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ROMA TRE LAW REVIEW

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GIULIO NAPOLITANO - GIORGIO RESTA

EDITORIAL

We are pleased to introduce to the reader the first issue of the Roma Tre Law Review, a law review sponsored by the Department of Law of the University of Roma Tre.

Roma Tre is a pretty recent university established in 1992, which has soon gained importance in the Italian higher education system. In 2018, the University of Roma Tre has been one of the best 150 young universities in the world, according to the Times Higher Education's ranking.

The Department of Law is one of its most distinguished ones. In 2018 it has been ranked by the Italian Ministry of Education and University among the 15 national departments of "*excellence*". These results are due to a dynamic, fresh and open environment, which is also particularly useful to promote innovation and interdisciplinarity.

Since the beginning, the Department of Law has developed strong international connections, thanks to individual initiatives by members of the Faculty, special programs for visiting professors, European and global research networks, active involvement in the Erasmus programs, which give to Italian scholars and students the opportunity to spend a period in other European universities and to European scholars and students the chance to study at the University of Roma Tre.

The international projection of the Department of Law is strengthened by the "*Studying law at Roma Tre*" program, which offers 18 courses entirely taught in English for both Italian and international students, and covering subjects and topics that are not usually dealt with by traditional courses.

The title, and the overall project of the "Roma Tre Law Review", deserves a concise explanation. Differently from the American attitude, it is quite uncommon for an Italian law review to identify itself with a specific institution. Generally, journals and reviews have a thematic imprinting, being originally associated with one or more specific topics, a discipline, or a methodology. In the most egregious cases, they

represent the vehicle of a peculiar cultural project; in other instances, they have mainly an informative character, addressing the academia, the legal professions or both. Invariably, however, they stem out of the efforts of a web of scholars or practitioners, who tend to be bound only by common intellectual interests. Also, in the majority of cases law reviews are published by commercial publishers, which are usually established in the form of for-profit corporations (an element which may explain why – according to the theory of the anti-commons – no comprehensive legal databases, such as Westlaw or Hein-Online, have yet been developed in Italy). The Roma Tre Law Review aims to break with this tradition, on two main grounds:

(i) it is conceived as the spin-off of an institution and not of a group of scholars or practitioners. As a result, it is not focused on a specific topic or a set of issues, but it is aimed at surveying transversally (and from an interdisciplinary perspective) the national and trans-national legal landscape. We do not hold this to be a merely formal or ephemeral difference, nor do we intend to artificially imitate an organizational model embedded in a completely different context, such as the North American one. We are convinced, on the contrary, that by relocating the production of legal knowledge in the University, a set of particularly important cultural objectives may be pursued. First, this may help out reviving the sense of belonging to one and the same epistemic community, which is based in a particular place, shares a peculiar pedagogical project, interacts with the same stakeholders, and pursues converging lines of research. Unfortunately, the Italian recruitment system, the ministerial funding schemes, as well as a consolidated intellectual legacy have all mitigated such an attitude, strengthening the ties within but not beyond the several disciplinary sectors. We hope that the diffusion of university-based law reviews, such as the Roma Tre Law Review, might contribute to reverse such a nefarious trend, reviving the long-lasting paradigm of the universitas as a *communitas* of teachers and disciples. Second, the very character of a generalist law review edited by members of the same faculty invites us to critically rethink and possibly overcome a complex set of dichotomies and artificial boundaries that still affect the Italian legal scholarship and limit its path-breaking potential, such as the division public/private, procedural/substantial, Law/society, etc. We expect that a common editorial endeavor might foster a truly problem- based and not just a discipline-based approach to societal issues having legal relevance. On this we will come back later.

(ii) it is published "*in house*" by a non-profit organization (Roma TrE-Press, established within the Roma Tre Foundation) and will be freely accessible on the web in digital format. This means that the commitment of a public institution to produce knowledge and make it accessible to the public is taken seriously. Moreover, the use of

English (and, in exceptional cases, of French and Spanish) as vehicular language reflects the intent to address a global audience, informing the public about relevant developments in Italian Law, and at the same time fostering a more systematic confrontation of the Italian jurists with the overall trends and problems emerging at a trans-national level. And, as we all now, speaking to a different audience implies changing not only the form, but also the content of the conversation.

In order to cope with the challenges so far mentioned, the review will host contributions ideally characterized by a specific set of features, and namely by their openness to comparative, transnational, and interdisciplinary perspectives on all legal issues of not strictly local concern. Symmetrically, the review is not interested in contributions having only a national, exegetic, and formalist character.

The idea of comparison that is behind this project is characterized by methodological pluralism and does not identify itself only with the orthodox functionalism adopted by the mainstream. It aims at widening the scope of knowledge, but it has not only an informative purpose. Even less it should be regarded as a tool indirectly aimed at reinforcing borders and differences and reestablishing hierarchies. Indeed, the basic unit of comparison shall not necessarily be constituted by the law of the nation states, but may comprise all sources of normativity, either stemming from the above (international law, transnational law, global law, multilevel constitutional structures, etc.) or from below (regional and local law, customs, commercial and social practices, in general all forms of non-state law). Comparing should be conceived, in this perspective, as a fundamental "*liberating exercise*", capable of uncovering the inherent contingency of legal artifacts, their historical and cultural dimension, the values hidden in a particular representation of reality, as well as the tendency toward the hybridization of legal patterns and the constant interaction among various forms of normativity. As François Jullien has persuasively argued, it is only by putting "*the other possible*" at the center of the scene, that it becomes feasible to engage in a respectful cross-cultural dialogue and learn with the others and not only from the others. So imagined, comparative law works as a vector of resistance against all kinds of established frameworks and paradigms, including those underpinning positive law and the existing institutional structures. Its main function is questioning and challenging received wisdom, and therefore fostering a dialogical, non-hierarchical and polycentric model of legal ordering. Starting from

the assumption that the law is not simply the exogenous product of the political state, and that consequently knowledge about law cannot be reduced to the aseptic study of the "*norm-in-force*", the review invites contributions from scholars trained in various disciplines, having a professional interest in the study of law, as well as from legal scholars interested in establishing an informed and not-occasional dialogue with other fields of knowledge. Social sciences have of course a prestigious tradition of interaction with the legal science. One might think only at the relationship between political science and public law, or between economics and private law; but more generally one of the main aims of the review is to systematically overcome the intellectual cleavage between law and society and promote all forms of realistic jurisprudence. Similarly, we are interested in the dialogue between law and humanities, being conscious that the success accrued to the US movement of law & literature has deep roots in the European legal culture, which deserve to be rediscovered and revived.

The Review intends to host contributions of Roma Tre professors and scholars, as well as guest speakers in our conferences and seminars, also with the purpose of witnessing the intellectual freshness and openness of our epistemic community.

The Review is divided into two main sections: Articles and Notes on Italian Law. The Articles concern issues of direct interest to the global scientific community. They are characterized by a comparative and multidisciplinary approach. The Notes focus is on actual questions on Italian Law, which can however be of interest for a broader international audience. Other sections will be Roma Tre Talks, Worldwide Legal Watch, and Book Reviews. Roma Tre Talks will host interviews with visiting professors and scholars and provide short summaries of the most important conferences and seminars hold at Roma Tre. Worldwide Legal Watch will offer short news on important reforms and courts decisions around the world. The Book Reviews will host comments on recently published books, as well on Italian legal "*classics*".

The advisory board of the review is composed by professors of the Department of Law of the University of Roma Tre. The international advisory board will help the development of the review. The board of editors is responsible of the quality of articles and notes, which will be put under the oversight of a standing committee of referees. Roma Tre students and past-students are also actively involved. They will be assistant editors and they will also contribute to the review with their articles and notes.

ELENA GRANAGLIA*

BETWEEN BASIC INCOME AND MINIMUM INCOME. A MODEST PROPOSAL

ABSTRACT. *The goal of the paper is to argue for a hybridization between two measures of income support: basic income and minimum income. The reason is that both measures have desirable and undesirable aspects from the point of view of social justice and efficiency. Hybridization could then neutralize the negative effects of each while ensuring the respective benefits. The potentialities of hybridization appear wholly undervalued both in public discussion and in the academic literature.*

1. Introduction

Basic income and minimum income are typically considered alternative income support measures. That these are different policies is indisputable. The point is that both of them have desirable and undesirable aspects from the point of view of social justice and efficiency. Given this reality, it seems useful to investigate the possibility of a hybridization aiming at neutralizing the negative effects of each while ensuring the respective benefits. The goal of this article is to present a proposal that goes precisely in this direction. The potentialities of hybridization appear wholly undervalued both in public discussion and in the academic literature.

The article is divided in three parts. The first and second present the respective desirable and undesirable aspects of basic income and minimum income, while the

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third is dedicated to the proposal.

First, a few brief words on what basic income and minimum income mean. Basic income is a transfer, financed from general taxation and disbursed, at regular intervals, on an individual basis, to the rich and to the poor, to those who work and to those who do not work. In other words, basic income does not require means testing and does not impose any obligation to work. Minimum income is also a transfer, financed from general taxation and disbursed, at regular intervals. Unlike basic income, however, it is a transfer of last resort, addressed to those whose resources are below a given poverty line: the objective is the fight against poverty (regardless of how this can be defined). The beneficiaries, chosen through means testing, are typically families. Otherwise, the risk is that an individual without his own resources can be considered poor, and, as such, eligible for help, while living in a rich family.

Today, all existing minimum income schemes have added willingness to work as a requisite for accessing transfers. The reason is the disincentive to work that would be inherent in the rate of 100% typical of guaranteed minimum income. In this last perspective, every extra euro earned implies a euro less transfer until cessation once the poverty line has been reached, thus giving rise to unemployment traps. Of course, to avoid such pitfalls, the rate could be lowered, thus leaving part of the transfer in the hands of those who work: but this would simply replace the unemployment traps with poverty traps. When the threshold is reached, the transfer would be lost.

Work-related conditionality, in turn, can be specified in very different forms ranging from the most punitive measures of workfare, that is, the obligation of unpaid work as a counterpart of transfers, to measures based on "the taking in charge", thanks, for example, to the offer of employment services in association with relatively less stringent obligations (for example, the right to transfer is lost only after declining more than one work offer considered adequate). In the words of Sarah Marchal and Natascha van Mechelen,[1] the spectrum of work-related conditionality goes from the most "demanding" measures to those most "enabling". Moreover, conditionality could be extended to social services considered crucial for overall inclusion. Beneficiaries of minimum income should, for example, commit to sending their children to school and/or participating in health prevention programs.

1 S. Marchal - N. van Mechelen, *A New Kid in Town? Active Inclusion Elements in European Minimum Income Schemes November, in Social Policy & Administration*, 51, 1, 2015, pp. 171-194.

2. Desirable and undesirable aspects of basic income

One of the main ambitions of basic income is to favor freedom. Thanks to its unconditional nature, basic income favors freedom from others. It allows one to say no to family members, on whom one would otherwise depend, whether they are parents, in the case of children, or husbands/partners in the case of women. It allows one to say no to employers who impose unfair working conditions as well as to job offers from organized crime. It also avoids dependence on public administrators who, in the perspective of minimum income, would be responsible for carrying out means testing and specifying conditionality. For these reasons, basic income, in addition to guaranteeing income, would also promote more equal social relations.

To be favored, however, it would not be just freedom from. It would also be freedom to. Having an unconditional income gives everyone a basis of security, whatever the conditions in which one is and whatever the life project one wishes to undertake. Furthermore, basic income allows one to keep "portfolios" of different activities, whether they are pursued for money or not (as in the caring of family members and/or in community work), while favoring, among other things, transitions both between jobs and between work and training. These contributions appear particularly attractive in a situation, like the current one, of increasingly unstable families and occupations.

