by which an adopted child acquires new kinship ties that are equivalent to biological ties, thus becoming the actual child of the adoptive parents. In contrast, a very important principle in Islamic law is that adoption is prohibited.[14] According to the Qur'an, adopted sons and daughters are not to be regarded as real sons and daughters. Islamic scholars unanimously agree that adoption is contrary to Islamic norms.

The Islamic *kafalah* system creates no filial bonds, no right to inherit (except when the *kafil* entitles the *makful* to inherit) and, finally, no right for the minor to acquire the name of the guardian.[15] Consequently, the child maintains his or her blood ties with his or her family of origin, throughout his or her entire life. Moreover, it is worth emphasizing that legitimate filiation is necessarily bound to biological procreation under Islamic law.[16] In addition, the parent-child bond can only arise through a lawful relationship between parents.[17] Accordingly, there is no room for the concept of illegitimate filiation.

[11] International Reference Centre for the Rights of Children Deprived of their family (ISS/IRC), 'Specific Case: Kafala', Fact Sheet No 51 (Geneva: ISS, 2007).

[12] Corte Suprema di Cassazione, Ufficio del Massimario e del Ruolo, 'Relazione per le Sezioni Unite su questione di massima di particolare importanza n. Reg. Gen. 9608/20111', no 100, (Rome, 10 May 2012), 3-4, available at http://www.ca.milano.giustizia.it/ArchivioPubblico/B_144.pdf (last visited 24 May 2016).

[13] M. Sayed, 'The Kafala of Islamic Law: How to approach it in the West', in P. Lindskoug, U. Maunsbach and G. Millkvist eds, *Essays in Honor of Michael Bodgan* (Lund: Juristforlaget, 2013), 313-511.

[14] '(...) Nor does he regard your sons as adopted sons. These are mere words which you utter with your mouths; but Allah declares the Truth and guides you to the Right Way' (Qur'an, 33:4).

[15] A. Cilardo, n 7 above, 237.

[16] R. Aluffi Beck-Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi* (Milano, Giuffrè, 1990), 152.

[17] F. Castro, *Il modello islamico* (Torino: G. Giappichelli Editore, 2007), 40.

Kafalah rules tend to be different, depending on the Muslim State. In several Muslim countries, *kafalah* is mediated by the state. In this case, judges issue *kafalah* through a formal procedure. Judicial *kafalah* requires foster parents (or one of them) to make a 'revocable' statement before the judge, in which they declare that they will take care of the abandoned minor.[18] Alternatively, the families involved may reach an agreement, which must be approved by a judge or a notary.[19] This is known as consensual *kafalah*.

In general terms, for *kafalah* to be valid, Islamic rules require both a formal declaration of abandonment of the child and the suitability of a married couple or of a single parent to become *kafil*.[20] The need to prove that these requirements exists makes space for further investigation by special commissions. In any case, supervision by a court is required not only at the beginning of the *kafalah* relationship, but also as long as *kafalah* is in force, given its remit as a form of social protection.[21]

The *kafil* acquires a wide range of authority and obligations. Nevertheless, it is important to emphasize that the authority granted to the *kafil* does not include legal representation of the child. On the other hand, minors enjoy many rights under Islamic law. With regard to *kafalah*, the rights involved range from the right to life, to the right to live within their family, and to the right to be brought up in accordance with their own religious background.

Before the institution of *kafalah* was introduced, it was upon the family and the entire Muslim community to protect children in need. However, economic growth prompted changes in society and family structures. To face these changes, lawmakers introduced the institution of *kafalah*. This clearly reflects the transition from a patriarchal family to a nuclear family.[22]

As noted above, the regulatory framework applicable to *kafalah* is not the same for all Muslim States, varying rather from country to country. However, in current times, regardless of these differences, the question is: what happens when *kafalah* rules come into contact with a Western legal order that does not contemplate this institution? This is the case with Italy, as well as several other Western States. Nevertheless, several Western countries must deal with the Islamic rules on *kafalah* due to the

[18] M. Nisticò, 'Kafala Islamica e Condizione del Figlio minore: la rilevanza della kafala nell'ordinamento italiano' (2013), available at http://www.gruppodipisa.it/wp-content/uploads/2013/05/NISTICO.pdf (last visited 24 May 2016), 9.

[19] Suprema Corte di Cassazione, Ufficio del Massimario e del Ruolo, n 12 above, 3.

[20] Ibid.

[21] A. Cilardo, n 7 above, 236.

[22] Ibid.

growth of their Muslim populations. This suggests the need to intervene not only on domestic norms, but also on an international level. The common ground for this analysis is to consider *kafalah* as a tool to protect minors coming from the Islamic world. The need to take into account this form of delegation of parental authority is closely bound to the theoretical imperative of avoiding discrimination against Muslim children in need of help. An interesting case arises with regard to Moroccan *kafalah*, which lies at the core of the decision given by the Court of Cassation on 16 September 2013, no 21108.

The situation of abandoned children is addressed in various Moroccan legislative acts: the new Family Law Code (the *Mudawwana al-usra*), the Penal Code and the Labour Law.[23] In 2002, Morocco implemented an additional law on the *kafalah* guardianship system. *Kafalah* was first regulated by the so-called *dahir portant loi* no 1-93-165 10 September 1993. However, from 13 June 2002, it was replaced by new rules (*dahir portant loi* no 1-02-172 13 June 2002) according to which *kafalah* is reserved to anyone under the age of eighteen who is abandoned, orphaned or whose parents are impaired in exercising their parenthood.[24]

Kafalah may be given to Muslim couples or even to a Muslim woman, provided they are mature and capable of financially supporting the child.[25] To place a child in a *kafalah* arrangement, several administrative procedures must be completed. This is especially true in the case of abandoned children. According to Moroccan law, an abandoned child is under the guardianship of the Judge of Minors Affairs, even after a *kafalah* placement has been made. Once the child is legally declared as abandoned, the interested parties must submit an application to the judge for the *kafalah* proceeding to start. The judicial decision is to take into account the applicants' suitability. Nonetheless, the judge has extensive freedom in choosing the approach to be adopted in each specific case. If the applicants are given the right of *kafalah*, the decision is noted in the registrar's ledgers.

As noted above, the *kafalah* placement ends when the child reaches legal adulthood. Nevertheless, it must be noted that other grounds for termination of this kind of relationship exist, and include: the death of the child; the death of the *kafalah* parents; and the parents' failure to provide for the child in accordance with the *kafalah* entrustment. If the *kafalah* parents divorce, *kafalah* care is not terminated. The child is placed with one of his/her *kafalah* parents and specific custody rules established

[23] L. Buskens, 'Sharia and national law in Morocco', in J. M. Otto ed, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), 113-134.

[24] M. Sayed, n 13 above, 514.

[25] Ibid.

by family law are applied.

Kafalah is internationally recognized as an instrument of protection. Among the international conventions is the UN Convention on the Rights of the Child, adopted in New York on 20 November 1989.[26] Art 20 of this Convention emphasizes the importance of Contracting States' providing protection for minors deprived of their family environment. Such protection includes several institutions, among which *kafalah* is expressly listed.

Within the Hague Conference for Private International Law, two forms of protection of children are provided. The first is the 1993 Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption. This Convention covers only adoptions. However, Egypt has suggested that a new paragraph be added to the Convention to include *kafalah* as an Islamic form of protection of children. This led to negotiations that resulted in provisions in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children. The 1996 Convention has a wide scope of application. Its object is 'to protect the person or the property of the child by providing rules on jurisdiction, applicable law to parental responsibility, rules on recognition and enforcement and the establishment of co-operation between authorities of the contracting states in order to achieve the purposes of the Convention'.[27] Within this scope, the Islamic *kafalah* guardianship system found place thanks to the Moroccan delegation's efforts to include *kafalah* within the Convention.

As for Italy, in June 2014, a bill submitted to the Parliament defined Islamic *kafalah* as the custody of or the provision of legal assistance to a child.[28] However, it was only in March 2015, upon invitation of the Court of Cassation, that the Italian Senate approved the Bill to ratify the Hague Convention. Nevertheless, in light of 'delicate questions of compatibility'[29] between the Italian legal system and the Islamic *kafalah* system, Italy has decided to take some time to further mediate the rules for internal adjustment.

III. *Kafalah* and Italian Case Law: Tradition and Innovation

[26] The Convention was enforced in Italy by means of legge 27 May 1991 no 1761.

[27] M. Sayed, n 13 above, 518.

[28] On this matter, see C. Peraro, 'Il riconoscimento degli effetti della kafalah: una questione non ancora risolta' *Rivista di diritto internazionale privato e processuale*, 541-566 (2015).

[29] Rapporteur: Rosanna Filippin (PD).

In 2005, the Court of Cassation began to shed light on the main features of the institution of *kafalah*. Since then, the Court of Cassation has addressed the issue on several occasions before it handed down Judgment 16 September 2013 no 21108.[30] At the same time, some indications came from the European Court of Human Rights, in *Harroudj* v *France*[31] and in *Chibhi Loudoudi and Others* v *Belgium*.[32]

In 2005, the Court of Cassation ruled that the Italian couple entrusted with a Moroccan minor by virtue of *kafalah* was not allowed to challenge the adoptability decree granted by the court for minors, because *kafalah* as an institution had no legal standing in Italy. Indeed, the Court of Cassation asserted that even if *kafalah*, unlike adoption, granted the *kafil* both the power and the duty to take custody of a minor by providing him or her with care, assistance and education, it did not imply any form of legal tutorship and representation.

The absence of compatibility between *kafalah* and adoption has been confirmed on several occasions by the Court of Cassation. When asked to issue a ruling on the possibility of granting an entry visa, for the purposes of family reunification, to Moroccan minors taken under *kafalah* by Moroccan citizens residing in Italy, the Court stressed the need to grant priority to the principle of the best interests of the child, when balancing the various interests at stake, to find the interpretation of immigration law that was compatible with the Constitution.[33] In this respect, it was noted that the potential risks deriving from attempts to avoid immigration law could be averted by applying internal controls before the residence permit for family reasons was released. Therefore, according to the Court of Cassation, to deny the possibility of family reunification to foreign minors under *kafalah* was contrary to the principle of equality, as it discriminated against children from Muslim countries. Furthermore, the

[30] Corte di Cassazione 4 November 2005 no 21395, *Rivista di diritto internazionale privato e processuale*, 799 (2006); Corte di Cassazione 20 March 2008 no 7472 n 6 above; Corte di Cassazione 2 July 2008 no 18174, *Famiglia persone e successioni*, 891 (2008); Corte di Cassazione 17 July 2008 no 19734, *Famiglia e diritto*, 675 (2008). For further details see: Corte di Cassazione 2 February 2015 no 1843 with a note by M. Di Masi, 'La Cassazione apre alla *kafalah* negoziale per garantire in concreto il *best interest of the child*' *La nuova giurisprudenza civile commentata,* 707-724 (2015).

[31] Eur. Court H.R., *Harroudj* v *France*, Judgment of 4 October 2012, available at http://hudoc.echr.coe.int/eng?i=001-113819 (last visisted 24 May 2016). On the case, see the note by S.Bollée, 'La conformité à la Convention européenne des droits de l'homme de l'interdiction d'adopter un enfant recueilli en kafala' *Revue trimestrielle des droits de l'homme*, 717 (2013).

[32] Eur. Court H.R., *Chbihi Loudoudi and Others* v *Belgium,* Judgment of 16 December 2014, available at http://www.echr.coe.int/Documents/CLIN_2014_12_180_ENG.pdf (last visited 24 May 2016).

[33] Art 29 of decreto legislativo 25 July 1998 no 286.

Court emphasized that similarities prevailed over differences, when comparing the foster care regulated by domestic law and the Islamic *kafalah*.[34] This allowed the Court of Cassation to extend, to Muslim children under *kafalah* proceedings, the application of Art 29, para 2, of decreto legislativo 25 July 1998 no 286, Title IV of which provides for the protection of both families and minors coming from foreign countries.

A different perspective has emerged regarding claims for entry visas for the purpose of family reunification made on behalf of foreign minors that had been entrusted to Italian citizens residing in Italy under *kafalah*. This judicial perspective operated on the basis of the principle that the internal rules on visas for family reunification, in this case regarding foreign minors under *kafalah*, applied only to foreigners.[35] According to the Court of Cassation, the safeguard clause that enabled the application of the most favourable norm did not require extension of those rules to Italian citizens residing in Italy. Indeed, Art 23 of decreto legislativo 6 February 2007 no 30 (previously Art 28 of decreto legislativo 25 July 1998 no 286) concerned only how family reunification was to be handled; it did not address the category of relatives towards whom the legislative measure was deemed applicable. This category is described in Art 2, *lett*. b), referred to by both Art 1, *lett*. a), and Art 3, para 1, of decreto legislativo 6 February 2007 no 30.[36] The definition enshrined in Art 2 has been extended by Art 3, para 2, *lett*. a), to include any other relative:

- who is a dependent of a citizen of the European Union;
- lives with the European citizen within the country of origin;
- requires assistance for serious health problems.