For these reasons, basic income could also be conceived as a concrete expression of the *ius existentiae* – the right to live in a free and dignified way. Moreover, the fact that it is given to all would better reflect the universalism of fundamental rights.[2] Interesting, in this regard, are the observations by Giuseppe Bronzini on some experiences of medieval free cities and the Paris Commune, which highlight that "whenever the democratic and partecipatory dimension becomes more intense, the problem of a social minimum due to all has been put forward.[3]"

Basic income would also outperform those that Philippe van Parjis and Yannick Vanderborgh[4] define as its "cousins". Unlike the career's allowance, it favors fairness

2 See L. Ferrajoli, *Manifesto per l'uguaglianza*, Bari, 2018.

3 G. Bronzini, *Il diritto a un reddito di base, Firenze, 2017. The quotation is from p. 29 and the translation is mine.*

4 P. Van Parijs – Y. Vanderborgh, *Basic Income. A Radical Proposal for a Free Society and a Sane Economy,* Cambridge, 2017.

in the division between productive and reproductive work: it is accessible to those who engage in care responsibilities, but it is also for those who decide to work on the market. Unlike the uniform and generalized reduction of working time, it allows freedom in choosing working hours. Still, it avoids the risks of "forced labor" and overall violation of the work aspirations of the unemployed, present in the perspective of the State as an employer of last resort. Unlike the negative income tax, it does not require any balancing between the transfers received and the money earned, thus avoiding the risk of having to give back the money received if the yearly income exceeds the threshold entitling to the transfer.[5] Unlike the universal citizens' stake, an amount of wealth provided *una tantum*, it is delivered continuously through time. This diminishes the risk of remaining with no help, in case the stake is wasted.

But wouldn't basic income violate, at least one freedom, that of those who strive more on the market? Wouldn't these strivers be taxed for those who do not work? The answer is negative in so far as basic income represents the sharing among all of common resources, which are today appropriated privately (and unfairly) by some. More precisely, the idea, for the defenders of basic income, is that the value added produced on the market cannot be wholly ascribed to the effort of the single producer. On the contrary, it depends on a messy set of random factors with respect to which no one can claim a private property right.

Just think of the role of market supply and demand and of the plurality of factors that allow productivity to flourish, from the material and social infrastructure inherited from the past to the natural abilities we have and the overall rents accumulated over time by a process of private appropriation of natural resources.[6] Do we deserve, for example, an increase in our market remuneration simply because the demand for what we offer increases (maybe for an exogenous shock somewhere in the world) or because we are lucky enough to live in a territory well endowed with

5 The negative income tax is a transfer delivered through the tax system. The right to access the benefit in a given year is based on the income declared in the previous year (or expected at the start of the new year). If, at the end of the period, the income actually earned is bigger, the negative income tax received in excess should be given back to the Treasury (and vice versa, if it is smaller, one has to wait the whole year to get the integration).

6 On the omnipresence of luck in the market, see also F. Von Hayek, *Law, Legislation and Liberty. The Mirage of Social Justice*, Chicago, 1978.

social and material capital? The share of value added independent of the effort of the individual has the nature of rent or, in the words of van Parijs of "gifts".[7] As no one deserves the private gifts he receives, taxing someone with more gifts does not take away something we deserve.

Alternatively, basic income could be conceived as counterpart of the contribution that we all give today to the economy by putting our personal data in the network, for which, however, we receive nothing. If so, basic income would reflect an intentional rather than a random contribution, as in the perspective of common resources. Nevertheless, not only is this justification wholly compatible with that in terms of common resources, but in both cases basic income would remedy inequities afflicting market distribution. In other words, basic income, rather than being a classic *ex post* redistributive measure, would intervene *ex ante*, ensuring a fairer distribution of market incomes.

Against these favorable aspects, basic income has, however, some critical points. I do not refer so much to those most often advanced in public debate, which rely on the concept of parasitism, according to which the idlers would enjoy, with impunity, an income unjustly taken from those who work, as the Malibu surfers depicted by Rawls. In this regard, What I have written above regarding common resources applies. If basic income represents our share of common resources, nothing would be unfairly taken away from others. On the contrary, the parasite, today, would be those who appropriates our common resources. Furthermore, as with the gifts we privately receive, that we can freely use, we should be free to do what we want with the collective gifts dispensed through basic income.

Neither do I refer to other objections such as that basic income would undervalue the importance of social services or of work, reducing the role of Welfare State to that of merely ensuring a minimal monetary compensation, and/or would violate progressivity as well as disregard needs heterogeneity, by giving the same amount to all. Certainly, many Silicon Valley entrepreneurs and other libertarian defenders of basic income see the latter as a substitute for the other policies of the welfare state. However,

7 See P. Van Parijs, *Real Freedom for All*, Oxford, 1995 and P. Van Parijs, *Egalitarian Justice, Left Libertarianism and the Market*, in I. Carter – S. De Wijze – M. Kramer, *The Anatomy of Justice. Themes from the Political Philosophy of Hillel Steiner*, London, 2014, pp.145-162.

this does not negate the fact that basic income can be combined with social services and employment policies. At the same time, the rich, certainly, would receive basic income, but, having had more gifts, they would also contribute more to the financing of the measure (more precisely, all the subjects with income less than the average are net beneficiaries, while those with higher incomes pay more compared to what they receive). The overall effect is, then, progressive. One important implication is that basic income, although not typically invoked for fighting poverty, could favor this end, thanks to this distributive effect. Unlike what could occur with minimum income as we will see, money would also be ensured free of any hole in the roofing.

Heterogeneity of needs would, instead, remain disregarded. Also this objection, however, would not be decisive: it could be tackled by adding to a basic income a scheme of differentiated monetary supplements based on needs.

Some disincentives to work will also remain. Yet, on the one side, basic income only induces the disincentives linked to the income effect: being richer, one is less willing to work. Unlike what happens with the minimum income, it would not produce substitution effects, the transfer being available irrespective of whether one works and has money or not. On another side, "cute rules",[8] such as those endowing everyone with a basic income, could encourage social cooperation. If so, the guarantee of an income could stimulate the propensity to work and to take risks, thus, acting as a tonic, to paraphrase John Stuart Mill. On still another side, if work were really an opportunity, people would also work in the presence of an income. How many of us work, even if not driven by the need to earn an income or, anyway, far beyond that necessity? Perhaps, if individuals do not work, it is because there isn't work and, even when there is, it often has few characteristics of opportunity and/or is rendered inaccessible by barriers of various kinds. Do not underestimate, then, the plurality of ways to activate oneself. In addition to those available on the labor market, there are care activities, voluntary action for the community, and participation in the management of common goods.

The real problems concern the cost of the measure. Even though we should

8 The reference is here to the logic of "*tit for tat*" explored by R. Axelrod, *The Evolution of Cooperation*, New York, 1984.

avoid double counting (today many subjects receive monetary transfers and enjoy tax breaks that would be replaced by basic income) and take into account the lower administrative cost of basic income (unlike minimum income, basic income does not require means testing or other forms of conditionality), giving to everyone is expensive. The cost is all the more worrisome the more one does not want to renounce the other policies above mentioned, from in-kind transfers to employment policies and to monetary supplements to deal with the heterogeneity of needs. The risk is, therefore, that of having to settle for a very low basic income, for many insufficient to a dignified life, and, maybe, even to renounce other important social welfare interventions. In any case, many of today's transfers and tax breaks are difficult to replace in so far as justified for reasons that have nothing to do with income support. For example, neither contributory pensions or allowances for dependent workers can be replaced by basic income, the former representing deferred earnings and the latter having to do both with the principle of qualitative discrimination in personal income taxation and with the fact that employees, unlike the self-employed, cannot deduct the expenses incurred in income production.

3. Desirable and undesirable aspects of minimum income

Minimum income counters precisely these limits of basic income. Being circumscribed to the poor, it has a lower financial cost. This would allow better protection of the disadvantaged and, at the same time, easier integration with other social policies.

The contribution is not, however, without costs. First, there are the costs of selectivity. On the one side selectivity implies an unavoidable arbitrariness in the selection of those entitled to the transfer as there is no poverty line that can unequivocally distinguish the poor from the non-poor. The reason derives from the unavailability of equivalence scales capable of taking full account of the heterogeneity of needs. One can hypothesize, for example, a threshold of 1000 euros: well, nothing assures that those who have 1001 euros are actually in better economic conditions than those who have 999 euros and therefore have the right to a transfer. Similar considerations apply to the choice of resources to be included in the means test: for example, in the presence of an allowance for the first house, which values to choose? Very small changes in the equivalence scales and in the resources included in means testing may involve significant

changes in the number of beneficiaries, creating an inevitable risk of war among the disadvantaged.

On another, side selectivity is also intrinsically divisive and the means testing on which it is based entails risks of interference in individual lives, paternalism and overall violation of the equality of consideration and respect. Means testing involves, then, administrative costs and requires time to be administered. In the meantime, the poor could remain without income. The latter risk appears particularly accentuated today, given the frequency of exits from, and re-entry into, the labor market. Selective transfers, then, are typically provided to "representatives" of the family, in the underestimation of possible inequities in the infra-family distribution of resources.

On still another side, selectivity favors non-work far more than basic income, due to the substitution effects and related traps. Certainly, as anticipated with respect to basic income, people often do not work because of lack of opportunities rather than for a choice to put leisure before work. Consider, for example, the subjects at the center of studies that would prove "*dependency*": single mothers. Do not single mothers suffer from some obstacle to employability? Similar considerations apply to people with low education penalized by the violation of the right to equal opportunities. In any case, there is much evidence on the willingness to work for many poor people if only they were assured of the certainty of an income if they lose their jobs. This notwithstanding, selectivity, by entailing the cessation of the benefit once one reaches the threshold, also entails a structure of incentives favoring false positives, individuals who could work and escape poverty, but find it more convenient to rely on the transfer.[9]

Finally, selectivity could weaken the propensity to redistribute. The reference here is to the so-called paradox of Walter Korpi and Joakim Palme,[10] according to which selective transfers, as they are circumscribed to a sub-group of subjects, would not be able to generate high levels of funding. If it were, the alleged redistributive superiority of minimum income would disappear. Given a fixed budget, it is certainly indisputable

9 For a good summary of the empirical evidence on these data, see H. Immervoll – S. Jenkins – S. Königs, *Are Recipients of Social Assistance "Benefit Dependent"? Concepts, Measurement and Results for Selected Countries*, IZA Discussion Paper No. 8786, 2015.

10 W. Korpi – J. Palme, *The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries, in American Sociological Review*, 63, 5, 1998, pp. 661-687.

that minimum income has a greater redistributive effect compared to a measure that requires the distribution of resources among all. If you have 1000 euros, it is one thing to distribute it only to the poor and it is another to share it among all the citizens. The dimensions of the budget, however, are important. The risk is that selective transfers, benefiting a sub-set of subjects, and, moreover, of subjects with little voice, acquire less resources than the universal ones which can, instead, rely on broader support and which do not create a divide between "us" and "them".[11]

Second, administrative costs and risks of arbitrariness, paternalism, interference with individual choices and overall questioning of equality of consideration and respect are accentuated by the activation processes and by the use of sanctions. These risks become all the more aggravated the more you move towards a "demanding" perspective. They also exist, however, in an "enabling" perspective. Just think of the practice of "taking in charge" the measure at the heart of the Italian minimum scheme. Such a measure is grounded on a pact between public administrators, who have the responsibility to offer the services needed to support employment, and beneficiaries of the minimum income, who have the responsibility to activate themselves and eventually to exit from poverty. Despite the reference to the pact, which alludes to the symmetry between the contractors (as in the contractual tradition), the relationship is between a party (the administrators of the program) which can provide sanctions and intervene in the behavior of others, and another that must comply in order not to lose the income necessary to live.