According to the Court of Cassation, this meant that the debated category included minors who had been adopted or who were involved in adoption proceedings in accordance with international adoption law.[37]

[34] These are both temporary measures intended to protect minors in need; however, neither touches upon the civil status of the minor in question. See Corte di Cassazione, n 1 above.

[35] The issue is addressed by decreto legislativo 6 February 2007 no 30 by means of the reference made by Art 28 para 2 of decreto legislativo 25 July 1998 no 286, which in turn refers to the Decreto del Presidente della Repubblica 30 December 1965 no 1656. This was abrogated in 2002 by Art 15 of the Decreto del Presidente della Repubblica 18 January 2002 no 54, subsequently abrogated, in 2007, by Art 25 of decreto legislativo 6 February 2007 no 30.

[36] Decreto legislativo 6 February 2007 no 30. The category of relatives includes direct descendants under the age of twenty-one or who are dependents, or those direct descendants of the spouse or of the partner having entered into a registered union equivalent to marriage.

[37] Legge 4 May 1983 no 184.

The same reasons justifying the family reunification of a minor entrusted under *kafalah* to a foreign citizen residing in Italy could not avail. Therefore, it was stated that Italian citizens who decide to take charge of an abandoned child had no choice but to refer to international adoption, in accordance with legge 4 May 1983 no 184 (and subsequent amendments).[38]

Two principles emerged from the case. The first underscored that the interest of the child must prevail over any other conflicting principle. This was clearly expressed at the international level, as well as at regional and national levels. This principle found place within the Italian Constitution[39] and was also to be applied in the field of domestic regulation of immigration.[40] Furthermore, it was noted that it was always necessary to adopt an interpretation based on the Constitution when dealing with the so-called 'primary rules', ie all legal norms within the hierarchy of the sources of law.

Some issues must be contextualized within the rationale of the Italian Court of Cassation. Decreto legislativo 6 February 2007 no 30 was to be applied to Italian citizens seeking to be reunited with a minor entrusted by means of *kafalah*.[41] The Court emphasized that the legal definition of 'foreign relative' on the basis of which an Italian citizen was entitled to request family reunification could not be applied in an analogous manner. Nevertheless, there were no norms that prevented interpreting the norm extensively (Arts 2 and 3 of decreto legislativo 6 February 2007 no 30), especially when this would be the only interpretation that could guarantee the observance of both Italian constitutional principles and the supranational values. Indeed, the interpretation of Art 3, para 2, *lett*. a), of the aforementioned legislative decree in terms of including foreign minors under *kafalah* within the category of relatives conforms with a Communication made by the European Commission to the European Parliament and Council on 2 July 2009, to guide European States in applying Directive 2004/38/EC.[42] The Court of Cassation noted that any other interpretation

[38] For further details on the role of adoption in a wider cultural context, see C.E. Tuo, 'Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali' *Rivista di diritto internazionale privato e processuale*, 43-80 (2014).

[39] Arts 2 and 30 of the Italian Constitution.

[40] Art 28 para 3 of decreto legislativo 25 July 1998 no 286.

[41] Art 28 para 2 of decreto legislativo 25 July 1998 no 286 makes reference to decreto legislativo 6 February 2007 no 30. Furthermore, the application of the most favourable norms, prescribed by Art 23 of decreto legislativo 6 February 2007 no 30 prevents the application of Art 29 para 2 of decreto legislativo 25 July 1998 no 286, which is limited to requests for family reunification made by foreign citizens.

[42] See 'Guida agli aspetti di difficile trasposizione ed applicazione della direttiva 2004/38/CE', available at http://www.meltingpot.org/IMG/pdf/linee_guida_UE_1__doc.pdf (last visited 24 May 2016).

of that norm would result in breaching both the Constitution and the principle of the best interests of the child. Moreover, the norm itself did not allow for a different interpretation. Indeed, the court stressed that the category of relatives was not based on parental ties. Furthermore, the argument according to which giving relevance to a request that was potentially meant to either avoid or violate domestic rules concerning international adoption was contrary to internal public policy was denied, on the grounds that it was a measure intended only indirectly to produce legal effects within the Italian system. According to the Court of Cassation, *kafalah* does not produce the same effects as adoption; indeed, it does not even produce similar effects. The Court asserted that the guardianship system of *kafalah* has no effect other than the affective and material care of the minor. Accordingly, it was stated by the Court of Cassation that an Italian citizen residing in Italy may seek family reunification in three cases: if the minor is dependent on the requesting Italian citizen; if the minor lives with the Italian citizen in the country of origin; and when serious health reasons require the Italian citizen to personally assist the minor.

The impact of European principles on the '*kafalah*' issue must not be underestimated. This much is clear from the rulings given in *Harroudj* v *France*[43] and in *Chibhi Loudoudi and Others* v *Belgium*.[44] On those occasions, the European Court of Human Rights addressed the relationship between national laws and Arts 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights. The question at issue was the rejection, by the French and Belgian courts, of a request to adopt a foreign child entrusted by means of *kafalah*. What emerges from the aforementioned European decisions is that Art 8 is to be interpreted in terms of recognizing 'a margin of appreciation' to the States, to enable them to balance the rights of the individual and the interests of society as a whole.[45]

Judgment no 21108 handed down by the Court of Cassation on 16 September 2013 launches a new judicial course, laying the foundations for both understanding and accepting a different legal and cultural institution. This course was confirmed two years later by a new ruling: Judgment 2 February 2015 no 1843.

[43] n 31 above.

[44] n 32 above.

[45] F. Di Pietro, 'La kafalah Islamica e le sue applicazioni alla luce della giurisprudenza della Corte Europea dei diritti dell'uomo' *Ordine Internazionale e Diritti umani*, 91-99 (2016).

IV. Confirming *Kafalah*: A New Case for the Court of Cassation

The principles leading the Court of Cassation to the 2013 ruling on *kafalah* continued to inspire the Court of Cassation in subsequent cases.[46] In 2015, the First (Civil) Division of the Court of Cassation was asked to decide a case on the recognition of a measure approving a *kafalah* agreement.[47] The measure had been issued by a Moroccan notary court. The Court of Cassation was called upon to rule on both the petition of the Italian Ministry of Foreign Affairs (in particular, the Italian Consulate in Casablanca) against an Italian citizen of Moroccan origin, and the petition made by that same Italian citizen against the Italian Ministry of Foreign Affairs, with reference to Judgment no 132 issued by the Court of Appeal in Brescia on 16 February 2012.[48]

In January 2011, the Italian citizen applied to the Court of Appeal for recognition, under Art 65 and following provisions of legge 31 May 1995 no 218, of a *kafalah* agreement approved by the notary court of first degree of Khouribga in Morocco.

The claimant was born in Morocco, but had been living and working in Italy for over twenty years. His family was composed of his wife, who was also born in Morocco, and their son. Both the husband and the wife had obtained Italian citizenship. The husband had a permanent job and the family was well integrated within the local society. The claimant had a brother who lived in Morocco, with his wife and their two sons, in a precarious economic situation. Given the favourable economic situation of the Italian family, the two families decided to establish a *kafalah* agreement. The agreement provided that the Italian citizen would take charge of his brother's sons. Since the *kafalah* agreement had to be approved by the competent court under Moroccan law, in April 2005, the Khouribga court approved the *kafalah* agreement, with the consent of both of the children's parents and of the uncle. On this basis, the Moroccan authorities issued the relevant measure according to which the two minors were allowed to expatriate and reach their uncle in Italy, where they would finish their studies and start to work. However, when the Italian citizen applied to the Italian Consulate in Casablanca for their entry visa, the Italian authority refused to issue the entry visa for family reunification, on the grounds that the minors did not fall within the category

[46] Corte di Cassazione 2 February 2015 no 1843, n 30 above. See M. Di Masi, n 30 above, 707-724.

[47] This was a consensual *kafalah*. For further details on Moroccan *kafalah*, see M. Sayed, n 13 above, 514-515. See also A. Cilardo, n 7 above, 245-251.

[48] Corte d'Appello di Brescia 16 February 2012 no 132 (unpublished). See M. Di Masi, n 30 above, 708.

of relatives. They were thus not entitled to family reunification under Art 2, para 1, *lett*. b), of decreto legislativo 6 February 2007 no 30.

The Brescia Court of Appeal set a date for the interested parties to appear before the court.

The Ministry of Foreign Affairs argued that the petition was inadmissible. It was noted that the Italian citizen held no interest in obtaining the recognition of the *kafalah* order, because issuance of the entry visa to the minors could not be based on *kafalah*. The well-known *Testo Unico sull'Immigrazione* (decreto legislativo 25 July 1998 no 286) was considered inapplicable: Art 29, addressing the relevance of *kafalah* for family reunification, provided that an Italian citizen entrusted with a non-European child under *kafalah* could not seek family reunification.[49] The Ministry stated that in such cases, only foreign citizens could seek family reunification.

The request was granted by the Court of Appeal under Art 2, para 1, *lett*. b) no 3, and Art 3, para 2, *lett*. a), of decreto legislativo 6 February 2007 no 30. These rules allowed the inclusion – within the category of relatives entitled to family reunification – minors who are wards of the claimant and minors living with the claimant and having a parental bond or family bonds with the claimant. The Court of Appeal stressed that the *kafalah* agreement was consistent with the Italian rules on foster care and adoption of minors.[50] These rules did not require a judicial or administrative enforcement measure, if parental control was present. [51]

The Ministry of Foreign Affairs appealed to the Court of Cassation, leading the claimant to file a counter-appeal. While the latter was based on the fact that the Court of Appeal had not ruled on the costs of the proceedings, the Ministry of Foreign Affairs appealed the judgment on five grounds.

As for the first ground, the Ministry of Foreign Affairs argued that the

[49] For a more comprehensive picture of the legal scholarship on matters of *kafalah* and family reunification, see A. Venchiarutti, 'No al ricongiungimento familiare del minore affidato con kafalah: i richiedenti sono cittadini italiani' *Diritto di famiglia e delle persone*, 1621-1639 (2010). See also M. Orlandi, 'La Kafala islamica e la sua riconoscibilità quale adozione' *Diritto di famiglia e delle persone*, 635 (2005).

[50] T. Tomeo, 'La Kafala' *Comparazione e diritto civile*, (2013), available at http://www.comparazionedirittocivile.it/prova/files/ncr_tomeo_kafala.pdf (last visited 24 May 2016).

[51] For a more detailed investigation of *kafalah* and Western law, see R. Senigaglia, 'Il significato del diritto al ricongiungimento familiare nel rapporto tra ordinamenti di diversa tradizione. I casi della poligamia e della «kafala» di diritto islamico' *Europa e diritto privato*, 533-575 (2014). See also M. Della Rocca, 'La kafalah non è né adozione né affidamento preadottivo. Fuori luogo il richiamo all'articolo 42, comma 2, L. n 218/1995' *Corriere Giuridico*, 199-203 (2012).

judge was not to apply Art 67 of decreto legislativo 25 July 1998 no 286. The Ministry held that it was a case of adoption, and thus the Court of Appeal should have applied Art 41 para 2, on the recognition of foreign adoption orders. According to this provision, in the context of the adoption of minors, special laws must be applied. Consequently, the correct procedure was that established by legge 31 December 1998 no 476, on international adoption. The Ministry stressed that the request for recognition of the judicial measure approving the *kafalah* agreement was not admissible because the judge did not possess the requisite jurisdiction. Furthermore, the request had to be rejected because an Italian citizen wishing to include an abandoned foreign child within his family had no choice than to refer to international adoption law, since the Italian legal system recognized neither international foster care nor the *kafalah* system of guardianship.[52]

The Court of Cassation ruled out the first ground of appeal for lack of legal basis, to the extent that it excluded the applicability of Art 67 of decreto legislativo 25 July 1998 no 286 and required the application of international adoption law. Referring to Judgment no 1155 of 23 January 2004 by the First (Civil) Section of the Court of Cassation, the Ministry emphasized that decreto legislativo 25 July 1998 no 286, in so far as it abrogated Art 796 and following articles of the Civil Code and replaced these provisions with an automatic recognition of foreign rulings, provided, at Art 41, for the application of the special laws on adoption. Therefore, this implied the applicability of legge 31 December 1998 no 476 enforcing the 1993 Hague Convention, which had amended international adoption law. Therefore, this had introduced, by means of legge 4 May 1983 no 184, a well-articulated procedure that conferred the relevant powers upon the Juvenile Court, and provided that the international adoption of children from States that had ratified the Convention could only occur in accordance with the procedures and under the effects of the aforementioned law. This was confirmed by a further reference to *ordinanza* 11 March 2006 no 5376, which had been issued by the First Division of the Court of Cassation.

According to the Court of Cassation, both references were irrelevant. The judge stated that, in light of the original purpose of the institution of *kafalah* within Islamic states to address the Islamic ban on adoption, the application of international adoption law instead of provisions of private international law (decreto legislativo 25 July 1998 no 286) meant denying

[52] A. Venchiarutti, 'La kafala al cospetto dell'ordinamento italiano', in M. Papa, G. M. Piccinelli and D. Scolart eds, *Il Libro e la bilancia: studi in memoria di Francesco Castro* (Napoli: Edizioni Scientifiche Italiane, 2011), 1131-1142.

the significance of this particular institution within Muslim countries.[53] Art 41 of the *Testo Unico sull'Immigrazione* could not be interpreted, and was not to be interpreted, as a norm seeking to prevent the recognition of any other institution having the purpose of protecting minors. Rather, Art 41 was intended to emphasize the peculiar features of international adoption as a consequence of the involvement of two different countries: the country of origin and the receiving country. Therefore, the entire process was to be carried out in accordance with the internationally established standards of the 1993 Hague Convention. Furthermore, and most importantly, denying the claim's inadmissibility due to an absence of interest on part of the claimant called into question the case law of the Court of Cassation, and, more specifically, the principle of law established by Judgment 16 September 2013 no 21108. On that occasion, as previously noted, the Joint Divisions stressed that the argument according to which Italian citizens who wished to include an abandoned foreign child within their families had no means other than international adoption, under legge 4 May 1983 no 184, could not be supported. This was because the Court of Cassation, in its previous decisions, had shed light on two principles. The first was the best interests of the child, which was determined on multiple levels – from the national to the international. The second was the principle of the constitutionally compatible interpretation of the aforementioned primary legislation. Therefore, denying the Italian citizen the possibility to obtain reunification with a foreign minor taken in charge under *kafalah*, on the sole basis of a strict interpretation of decreto legislativo 6 February 2007 no 30, was contrary to the principle of equality. Specifically, this led to differences in the treatment of both minors from Muslim countries who needed protection and Italian citizens. Indeed, while foreign citizens were entitled to reunification with Muslim minors under *kafalah*, Italian citizens, being allowed only adoption, were deprived of a fundamental tool to provide care and protection to foreign children coming from Muslim states.[54]

The Ministry's second argument was dismissed on the grounds that the *kafalah* measure could not be approved in Italy because it was contrary to national public policy, as clearly shown in the provisions on adoption. As stated above, adoption was not regulated by private international law. Furthermore, no substantial differences could be noted, if *kafalah* was

[53] V.M. Donini and D. Scolart, *La* sharì'a *e il mondo contemporaneo* (Roma: Carocci, 2015). For further details on *shari'a* and its relationship with the contemporary world, see also J.M. Otto ed, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010).

[54] On this matter, see G. Pizzolante, 'La kafalah islamica e il suo riconoscimento nell'ordinamento italiano' *Rivista di diritto internazionale privato e processuale*, 947 (2007).

assimilated to foster care rather than to adoption: Art 35, para 6, *lett*. d), of legge 4 May 1983 no 184 concerned both the adoption and the foster care of foreign children, which could not be registered unless they occurred under a central authority or an authorized body.

According to the Ministry of Foreign Affairs, in these cases, the requirements provided by decreto legislativo 25 July 1998 no 286 could not be applied. The *kafalah* agreement had been approved by a notary court that applied Islamic law, and not a court for juvenile affairs that applied Italian law. Furthermore, *kafalah* was deemed to be contrary to national public policy because those citizens who wished to include a foreign minor within their families should apply the means provided by legge 4 May 1983 no 184, the only law intended to integrate public policy. Thus, *kafalah* could not be enforced in Italy because – according to the Court – this placed the minor within the receiving family in a detrimental position.

The Court of Cassation stressed that the Ministry had failed to take into account the singularities of *kafalah* as an institution originating in the Islamic world. Indeed, referring to international adoption law, for Italian citizens to receive a foreign minor within their families contradicted the Court of Cassation's 2013 ruling: to verify whether *kafalah* enables the theoretical and the practical achievement of the best interests of the child, in a cultural and legal context other than the Italian socio-legal framework and in which adoption is not permitted.

According to the Court of Cassation, the Ministry's argument was at odds with the fact that Italy had joined several international conventions, such as the New York Convention and the 1996 Hague Convention, which both recognized *kafalah* as a tool through which to protect minors.[55] As a Member State, Italy was to comply with the Conventions, even though the Hague Convention had yet to be ratified. A different approach would contrast with the instruments adopted by international law to standardize and harmonize national laws, and ensuring judicial cooperation in a broader European context.

The Court of Cassation noted that, in terms of judicial activity, the *kafalah* system had to be examined by elucidating the reasons for its existence as well as its context, recalling that public control was in any case exerted on this form of guardianship.[56] Such public control could be

[55] For further details on the application of Islamic family law within the Italian legal system, see C. Campiglio, 'Il diritto di famiglia islamico nella prassi italiana' *Rivista di diritto processuale italiano e comparato*, 43-76 (2008).

[56] R. Duca, 'Family Reunification: the case of Muslim Migrant Children in Europe' *Athens Journal of Social Science*, 114 (2014): 'Once *kafala* is allowed, the public competent authority keeps the right and the duty of surveillance and checks the evolution of the

entrusted to either a judicial authority or an administrative authority, and both could exercise their power in different ways during the various stages of the *kafalah* relationship. The Court of Cassation declared that it would be pointless to discriminate *kafalah* on the basis of the notary court's role in the case brought to its attention: its power to check was meant to protect minors and fulfil their interest, examining whether the *kafil* met the requirements for starting the *kafalah* relationship. In this particular respect, the Court declared that international conventions did not deprive States of the power to decide the type of authority that was to exercise public control.

As for Moroccan *kafalah* and its relationship with national public policy, the Court of Cassation maintained that there was no difference between judicial *kafalah* and consensual *kafalah*, because there could be no conflict with public policy when the parents of a minors, aware of their incapability to offer the best moral and material assistance, decide to entrust other members of their family with assisting, caring for and protecting their children.[57] Nonetheless, according to the Court, the principle of reciprocity could not be applied to matters concerning the protection of minors, on the grounds that differences in legislation between States are the expression of cultural singularities that should be respected. Thus, states retain sovereign power on this matter, even if they are called upon to cooperate to achieve the best interests of the child at the international level.

On the third ground of appeal, the Ministry noted that the Court of Appeal had included, among the relatives, a foreign minor who had been entrusted by means of *kafalah* to an Italian citizen living in Italy. This was in contrast with decreto legislativo 6 February 2007 no 30. Indeed, the foreign minor was not a direct descendent of the Italian citizen; he had not been adopted by the Italian citizen; he was not affiliated to the Italian citizen and he did not live with the Italian citizen in Italy or in his or her country of origin. *Kafalah* had to be considered an institution of Islamic law without any legal effects within the Italian system, which provided binding principles to include foreign minors within the domestic system. Applying principles of Islamic law to an Italian citizen implied granting Islamic law a superior role as a source of law than the national law referring to the international adoption procedure. Therefore, Italian

child's integration in the extended family and in the event of *kafil*'s transfer of residence abroad it must authorize *makful's* transfer'.

[57] On the distinction between judicial *kafalah* and consensual *kafalah*, see M. Di Masi, n 30 above, 719, quoting M. Della Rocca, 'Uscio aperto, con porte socchiuse, per l'affidamento del minore mediante *kafalah* al cittadino italiano o europeo' *Corriere giuridico*, 1497 (2013). See also Corte Suprema di Cassazione, Ufficio del Massimario e del Ruolo, n 12 above, 2-3.

Muslims could elude Italian adoption law, and, by contrast, this law ended up being restrictive for other religious individuals. This could lead to negative consequences in terms of discrimination.

In dealing with this ground for appeal, the Court of Cassation insisted upon what had been stated in response to the other grounds: international adoption law was not to be favoured over *kafalah* law on the grounds that *kafalah* is not an Italian legal institution. If it was capable of offering assistance and care to minors, *kafalah* had to be recognized. Furthermore, according to the Court of Cassation, the Court of Appeal had not been asked to interpret Arts 2 and 3 of decreto legislativo 6 February 2007 no 30, as it had evaluated the relationship between the Italian citizens and the two minors. Indeed, in 2013, the Court had ruled that the foreign minor given to an Italian citizen under *kafalah* was to be considered within the category of 'other relatives' under Art 3, para 3, *lett*. a) of decreto legislativo 6 February 2007 no 30. Accordingly, in certain well-defined circumstances, Italian citizens could seek family reunification. The Court reaffirmed the fundamental principles at the heart of the 2013 judgement: the minor's fundamental right to family unity; the role of *kafalah* as a tool to provide material and affective care to minors, without producing the same legal effects as adoption; the absence of any form of religious discrimination, providing Muslim individuals with the opportunity to assure protection to minors in accordance with their faith; and the need to allow Italian citizens to benefit from the full rights of the Italian legal system.[58] Furthermore, the fact that Moroccan law required that only couples of Islamic faith and married for at least three years could be entrusted with a minor by *kafalah* was considered irrelevant.[59] In particular, this was irrelevant in terms of discrimination and in terms of potential conflict with the principle of secularism, on the grounds that the Italian court needed only examine a legal measure that had been adopted and approved in Morocco – and Morocco, as Italy, was party to the Hague Convention, which grants minors protection in accordance with the religious convictions of the individuals involved and strives to provide protection beyond national boundaries.

On the fourth ground for appeal, the Ministry of Foreign Affairs argued that the Moroccan *kafalah* agreement was not consistent with the *kafalah* pattern acknowledged by the New York Convention, because the minor had not been abandoned. This was considered to be a very important requirement in deciding whether the minor could leave his or her parents. Thus, the Court of Appeal had failed to assess the minor's best interests.

[58] See Corte di Cassazione, n 1 above.
[59] On this *kafalah* requirement, see Corte Suprema di Cassazione, n 12 above, 3.

The Court of Cassation confirmed that the Convention refers to *kafalah* operating in situations of abandonment, or when the minor lives in extreme hardship within his or her family.[60] Consequently, the Moroccan *kafalah* was not inconsistent with the provisions of the New York Convention.[61] Indeed, for the *kafalah* institution to be legitimate, the Court of Cassation suggested comparing it with the fundamental principles of the Convention, in particular with the principle of the best interests of the child. Thus, it was necessary to take into consideration how the principle was enforced in each case. Moreover, this principle was to be balanced with the minor's right to live and grow up in his family. Such a perspective appeared to be consistent with consensual *kafalah*, a prerequisite of which is an unsuitable or difficult family context, rather than the abandonment of the minor. This did not appear to contradict the fundamental principles of the New York Convention. This Convention, as well as the European Convention on Human Rights (ECHR) and the Hague Convention, provide for cooperation between States on matters of child protection, to reach a shared decision in accordance with the principle of the best interests of the child.

On the fifth ground for appeal, the Ministry stated that the Court of Appeal had registered the existence of a consensual agreement that met all relevant requirements, and was thus equivalent to public *kafalah*. This was deemed to contrast with Moroccan law, which established specific conditions for ascertaining the abandonment of the child and the parents' unfitness to be entrusted with the minor under *kafalah*. Nevertheless, according to the Court of Cassation, this argument was unfounded. The Court of Appeal had ascertained the knowing participation of the Moroccan family to the *kafalah* agreement on the grounds of its precarious economic situation and the need for the Italian family's continuous involvement in supporting the minors. Even transferring the children to Italy was consistent with their best interests.[62] Indeed, the *kafalah* system does not necessarily imply that the person taken into *kafalah* should live with those who provide the *kafalah*. The Court of Appeal had described in detail how the two families had engaged in the *kafalah* relationship. The Court of Appeal had taken into account a series of elements, such as the suitability of the Italian family to provide the minors with care and assistance; the Moroccan family's consent; the existence of a young cousin in the Italian family; the fact that all the members of the Italian family held Italian citizenship; the receiving

[60] See M. di Masi, n 30 above, 715-716. See also T. Tomeo, n 50 above, 1-13.
[61] M. Sayed, n 13 above, 514. See also T. Tomeo, n 50 above, 8.
[62] R. Duca, n 56 above, 114.

family's full integration within Italian society; and the Moroccan authority's examination of how the relationship had evolved, and its verification of the pros and cons of a temporary transfer of the minors far from their family of origin. Thus, the Court of Appeal maintained that the best interests of the child required recognition of the *kafalah* agreement and allow them to live in Italy.[63]

The appeal was to be dismissed, while the counter-appeal was to be upheld. It was confirmed that the Court of Appeal had not issued a decision on costs. Moreover, judicial conflicts on a matter in which there were no specific rules or recent case law made it necessary to rule on the costs of the proceedings before both the Court of Appeal and the Court of Cassation.

V. Conclusion

When dealing with the 'Islamic' system of *kafalah* guardianship, the Court of Cassation draws on a series of principles. The reasoning is essentially based on a dual awareness: on one hand, prioritizing the best interests of the child, and on the other, avoiding any discrimination against children from Muslim countries, where *kafalah* constitutes an extremely important form of protection of abandoned children. According to the Court, completely excluding Italian citizens from the range of subjects entitled to achieve reunification with foreign children under *kafalah* would be not compatible with Italian constitutional values. Furthermore, it would not be consistent with European legislation and international conventions having the purpose of protecting minors beyond state borders. Moreover, the Court of Cassation emphasizes that foster care, as addressed in Italian legislation, has several similarities with the *kafalah* system, an observation that played a very important role in clearing the way for accepting *kafalah* within Italian society.