A further effect of feeling treated as a second-class citizen and, therefore, like an object of stigma, is the onset of false negatives: poor people who do not demand

11 The paradox has lately been challenged by L. Kenworthy, *Progress for the Poor*, Oxford, 2011 and I. Marx – L. Salanauskaite – G. Verbist, *The Paradox of Redistribution Revisited: And That It May Rest in Peace?*, Bonn, IZA Discussion Papers No. 7414, 2013, who have confined its validity to a particular time (it wouldn't occur after the 90s) and to a restricted set of countries. A. Mcknight, *A fresh look at an old question: is pro-poor targeting of cash transfers more effective than universal systems at reducing inequality and poverty?*, London, 2015 and O. Jacques – A. Noël, *The case for welfare state universalism, or the lasting relevance of the paradox of redistribution, in Journal of European Social Policy*, 28, 1, 2018, pp.70-85, have, instead, confirmed its validity. In any case, the new countries contributing to challenging the paradox include Italy, qualified as universal only in so far as lacking selective measures. But, the lack of selectivity does not make a welfare system universal (on the contrary, as in the case of Italy, one can be lacking on both grounds). Furthermore, the countries having the highest redistributive impact are those characterized by a strong dose of selectivity within universal transfers as in the perspective of "targeting within universalism". For a summary of the advantages of universal transfers, see E. Granaglia, *Farewell to Universalism? Some Introductory Remarks, in Politiche Sociali*, 3, 2016, pp. 391-402.

the transfers while having the right to it. Of course, non-access can derive from other factors in addition to the stigma, primarily, from lack of information. Stigma, however, counts. In this regard, it is worth recalling that in many European countries the phenomenon of false negatives has reached almost half of the potential beneficiaries of minimum income schemes.[12]

These overall limits led Antony Atkinson,[13] among others, and many decades before Juliet Rhys Williams,[14] to defend a basic income as a second-best solution for the purpose itself of fighting poverty.

Lastly, minimum income is an eminently redistributive measure, which implies an underestimation of the pre-distributive reasons for a fairer distribution of the common resources produced in the markets.

4. The case for hybridization

Given the coexistence of this set of desirable and undesirable aspects, a road to explore, and which is still largely unexplored, is that of the hybridization between basic income and minimum income. This would ensure, as much as possible, the positives aspects of both measures, while minimizing the negative ones. In this perspective, the first step could be to introduce a universal/quasi-universal child allowance. The automatic and universal/quasi-universal specification of the allowance would avoid many limits of selectivity: from the risks of arbitrariness, interference and overall violation of equality of consideration and respect and, with them, wars among the poor, to those of weakening the political sustainability of redistribution. At the same time, it would greatly contribute to poverty reduction, the number of dependent children being one of the primary causes of poverty. In Italy, the risk of poverty increases over the average

12 EMIN, *Toward Adequate and Accessible Minimum Income Schemes in Europe. Analysis of Minimum Income Schemes and Roadmaps in 30 Countries Participating in the EMIN Project. Synthesis Report, European Union*, Bruxelles, 2015.

13 A. Atkinson, *Inequality. What can be done?*, Cambridge, 2015.

14 J. Rhys Williams, *Something to Look Forward to: A Suggestion for a New Social Contract*, London, 1943.

already after the first child.[15]

Minimum income would, then, intervene only in a residual way to cover the holes that may still exist to the detriment of families with children and to support the poor without children. Limiting the role of minimum income would, however, also limit its problems. In this regard, as already indicated,[16] the empirical evidence is very robust in showing the advantages, in terms of redistributive impact, of "targeting within universalism", namely using selective transfers against poverty within universal/quasi-universal policies.

Minimum income could then itself be designed to incorporate some elements of basic income. For example, in addition to being available to all adults who live alone (today, many countries place constraints in terms of age), minimum income could, as occurs in Sweden, contemplate that adult children who do not study, but still live in their family of origin, are considered as separate households in themselves. This means both that, if poor, even these young people could receive the transfer and that their incomes would not contribute to family income. The overall result is greater individualization, exactly in the direction of basic income. In this perspective, the abolition or, in any case, the downsizing of the equivalence scales could also be carried out: the assumption would be that, due to the greater fragility of family relationships, one should not assume the pooling of resources. Furthermore, even in the presence of equivalence scales, the transfer could be shared between the two components, rather than going to a representative of the couple, Finally, one could think of a double level of transfers: an unconditional level, independent of work-related conditionality, and an additional one, associated with the obligation to work.[17]

Do these contaminations not lend themselves, however, to risks of *ad hoc* com-

15 Italy lacks a comprehensive system of child support, this latter being available only to those who have enough money to pay taxes and thus enjoy children allowances or who are employees and thus enjoy the categorical transfers available to them. The poor can only have some help for children up to three years (and the help is very limited). On this, see E. Granaglia, *Social Policies between Old and New Inequality*, in A. Scialà, Italian Fiscal Policy Review, Roma, 2015.

16 See footnote 11.

17 For an interesting proposal in this direction, see C. Sirugue, *Repenser les minimum sociaux. Vers une couverture socle commune.*

binations reflecting the subjective preferences of those who support them?[18] Given the budgetary constraints, Van Parijs and Vanderborgh[19], for example, consider it very difficult to ensure a decent level of basic income today. Yet, rather than embracing compromises such as those outlined here, they defend a basic income of reduced amount, starting with a value around 15% of the GDP per capita of individual countries to arrive over time to 25%.

The drawback is that granting a basic income of this amount remains costly and leaves the poor very far from the poverty threshold. In Italy, for example, the relative poverty threshold is 812 euros, while the absolute one, for an individual between 18 and 59 years old, oscillates between 554.03 and 817.56 euros, depending on where one lives. Fifteen percent of the GDP is around 260 euros per month. At the same time, the Italian welfare system presents a plurality of shortcomings (from the increasing difficulties to access the National Health Services to the lack of kindergartens in many Regions and to the overall deficiencies in long-term care), which would be even more difficult to tackle if we had to finance a basic income.

If this approach were indeed undertaken, seeking solutions, like the one here presented, that can protect against poverty while trying to limit the many problems that affect selective measures, seems desirable on the basis of social justice and efficiency.

18 I am grateful to Nicola Riva for having brought my attention on this question.

19 P. Van Parijs – Y. Vanderborgh, *Basic Income. A Radical Proposal for a Free Society and a Sane Economy,* 2017.

LUCA LUPÁRIA* - MITJA GIALUZ**

ITALIAN CRIMINAL PROCEDURE: THIRTY YEARS AFTER THE GREAT REFORM

ABSTRACT. *The Italian Code of Criminal Procedure of 1988 is considered a point of reference for its technical quality and the solutions adopted to transpose several rules typical of the Anglo-American accusatory model into a traditionally inquisitorial criminal justice system. It should therefore come as no surprise that it is one of the most influential and studied legislations in comparative law. The aim of this paper is to provide a guide to the Italian system of criminal procedure by considering the provisions of the CCP on the one hand and exploring the rugged path of the practical implementation of the new Code in its first thirty years of application on the other.*

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1. Introduction

1.1. The international significance of the Italian Code of Criminal Procedure and its sphere of influence

Since the second half of the twentieth century, few procedural reforms have had such a remarkable impact as that of the Italian Code of 1988, which has raised widespread interest among scholars across the world.[1] The act of surpassing the continental century-old tradition and the strong acceptance of the values of the Common Law system immediately aroused an exceptional interest in the Italian Code, which many comparatists viewed as a stimulating laboratory to test classical categories of the theory of the criminal process.[2] For the first time in Old Europe there was, in fact, a sharp transition from the inquisitorial to the accusatorial system.[3] Likewise, there was a substantially unprecedented introduction into a European system of principles that had always been deemed incompatible with the sensitivity of the "Civil Law" criminal justice model, such as *patteggiamento* (application of punishment upon request)[4] and *inutilizzabilità* (unlawfully gathered evidence),[5] which were mainly inspired, respectively, by the Anglo-American plea bargaining and exclusionary rules. Moreover, scholars in the field soon realized that this historic turn allowed them to see, from a privileged perspective, the reactions of courtroom operators to a sudden change of the modalities of judicial ascertainment or, as in this case, of the actual mental approach to the idea of criminal justice. It was indeed possible, for instance, to assess the adaptive capacity of a "French-sty-

1 Among the first comments in the international literature, E. Amodio – E. Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure, in Temple Law Review*, 62, 1989, p. 1211; E. Amodio, *Das Modell des Anklageprozesses im neuen italienischen Strafverfahrensgesetzbuch, in Zeitschrift für die gesamte Strafrechtswissenschaft*, 102, 1990, p. 171; L. FASSLER, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe, in Colombia Journal of Transnational Law*, 29, 1991, p. 245; W. T. Pizzi – L. Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation, in Yale Journal of International Law*, 17, 1992, p. 1; A. M. Stile, *Die Reform des Strafverfahrens in Italien, in Zeitschrift für die gesamte Strafrechtswissenschaft*, 104, 1992, p. 429; M. L. Volcansek, *Decision-Making Italian Style: The New Code of Criminal Procedure, in West European Politics*, 13, 1990, p. 33.

2 For instance: J. T. Ogg, *Adversary and Adversity: Converging Adversarial and Inquisitorial Systems of Justice - A Case Study of the Italian Criminal Trial Reforms, in International Journal of Comparative and Applied Criminal Justice*, 37, 2013, p. 31.

3 G. Illuminati, *The Accusatorial Process from the Italian Point of View, in North Carolina Journal of International Law & Commercial Regulation*, 35, 2010, p. 297.

4 See J. J. Miller, *Plea Bargaining and Its Analogues under the New Italian Criminal Procedure Code and in the United States: Towards A New Understanding of Comparative Criminal Procedure, in New York University Journal of International Law & Politics*, 22, 1989-1990, p. 215; R. Orlandi, *Absprachen im italienischen Strafverfahren, in Zeitschrift für die gesamte Strafrechtswissenschaft*, 116, 2004, pp. 120-123; R.a. Van Cleave, *An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System, in Emory International Law Review*, 11, 1997, p. 419. *The Italian choice has, in some way, influenced the extension of negotiated criminal justice in Germany*: U. Bogner, *Absprachen im deutschen und italienischen Strafprozessrecht, Verfahrensbeschleunigung durch die applicazione della pena su richiesta delle parti und das giudizio abbreviato, ein Modell für den künftigen deutschen Strafprozeß?*, Marburg, Elwert, 2000; M. Frommann, *Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?, in Hanse Law Review*, 5, 2009, p. 197.

5 T. Armenta Deu, *La prueba ilícita (un estudio comparado),* Madrid, 2011, p. 42; S. C. Thaman, *"Fruits of the Poisonous Tree" in Comparative Law, in Southwestern Journal of International Law*, 16, 2010, p. 333.

le[6]" judge that was transformed into an impartial referee in a process that was managed by defence and prosecution; of a public prosecutor who was used to holding a position of supremacy during proceedings and was now placed at the same level of the accused person's lawyer; of a lawyer who could now, unprecedentedly, take part in evidence gathering. This aspect played a significant role in ensuring the success of the change to the regulations[7] and also in providing useful indications in view of possible reforms in other systems.[8] It is thus not surprising that the Code (including preparatory studies and the preliminary project)[9] soon became the point of reference for the legislators of countries that wished to leave the French model behind (from the investigating judge[10] to the freedom of proof)[11] or to introduce a concept of proceedings that steered away from the authoritarian models similar to those of the previous Italian Code of 1930, the fruit of fascism.[12] The role the Code took, which could be defined as that of a "model Code", had profound effects not only in Central and South America,[13] where

6 About this critical aspect of continental procedure: M. R. Damaška, *Evidence Law Adrift*, New Haven, 1997, p. 95.

7 On this issue, M. Vogliotti, *La "rhapsodie": fécondité d'une métaphore littéraire pour repenser l'écriture juridique contemporaine. Une hypothèse de travail pour le champ pénal, in Revue Interdisciplinaire d'Etudes Juridiques*, 2001, p. 156.