On matters of *kafalah* and family reunification, the new judicial perspective introduced by the Court of Cassation in Judgment 16 September 2013 no 21108 has been confirmed by the First (Civil) Division of the Court of Cassation in a new ruling of 2015. This new stance demonstrates a great change occurring within Italian society in recent years, in both legal and cultural spheres. Indeed, the Court of Cassation was led to bring about this change on the basis of the strength of principles such as the best interests of the child and non-discrimination, together with the need to apply these principles in a manner that is more consistent

[63] M. di Masi, n 30 above, 716-717.

with societal developments. In an increasingly globalized world, where there is far less distance between individuals, and where groups with different cultural and legal values live with one another, society is becoming aware of the need to face and accept diversity. Accordingly, judges and lawmakers must adapt the law to a fast-changing society, so that people can learn to live with each other, respecting cultures and rights and in compliance with universal fundamental principles.

Hard Cases

The Prohibition of Gametes' Donation: When the Constitutional Court 'Decides to Decide'

Emanuella Prascina*

Abstract

The paper addresses the prohibition on gamete donation, which was recently revoked by a landmark judgment of the Italian Constitutional Court. In the first part, it explores the social and cultural context to and political debate regarding the Italian law on medically assisted reproduction. It then sets out a framework for analysing the progressive erosion of the ban. It presents the Court's clear intention finally to adopt a position, setting aside the reluctant stance of the past and the much-criticised tendency to 'decide not to decide'. The paper then concludes with a discussion of the scenarios to which the revocation of the ban has given rise.

> *'One egg, one embryo, one adult – normality. But a bokanovskified egg will bud, will proliferate, will divide. From eight to ninety-six buds, and every bud will grow into a perfectly formed embryo, and every embryo into a full-sized adult. Making ninety-six human beings grow where only one grew before. Progress.'*
>
> Aldous Huxley, *Brave new world* (1932)

I. The Facts

In the judgment to which this commentary relates,[1] the Italian Constitutional Court ruled unconstitutional the absolute prohibition on heterologous fertilisation.[2]

This technique of 'artificial reproduction'[3] enables a foetus to be conceived with the use of genetic material originating either in whole or

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[1] Corte Costituzionale 10 June 2014 no 162, available at www.giurcost.it.

[2] Cf legge 19 February 2004 no 40, Art 4, para 3; Art 9, paras 1 and 3; Art 12, para 1.

[3] The literature refers in general to 'artificial reproduction' in relation to all clinical and biological practices that enable conception other than according to the natural process: P. Vercellone, 'Procreazione artificiale' *Digesto delle discipline privatistiche* (Milano: Giuffrè, 1997), XV, 309. M. Tedesco, 'La procreazione medicalmente assistita', in M. de Tilla et al

in part from persons outside the couple.[4] Heterologous fertilisation, as is known, is of significant scientific and therapeutic benefit as it makes reproduction possible also in situations in which the couple is sterile or infertile (ie: failure to produce gametes suitable for reproduction).[5] Nevertheless, it has encountered a certain level of resistance on a legal level due to certain complex ethical and moral questions.[6] The widespread prejudice against heterologous fertilisation – which was already clear in the debate prior to the enactment of legge 19 February 2004 no 40 (hereinafter 'legge 40') – was confirmed within the legislation by the absolute prohibition on the donation of gametes.

In the cases examined by the referring courts, three Italian couples who were incapable of reproducing naturally approached various healthcare facilities seeking heterologous reproduction. However, these facilities refused to perform the procedure, thereby preventing the couples from reproducing in the only manner in which they were able. The courts that heard the application,[7] basing their position on the principles and arguments asserted by the European Court of Human Rights in Strasbourg,[8] referred the Italian legislation in this area for constitutional review on the grounds of unreasonableness.[9] This legislation – whilst being inspired by the aim of

eds, *Fecondazione eterologa* (Milano: UTET Giuridica, 2015), 2-3.

[4] The production of the embryo in cases involving the donation of eggs necessarily occurs *in vitro*: the egg, which is extracted from the donor by laparoscopy, is fertilised *in vitro* with the aspiring father's semen and subsequently implanted in the woman's uterus. In the event that male semen is donated, fertilisation may occur either *in vivo* or *in vitro* (P. Spaziani, 'Questioni attuali in tema di procreazione medicalmente assistita: fecondazione eterologa e diagnosi preimpianto alla luce della giurisprudenza della Corte EDU' *Nel Diritto*, 7-8 (2013)). On this point see also: G. Baldini, *Tecnologie riproduttive e problemi giuridici* (Torino: Giappichelli, 1999), 96; G. Cassano, *Le nuove frontiere del diritto di famiglia* (Milano: Giuffrè, 2000), 54; G. Ferrando, 'La riproduzione assistita nuovamente al vaglio della Corte Costituzionale. L'illegittimità del divieto di fecondazione «eterologa»' *Corriere Giuridico*, 1068 (2014), which specifies that it would be more appropriate to refer to 'exogamic' fertilisation as the use of the adjective 'heterologous' refers in scientific terms to reproduction between subjects from different species.

[5] In situations involving reproductive disorders of this type, it is not therefore possible to have recourse to homologous medically assisted reproduction. In fact, this practice presupposes that the generic material produced by both persons is potentially suitable for reproduction.

[6] Cf G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' available at www.ordineavvocatifirenze.eu (last visited 24 May 2016).

[7] Cf Tribunale di Firenze, 29 March 2013, Tribunale di Milano 8 April 2013, Tribunale di Catania 13 April 2013, available at www.gazzettaufficiale.it. See I. Rapisarda, 'Il divieto di fecondazione eterologa: la parola definitiva alla Consulta' *Nuova giurisprudenza civile commentata*, I, 929-938 (2013).

[8] Eur. Court H.R., *S.H. and Others* v *Austria*, Judgment of 1 April 2010 and Eur. Court H.R. (GC), *S.H. and Others* v *Austria*, Judgment of 3 November 2011, available at www.hudoc.echr.coe.it.

[9] See R. Bartoli, 'La totale irrazionalità di un divieto assoluto. Considerazioni a

offering therapeutic instruments to couples suffering from irreversible reproductive illnesses – is not capable of achieving its goals because it prevents the use of heterologous reproduction also in situations in which this represents the *only* possibility for conception.[10] In addition, the referring courts asserted that the absolute prohibition on heterologous fertilisation may violate the right to the full realisation of private family life and the right to self-determination of individuals, with the risk of dangerous repercussions on the psychological wellbeing of the couples involved.

When examining the question, the Constitutional Court stressed that access to techniques of medically assisted reproduction impinges upon a range of interests of constitutional significance. In these cases, a balance must be struck[11] between these interests in order to guarantee a 'minimum level of legislative protection'.[12] Generally speaking, the striking of a reasonable balance between the various ethical issues involved and the dignity of the individual falls to the legislator. However, the primary competence of the legislator does not preclude the Constitutional Court's ability to assess the matter[13] when the balance struck within the legislation is unreasonable.

Following these methodological indications, the Constitutional Court

margine del divieto di procreazione medicalmente assistita eterologa' *Rivista italiana di diritto e procedura penale*, 90 (2011); E. Dolcini, 'Il divieto di fecondazione eterologa … in attesa di giudizio' *Diritto penale e processo*, 353 (2011).

[10] In particular, in the cases heard by the Tribunale di Milano and the Tribunale di Firenze, the couples had requested medically assisted reproduction involving the donation of male gametes, due to the husband's complete azoospermia (total lack of sperm cells in the seminal fluid). In the case brought before the Tribunale di Catania on the other hand, sterility – which was also absolute and irreversible – was due to the wife's premature menopause, with the result that it was only possible to reproduce using donated eggs.

[11] On the need to strike a balance in the specific individual case, see P. Perlingieri, 'Ermeneutica e valori normativi', in Id, *L'ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 363-371; Id, *Interpretazione e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2012); A. Morrone, 'Bilanciamento (giustizia costituzionale)' *Enciclopedia del diritto – Annali* (Milano: Giuffrè, 2008), II, 185-204; A.M. Citrigno, 'Questioni di inizio vita nella dimensione della democrazia pluralista: la controversa disciplina sulla procreazione medicalmente assistita' 14-15 *Revista de la Facultad de Ciencias Juridicas*, 79 (2009).

[12] Corte Costituzionale, n 1 above.

[13] G. Baldini, 'La Consulta cancella il divieto di PMA eterologa', n 6 above, 4. But see Tribunale di Milano ord 23 November 2009, *Nuova giurisprudenza civile commentata*, 774-782 (2010) which refused to refer a question concerning the constitutionality of heterologous fertilisation as the discretion of the legislator is not amenable to review. The question was also analysed by Tribunale di Catania ord 3 May 2004, *Giurisprudenza italiana*, 2088 (2004).

held – in line with the interpretative guidelines previously laid down[14] – that the legislation lacked an adequate foundation in constitutional law.

II. The Prohibition on Heterologous Fertilisation. Chronicle of a Death Foretold

The declaration that the prohibition on heterologous fertilisation was unconstitutional arose as part of a process of 'demolition'[15] by politics and case law which, in little more than ten years, has uprooted the rigorous framework of the law on medically assisted reproduction.[16] However, this singular 'story of rejection'[17] should not come as a surprise[18] as it represents

[14] Corte Costituzionale 8 May 2009 no 151, available at www.cortecostituzionale.it asserted the need to balance protection for the embryo against the requirements of procreation.

[15] Cf M. Casini and C. Casini, 'Il dibattito sulla PMA eterologa all'indomani della sentenza costituzionale n. 162 del 2014. In particolare: il diritto a conoscere le proprie origini e l'«adozione per la nascita»' *Rivista di Biodiritto*, 136-138 (2014); L. Violini, 'La Corte e l'eterologa: i *diritti* enunciati e gli *argomenti* addotti a sostegno della decisione' (2014) available at www.osservatorioaic.it.

[16] Corte Costituzionale 8 May 2009 no 151, n 14 above, ruled unconstitutional the prohibition on producing more than three embryos and the requirement of parallel implantation, without making any reference to the possible detriment to the health of the woman. After issuing the judgment under discussion, the Constitutional Court (Corte Costituzionale 5 June 2015 no 96, available at www.giurcost.it) struck down the prohibition on the recourse to medically assisted reproduction techniques for fertile couples who are carriers of serious genetic diseases along with the prohibition on diagnosis prior to implantation. The Constitutional Court has ruled more recently on the prohibition on experimentation with human embryos under Art 13 legge 40 in relation to the possibility for couples to select healthy embryos for implantation (Corte Costituzionale 11 November 2015 no 229, available at www.giurcost.it). In particular, it held that Art 13, para 3 (b) of legge 40 – which subjects to criminal punishment any doctor who has selected embryos, whilst also requiring the conservation the 'excluded' embryos indefinitely – was unreasonable (and hence unconstitutional). Recently (Corte Costituzionale 22 March 2016 no 84 available at www.cortecostituzionale.it) a question concerning the constitutionality of the prohibition on research and experimentation on embryos, even if they are in excess or affected by serious disease and not suitable for implantation, was ruled unconstitutional on the grounds that the balancing of the countervailing interests in such 'sensitive' matters falls to the legislator. Consequently, Italian law maintains the prohibition on the use of embryos for the purpose of experimentation, even in relation to embryos that are destined for indefinite cryopreservation. The Constitutional Court's position may in fact be strongly criticised. The safeguarding of the life of an embryo destined for eternal cryopreservation appears to be a 'pitiful hypocrisy'; their destination for research is in fact a much more dignified purpose: F.D. Busnelli, 'Cosa resta della legge 40? Il paradosso della soggettività del concepito' *Rivista di diritto civile*, I, 468 (2011).

[17] M. Sesta, 'La procreazione medicalmente assistita tra legge, Corte costituzionale, giurisprudenza di merito e prassi medica' *Famiglia e diritto*, 839 (2010).

[18] M. Abagnale, 'La procreazione medicalmente assistita nella metamorfosi della legge 40/2004' *Forum di Quaderni Costituzionali – Rassegna n. 1*, 1 (2015).

the natural epilogue of a 'failure' foretold.[19]

Recourse to assisted reproduction techniques has grown exponentially due to the diffusion of reproductive problems throughout Western societies. Within this context, progress in biomedical science has on the one hand offered an effective response to the growing social perception of sterility/ infertility as an illness,[20] whilst on the other hand raising complex questions surrounding the 'ethics of conception', fuelling the fear that the reproductive event might depart 'from the sphere of natural occurrences and turn into something artificial'.[21]

Confronted with this inability to establish a shared position in this area, the need for legislative intervention[22] was felt in order to answer the questions raised by artificial reproduction as part of a synthesis between secular pragmatism and respect for human dignity.[23] Initially however, the recourse to techniques of medically assisted reproduction occurred within the context of a worrying legislative vacuum. During this phase, the definition of the extent and limits of protection was *de facto* delegated to ethical principles, and above all the sensitivity of the courts.[24] However, this situation risked undermining the principle of equality and legal certainty.[25] Consequently, in spite of its reluctance to adopt a position in relation to such a delicate issue, the Italian legislator was forced to address the question. And yet the result obtained was a legislative text which was

[19] See along the same lines A. Musumeci, ' "La fine è nota". Osservazioni a prima lettura alla sentenza n. 162 del 2014 della Corte costituzionale sul divieto di fecondazione eterologa' (2014) available at www.osservatorioaic.it; R. Bartoli, n 9 above, 92.