8 See C. Li, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, in J. Pol. & L., 1, 2008, p. 13; W. T. Pizzi, *Lessons From Reforming Inquisitorial Systems*, in Fed. Sent. R., 8, 1995, p. 42.

9 Portuguese legislators, for instance, took inspiration from the preliminary Italian project to write their new 1987 Code.

10 Even France has studied and still pays attention to Italy with regard to the role of the investigating judge, particularly in the framework of the Reform Commissions that have recently considered the possible abolition of this role: S. Gless et al., *Regards de droit comparé sur la phase préparatoire du procès*, in V. Malabat et al, La réforme du Code pénale et du Code de procédure pénale. Opinio Doctorum, Paris, 2009, p. 203. In Spain, the current debate on whether the role of the juez de instrucción ought to be abolished often makes reference to the Italian Code as a positive approach to be imitated: J. Burgos Ladrón De Guevara, *Modelo y propuestas para el proceso penal español, Sevilla*, 2012, p. 11.

11 See J. Pradel, *Criminal Evidence*, in J. F. Nijboer & Wim J.J.M. Sprangers, *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, 2000, p. 441.

12 It may be useful to remember that the Code of criminal procedure is the only one among the "four Codes" (namely the Civil Code, Code of Civil Procedure, Criminal Code and Code of Criminal Procedure) that was approved during the Republican era. The other Codes, though modified and improved, still maintain the structure that was decided in the Fascist era, when they were approved.

13 M. Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery, in American Journal of Comparative Law*, 55, 2007, p. 617. Amongst others, Chile and Brazil are two examples worth remembering. With regard to Chile, it is sufficient to read the official report of the reform to understand how much influence the Italian Code has had on the work of the Commission: *Historia de la Ley N° 19.696 Establece Código Procesal Penal, 12 de octubre del año 2000, in Diario Oficial de fecha 31 de mayo de 2002*, Santiago, 2002. As for the Brazilian expierience, see the recent publication A. Pellegrini Grinover, *A reforma do Código de Processo Penal brasileiro. Pontos de contato com o direito estrangeiro*, in P. Corso & E. Zanetti, *Studi in onore di Mario Pisani*, Piacenza, 2010, II, p. 969. See also, for an updated overview of the various procedural systems in South America, T. Armenta Deu, *Sistemas procesales penales. La justicia penal en Europa y América*, Madrid, 2012, p. 193.

the Italian doctrine has often had remarkable influence,[14] but also in other parts of the world where inspiration was drawn from the choices made by the Italian Code, which must undoubtedly be acknowledged as having highly technical quality and bravery in the modalities of transition from the inquisitorial to the accusatorial approach.

Numerous commissions studying the Italian system have "copied" the solutions adopted by the 1988 Code and many works of individual scholars have paved the way for transplants of the model abroad. One need only mention the Albanian,[15] Turkish and Croatian experiences, which show traces of influence of the Italian model. It is also worth remembering the Chinese study Commissions that showed interest in the Italian Code in view of their first systematic reform of 1996.[16] Even single legislative solutions are (or have been) the object, as models, of comparative studies or analyses of reform commissions across the world, from the incidente probatorio (special evidentiary hearing) to the patteggiamento, from the giudizio abbreviato (summary trial) to the giudice per le indagini preliminari (preliminary investigation judge), to mention a few.[17]

1.2. True and false in the ways of representing the Italian model

When approaching the current Italian system, any simplistic classification ought to be avoided, such as the one that depicts the system as an "American-style" mo-

14 A. Pellegrini Grinover, *A influência do direito italiano no Brasil, in Revista de la Câmara Ítalo-Brasileira de Comércio e Industria*, 2005, p. 22.

15 On the issue of the new Albanian Code drawing inspiration from the Italian reform: B. Pavišić, *Overview,* in B. Pavišić & J. Pradel, *Transition in Criminal Procedure Systems*, Rijeka, 2004, p. XXXII. The same volume underlines how successful the figure of the "preliminary investigation judge" has become across the whole of Eastern Europe (p. XLIX).

16 See M. Cui, *Several Debated Issues During the Discussions on the Revision of the Criminal of the Criminal Procedure Law, in Gongan Daxue Xuebao (Police University Academic Journal)*, 1995, p. 64; S. Liu – T. C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law, in Law & Social Inquiry*, 34, 2009, pp. 911-919; L. Lupária, *Quelques réflexions d'un observateur européen sur le procès pénal chinois, in Cahiers de défense sociale*, 2006, p. 123. On the last reform in 2012: J. Chen, *Criminal Law and Criminal Procedure Law in the People's Republic of China*, Leiden, 2013.

17 The following articles may be consulted: V. Vladimirovna Khatuaeva, "*Plea Agreement*" in Foreign *and Russian Criminal Procedure Law*: Comparative Analysis, in Middle-East Journal of Scientific Research, 18, 2013, p. 1402; P. Pikamäe, *Italian Criminal Procedure as a Possible Model for Reforming Estonian Criminal Procedure*, in Juridica, II, 1999, p. 82; R. R. Strang, "*More Adversarial, but not Completely Adversarial*": *Reforms of the Indonesian Criminal Procedure Code, in Fordham International Law Journal*, 32, 2008, pp. 118-217, about the importance of the concept of "*preliminary investigation judge*" in the reform Commission; T. Weigend, *Reform Proposal on Dutch Criminal Procedure. A German Perspective*, in M. Groenhuijsen & Tijs Kooijmans, *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective*, Leiden, 2012, p. 160.

del. Its interpretation is, on the contrary, rather more complex.

The introduction of new safeguards protecting the accused, for example, has been surely determined by a sort of reaction to the authoritarian features of the old Code rather than by the intention to adopt Common Law principles, even though the Anglo-American model was viewed as the most "prestigious" by Italian jurists.[18] It was therefore imperative, at that historic moment, to distance the system from the past and reject whatever could be related to the inquisitorial system, even despite its actual demerits.[19]

After all, the systems that were established in imitation of the accusatorial archetype did not, paradoxically, take inspiration from the actual set of norms that existed in England or the United States at the time, but rather from a sort of "timeless," abstract vision of their procedural devices. The result has hence been, for some aspects, that the Italian criminal process bears some of the characteristics of the Anglo-American models of the past, rather than of the proceedings that are conducted today in Anglo-American courtrooms.[20] The right to silence, for instance, is to some extent more safeguarded in the Italian Code than in the current system in England, despite being its

18 E. Grande, *Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe, in American Journal of Comparative Law*, 64, 2016, p. 583. On the importance of the prestigious nature of models for their circulation in the comparative scenario: W. Ewald, *Comparative Jurisprudence (II): the Logic of Legal Transplants, in American Journal of Comparative Law*, 43, 1995, p. 489; U. Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law, in American Journal of Comparative Law*, 42, 1994, p. 195; A. Watson, *Legal Transplants: An Approach to Comparative Law*, Athens GA, 1993; W. Wiegand, *The Reception of American Law in Europe, in American Journal of Comparative Law*, 39, 1991, p. 229.

19 That this was a reaction, partly ideological and partly emotional, has been underlined by many scholars, since the previous system – though highly deficient – did not justify a complete demonisation. After all, one must not forget that many studies are even describing the inquisitorial system as offering remarkable safeguards to the accused despite the completely negative reputation it has gained: M. R. Damaška, *The Quest for Due Process in the Age of Inquisition, in American Journal of Comparative Law*, 60, 2012, p. 919; D. Alan Sklansky, *Anti-Inquisitorialism, in Harvard Law Review*, 122, 2009, p. 1639 and, in the French literature, A. Astaing, *Droits et garanties de l'accusé dans le procès criminel d'ancien régime (XVI-XVIII siècle). Audace et pusillanimité de le doctrine pénale française*, Aix-en-Provence, 1999.

20 There has certainly been acceptance of the approach in the criminal proceedings that emerged during the great season of the American Supreme Court in the 1960s, under Warren's presidency. See L. Fassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe, in Columbia Journal of Transnational Law*, 29, 1991, at 246. However, the true theoretical coordinates lie on the traditional pillars of the adversarial process and, equally, they are well-rooted in the English Courts of the 1700s (on this "hard core" of principles, which can still be taken as a model today: R. Vogler, *A World View of Criminal Justice*, Hants, 2005, p. 129).

motherland.[21] Similarly, hearsay evidence, which has inspired the Italian Code, differs from what is practiced today in the USA.[22]

From a different perspective, it is also worth remembering those systematic profiles that persist in the Italian model and can be markedly linked to the continental tradition (the judge's partial ex *officio powers*, rules on precautionary measures that differ from the theory of bail),[23] as well as those choices that have been affected by the Italian historical parabola, which are incompatible with the Anglo-American tradition (among others, the rejection of forms of discretion in prosecution). Against this backdrop, however, there are also original solutions that were achieved by the reformers in 1988 which cannot be viewed as the result of one single juridical experience. In practice, there is no doubt that the Italian Code of criminal procedure has looked to the tradition of Common Law, also as a symbolic, historic step away from the inquisitorial system that was established during the dictatorship. However, despite this pre-packaged label, today's system still bears the traces of a past that it has not rejected completely[24] and some theoretical concepts that have been formulated by single scholars, whilst showing a strong connection with the fundamental values endorsed by the

21 As is known, the legislation related to the Irish issue has led to the Criminal Justice and Public Order Act of 1994 whereby inferences against the accused could be drawn if the latter invoked the right to silence. Since then, to the present day, numerous norms of similar caliber have succeeded one another, such as, amongst other: the Criminal Justice (Terrorism and Conspiracy) Act of 1998, the Terrorism Act of 2000. See M. Berger, *Reforming Confession Law British Style: a Decade of Experience with Adverse Inference from Silence,* in Col. H. R. L. Rev., 31, 2000, p. 243; J. D. Jackson, *Interpreting the Silence Provisions: the Northern Ireland Cases, in Criminal Law Review*, 1995, p. 587; M. Redmayne, *Rethinking the Privilege against Self-Incrimination*, in Oxford Journal of Legal Studies, 27, 2007, p. 214.

22 Particularly in light of concrete judicial practices and some important judgments of the Supreme Court on the right to challenge incriminatory witness evidence, including Crawford v. Washington 541 U.S. 36 (2004). See I. Dennis, *The Rights to Confront Witnesses: Meaning, Myths and Human Rights, in Criminal Law Review*, 4, 2010, p. 255; H. Lai Ho, *Confrontation and Hearsay: A Critique of Crawford, in International Journal of Evidence & Proof*, 8, 2004, p. 147; L. Heffernan, *Calibrating the Right to Confrontation, in International Journal of Evidence & Proof*, 20(2), 2016, p. 103.

23 A recent overview with a comparative analysis with the other European systems is provided by S. Ruggeri, *Personal Liberty in Europe. A Comparative Analysis of Pre-Trial Precautionary Measures in Criminal Proceedings*, in S. Ruggeri, *Liberty and Security in Europe. A Comparative Analysis of Pre-trial Precautionary Measures in Criminal Proceedings*, Osnabrück, Gottingen, 2012, p. 185. See M. Gialuz – P. Spagnolo, *Reasonable Length of Pre-trial Detention: Rigid or Flexible Time Limits? A study on Italy from a European Perspective, in European Criminal Law Review*, 3, 2013, p. 220.

24 For G. J. Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial, in Boston University International Law Journal*, 30, 2012, p. 229, the inquisitorial roots of the Italian system still prevail.

European Convention of Human Rights.[25] Indeed, the Code is a body of sources and influences that have made it an unprecedented laboratory that could help test the possible balances between the Anglo-American and European legal worlds.

It is a fundamental model for scholars across the world at a historical moment when England and the United States are looking to the process occurring in the old continent[26] to redress the faults of a system that is too linked to a partisan[27] and negotiated[28] vision of justice. At the same time, many European and non-European States are trying to stray from the distortions of an approach that is aimed at finding a material truth at all costs[29] to the detriment of the safeguards established to protect the accused.[30] Thirty years after the great reform, it may be useful to look into the reactions that were triggered by the introduction of the new criminal justice system and its subsequent evolutions brought about by Supreme Court's decisions and by legislative reforms.