[20] M. Tedesco, n 3 above, 2.

[21] C. Tripodina, 'Il "diritto" a procreare artificialmente in Italia: una storia emblematica, tra legislatore, giudici e Corti' *Rivista di Biodiritto*, 2, 67 (2014); M. Sesta, 'Procreazione medicalmente assistita' *Enciclopedia giuridica* (Roma: Treccani, 2004), XXVIII, 1.

[22] Cf previously Tribunale di Roma 30 April 1956, *Giurisprudenza italiana*, 218 (1957).

[23] H. Jonas, *Tecnica, medicina ed etica. Prassi del principio di responsabilità* (Torino: Einaudi, 1997), 222-239. Similarly, S. Rodotà, 'Per un nuovo statuto del corpo umano', in A. De Meo and C. Mancina eds, *Bioetica* (Roma-Bari: Laterza, 1989), 41-68, asserts the imperative requirement for the enactment of law in relation to bioethical issues. However, it must be an 'elastic' and 'flexible' right open to ideological and value pluralism, and not conditioned by morals. Lawmakers should intervene by identifying the 'rule of compatibility' between countervailing values rather than the 'rule of predominance': P. Borsellino, 'Vere e false alternative in tema di rapporti tra bioetica e diritto' *Politeia*, 122-125 (2002); G. Zagrebelsky, *Il diritto mite* (Torino: Einaudi, 1992).

[24] M. Abagnale, n 18 above, 5; C. Tripodina, n 21 above, 83. On the importance of the role of the courts, see also C. Casini, C.M. Casini and M.L. Di Pietro, *La legge 19 febbraio 2004, n. 40 «Norme in materia di procreazione medicalmente assistita». Commentario* (Torino: Giappichelli, 2004), 12.

[25] M. Abagnale, n 18 above, 5-6; C. Tripodina, n 21 above, 84. By contrast A.M. Citrigno, n 11 above, 79 considers that questions relating to human life can be addressed through case law as it is calibrated to the specific circumstances of the individual case.

inflexible, barely convincing, and thus incapable of fulfilling the requirements considered by its framers.

Regarding the issue of heterologous fertilisation the law appeared open to criticism from the outset as it put an end to a widespread practice,[26] which had been supported within the case law itself.[27] In fact, prior to the entry into force of legge 40, the use of gametes originating from outside the couple was considered to be lawful.[28] The only restrictions were a prohibition on the practise of this technique within National Health Service facilities and the prohibition on any form of remuneration for the provision of genetic material.[29]

Secondly, the intolerance of this stance of legislative self-restraint was fuelled by the lack of a corresponding prohibition on international and Community level. The 1997 Oviedo Convention[30] and the Additional Protocol from 1998[31] expressly prohibit artificial reproduction for selective and eugenic purposes along with the cloning of human beings, but do not contain any exclusion on heterologous fertilisation. In addition, compared to other European legal systems,[32] the position in Italy appeared to be 'eccentric'[33]

[26] See U. Salanitro, 'Il dialogo tra Corte di Strasburgo e Corte Costituzionale in materia di fecondazione eterologa' *Nuova giurisprudenza civile commentata*, II, 636 (2012).

[27] See M. Sesta, 'Dalla libertà ai divieti: quale futuro per la legge sulla procreazione assistita?' *Corriere giuridico*, 1405 (2004).

[28] Cf Report of 14 July 1998 given by the XIIth Standing Committee of the Chamber of Deputies concerning draft bills no 414, no 616 and no 816, presented during the XIIth legislature, available at http://leg13.camera.it/_dati/leg13/lavori/stampati/pdf/04140A.pdf (last visited 24 May 2016). For the legislative framework prior to legge 40: M. Abagnale, n 18 above, 3-9; S. Canestrari, 'Verso una disciplina penale delle tecniche di procreazione medicalmente assistita? Alla ricerca del bene giuridico tra valori ideali e opzioni ideologiche' *Indice penale*, 1091-1115 (2000); A. De Santis, 'La fecondazione eterologa nel quadro legislativo e giurisprudenziale italiano', in M. de Tilla et al eds, n 3 above, 207-214.

[29] Cf circolare del Ministro della sanità 1 March 1985 (Limits and conditions for establishing the legitimacy of artificial insemination services under the National Health Service); ordinanza del Ministro della sanità, 5 March 1997 (Prohibition on the marketing and advertising of gametes and human embryos). On this point see G. Ferrando, n 4 above, 1069, fn 11.

[30] 'Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine' signed at Oviedo on 4 April 1997 and ratified by the Italian Parliament by legge 28 March 2001 no 145. The Convention is available at http://conventions.coe.int/.

[31] 'Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings' signed at Paris on 12 January 1998 and available at http://conventions.coe.int/.

[32] For an overview of the legislation on heterologous fertilisation adopted by the other European states, see: A. Diurni, 'Il futuro di divieti e limiti della fecondazione eterologa in Europa', in G. Gabrielli et al eds, *Liber amicorum per Dieter Henrich. II. Famiglia e successioni* (Torino: Giappichelli, 2012), 108-124 including further bibliographic references.

[33] G. Ferrando, n 4 above, 1069; U. Salanitro, n 26 above, 636. For a comparative

and excessively rigid.[34] In fact, heterologous fertilisation is currently practised within most Member States of the Union, with the exception of Lithuania.

This argument does not in itself appear to be decisive since, in matters of an ethical nature, the European Court of Human Rights itself[35] tends to privilege states' 'margin of appreciation'. However, the engagement with the European context shows that the Italian legislation in the area of medically assisted reproduction is unable to ensure a satisfactory level of protection for the rights of individuals. Accordingly, the European experiences have undoubtedly favoured a rethinking of the limits contained in Italian legislation with the aim of securing genuinely universal protection for human dignity.[36]

The most critical aspect of legge 40 relates to the fact that the solutions adopted by the Italian legislator, including in particular the prohibition on heterologous fertilisation, were excessively influenced by ethical and moral considerations[37] originating from Catholic circles.[38] This influence, which became apparent during the pre-legislative debate,[39] was not able to prevent the law from being approved.[40] However, it is plausible that the legislator maintained the prohibition on heterologous fertilisation in the definitive text precisely in order to counterbalance conservative positions with the need to be open towards technological progress.[41] In this way, whilst not fully endorsing the recourse to assisted

perspective on assisted fertilisation, see on all points, V.C. Casonato and T.E. Frosini eds, *La fecondazione assistita nel diritto comparato* (Torino: Giappichelli, 2006).

[34] B. Ferraro, 'Profili della disciplina sulla fecondazione medicalmente assistita' *Diritto di famiglia e delle persone*, 252 (2005).

[35] See n 8 above.

[36] M. Dell'Utri, 'La fecondazione eterologa nel sistema dei diritti fondamentali' *Giurisprudenza di merito*, 382 (2011).

[37] G. Fiandaca, 'Aspetti problematici del rapporto tra diritto penale e democrazia' *Foro italiano*, 4 (2011); G. Menicucci, 'Ancora dubbi sul divieto di fecondazione assistita di tipo eterologo. Nota a margine dell'ordinanza del Tribunale di Milano del 02.02.2011' (2011) available at www.rivistaaic.it; A. Vallini, 'Procreazione medicalmente assistita', in T. Padovani ed, *Le leggi penali complementari* (Milano: Giuffrè, 2007), 570. The argument concerning the ideological basis to the legislative choice is not shared by G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' n 6 above, 1.

[38] John Paul II, *Evangelium Vitae. Encyclical Letter by Pope John Paul II, On the value and inviolability of human life* (Città del Vaticano: Libreria Editrice Vaticana, 1995), § 14.

[39] Cf draft bill sponsored by Martinat and others, no 676, tabled in the Chamber of Deputies on 11 June 2001 entitled 'Prohibition on any form of medically assisted extra-corporeal human reproduction', available at https://www.senato.it/documenti/repository/leggi_e_documenti/raccoltenormative/15%20-%20Procreazione/1%5E%20CAMERA/DDL%200676.pdf (last visited 24 May 2016).

[40] M. D'Amico, 'La fecondazione "eterologa" ritorna davanti alla Corte costituzionale' *Corriere giuridico*, 746 (2013).

[41] Cf Congregation for the Doctrine of the Faith, 'Instruction *Donum vitae* on Respect

reproduction, the legislator avoided compromising the natural quality of the reproductive process, thereby dispelling the risk of 'exasperated scientism'.[42]

From a different perspective, the prohibition on heterologous fertilisation was imposed in order to guarantee a balance[43] between the legitimate aspiration to become a parent and protection of the unborn child,[44] thereby preventing protection for the foetus – as asserted in Art 1 of legge 40 – from transforming into a mere assertion of a principle. Although the principal objective of the legislation continues to be that of offering couples a solution to reproductive disorders, the prohibition on the donation of gametes ensures that each child can be certain about his or her biological origins (right to genetic identity)[45] and excludes the psychological risk[46] that could result from differences between the status of his or her parents[47] and a relationship with a parent not based on a blood relationship.[48]

for Human Life in Its Origin and on the Dignity of Procreation' (1987) available at www.vatican.va; E. Sgreccia, 'La Chiesa e la fecondazione artificiale' 77 *Notizie di Politeia*, 154-158 (2005); L. Scopel, 'La procreazione artificiale nei recenti documenti della Chiesa Cattolica' (2012) available at www.statoechiese.it.

[42] Draft bill sponsored by Angela Napoli and others, no 762, tabled in the Chamber of Deputies on 12 June 2001 entitled, entitled 'Provisions on the protection of the embryo and the dignity of assisted reproduction' available at http://www.camera.it/_dati/leg14/lavori/stampati/pdf/14PDL0005380.pdf (last visited 24 May 2016).

[43] This aim is pursued by all of the other prohibitions contained in the law (including in particular the prohibition on pre-implantation diagnosis and the use of embryos for research). However, many authors have criticised this attempt to strike a balance as any impediment on the recourse to assisted fertilisation will be detrimental for the pre-eminent interests of the woman and for her freedom to use her body to reproduce: L. Ferrajoli, 'La questione dell'embrione tra diritto e morale' 65 *Notizie di Politeia*, 155 (2002); M. Manetti, 'Profili di illegittimità costituzionale della legge sulla procreazione medicalmente assistita' 3 *Politica del diritto*, 458 (2004); S. Rodotà, 'Prefazione', in C. Valentini ed, *La fecondazione proibita* (Milano: Feltrinelli, 2004), 12.

[44] G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' n 6 above, 1.

[45] P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 777-778 (criticising the choice of anonymity for the semen donor).

[46] R. Lombardi, 'Implicazioni psicologiche della riproduzione artificiale eterologa (AID)' 27 *Diritto di famiglia e delle persone*, II, 663-672 (1998). In general, the possibility that procreation (even if natural) could entail harm to the child was advocated in an article published a number of years ago on 'harm from reproduction': P. Rescigno, 'Il danno da procreazione' *Rivista diritto civile*, I, 614 (1956).

[47] M. D'Amico, n 40 above, 746 observes that this argument is entirely inadequate and lacks any scientific basis. During the parliamentary debate in fact, it emerged that the only accredited research carried out by the World Health Organization had excluded the risk of any detriment to the development of the subjects examined.

[48] Cf F. Di Lella, 'Osservazioni in margine alla rimessione alla Consulta del divieto di fecondazione eterologa' *Diritto e giurisprudenza*, 81 (2011); L. Violini, 'La Corte e l'eterologa' n 15 above, 4. But see R. Bartoli, n 9 above, 96 who asserts that the prohibition

In addition, the prohibition on heterologous fertilisation furthers the need to safeguard the family as an institution[49] from the consequences created by the proliferation of biological relations with unknown persons.[50] In fact, it ensures that genetic parentage will coincide perfectly with socio-legal parentage[51] and excludes the creation of new models for the family.[52]

The problem – as is evident – is filled with ideological questions. Consequently, the fear of prejudicing the principle of the secular nature of the state,[53] and the very freedom of conscience of individuals,[54] has over time given rise to a process of erosion of legge 40.[55]

1. The Path towards the Constitutional Court

The first attempt to mitigate the rigidity of the prohibition contained in legge 40 was made within Parliament itself. As early as the first few months following the entry into force of the legislation, several significant draft bills were tabled with the aim of comprehensively modifying the framework of the law on medically assisted reproduction and repealing the prohibition on heterologous fertilisation. In particular, disegno di legge 18 novembre 2004 no 3320[56] demonstrated that a reasonable compromise between science and ethics is not a utopian objective and

on heterologous fertilisation cannot be justified by the need to protect the embryo's right to life, precisely because it prevents the very creation of the embryo.