The third part of this essay focuses on the analysis of the criminal justice system that is in force in Italy today.

25 On the criminal trial in an international human rights context, S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford and Portland, Hart, 2007; *S. Trechsel, Human Rights in Criminal Proceedings,* Oxford, 2005.

26 "A quasi-inquisitorial system of justice, patterned after the revised Italian Code of Criminal Procedure, would provide a more fair, equitable distribution of justice while also promoting the goal of seeking truth in the criminal justice system" (R. Lawson Mack), *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System, in Indiana International & Comparative Law Review*, 7, 1996, p. 67.

27 W. T. Pizzi, *Trial without Truth. Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Rebuild It*, New York, 1999.

28 See R. P. Burns, *The Death of the American Trial*, Chicago, 2009; M. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, in Journal of Empirical Legal Studies*, 1, 2004, p. 459.

29 E. Grande, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth*, in J. Jackson, M. Langer & P. Tillers, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, Oxford and Portland, 2008, p. 145; T. Weigend, *Should We Search for the Truth, and Who Should Do it?, in North Carolina Journal of International Law and Commercial Regulation*, 36, 2011, p. 389.

30 On the current relationship between common Law and civil Law systems in the field of criminal justice, in the light of the general path of convergence, see J. D. Jackson – S. Summers, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions*, Cambridge, 2012; M. Jimeno-Bulnes, *American Criminal Procedure in a European Context, in Cardozo Journal of International & Comparative Law*, 21, 2013, p. 409.

2. Genesis, extent and evolution of the great 1988 reform

2.1. The new Code of Criminal Procedure

Since the Italian Republican Constitution came into force in 1948, the problem of reforming the Code of Criminal Procedure of 1930 (so called Rocco Code) has been at stake. The Rocco Code was indeed a product of fascism and reflective of a traditionally inquisitorial criminal justice system.[31]

The new Constitution overturned the ideological postulates typical of the fascist regime and placed the individual at the heart of the justice system. The Constitution thus expressly recognized a series of fundamental rights to the accused person (personal liberty in Article 13;[32] the right to defence in Article 24;[33] the right to a lawful judge in Article 25[34]) and ratified – despite the confused formulation – the presumption of innocence, placing the burden of proof on the prosecution (Article 27, par. 2).[35] After a decade of small changes made to the Rocco Code by Parliament (Law no. 517/1955), in the early Sixties two processes were set in motion. On one hand, the Constitutional Court acted to eliminate the norms of the Code that clashed with the above-mentioned constitutional principles and to provide greater protection to the accused in the pre-trial phase; on the other hand, an intense doctrinal debate on the reform of the Code of Criminal Procedure began, with the aim of leaving behind a criminal-procedure system built by a totalitarian regime and bringing Italy's criminal justice system in line with liberal democratic political structures. Parliament approved

31 For more information on the Italian 1930 Code, see L. F. Del Duca, *An Historic Convergence of Civil and Common Law Systems. Italy's New "Adversarial" Criminal Procedure System, in Dickinson Journal of International Law*, 10, 1991, pp. 73-75-81; G. Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988), in Washington University Global Studies Law Review*, 4, 2005, p. 567.

32 According to Art. 13 Italian Constitution "1. Personal liberty is inviolable. 2. No one may be detained, inspected or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the Law. 3. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the Law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void. 4. Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished. 5. The Law shall establish the maximum duration of preventive detention."

33 According to Art. 24, par. 2, It. Const. "Defence is an inviolable right at every stage and instance of proceedings."

34 According to Art. 25, par. 1, It. Const. "No one may be removed from the lawful court previously established by Law."

35 According to Art. 27, par. 2, It. Const. "The accused person shall be considered not guilty until a final judgment has been passed."

a first enabling act in 1974; due to the terrorist threat of the time, however, the decree was never implemented.[36] In 1987 a second enabling act was approved whereby the Government committed to adopting a Code of Criminal Procedure that "ought to implement the principles of the Constitution and conform to the norms of international conventions ratified by Italy on the rights of the individual and on the criminal process." It also had to "introduce in the criminal process the features of the accusatorial system", according to a series of fundamental principles defined in the enabling act.[37] In October 1989, the new Code of Criminal Procedure came into force, which "represented the most serious attempt to transfer adversarial criminal procedures into an inquisitorial jurisdiction since 1791, when the French attempted to import the English system during the heat of the Revolution.[38]" Indeed, many Italian legal scholars talked of a "revolutionary turn[39]" and it was recognised that "no other country with a continental system, including Japan, can compare with the Italian's reform with respect of depth and strength of the reform.[40]"

2.2. The rugged path of the new system: the inquisitorial reaction to the new Code and the amendment of Article 111 of the Constitution.

Despite the mentioned scientific enthusiasm, the practical implementation of the new Code has followed a rugged path:[41] the ambitious relinquishment of the in-

36 R. Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 1996, p. 86.

37 On the accusatorial model from an Italian perspective G. Illuminati, *The Accusatorial Process from the Italian Point of View*, 2010, at 310; M. Panzavolta, *On hearsay and beyond: is the Italian criminal justice system an adversarial system?, in International Journal of Human Rights*, 20, 2016, p. 617.

38 M. Langer, F*rom Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, in S. C. Thaman, *World Plea Bargaining. Consensual Procedures and the Avoidance of the Full Criminal Trial*, Durham, 2010, p. 60. See also E. Amodio – E. Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 1989, p. 1211.

39 G. Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 2005, at 571; M. Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System, in North Carolina Journal of International Law & Commercial Regulation*, 30, 2005, p. 577.

40 C. Li, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, 2008, at 20.

41 M. Fabri, *Theory versus Practice in Italian Criminal Justice Reform, in Judicature*, 77, 1994, p. 211; J. T. Ogg, *Italian Criminal Trials: Lost in Transition? Differing Degrees of Criminal Justice Convergence in Italy and Australia, in International Journal of Comparative and Applied Criminal Justice*, 36, 2012, p. 229.

quisitorial tradition and the introduction of a rather accusatorial system brought about a crisis of rejection. Despite being the fruit of the work of the best professors and the most learned legal experts, the Code aroused distrust in some Italian judges and public prosecutors since the beginning and so some of its provisions in favour of the accused have been distorted by the application of the law.[42]

Indeed, many judges, who were used to the old 1930 system where the judge was the driving force of the adjudication and the defence had limited powers, ill-adapted to the new roles assigned by the reform of the criminal justice system. The same can be said about the interpretation of the new role of public prosecutors.[43] It can be stated that the impact of the practical implementation of the reform was in some way underestimated by the reformers who perhaps did not take into account one of the fundamental rules of the criminal justice system. As the most attentive comparatists remark, using a metaphor taken from music, replacing the musical score is generally not enough if the instruments and the musicians remain the same.[44]

The consequence has thus been that judicial life has been filled with deviating practices, sometimes aimed at not applying some norms, and that judges raised many questions of constitutional legitimacy. The Constitutional Court accepted them:[45] at a time of major attacks by organized crime,[46] the need for an efficient criminal justice

42 See R. Montana, *Adversarialism in Italy: Using the Concept of Legal Culture to Understand Resistance to Legal Modifications and its Consequences, in European Journal of Crime, Criminal Law & Criminal Justice, 20, 2012, p. 99 and Procedural tradition in the Italian Criminal Justice System. The Semi-adversarial Reform in 1989 and the inquisitorial cultural resistance to adversarial principles, in International Journal of Evidence & Proof*, 20(4), 2016, p. 289.

43 Some authors believe that another factor to be taken into consideration would be a political interpretation of their role on the part of many public prosecutors: M. R. Ferrarese, *Penal Judiciary and Politics in Italy, in Global Jurist Topics*, 1, 2001, p. 1535. On the regulations establishing the role of the public prosecutor in Italy: M. Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. Luna & M. Wade, *The Prosecutor in Transnational Perspective*, Oxford, 2011, p. 250; G. Illuminati, *The Role of the Public Prosecutor in the Italian System, in P. TAK, Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen, I, 2004, p. 303; S. Ruggeri, *Investigative and Prosecutorial Discretion in Criminal Matters: The Contribution of the Italian Experience*, in M. Caianiello – J. S. Hodgson, *Discretional Criminal Justice in a Comparative Context*, Durham, 2015, p. 59.

44 M. R. Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments, in American Journal of Comparative Law*, 45, 1997, pp. 839-849.

45 See M. Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005.

46 See E. Creegan – C. J. Hatfield, *Creeping Adversarialism in Counterterrorist States, in Connecticut Journal of International Law.*, 29, 2013, at 22; S. Maffei – I. Merzagora Betsos, *Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country, in European Journal of Criminology*, 4, 2007, pp. 461-471.

arose once more and the tip of the scale shifted again from the "due process model" to the "crime control" model.[47] Hence, a proper counter-reformation was launched: in the name of the principle styled as "non-dissipation of evidence,[48]" the Constitutional Court first and then the legislature dismantled the principle of separation between the preliminary phase and the trial, which was the architrave of the new process.[49]

Paradoxically, the Code that had been created to implement the constitutional principles was dismantled by the Constitutional Court in favour of other constitutional standards.[50]

In order to react to this step back to the past, Parliament amended Art. 111 of the Constitution;[51] reaffirming strongly the principle of adversarial adjudication that formed the basis of the 1988 Code.[52] With this reform, the principles of fair trial

47 Reference is made to the classic distinction proposed by H. L. Packer, *Two Models of the Criminal Process, in University of Pennsylvania Law Review*, 113, 1964, p. 1.

48 Which is "a novel disguised version of the "material truth" principle at the root of Continental criminal justice": E. Amodio, *The accusatorial system lost and regained: reforming criminal procedure in Italy, in American Journal of Comparative Law*, 52, 2004, pp. 489-493.

49 C. Li, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, 2008, at 17; S. P. Frecero, *An Introduction to the New Italian Criminal Procedure, in American Journal of Criminal Law*, 21, 1994, p. 345; E. Grande, Italian *Criminal Justice: Borrowing and Resistance, in American Journal of Comparative Law*, 48, 2000, pp. 227-238; M. Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005; W. T. Pizzi – L. Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 1992; W. T. Pizzi – M. Montagna, *The Battle to Establish an Adversarial Trial System in Italy, in Michigan Journal of International Law*, 25, 2004, p. 429.

50 L. Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. Jackson, M. Langer & P. Tillers, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, Oxford and Portland, 2008, at 85.

51 This evolutional parabola is analysed by E. Amodio, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, at 489; E. Grande, *Italian Criminal Justice: Borrowing and Resistance*, 2000; W.t. Pizzi – M. Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 2004.

52 Art. 111 It. Const. the following paragraphs have been added: "1. The judicial function should be carried out according to the principle of due process of Law. 2. Every trial should be carried on giving the parties the right to offer evidence or counterproof and counterarguments against unfavourable evidence, on equal standing in front of an impartial judge. The Law guarantees the reasonable length of the trial. 3. In the criminal trial the Law guarantees that everyone charged with a criminal offence should be privately informed as soon as possible of the nature and cause of the accusation against him; that the accused should be assured to have adequate time and facilities for the preparation of his defence; that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to have favourable witnesses summoned for being examined at trial on an equal basis with the prosecution, as well the right to produce other evidence in his favour; that the accused have the free assistance of an interpreter if he cannot understand or speak the language used in court. 4. The criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused person's guilt shall not be proved on the basis of statements made by the person who deliberately chose not to be examined by the accused or his lawyer. 5. The Law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by reasons of the accused person's consent or of an objective impossibility or of a proved unlawful conduct".

upheld by Art. 6 of the European Convention of Human Rights (hereinafter referred to as the ECHR) were expressly adopted. In the following years, the CCP underwent other modifications aimed at implementing the said principles and restoring – and, in some respects, improving - its original structure[53].