[49] This argument is not convincing because the legal order has now abandoned a traditional conception of the family and embraces 'multiple notions of the family': P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 775, 921.

[50] In the report accompanying the Martinat proposal (n 39 above), it is even stressed that people born as a result of heterologous reproduction, who were unaware of that fact, might in turn reproduce amongst themselves and expose themselves to the risk of extremely serious hereditary diseases.

[51] S. Chessi, 'La fecondazione artificiale eterologa: verità biologica e verità giuridica' 5 *Nuova giurisprudenza civile commentata*, 521-527 (2000).

[52] G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' n 6 above, 1.

[53] G. Di Cosimo, 'Quando il legislatore predilige un punto di vista etico/religioso: il caso del divieto di donazione dei gameti' 21 *Stato, Chiese e pluralismo confessionale*, 13-30 (2013) observes that the secular principle requires the legislator to refrain from a religious basis for the positions adopted and to remain neutral regarding and equidistant from religious confessions. Since the Italian legislator embraced the Catholic position on heterologous fertilisation it did not respect either of the two logical premises of the principle.

[54] C. Tripodina, n 21 above, 69.

[55] This paper will consider only the passages of interest for the prohibition on heterologous fertilisation. For an analysis of the process of demolition to which legge 40 in general has been subject, cf C. Tripodina, n 21 above, 67-87; M. Dell'Utri, n 36 above, 382.

[56] Bill no 3320 (XIVth legislature) sponsored by Senators Amato, Soliani and the notification of the President of 18 November 2004 available at http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Ddlpres&leg=14&id=00121877&part=doc_dc&parse=si&stampa=si&toc=no (last visited 24 May 2016).

does not necessarily require the most restrictive solution to be adopted.[57]

In contrast to legge 40, this draft bill in fact appears to offer an *effective* therapeutic response to reproductive diseases. The use of genetic material from outside the couple is permitted not only in situations involving insuperable sterility/infertility but also when this proves to be necessary in order to protect against infective or genetically communicable diseases.

This solution appears to reconcile a secular perspective with the fundamental need to protect human dignity, including that of the foetus. In fact, although on the one hand the text proposed redefines the prerequisites for, access to and consequences of heterologous fertilisation whilst respecting its therapeutic aims,[58] on the other hand it proves to be clearly inspired by the protection of human life and dignity in outlawing surrogate maternity, the genetic manipulation of embryos and their destruction.[59]

It is thus necessary to agree on the fact that the adoption of a 'more open' legislative framework will not necessarily entail the sacrifice of human dignity in the name of a 'science without conscience',[60] nor less the indiscriminate exercise of the choice to reproduce. The objective of the legal solution to questions relating to the start of life is not to emancipate procreation from sexuality.[61] In fact, the prerequisite for conception *is* and *remains* the natural physical union between a man and a woman. Also from a secular point of view, the involvement of a physician must be a practicable – albeit exceptional – solution in all situations in which such involvement represents an 'unavoidable, or very useful, instrument for the full development of the individual'[62] (incurable sterility, serious diseases that are communicable to the foetus). Under these conditions, there are no longer any margins for legislative discretion: the individual has the right to receive assistance from the state.[63]

In the wake of the failure of the proposals to amend the legislation, the

[57] U. Salanitro, n 26 above, 637.

[58] Report concerning bill n 56 above, 2. This bill departs from the text in force in that it permits not only heterologous fertilisation but also diagnosis and selection prior to implantation, the cryopreservation of ootids (the stage prior to the formation of the embryo) and the use of embryos that are not implanted for the purposes of research.

[59] Cf Art 17 of bill legge n 56 above, which prevents the destruction of any embryo that is not implanted, but enables it to be used for research for therapeutic purposes. In this way, the embryo becomes 'a gift in favour of other lives (…), accompanying that destination with guarantees and precautions capable of reassuring religious sentiment, no less than secular individuals'.

[60] F. Rabelais, *La vie de Gargantua et de Pantagruel* (1542) translated by M. Bonfantini (Torino: Einaudi, 1953).

[61] M. Dell'Utri, n 36 above, 397.

[62] P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 774.

[63] Ibid 774.

prohibition on the donation of gametes was the object of a popular referendum[64] in 2005, in which the necessary quorum was not reached.[65] In any case, this vote constituted a further fundamental stage in progress towards the recent judgment of the Constitutional Court. The judgments by which the Constitutional Court ruled on the admissibility of the referendum questions in fact acted as precursors – albeit in a subliminal manner – for the future openness of the judges towards an elimination of the prohibition.[66] In ruling inadmissible the question seeking the full repeal of legge 40,[67] the Constitutional Court clarified on the one hand that the legislation on medically assisted reproduction is, considered overall,[68] mandated under constitutional law; on the other hand, it clarified that this consideration does not preclude a review of the constitutionality of the individual prohibitions contained in the law.

Following the failure of the referendum, the focus of national case law on heterologous reproduction decreased temporarily. However, it is necessary to mention several judgments which – whilst not dealing directly with the donation of gametes – favoured the 'path'[69] towards a ruling that heterologous fertilisation is unconstitutional.[70] In particular, the Constitutional Court judgment[71] which abolished the maximum limit on the number of embryos that can be produced and the obligation for parallel implantation had the merit of highlighting various grounds for reflection which without doubt conditioned the process of interpretation followed by the Constitutional Court also in relation to heterologous fertilisation. By moving beyond the dogma of the immunity from review of legislative discretion, the Court asserted first and foremost that the conflict between a variety of interests of constitutional standing must be resolved not by recourse to a judgment as to which of the values prevails, but rather a reasonable balancing operation. Secondly, it was asserted that the legal questions concerning the relationship between technical

[64] On the admissibility of the fourth question concerning the repeal of the prohibition on the donation of gametes, see Corte Costituzionale 28 January 2005 no 48, available at www.giurcost.it.

[65] M. Ainis ed, *I referendum sulla fecondazione assistita* (Milano: Giuffrè, 2005). Out of the five questions originally formulated, only those relating to the repeal of the *individual* prohibitions contained in legge 40 were ruled admissible by the Constitutional Court. By contrast, the question seeking the *total* repeal of the law was ruled inadmissible (Corte Costituzionale 28 January 2005 no 45, available at www.giurcost.it).

[66] M. Abagnale, n 18 above, 9.

[67] Corte Costituzionale 28 January 2005 no 45, available at www.giurcost.it.

[68] Ibid paras 3 and 6.

[69] The expression is used by M. D'Amico, n 40 above, 746.

[70] Ibid 748.

[71] See Corte Costituzionale 8 May 2009 no 151, n 14 above.

progress and human life cannot be addressed by the legislator independently of scientific knowledge[72] and in particular of the autonomous and responsible assessments of the doctor, as the only 'depositary of technical knowledge in the specific case'.[73]

The definitive blow to the prohibition on heterologous reproduction however arose within European case law,[74] which contributed significantly to 'bringing coherence back into the Italian legal system'[75] with the case of *S.H. and Others* v *Austria* before the European Court of Human Rights.[76] The case involved certain Austrian healthcare facilities which had refused access to in vitro heterologous fertilisation to two heterosexual couples who were unable to conceive naturally.[77] This procedure for conception was prohibited under the national legislation in force at the time.[78] The Austrian Constitutional Court[79] had ruled that the provisions of the national law were not incompatible with the principles laid down by Arts 8 and 14 ECHR. In fact, the prohibition resulted from the need to strike a balance between human dignity, the right to reproduce and the wellbeing of the unborn child in that it aimed to protect the unborn child from unusual parental relations, which would be detrimental for its wellbeing.

The European Court of Human Rights overturned the decision of the

[72] Corte Costituzionale 12 January 2011 no 8, available at www.giurcost.it.

[73] Ibid para 5.2. This assertion includes confirmation of the supposed primacy of science over law: see R. Bin, 'La Corte e la sua scienza', in A. D'Aloia ed, *Bio-tecnologie e valori costituzionali. Il contributo della giustizia costituzionale* (Torino: Giappichelli, 2006), 2; G. Di Genio, 'Il primato della scienza sul diritto (ma non sui diritti) nella fecondazione assistita' (2009) available at www.forumcostituzionale.it.

[74] P. Spaziani, n 4 above, 6.

[75] C. Nardocci, 'La Corte di Strasburgo riporta a coerenza l'ordinamento italiano, fra procreazione artificiale e interruzione volontaria di gravidanza. Riflessioni a margine di Costa e Pavan c. Italia' (2013) available at www.rivistaaic.it.

[76] See Eur. Court H.R., *S.H. and Others* v *Austria*, Judgment of 1 April 2010, n 8 above. On the doubts concerning the compatibility between the prohibition on heterologous fertilisation and the principles contained in the European Convention on Human Rights, see G. Ferrando, 'La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche' *Corriere giuridico*, 813 (2004); B. Mastropietro, 'Procreazione assistita: considerazioni critiche su una legge controversa' *Diritto di famiglia e delle persone*, 1408 (2005).

[77] One of the couples required a sperm donation – due to the infertility of the husband and the dysfunctioning of the wife's fallopian tubes – followed by the fertilisation of the woman's eggs *in vitro* . The second couple by contrast requested a donation of eggs due to wife's agonadism (A. Scalera, 'La fecondazione eterologa all'esame della Corte Europea dei Diritti dell'Uomo' 10 *Studium Iuris*, 1118 (2010)).

[78] Art 3(2) and (3) of the Austrian Reproductive Medicine Act (*Fortpflanzungmedizingesetz* 1 July 1992) permitted on an exceptional basis the donation of male semen, provided that the semen was used in order to fertilise the woman *in vivo*, whilst prohibiting the donation of eggs.

[79] Verfassungsgerichtshof Osterreich 8 November 1999.

Austrian courts. The European Court held that, even if it is exercised through recourse to artificial means, the right to reproduce falls under the broad notion of 'private life'[80] (Art 8 ECHR). Any limitations on this freedom are not in themselves discriminatory unless there is no objective and reasonable justification (the legislative restriction is justified if it 'pursue[s] a 'legitimate aim' or ... [if] there is no 'reasonable proportionality between the means employed and the aim sought to be realised' ').[81] The reasonableness of the legislative choice is in any case left to the discretionary assessment – which in this case is particularly wide – of the states,[82] which must exercise their legislative discretion in such a way as to strike a reasonable balance between the interests in play in accordance with the principles enshrined in the Constitution. On the basis of these considerations, the European Court held that the prohibition on heterologous fertilisation contained in the Austrian law was unreasonable, concluding in particular that any discrimination between couples on account of the severity of the reproductive disease was not proportionate with the goal pursued by the legislator (Art 14 ECHR).[83]

In the wake of this ruling, the Italian merits courts raised the first questions concerning the constitutionality of the prohibition on heterologous fertilisation, invoking not only principles of national constitutional law but also the violation of the Convention principles considered in the aforementioned ruling of the European Court of Human Rights. However, in a much-debated interlocutory order, the Constitutional Court[84] 'decided not to decide',[85] and remitted the proceedings to the referring courts for a renewed examination of the question.[86] This can be explained by the

[80] Eur. Court H.R., *S.H. and Others* v *Austria*, Judgment of 1 April 2010, n 8 above, para 58.

[81] Ibid para 64.

[82] Ibid para 65.

[83] M. D'Amico, n 40 above, 749.

[84] Corte Costituzionale ord 22 May 2012 no 150, available at www.giurcost.it. On the critical aspects relating to this order, see U. Salanitro, n 26 above, 640-644; R. Romboli, 'Restituzione degli atti per '*novum*' *superveniens* e riproponibilità delle questioni di costituzionalità sul divieto di inseminazione eterologa' *Notizie di Politeia*, 88 (2013); B. Randazzo, 'Le sentenze della Corte europea dei diritti dell'uomo come *ius superveniens*: un caso discutibile di *self-restraint* della Corte costituzionale in tema di fecondazione assistita' *Notizie di Politeia*, 95 (2013); A. Luberti, 'Fecondazione eterologa, norme della Convenzione europea dei diritti dell'uomo e Corte costituzionale: i nuovi diritti presi sul serio' *Giustizia civile*, I, 2327-2339 (2013).

[85] M. D'Amico, n 40 above, 750.

[86] See B. Randazzo, n 84 above, 95; I. Rivera, 'Quando il desiderio di avere un figlio diventa un diritto' *Rivista di Biodiritto*, 46 (2014); P. Veronesi, ' "Nuove" decisioni processuali, "nuovi" rapporti tra Corte costituzionale e Corte EDU, "nuove" forme di interpretazione adeguatrice: l'ordinanza costituzionale n. 150 del 2012 in materia di fecondazione eterologa' *Studium iuris*, 139-40 (2013).

interpretation of the provisions of the European Convention on Human Rights contained in a ruling of the Grand Chamber of the Strasbourg Court, which had been adopted in the meantime.[87]

In fact, whilst the proceedings before the Italian Constitutional Court were pending, the Grand Chamber issued a further ruling in the Austrian case, which significantly reined in the scope of the first judgment in the light of a renewed attention for the 'national States' margin of appreciation'.[88] This in a nutshell is the position of the Strasbourg Court: since it is not possible to identify a uniform position concerning the question on European level and since it is a 'controversial and ethically sensitive' area of law,[89] the choice by the national legislator falls within the correct exercise of the margin of appreciation and cannot be objected to. The prohibition on recourse to *specific*[90] practices of heterologous fertilisation is thus capable of striking a reasonable balance between the aspiration to become a parent and the psychological and social wellbeing of the unborn child.