In particular, Law no. 63 of 2001 strengthened the right to confrontation with the adverse witnesses and limited the application of the right to silence by reducing the incompatibility to witness and by introducing "assisted testimony". After twenty five years of theoretical elaborations that led to the 1988 reform, more than eighty changes have been made to the Code in the following thirty years; one of the last of which is the so-called "Orlando Reform," which modified thirty-nine Articles.

2.3. Some externals factors overlooked in the construction of the Code

The difficulty of implementing, over the years, the project conceived by the reformers is related to different and more profound causes than to the dynamics hitherto described: the reasons, so to speak, are to be found "outside the Code.[54]" In particular, it was the lack of a parallel reform of the Judiciary that hindered the practical and efficient implementation of the values of the accusatorial system. The judge's impartiality and the levelling of roles between defence and prosecution, though fully affirmed and safeguarded by the articles of the Code, were bound to become vulnerable in a system that favoured the same career for the prosecuting authority and the judging authority, where, basically, the public prosecutor and the judge are colleagues, they can, so to speak, exchange their jobs during their professional careers, and most of the time they work in the same offices, thus in close contact with one another.[55] These circumstances are anything but banal, and may mitigate the adversarial approach of the system.[56]

53 E. Amodio, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, at 496; G. Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988),* 2005, at 576; W. T. Pizzi – M. Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 2004, at 460.

54 Clearly, sociological and cultural features of the Italian society also ought to be considered: D. Nelken, *Telling Difference: Of Crime and Criminal Justice in Italy*, in D. Nelken, *Contrasting Criminal Justice: Getting from Here to There*, Aldershot, 2000, p. 233.

55 M. Langer – D. A. Sklansky, *Prosecutors and Democracy: A Cross-National Study*, Cambridge, 2017.

56 On this opinion, see L. Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions, in J. JACKSON, M. LANGER & P. TILLERS, Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, at 95.

Indeed, it is misleading to believe that at the "*boutique*" of foreign law you can purchase only some of the items available in one specific model: any partial and confused import of the original structure may prevent reaching the desired effects.[57]

This is what has occurred with the Italian experience where the system of safeguards with an accusatorial imprint should have been flanked by a mitigation of the principle of compulsory prosecution, which, by nature, sets into motion a large mass of proceedings that can be hardly managed, thus causing an unacceptable delay in the justice system.[58] Moreover, special proceedings, which are necessary to ensure that trials are conducted solely for those cases that do require further analysis, have turned out to be of little attraction to the accused persons who, despite the existence of strong proof of guilt, are tempted to go to trial in the hope that their offence may no longer be prosecutable because of the statute of limitations, which in Italy is conceived in a completely different way compared to the other systems.[59] The limited application of negotiated justice, after all, hinders the effective functioning of the accusatorial model.[60] In addition, the civil party and the system of appellate remedies are residues of the continental tradition (markedly French) which have not excelled in terms of compatibility with the accusatorial choice made.[61] From another perspective, the enthusiasm for the adversarial process has, in some way, brought about a stereotyped vision of the "challenge" between prosecution and defence that resulted in an inadequate consideration of other subjects involved in the management of justice, such as for example the victim,

57 With this view, M. R. Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 1997. See also J. D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence, or Realignment?, in Modern Law Review*, 68, 2005, p. 737, who underlines that legal transplants sometimes do not have the intended effects, citing Italy as an example

58 A wide range comparative analysis is performed by Y. Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective, International Criminal Justice Review*, 12, 2002, pp. 22-40.

59 See N. Boari, *On the Efficiency of Penal Systems; Several Lessons from the Italian Experience, International Review of Law & Economics*, 17, 1997, p. 115. An aspect that ought to be taken into account is also that the criminal Code, as mentioned above, still dates back to 1930: though amply modified and rendered compliant with the Constitution over the years it clearly reflects an approach to criminal justice that does not fully conform to that of the Code of Criminal Procedure of 1988.

60 Similarly, G. Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 2005.

61 These issues can be further studied in the publications that analyse the Italian Code as a whole: V. Cirese – V. Bertucci, T*he New Italian Criminal Procedure for Foreign Jurists*, Rome, 1993; P. Corso, *Italy*, in Chris Van Den Wyngaert, *Criminal Procedure Systems in the European Community*, 1993, p. 223; S. P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 1994; A. Perrodet, *The Italian System*, in M. Delmas-Marty & J. R. Spencer, *European Criminal Procedures*, Cambridge, 2005, p. 348.

who is rather forgotten in the balances of the Code.[62] A critical issue has been the introduction by the legislature of new norms solely for proceedings concerning organized crime: a parallel way of fact-finding and performing investigations has progressively taken shape, with less guarantees and no compliance with the philosophy of 1988.

A last aspect concerns the model of precautionary measures,[63] which, not surprisingly, has undergone continuous modifications over the past decades (the last one in 2018). The system – which was meant to enhance as much as possible the presumption of innocence – has fallen far short of its objectives, due to the excessive slowness of proceedings[64] and the incomplete assimilation of the rule that defines freedom as the ordinary status while awaiting judgment. Almost half of prisoners in Italian jails are accused persons who, often, stay in prison for an unreasonable period of time. Understandably, this circumstance has created an imbalance also in the penitentiary system, becoming the main cause of prison overcrowding, a problem on which the European Court of Human Rights has taken a firm stance.[65]

2.4. Changes deriving from the transposition of European stimuli

As we have seen, during the Nineties and at the beginning of 2000, the Italian system underwent important adjustments due to the inquisitorial counter-reform first, and then due to the reaffirmation of the principles of the accusatorial system in the Constitution. This evolution of the system was flanked by two other important reforms aimed at completing the 1988 reform from an accusatorial viewpoint. The first one was the Law that introduced a well-constructed system of defence investigations (Law 397

62 M. Chiavario, *The Rights of the Defendant and the Victim*, in M. Delmas-Marty & J. R. Spencer, *European Criminal Procedures*, p. 543; L. Lupária, *Reflexiones sobre el estatuto de la victima en el proceso penal italiano, in Revista de Derechos Fundamentales*, 2012, p. 99. For comparative remarks on the status of the victim of crime in the Italian, French and Spanish system see the volume L. Lupária, *Victims and Criminal Justice. European standards and national good practices*, Milano and Padova, 2015.

63 See G. Di Chiara, *Italy,* in S. Ruggeri, *Liberty and Security in Europe. A Comparative Analysis of Pre-trial Precautionary Measures in Criminal Proceedings*, 2012, at 121. On preventive detention, see M. Pelissero, *The Doppio Binario in Italian Criminal Law*, in M. Caianiello & M.L. Corrado, *Preventing Danger. New paradigms in criminal justice*, Durham, 2013, p. 107.

64 More than once Italy has been sanctioned by the European Court of Human Rights. Among the most recent decisions: ECHR, 26 November 2013, *Francesco Quattrone v. Italy*; ECHR, 6 March 2012, *Gagliano Giorgi v. Italy*; ECHR, 16 October 2007, *Capone and Centrella v. Italy*

65 ECHR, 8 January 2013, *Torreggiani and others v. Italy* (the "pilot" judgment condemns Italy for inhuman and degrading treatment in overcrowded jails).

of 2000) and the other was the Law that limited the Public Prosecutor's right to appeal and introduced in the code the beyond-any-reasonable-doubt evidentiary standard (Law 46 of 2006).[66]

Over the past twenty years, other changes have occurred, which have stemmed from two different guiding principles.

The first principle underlies reforms inspired from the concept of "crime control.[67]" Among these reforms it is worth mentioning those deriving from the need to make proceedings more efficient and from the necessity to give an immediate answer to criminal phenomena that were considered alarming. In this framework, the following were introduced: the Justice of the Peace to deal with minor cases (legislative decree 274 of 2000), the single first instance judge with the abolition of the "*pretore*" (Law 479 of 1999), a wider application of plea bargaining (from two to five years of imprisonment) (Law 134 of 2003), a nearly compulsory detention system for more severe offences (decree Law decree 11 of 2009).

The second principle underlying the evolution of the Italian criminal justice system is linked to a new event, that of the increasing integration of the Italian system into the European one, with reference to the so-called "large Europe" (that is the Council of Europe) on one hand, and the so-called "small Europe" (that is the European Union) on the other.

With regard to the former, the Italian system has opened up to the conventional system with a series of decisions by the Constitutional Court[68] which have established that the ECHR norms, as interpreted by the Court in Strasbourg, are superior in rank to ordinary laws because they integrate the constitutional parameter. Therefore, the national criminal justice system has to adjust to the binding indications that come from Strasbourg: national judges are to provide a conventionally-oriented interpretation of national norms[69] and Parliament must adopt the necessary legislative changes

66 See *infra*, § 3.5.

67 See H. L. Packer, *Two Models of the Criminal Process*, 1964.

68 See Corte costituzionale, 22 October 2007, n 348; Corte costituzionale, 24 October 2007, n. 349; Corte costituzionale, 26 November 2009, n. 311; Corte costituzionale, 4 December 2009, n. 317

69 See *infra*, § 3.4.

to adapt the domestic system to the standards set by the European Court. Of the legislative changes worth mentioning is the historic reform with which Italy has removed the proceeding in absentia (Law 67 of 2014): a reform ultimately brought about by decisions holding against Italy in the Sejdovic and Somogyi[70] cases. Secondly, reference must be made to legislative decree no. 159 of 2011, regulating the application of preventive measures in the first instance and in the instances of appellate remedies, which transposed the judgments of the Court of Strasbourg on the right to have a public hearing.[71]

With regard to the restriction of personal liberty, the Italian Parliament responded to the heavy censure contained in the judgment Torreggiani v. Italy by reducing the area of application of precautionary detention in jail, establishing that it can only be adopted in the event of offences that are punishable with a maximum term exceeding five years (and no longer four) (Art. 280, par. 2) and increased the penalty limits within which enforcement of the conviction and use of measures other than detention may be suspended (decree Law 78 of 2013). With regard to the demands made by the "small Europe", reference must be made to the changes stemming from the implementation of European Union directives. In 2014, the Italian Government adopted at least two reforms with this aim: legislative decree no. 32, aimed at implementing "the First EU Fair trial Law,[72]" that is Directive 2010/64/EU, of 27 October 2010, and decree no. 101, aimed at implementing Directive 2012/13/EU, of 22 May 2012.[73] The need to transpose the euro-unitary law has been met by taking various actions which have strengthened, over the past few years, the position of the victim of the offence. The Italian legislator has excluded that the victim may take on the status of party in the proceedings, but he has progressively recognized the victim a wider set of rights, such as the right to information, assistance and participation.[74]

70 See *infra*, § 3.3

71 ECHR, 13 November 2007, *Bocellari and Rizza* v. Italy; ECHR, 8 July 2008, *Perre v. Italy*; ECHR, 5 January 2010, *Bongiorno v. Italy*; ECHR, 2 February 2010, *Leone v. Italy*; ECHR, 17 May 2011, *Capitani and Campanella v. Italy*.

72 See S. Ludford, *European Parliament, debate*, 14 June 2010.

73 See *infra*, § 3.3.

74 See *infra*, § 3.3

3. A reading guide to the current Italian criminal justice system

3.1. The subjects of the criminal proceedings

The Italian Code has a clear structure. It is divided into two parts: the "static" one and the "dynamic" one. The first part (Books I, II, III, IV) deals with those aspects of the criminal process that could be considered "independent" from the actual procedure and sets out "functional" notions and elements to the procedure itself. The second part (Books V, VI, VII, VIII, IX, X, XI) regulates the development of the proceedings through the different stages. It may be convenient to start the analysis from the first book of the Code, which sets out who the subjects of the criminal process are. This book has introduced some important new elements compared to the past version.