This decision gave rise to widespread delusion and disappointment from various quarters as it appears to have marked a decisive step backwards compared to the interesting openness to different ideas in the first ruling by the Strasbourg Court. In reality, a correct methodological approach would require consideration to be given to the deep-seated differences between the Austrian and Italian legislation.[91] In fact, Austrian law only provided for a partial prohibition on the donation of eggs and the fertilisation *in vitro* with semen from outside the couple. By contrast, the prohibition under Italian law is absolute in nature as it precludes *any* form of heterologous fertilisation. The two hypotheses are not entirely identical and thus require the indications provided by the Strasbourg Court to be read in a different light. The Austrian case in fact demonstrates how the protection of the unborn child can justify a moderate limitation on possible therapeutic solutions for infertility. By contrast, the prohibition

[87] Eur. Court H.R. (GC), *S.H. and Others* v *Austria*, Judgment of 3 November 2011, n 8 above.

[88] Cf E. Nicosia, 'Il divieto di fecondazione eterologa tra Corte europea dei diritti dell'uomo e Corte costituzionale' *Foro italiano*, IV, 220 (2012).

[89] P. Spaziani, n 4 above, 8.

[90] In that sense the Austrian Constitutional Court concluded that, whilst the prohibition on the donation of eggs limits the reproductive freedom of the couple, it is justified by the need to protect the unborn child. This prohibition in fact prevents the formation of unusual personal relationships that would run contrary to the certainty of the maternal relationship, along with the risk of exploitation of the female body. In addition, the prohibition on heterologous fertilisation *in vitro* avoids the risk of the commercialisation of gametes and the selection of embryos, all of which is to the benefit of the wellbeing of the future child. By contrast, none of these risks applies in relation to heterologous fertilisation *in vivo*. See U. Salanitro, n 26 above, 638.

[91] P. Spaziani, n 4 above, 8.

under Italian law, framed in absolute terms, does not strike a balance between the interests of the child and those of the couple as it 'entails a complete sacrifice of the right of the aspiring parents'.[92]

Nevertheless, the interlocutory order issued by the Constitutional Court did not prevent questions concerning the constitutionality of the prohibition on heterologous fertilisation from being raised a second time. In fact, this prohibition appears to be unreasonable and open to criticism from the viewpoint of the principle of equality, the right to health of the couple and self-determination in relation to reproductive choices.

III. The Prohibition on Heterologous Fertilisation and the Balance Struck by the Constitutional Court

The judgment under discussion is consistent with the process of demolition described above, having struck down one of the last pilasters of the normative framework of legge 40. In reality, at least in terms of the judicial reasoning used by the Constitutional Court, it cannot be said that the ruling involved a break with the previous position.[93] The Court in fact 'limited' itself to following an interpretative trend which is now consolidated: judicial reasoning assesses the adequacy and proportionality of the prohibition on heterologous fertilisation taking account of the goals of the Italian legislation with the aim of striking a reasonable balance between the interests in play. However, one element did involve a break from the past, or at the very least a novel approach: the clear intention of the Court finally to adopt a position, casting aside the reluctant stance of the past[94] and the much-criticised tendency to 'decide not to decide'.[95]

[92] Ibid 9.

[93] Similarly, see S. Agosta, 'L'anabasi (tra alterne fortune) della fecondazione eterologa' *Rivista di Biodiritto*, 92 (2014); C. Tripodina, n 21 above, 81.

[94] See L. Trucco, 'Procreazione assistita: la Consulta, questa volta, decide (almeno in parte) di decidere' (2014) available at www.giurcost.it. D. Chinni, 'La procreazione medicalmente assistita tra "detto" e "non detto". Brevi riflessioni sul processo costituzionale alla legge n. 40/2004' *Giurisprudenza italiana*, 329 (2010).

[95] An emblematic decision is that by which the Constitutional Court issued a ruling of *non liquet* in relation to a question concerning the constitutionality of the prohibition on diagnosis prior to implantation also for couples who are bearers of diseases that are communicable to the unborn child (Corte Costituzionale ord 9 November 2006 no 369. available at www.giurcost.it). Another 'lost opportunity' was Corte Costituzionale ord 22 May 2012 no 150, n 84 above. For a general overview of this 'approach of not deciding' followed by the Constitutional Court, see V. Barsotti, *L'arte di tacere. Strumenti e tecniche di non decisione della Corte Suprema degli Stati Uniti* (Torino: Giappichelli, 1999). The non-decision is in fact a technique used above all in order to carry out a 'politic selection of disputes'.

The prohibition was ruled unconstitutional in the light of various purported systemic contradictions[96] compared to the goals asserted in Arts 1 and 4(1) of legge 40. As was noted above, the intention of the legislator in adopting this legislation was that it should provide an instrument for arriving at a therapeutic solution for reproductive problems resulting from absolute, irreversible sterility or infertility that cannot otherwise be overcome. As is clear from the definitions endorsed by the World Health Organization (WHO) and the American Fertility Society (AFS), sterility and infertility are two clearly distinct reproductive illnesses. A couple in which one or both of the partners is or are affected by a permanent physical condition which renders his or her genetic material unsuitable for reproduction is 'sterile'; by contrast, infertility relates to the inexplicable failure to conceive after twelve/twenty-four months of targeted unprotected sexual relations.[97]

In cases involving infertility, the recourse to homologous assisted fertilisation can without doubt offer an effective solution to the couple's reproductive problem, as the partners are potentially capable of producing gametes that can achieve conception. By contrast, in cases involving sterility, the lack of reproductive cells renders such a procedure unworkable; thus, to prevent the use of genetic material from outside the couple would *de facto* make it impossible for them to reproduce. Accordingly, there is evidently a clear contradiction (so-called *inherent irrationality*)[98] between the prohibition on heterologous fertilisation and the therapeutic aims asserted by the legislator.[99] The prohibition results in an unjustified restriction of the potential addressees of the law[100] and violates the principle of equality

[96] The inconsistency was also established in another respect by the Strasbourg Court in relation to the prohibition on diagnosis prior to implantation: Eur. Court H.R., *Costa and Pavan* v *Italy*, Judgment of 28 August 2012, available at www.hudoc.echr.coe.it. On this occasion, the Court held that the provision was inconsistent with the possibility of recourse to therapeutic abortion in the event of a foetus malformation. Cf E. Malfatti, 'La Corte di Strasburgo tra coerenze e incoerenze della disciplina in materia di procreazione assistita e interruzione volontaria della gravidanza: quando i "giochi di parole" divengono decisivi' (2012) available at www.rivistaaic.it; C. Nardocci, n 75 above.

[97] E. Cirant, *Non si gioca con la vita. Una posizione laica sulla procreazione assistita* (Roma: Editori Riuniti, 2005), 78 (criticising the temporal criteiorn for certifying infertility).

[98] C. Tripodina, n 21 above, 82.

[99] M. D'Amico, n 40 above, 747.

[100] The contradictory nature of the law had also emerged previously in relation to the prohibition on the heterologous fertilisation of persons suffering from highly contagious sexually transmitted viruses (HIV, hepatitis B and hepatitis C). In these cases in fact, the risk of infection for the other partner and for the unborn child prevents the couple from reproducing naturally, even if they are fertile. However, these couples could not strictly speaking access artificial reproductive techniques since they cannot technically be considered as sterile or infertile. This critical issue was initially resolved by the Guidelines contained in the ministerial decree of 21 July 2004 (updated in April 2008), which

and non-discrimination (Art 3 of the Italian Constitution). In fact, both sterility and infertility – although then involve reproductive dysfunctions that are not fully equivalent – prevent the couple from reproducing through natural means. The law on medically assisted reproduction should allow all couples the same possibility to access the most suitable scientific technique in order to overcome their reproductive problems. However, this does not occur for couples who are sterile as the prohibition on the donation of gametes prevents them from reproducing in the only manner possible. This disparity between the treatment[101] of the potential addressees of the legislation (so-called *inter-subjective irrationality* based on the severity of the illness)[102] is not only unreasonable but also gives rise to a paradoxical situation:[103] precisely the most serious dysfunctions are ineligible for treatment.

A further aspect of inter-subjective discrimination results from the 'financial' circumstances of sterile couples.[104] The prohibition on heterologous fertilisation amounts to an absolute impediment only for couples who do not have sufficient financial resources to obtain treatment at foreign healthcare facilities. By contrast, the couples that dispose of the greatest resources have been able to resolve their reproductive problems easily by travelling to other European countries in which heterologous fertilisation is freely available. The diffusion of so-called reproductive tourism[105] cannot be taken as a parameter for assessing the reasonableness of the legislative choice.

allowed access to assisted fertilisation also in cases involving infectious diseases. However, the Guidelines only cover sexually transmitted diseases and not genetic diseases that are communicable to the foetus. It follows that couples that are carriers of genetic diseases cannot benefit from assisted reproduction because they are not considered to be sterile, and cannot establish the health of the foetus prior to implantation. Also this limit has now been set aside by Corte Costituzionale 5 June 2015 no 96, available at www.giurcost.it, which ruled unconstitutional the prohibition on diagnosis prior to implantation.

[101] M. D'Amico, 'La fecondazione "eterologa" ritorna davanti alla Corte costituzionale' n 40 above, 745.

[102] C. Tripodina, n 21 above, 82.

[103] Così G. Baldini, n 6 above, 2.

[104] See C. Tripodina, n 21 above, 83.

[105] See: S. Rodotà, 'Etica, bioetica e diritto nell'età delle biotecnologie', in P. Amodio ed, *Etica, bioetica e diritto nell'età delle biotecnologie* (Napoli: Edizioni Giannini, 2005), 28; S. Catalano, 'Ragionevolezza del divieto di procreazione assistita eterologa, fra ordinamento italiano e CEDU' *Rivista dell'Associazione Italiana dei Costituzionalisti*, 1 (2010); M. D'Amico, n 40 above, 746; L. D'Avack, 'Sulla procreazione medicalmente assistita eterologa: il Tribunale di Firenze e quello di Catania rinviano la questione alla Corte costituzionale' *Diritto di famiglia e delle persone*, I, 40 (2011); E. Dolcini, 'Fecondazione eterologa: la parola alla Corte Costituzionale', in M. D'Amico and B. Liberali eds, *Il divieto di donazione di gameti tra Corte Costituzionale e Corte europea dei diritti dell'uomo* (Milano: Franco Angeli, 2012), 11-18; S. Tonolo, 'Il diritto alla genitorialità nella sentenza della Corte Costituzionale che cancella il divieto di fecondazione eterologa: profili irrisolti e possibili soluzioni' *Rivista di diritto internazionale*, 1123 (2014).

However, this phenomenon is a symptomatic indication of the discriminatory effects of the prohibition.

The aspects of most interest in the reasons given for the judgment concern the relationship between reproductive issues and the exercise of certain fundamental human rights. In fact, the choice to reproduce and to establish a family is an expression of the fundamental and general freedom of self-determination (which may be inferred from Arts 2, 29 and 30 of the Constitution),[106] which cannot be sacrificed in an absolute manner solely because the couple is incapable of reproducing naturally. The very broad and pluralist notion of family and the promotion of adoption,[107] which permeates the Italian legal system and its principles of constitutional law, demonstrate how the legal system encourages and protects the creation of family relations, also irrespective of a genetic relationship.[108] Although it did not assert such a position openly,[109] it appears that the Court acknowledges the constitutional significance of a genuine 'right to be a parent',[110] which is endowed with inviolable status. Inviolability does not mean that the couple's aspiration to become parents will translate into a selfish desire to be fulfilled at all costs and without reference to the child. Inviolability on the other hand must be understood as the prerequisite for the recognition of the right to use the various therapeutic options offered by science.[111]

The right to become parents of couples who access assisted reproduction techniques deserves to be protected also in terms of the right to health, including both physical and psychological/emotive health.[112]

[106] Art 12 European Convention on Human Rights (ECHR), on the fundamental right to establish a family.

[107] However, the argument focusing on the promotion of adoption is not entirely persuasive: in contrast to assisted fertilisation, adoption does not aim to satisfy the desire to become a parent, but to offer a child the opportunity to grow up within a family context.

[108] Corte Costituzionale, n 1 above, para 6 of the *conclusions on points of law*.

[109] C. Tripodina, n 21 above, 81, observes that the recognition of the *right* to reproduce is 'totally unprecedented' within constitutional case law, which has tended to protect only the *need* to procreate. See also L. D'Avack, 'Cade il divieto all'eterologa, ma la tecnica procreativa resta un percorso tutto da regolamentare' *Il diritto di famiglia e delle persone*, 3, 1005 (2014).

[110] V. Baldini, 'Diritto alla genitorialità e sua concretizzazione attraverso la la PMA di tipo Eterologo' (2014) available at www.dirittifondamentali.it

[111] This is an assertion which must be interpreted with the utmost care as it could have repercussions with a significant social impact on further extremely delicate issues (ie: surrogate maternity, the possibility for *singles* or homosexual couples to use heterologous fertilisation): L. D'Avack, 'Cade il divieto all'eterologa' n 109 above, 1005,

[112] See Corte Costituzionale 25 June 2008 no 251 and Corte Costituzionale 6 April 2004 no 113, available at www.giurcost.it. See also Constitution of the World Health

In fact, since the health of the couple may be seriously harmed by the 'failure to realise themselves through the experience of becoming parents',[113] the state has the precise task pursuant to Art 32 of the Constitution of protecting health by guaranteeing access to suitable therapeutic instruments.[114] The reference to the right to health demonstrates how the social perception of reproductive disorders has changed.[115] The refusal to allow heterologous reproduction arose within a social context with a reductive conception of a lack of health (a concept which originally related to one body only). If however health also includes spiritual wellbeing, the medicine of reproduction becomes a therapeutic instrument to all intents and purposes, which must be guaranteed by the legal system.

In addition, the suitability of therapeutic intervention cannot be preordained on the basis of an assessment of merely political discretion by the legislator, but must be assessed on the basis of scientific knowledge in this area. This conclusion – which has already been stressed in several constitutional precedents[116] and highlighted by the European Court of Human Rights itself[117] – requires pre-eminence to be afforded the role of the doctor, which legge 40 by contrast unduly banished to the sidelines. In essence, the utility and risks, including psychological risks, of a medical practice must comply with a fundamental rule: the choice must result from a synergy between the doctor's autonomy and sense of responsibility on the one hand and the patient's consent on the other.[118] Thus, the legislation must be limited to framing the medical practice in a manner that is consistent with constitutional principles.

The impact of the prohibition on heterologous fertilisation on a variety of 'constitutional interests' relating to a couple that is unable to reproduce is not however sufficient in order to conclude that it is unconstitutional: in order to do so it would in fact be necessary to establish whether or not a formulation of the prohibition in absolute terms offers the only instrument for guaranteeing protection to the other constitutional values involved. In that regard, the Court has stressed that the only interests standing in opposition to those of the couple relate to the person born by way of artificial fertilisation. Although in these cases the mother cannot exercise

Organization adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 and available at www.who.int.

[113] A. Musumeci, n 19 above, 7.

[114] In actual fact, the status of assisted reproduction techniques as therapeutic is not unanimously supported in the literature (I. Rapisarda, n 7 above, 933; R. Bartoli, n 9 above, para 4).

[115] G. Ferrando, 'La riproduzione assistita nuovamente al vaglio della Corte Costituzionale' n 4 above, 1071.

[116] Corte costituzionale 12 January 2011 no 8, n 72 above.

[117] Eur. Court H.R., n 8 above.

[118] P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 775.

the right to remain anonymous,[119] the use of genetic material originating from a person outside the couple could raise a problem concerning the genetic identity of the unborn child, or its right to establish a relationship with the biological parent, along with its psychological and social wellbeing within a non-biological relationship with a parent. In reality, the potential risks for the unborn child are not based on any scientific fact, but can above all be circumscribed following a parallel examination of the provisions on adoption.[120] Although they relate to different situations,[121] it is also the case that adoption and heterologous fertilisation share the common feature of the creation of a family relationship independently of any genetic link. The legal system promotes the recourse to adoption in asserting that the genetic difference between parent and child does not preclude the establishment of an ordinary family relationship that is healthy for the child.[122] It is thus difficult to understand the concerns surrounding the psychological wellbeing of a child born as a result of heterologous fertilisation. It must be added that the much more delicate issue of genetic identity has recently been considered by the Italian legislator precisely with reference to the provisions on adoption. Decreto legislativo 28 December 2013 no 154 scaled back the requirement of secrecy for information relating to biological parents, enabling the adoptee, under certain conditions, to access information relating to the identity of his or her biological parents,[123] without affecting the legal status of the adoptive parents.

Transferring these considerations to the issue of assisted fertilisation, the prohibition on heterologous fertilisation is not proportionate with the

[119] Cf Art 9 legge 40. Corte di Cassazione 16 March 1999 no 2315, *Corriere giuridico*, 429 (1999).

[120] On the connection between MAR and adoption see A.M. Azzaro, 'La fecondazione artificiale tra atto e rapporto' *Il diritto di famiglia e delle persone*, 227-236 (2005).

[121] Genetic material from outside the couple is not in fact sufficient to create life as the development of the embryo requires its implantation in the woman's body. Therefore, the donor cannot be considered as a biological parent, and his or her position cannot impinge upon the relationship between the child and a couple using the technique. This is also clear from legge no 40: Art 9 in fact provides that the donor of gametes does not acquire any legal relationship with the child. However, P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 777 does not exclude the possibility that, in the event of the death of the legal parent, the genetic donor-parent may take on some responsibilities, including in relation to education, towards the child. See also Id, 'L'inseminazione artificiale tra principi costituzionali e riforme legislative', in Id, *La persona e i suoi diritti. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 188.

[122] It is thus apparent that the principle of reproductive 'responsibility' prevails over the principle of biological derivation. See F. Di Lella, n 48 above, 83.

[123] This argument was endorsed in the recent judgment, Corte Costituzionale 22 November 2013 no 278, available at www.giurcost.it, on the reasonableness of the mother's right to anonymity as against the child's right to know his or her origins.

aim of protecting the unborn child. In fact, that aim could be achieved in a more effective manner by reviewing the principle of the anonymity of the donor[124] in all cases in which the inability to access information relating to its biological origins could be detrimental to the psychological wellbeing of the child. In this way in fact, a sterile couple will conserve its right to reproductive freedom without prejudicing the right of the child to know its own biological origins. Above all, the removal of the anonymity of the donor could offer a suitable way[125] of avoiding the risk of so-called *turbatio sanguinis*[126] along with possible risks of commodification of genetic material[127] In any case, there is no doubt that these aspects will be the object of debate in the near future.

The Court reiterates that the task of striking a reasonable balance between the interest of the couple and those of the unborn child is an assessment that falls first and foremost to the legislator. However, the history of legge 40 demonstrates that the legislator failed in this task as it chose to sacrifice the freedom of self-determination of the couple in the name of the principle of natural reproduction, proposing a family model that lacked any basis in constitutional law. The role of the courts must therefore be to correct the distortions within the law in order to ensure that it is reasonable and constitutional.

Also in this ruling – as previously occurred in relation to the obligation for the parallel implantation of the embryos produced – the Constitutional Court privileged a secular approach with the aim of 'purifying' legge 40 of its exclusively 'embryo-centric' focus, in favour of a correct balance between *all* of the interests involved. In this sense, the judgment offers a decisive contribution to safeguarding the fundamental human rights which, in this field more than in others, have been abused by a legislator

[124] This opinion has been supported since the 1980s by P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 777, who considers that certainty as to the identity of the donor is in itself capable of avoiding instances of speculation. Amongst those favourable to the removal of the anonymity of the donor, see also: R. Lanzillo, 'Fecondazione artificiale, «locazione di utero», diritti dell'embrione' *Corriere giuridico*, 638 (1984); G. Biscontini, 'Considerazioni brevi sull'inseminazione artificiale', in G. Biscontini et al eds, *Interruzione volontaria della gravidanza e procreazione assistita. Per uno statuto coerente dell'essere umano* (Camerino: Easypark, 2001), 130.

[125] For critical arguments, see M. Comporti, 'Ingegneria genetica e diritto. Profili costituzionalistici e civilistici', in E. Agazzi et al eds, *Manipolazioni genetiche e diritto* (Milano: Giuffrè, 1984), 176; F. Santosuosso, *La fecondazione artificiale umana* (Milano: Giuffrè, 1984), 76; G.B. Ascone and L. Rossi Carleo, *La procreazione artificiale. Prospettive di una regolamentazione legislativa nel nostro paese* (Napoli: Edizioni Scientifiche Italiane, 1986), 38.

[126] See n 50 above.

[127] P. Perlingieri, 'L'inseminazione artificiale tra principi costituzionali e riforme legislative' n 121 above, 188.

that was (perhaps) overly conditioned by politics or ideological viewpoints.

The Constitutional Court acknowledges that all of the interests in play in heterologous fertilisation may be classified under human dignity. The fact that those interests are significant under constitutional law does not however mean that they cannot be limited. It is necessary in any case that any limitations be reasonably and suitably justified by the fact that it would otherwise not be possible to protect any other interests of equal significance. Thus, whilst the right to become a parent is associated with freedom of self-determination, it cannot be exercised without limitation, above all when the interests of the couple conflict with other requirements that must similarly be protected by the legal order.

Thus, according to the Court's reasoning, the absolute prohibition on heterologous fertilisation is not a limit that is compatible with the principles of reasonableness and proportionality. On the one hand, in fact, it would appear to be unreasonable to prejudice more severe reproductive disorders. On the other hand, it is evident that the objective of preserving the life and physical and psychological wellbeing of the child may be fulfilled in a different way that is less detrimental for the couple. Ultimately, the absolute prohibition on reproduction by heterologous fertilisation is not the only instrument capable of guaranteeing other interests of constitutional standing. It must be added that the legal situation of the child is already suitably guaranteed by the legislative provisions on *status filiationis*, actions for disclaiming paternity and to access information relating to one's own biological origin, as well as the prohibition on surrogate maternity. Furthermore, the risks of immoral commodification of human genetic material are excluded by the legislation on the donation of tissues and human cells,[128] as such acts must be entirely free of charge and voluntary.

Against this backdrop therefore, the excessive encroachment on the rights of the couple lacks an adequate basis in constitutional law. Since the contested provisions violate the proportionality principle, the Court concluded by ruling unconstitutional the absolute prohibition on heterologous fertilisation.

IV. What Is Left of Legge 40

With the ruling in question one of the most odious aspects of the legislative framework of legge 40 was struck down. It is a worthy result, albeit late, which nonetheless entirely removes the problems associated with heterologous fertilisation.

[128] Decreto Legislativo 6 November 2007 no 191.

The possibility of using this artificial reproductive technique is in fact still a privilege of the few.[129] At present in fact, heterologous fertilisation is not yet included as an essential form of assistance guaranteed by the National Health Service; public healthcare facilities have not been allocated the necessary funds in order to enable the effective usage of this technique. The only Italian regions that enable access to heterologous fertilisation are Emilia Romagna, Friuli-Venezia Giulia and Tuscany, although the waiting lists are very long.

In addition, the removal of the prohibition has fuelled further doubts of an ethical nature (which were only in part resolved by the recent judgment[130] upholding the prohibition on surrogate maternity).[131] In fact, the abandonment by the Constitutional Court of the rigid perspective could in fact be a dangerous instrument if used in an indiscriminate manner and from a viewpoint that was balanced in favour of the claims – which are at times selfish – of the individual.

Within such a scenario, the objective of legal certainty would suggest a need for clarification by Parliament. However, this is a desire that will be difficult to realise, due to the excessively strong influence to which the Italian legislator continues to be subject.

Thus, the role of adjusting the law in line with the complexity of real life will fall to interpreting bodies. This delicate task will have to be carried out with a sense of awareness, responsibility and sensitivity, classifying the calls from the various stakeholders under the values of the legal system of origin. The aim to be pursued is to strike a reasonable balance between the interests of aspiring parents and those of future children, but also to assess the possible consequences that decisions based on an excessively

[129] Cf L. D'Avack, 'Cade il divieto all'eterologa' n 109 above, 1007; C. Lalli, 'La fecondazione eterologa resta un diritto per pochi privilegiati' (21 April 2016) available at http://www.internazionale.it/opinione/chiara-lalli/2016/04/21/fecondazione-eterologa-legge (last visited 24 May 2016).

[130] Corte di Cassazione 11 November 2014 no 24001, available at www.biodiritto.org. In this last case however, the confirmation of the prohibition led to the aberrant result of removing the child born in Ukraine as a result of surrogate maternity from its family. Italy has been condemned by the Strasbourg Court for this decision (Eur. Court H.R., *Paradiso e Campanelli* v *Italy*, Judgment of 27 January 2015, available at www.hudoc.echr.coe.it).

[131] Consider the embryo swapping scandal at the Pertini hospital in Rome. The two couples involved in this case had used homologous fertilisation *in vitro* and were awaiting the implantation of the embryos produced. During the operation, the healthcare staff mixed up the test tubes and implanted the two embryos in the wrong womb. This has accordingly been described as 'crossed' heterologous fertilisation. See F. Campodonico, 'Eterologhe "da errore" e salomonici abusi. Commenti a margine della Risposta del Comitato Nazionale di Bioetica e dell'Ordinanza del Tribunale di Roma sul caso dello scambio di embrioni all'ospedale Pertini di Roma' *Rivista di Biodiritto*, 1, 157-174 (2015).

forward-looking approach could have on the social context. This objective is not an easy one to achieve, but is a necessary one.