With reference to the public subjects involved in the process, the Code has adopted the principle of making a clear distinction between the functions of the prosecution and those of the judges.[75] To this end, the Code has first and foremost eliminated one of the most negative symbols of the inquisitorial model, that is the investigating judge (*giudice istruttore*). An ambiguous figure who was, at the same time, both a judge and an investigator: he had wide decision-making and investigative powers and had to provide evidence in order to discover the "Truth*"* (Article 299 of the 1930 CCP).

In the preliminary phase, the functions of guarantee are assigned to a new type of judge, the "preliminary investigation judge" (*giudice per le indagini preliminari*), who only intervenes when the law provides for it, i.e., essentially in three cases: firstly, to adopt measures restricting a person's fundamental rights (precautionary detention, house arrest, prohibition to leave the country, obligation to appear before the criminal police, interception of communications, etc.) (Arts. 267, 279); secondly, to impartially verify if the Public Prosecutor acted in compliance with investigation deadlines and with the mandatory nature of the prosecution (Art. 408); finally, in the exceptional cases where evidence must be collected immediately in the special evidentiary hearing – e.g. testimony of a dying person (Art. 392). In all these cases the preliminary investigation judge only intervenes when one of the parties – generally the Public Prosecutor

75 See E. Amodio, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, p. 490; G. Illuminati, *The Accusatorial Process from the Italian Point of View*, 2010, p. 311.

– requests it and makes a decision on the basis of the information given by the parties, because he has no dossier of his own. One can easily note that, in this way, the legislator has willingly created a powerless figure, an "unarmed judge" without file – a judge whose role has been outlined to be substantially different from that of the investigating judge. Secondly, the Code has transformed the role of the Public Prosecutor in the process. The inquisitorial tradition of the Public Prosecutor being a neutral quasi-judicial figure with wide decision-making powers on personal liberty has been relinquished; he is now conceived as a party in the proceedings, who is responsible for the investigation (Article 326) and for the prosecution (Articles 50, 405).[76]

The Code gives the Public Prosecutor an active role as a leader of preliminary investigations. Firstly, the Italian Public Prosecutor can actively search information relating to the offence (notitiae criminis), and not just passively receive information provided by the police (Art. 330). Secondly, when he finds or receives a report of a criminal offence, he leads the investigations and directs the criminal police (Art. 327).

Upon conclusion of investigations, the Public Prosecutor continues to be bound by the compulsory prosecution principle (Art. 112 of Italian Constitution).[77] The rule whereby the Public Prosecutor is obliged to exercise criminal action if investigations lead to believe that a criminal act has been committed is aimed at preventing any opportunistic assessment on the part of the Public Prosecutor: on conclusion of the investigations, he must only express a fact- and law-based judgment, which appears to be similar to what is expressed by the judge. During investigations, however, the Public Prosecutor exercises wide discretionary powers. Firstly, with regard to the development of investigations, he may decide to perform certain investigations and not other, whenever there are reasoned functional needs. Secondly, with the new Code, compulsory prosecution takes place at the end of investigations.

Therefore, there is no automatic consequential connection between the notitia criminis and the proceedings: Art. 125 of the Provisions for the implementation of

76 See A. Perrodet, *The Italian System*, in M. Delmas-Marty & J. R. Spencer, *European Criminal Procedures*, p. 361.

77 See A. Di Amato, *Criminal Law in Italy, Alphen aan den Rijn*, 2011, p. 33; S. Ruggeri, *Investigative and Prosecutorial Discretion in Criminal Matters: The Contribution of the Italian Experience*, in M. Caianiello – J. S. Hodgson, *Discretional Criminal Justice in a Comparative Context*, 2015, p. 59.

the CCP, in fact, establishes that the Public Prosecutor must not exercise his power of prosecution when "the pieces of evidence gathered during preliminary investigations are not suitable to uphold the accusation at the trial stage." However, the most delicate issue concerns the fact that, in light of the over-criminalisation of the Italian system, the Public Prosecutor cannot initiate investigations – and then exercise the power of prosecution – *for every notitia criminis.*[78] He is clearly obliged to make some choices and give priority to some notitiae criminis over others:[79] in the Italian system it all generally depends on the individual choices made by each Public Prosecutor. Some pilot experiences have shown that the Public Prosecutor of the Republic has adopted some guidelines in order to guarantee uniformity in the choices made by the office's prosecutors. But these guidelines are not expression of criminal policy options, because they are not adopted by bodies that have a political mandate. This structure thus translates into a situation where compulsory prosecution "is little more than a dogma" and Public Prosecutors "exercise discretion without any checks and balances at a hierarchical or political level.[80]"

3.2. The criminal police as the operative right-hand support of the Public Prosecutor

Under the old Code, there was a very feeble link between the Public Prosecutor and the criminal police. Consequently, in 1988, to give effect to Art. 109 of the Italian Constitution,[81] the new Code completely modified the relationship between these subjects.[82]

In terms of personnel relations, criminal police officers and officials report to

78 It has been observed that the Public Prosecutor finds himself in a condition where he is unable to deal with all the notitiae criminis: M. Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. Luna & M. Wade, *The Prosecutor in Transnational Perspective*, p. 256.

79 On the prosecutors' role as gatekeeper of the criminal justice system, see R. Montana, P*rosecutors and the definition of the crime problem in Italy: balancing the impact of moral panics', in Criminal Law Forum*, 20, 2009, pp. 471-477.

80 Literally, L. Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. Jackson, M. Langer & P. Tillers, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška,* 2008, at 95. See also M. Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. Luna & M. Wade, The *Prosecutor in Transnational Perspective*, at 261.

81 According to it, "*the judicial authority directly commands the criminal police*".

82 See R. Montana, *Paradigms of Judicial Supervision and Coordination between Police and Prosecutors: the Italian Case in a Comparative Perspective, in European Journal of Crime, Criminal Law & Criminal Justice*, 17, 2009, p. 309.

the criminal police corps they belong to, and, ultimately, to the competent Ministry (e.g., the Ministry of Home Affairs for the State Police; the Ministry of Defence for the *Carabinieri*); but the Code has strengthened the functional dependence of criminal police upon Prosecutors. In particular, the Italian Code has created criminal police departments established at each Office of the Public Prosecutor of the Republic (Art. 58 CCP) and made up of personnel coming from the various law enforcement corps (*Polizia di Stato, Carabinieri, Guardia di Finanza, Corpo Forestale dello Stato*). The members of these departments are police officers, who can only play a criminal investigation activity and the Public Prosecutor can command them (Art. 59 CCP). In this way, a very close relationship is created between Public Prosecutors and policemen[83].

The CCP has strengthened functional dependence also from a dynamic point of view: it establishes that the criminal police must transmit to the Public Prosecutor any notitiae criminis "within forty-eight hours" by means of a simple information note (Art. 347). The goal of such rule was indeed to reduce the investigative autonomy that the 1930 Code granted to the police. In the past, the law allowed the police to investigate on their own initiative and to transmit the report of the criminal offence only at the end of their inquiry by means of a detailed report with the results of the investigation.

The new Code establishes a very strict time limit expressly to allow the Public Prosecutor to immediately access the core of the investigations.

It should be said that such a provision was modified in 1992 by a decree-law that was adopted only a couple of days after the murder of Giovanni Falcone: the peremptory time limit of forty-eight hours was substituted by a softer "without delay.[84]" This means that the timeliness of such transmission will depend on its context: the delay will be generally short in case of serious offences – Art. 347 (3) CCP establishes that extremely serious offences require an immediate communication, even by phone or face-to-face – or when the police perform acts requiring the support of a defendant's

83 M. Caianiello – Giulio Illuminati, *The Investigative Stage of the Criminal Process in Italy*, in E. Cape, J. Hodgson, T. Prakken & T. Spronken, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerpen – Oxford, 2007, p. 134.

84 See L. Luparia, *La police judiciaire dans les procès pénal italien: questions anciennes et scenario inedits, in Archives de Politique Criminelle*, 2011, p. 165.

lawyer (in which case the time limit of forty-eight hours still applies, as per Art. 347 (2-bis) CCP). The delay will be longer for misdemeanours requiring standard investigations. In this case, the intervention of the Public Prosecutor is postponed and the police are more autonomous.

3.3. Private parties

With regard to the private parties, it may be more convenient to start the analysis from the accused. In compliance with the separation of the phases of the criminal process, the Italian Code clearly distinguishes between two statuses: during preliminary investigations, the subject who is suspected of having committed a crime is referred to as the "person undergoing investigations" (suspect) and his name is entered in the register referred to in Art. 335 (Register of notitiae criminis). Only after criminal prosecution is performed, that is when the trial phase begins, does the suspect become the accused (Art. 60). With regard to the accused, the Code translates some fundamental rights recognised by the Constitution and International Charters into accurate provisions.[85]

The most important one is surely the right to defence, which acquires a twofold value.

On the one hand, it corresponds to the right to the assistance of a lawyer, who may be either retained (Art. 96), or appointed or appointed by the court: if no lawyer is chosen by the accused, a lawyer must be appointed by the proceeding authority (Art. 97). Contrary to reference models, the Code has thus confirmed the choice of compulsory technical defence as a form of objective guarantee.[86] During investigations, the suspect has the right of access to a lawyer who must be informed in advance of any que-

85 M. Caianiello – Giulio Illuminati, *The Investigative Stage of the Criminal Process in Italy*, in E. Cape – J. Hodgson T. Prakken & T. Spronken, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, 2007, at 138.

86 M. Caianiello, *Italy*, in E. Cape – Z. Namoradze – R. Smith – T. Spronken, *Effective Criminal Defence in Europe, Antwerp* Oxford – Portland, 2010, p. 395.

stioning, inspection, identification of persons and line-up (Art. 364),[87] non-repeatable technical ascertainment (Art. 360); the lawyer may be present without notice during criminal police searches, upon the immediate opening of the envelope authorized by the Public Prosecutor under Art. 353, par. 2, in the event of urgent checks on the scene or of objects and persons (Art. 356), as well as in case of searches or seizures carried out by the Public Prosecutor (Art. 365).

On the other hand, the right to defence corresponds to the right to silence of the accused. This is a cornerstone principle of the Italian criminal process system. It is expressly recognised by Art. 64, par. 2, let. b, which obliges the authority to inform the accused of his right to remain silent before commencing the interview.[88] But he is also given an anticipated safeguard through the norm on incriminating statements, whereby "if a person who is not accused or suspected makes statements before the judicial authority or the criminal police that raise suspicion of guilt against him, the proceeding authority shall interrupt the examination, warn him that, following such statements, investigations may be carried out on him, and advise him to appoint a lawyer. Such statements shall not be used against the person who has made them" (Art. 63). Moreover, if the person should have been heard from the beginning as the accused or suspected person, his statements shall not be used, even against third persons.

In addition, it must be highlighted that the Italian Code has erected a barrier against the police using the pretext of "informational interviews" to circumvent the necessity of advising a suspect of the right to counsel and the right to remain silent: Art. 350, par. 7 of Italian CCP makes even spontaneous statements to the police in the absence of counsel inadmissible in court.

Furthermore, the right to silence cannot be sacrificed for the repression of crimes. In fact, an authoritative doctrine has recognized that "the Italian Code of Cri-

87 Reference to the identification of persons was introduced in Italy with legislative decree no. 101 of 15th September 2016, implementing Directive 2013/48/EU, of 22 October 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. On the Directive, L.B. Winter, *The EU Directive on the Right to Access to a Lawyer: A Critical Assessment, in S. RUGGERI, Human Rights in European Criminal Law*, Heidelberg, 2015, p. 111.

88 M. Caianiello – Giulio Illuminati, *The Investigative Stage of the Criminal Process in Italy*, in E. Cape – J. Hodgson T. Prakken & T. Spronken, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, 2007, at 139.

minal Procedure of 1988 contains the most radical protections for criminal suspects when confronted with interrogation, whether by police, public prosecutors or judicial authorities.[89]"

Nonetheless, the right of the accused to take part participate in the proceedings has not always been safeguarded effectively by the CCP, though expressly established in Art. 14, par. 3, let. d, International Convention on Civil and Political Rights and the Strasbourg laws.[90] Until the reform adopted in 2014, at the beginning of the preliminary hearing, in case of absence of the accused person, the judge had to ensure that notifications were made correctly: if this were the case and the accused was absent for causes other than a legal impediment, the judge had to declare the accused "absent by default" and proceedings against him continued even though he was not physically present.

In brief, it was presumed that by merely providing a regular notification the accused – even if he could not be found – was aware of the existence of the proceedings.

To make up for the practical possibility – consciously accepted by the system – that subjects convicted in absentia could be actually unaware of the proceedings, the Parliament introduced the subsequent remedy in article 175, par. 2, which granted a new time limit to appeal against the judgment issued in absentia. According to this mechanism, the accused person was not entitled to a new trial, but to a judgment in second instance, where he could ask for new evidence to be gathered. This system was condemned copiously by the European Court of Human Right over time, and needed a radical reform.[91]

By passing Law no. 67 in 2014 the legislator eliminated the historic concept of absentia. The new norms established that the service of the summons be provided in person, because it was a better way of ensuring that the accused was aware of the

89 S. C. Thaman, *Contributing Authors: Miranda in Comparative Law, in Saint Louis Law Journal*, 45, 2001, p. 592.

90 See D. Harris – M. O'boyle – E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, Oxford, 2009, p. 247; S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, 2007, at 66; S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, at 252; P. Van Dijk – F. Van Hoof – A. Van Rijn & Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, Antwerp – Oxford, 2006, p. 589.

91 ECHR, 12 Juny 2007, *Pititto v. Italy*; ECHR, 8 February 2007, *Kollcaku v. Italy*; ECHR, 1 March 2006, *Sejdovic v. Italy*; ECHR, 28 September 2006, *Hu v. Italy*; ECHR, 21 December 2006, *Zunic v. Italy*; ECHR, 18 May 2004, *Somogyi v. Italy*.

proceedings (Art. 420-bis, par. 2).

The new rule divided the old "*absentia*" into two different institutions: on the one hand, in the cases where the summons is delivered in person to the addressee or another symptomatic fact confirms that the accused is aware of the proceedings, the latter continues against the accused who is declared absent (Art. 420-bis); on the other hand, in the cases where there are no elements that allow to presume that the accused is aware of the proceeding and that he cannot be found, the proceedings is suspended (Art. 420-quater). Despite the new rule, however, proceedings may nonetheless be carried out against a subject who is actually unaware of the proceedings: in this case the legislator has introduced remedies that entail the regression of the proceeding to the first instance and readmission of the accused person's rights in that phase.

For example, the new Art. 420-bis, par. 4, establishes that the order to proceed has to be revoked – even *ex officio* – when the accused appears before the decision is delivered. Moreover, in the cases where the accused demonstrates his guiltless unawareness of the proceedings, he regains important rights in the proceedings – after the hearing has been adjourned. Similarly, arts. 604 and 623, par. 1, set forth similar measures in the stages of the appeal or cassation trial. Finally, the Parliament has introduced the new extraordinary appellate remedy of the rescission of the final judgment available against final judgments of conviction (or dismissal with which a security measure has been applied) (Art. 625-ter, now, after Law no. 103 of 2017, Art. 629-bis).

With reference to the various rights to information recognised to the accused by the Directive 2012/13/EU, of 22 May 2012,[92] the Government has adopted legislative decree no. 101 of 1 July 2014, which, however, has not innovated substantially the pre-existing system, becoming a lost occasion for the implementation of obligations towards Europe. The new rule mainly establishes that the officer in charge of enforcing the order directing precautionary detention (Art. 293) or a precautionary measure (Art. 386) hands to the accused a copy of the decision together with a written notification –

92 G.L. Candito, *The Influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures, in S. RUGGERI, Human rights in European Criminal Law*, 2015, p. 231; S. Cras – Luca De Matteis, *The Directive on the Right to Information. Genesis and Short Description*, in EUCRIM, 2013 (1), p. 22; S. Quattrocolo, *The Right to Information in EU Legislation*, in S. Ruggeri, *Human Rights in European Criminal Law*, 2015, p. 84.

translated into a language he understands if he is not Italian mother tongue –, which informs the accused of his main prerogatives in the proceedings.

Consequently, with reference to the right to information, it must be pointed out that still today the CCP has a particularly complex set of rules.

Firstly, various letters of rights are to be sent as provided for in Art. 369 (Notice of investigation), Art. 369-bis (Notice to the suspect about his right of defence) and Art. 415-bis (Notice to the suspect on the conclusion of preliminary investigations).[93] Secondly, the Code establishes that these notices, the suspect's request as per Art. 335, par. 3, and the summons to the examination (Art. 375, par. 3) must include a summary description of the offence being prosecuted.

Thirdly, the Code recognises the right of access to the materials of the case: with regard to precautionary measures, the rule established in Art. 293 CCP stands out, and in particular, the obligation to file with the Clerk's Office the order directing the precautionary measure together with the request of the Public Prosecutor and the enclosed documents. In the framework of preliminary investigations and notwithstanding the adoption of provisions affecting the liberty of the subject concerned, the discovery referred to in Art. 415-bis, par. 2 plays an utterly significant part. With regard to the safeguards set out in Directive 2010/64/EU, of 20 October 2010, on the right to interpretation and translation in criminal proceedings,[94] Art. 143 CCP has been modified by legislative decree n. 32 del 2014. On the one side, the new paragraph 1 expressly recognises the right to having an interpreter during the trial, in the preliminary phase and – for the first time in Italian history – during the communication between suspected or accused persons and their legal counsel. On the other side, Art. 143, par. 3 recognises the right to the translation of the significant documents: among them are

93 M. Caianiello, Italy, In E. Cape – Z. Namoradze – R. Smith & T. Spronken, *Effective Criminal Defence in Europe*, 2010, p. 390.

94 J. Brannan, *Raising the Standard of Language Assistance in Criminal Proceedings: From the Rights under Article 6(3) ECHR to Directive 2010/64/EU, in Cyprus Human Rights Law Review,* 1, 2012, p. 128; S. Cras – L. De Matteis, *The Directive on the Right to Interpretation and Translation in Criminal Proceedings. Genesis and Description*, in EUCRIM, 2010(4), p. 153; S. Monjean-Decaudin, *L'Union européenne consacre le droit à l'assistance linguistique dans les procédures pénales. Commentaire de la Directive relative aux droits à l'interprétation et à la traduction dans les procédures pénales, in Revue Trimestrielle de Droit. Europeen*, 2011, p. 763; C. Morgan, *The new European Directive on the rights to interpretation and translation in criminal proceedings*, in S. Braun & J. Taylor, *Videoconference and Remote Interpreting in Criminal Proceedings*, Antwerp-Oxford, 2011, p. 5; T. Rafaraci, *The Right of Defence in EU Judicial Cooperation in Criminal Matters*, in S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings, Berlin-Heidelberg*, 2013, p. 336.

the notice of investigation (Art. 369), the notice to the suspect about his right of defence (Art. 369-bis), the decision directing personal precautionary measures (Arts. 280-290), the notice to the suspect on the conclusion of preliminary investigations (Art. 415-bis), the decree ordering preliminary hearings (Art. 418) and the decree for direct summons for trial (Art. 552), the judgment and the decree of conviction (Art. 460).

Notwithstanding the new norms, the main problem of the Italian system is whether the linguistic assistance provided is effective, as it is often assigned to subjects who lack any form of qualification:[95] the reform did not solve this problem. In an attempt to overcome the criticism raised by the doctrine, the Government passed a second legislative decree in 2016, no. 120, to implement Directive no. 64 and create a national list of interpreters and translators to be made available to all judicial authorities (Art. 67-bis of the Provision for the implementation of the CCP).

The issue of language assistance to the victim was sorted with the adoption of Directive 2012/29/EU, of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.[96] The right to interpretation and translation for the person affected by the offence was recognised through legislative decree 212 in 2015 which added a new provision in Article 143-bis CCP: language assistance must be provided for the translation into Italian of any document that is written in a foreign language or when the person who has to make a statement (for example the witness) does not know the Italian language.

As for the victim, the Code has confirmed the traditional distinction between the person who has suffered the crime (victim) and the person who suffers harm as a result of the offence (injured person). Such distinction has led to underestimating the

95 M. Caianiello, Italy, In E. Cape, Z. Namoradze, R. Smith & T. Spronken, *Effective Criminal Defence in Europe*, 2010, pp. 411-412; Impli, *Improving Police and Legal Interpreting* (2011-2012). Final Report, 2012, p. 90.

96 See S. Allegrezza, *Victim's Statute within Directive* 2012/29/EU, in L. Lupária, *Victims and Criminal Justice*, 2015, p. 5; S.r. Buczma, *An overview of the Law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union, in ERA Forum*, 2013, p. 1. About the impact of the Directive on the Italian legal system, see G. Alvaro - A. D'andrea, *The impact of Directive 2012/29/EU on the Italian System of Protecting Victims of Crime in Criminal Proceedings, in S. RUGGERI, Human Rights in European Criminal Law*, 2015, p. 307.

victim's stance,[97] which has instead been enhanced from the year 2000 onwards particularly at the European level.[98] The victim's rights to information were remarkably strengthened with the adoption of Directive 2012/29/EU whereby the victim is to receive general information regarding his rights (Art. 90-bis) and specific information when the person remanded in custody, prosecuted or sentenced for criminal offences affecting the victim is released from or has escaped detention (Art. 90-ter). For the first time, the status of victim with specific protection needs during criminal proceedings was introduced.

This status is assessed by taking into account the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime (Art. 90-quater) – in line with article 22 of Directive 2012/29/EU.

The norms regarding the victim play an important role particularly during preliminary investigations: the Code recognizes to the victim the right to information (Arts. 90-bis, 90-ter, 299, 335, par. 3, 360, 369, 406, par. 3, 408, par. 2, 415-bis, 419), rights of participation, which translate into control powers over the non prosecution of the Public Prosecutor (Arts. 406, par. 3, 408, par. 2, 413),[99] as well as the right to urge the Public Prosecutor (Arts. 90, 394, 572) and, finally, rights of protection - particularly for victims with specific protection needs (Art. 90-quater)[100] - which correspond to measures of protection during the criminal trial (Arts. 282-bis, 282-ter) and measures of protection from the trial (Arts. 190-bis, 351, par. 1-ter, 362, par. 1-bis, 392, par. 1-bis, 398, par. 5-bis, 5-ter, 5-quater, 472, par. 3-*bis*, 498, par. 4-quater). The 2015 reform did fill some gaps in the safeguard of victims, but did not deal with a major problem that persists in the Italian system: the victim may not acquire the status of

97 See G. Todaro, *The Italian System for the Protection of Victims of Crime: Analysis and Prospects*, in L. Lupária, *Victims and Criminal Justice. European standards and national good practices*, 2015, at 101: "*with eyes focused on the guarantees to be granted to the defendant – whereby to overcome the inquisitorial drifts of the old system – very little attention has been dedicated to the injured party, in fact relegated to the margins*".

98 D. Atkinson, *Eu Law in Criminal Practice*, Oxford, 2013, p. 137; R. Letscher – C. Rijken, *Rights of Victims of Crime: Tensions between an Integrated Approach and a Limited Legal Basis for Harmonisation, in New Journal of European Criminal Law*, 4, 2013, p. 226; S. Peers, *EU Justice and Home Affairs Law*, Oxford, 2011, p. 744.

99 See A. Novokmet, *The Right of a Victim to a Review of a Decision not to Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of its Transposition in Germany, Italy, France and Croatia, in Utrecht Law Review*, 12, 2016, p. 95.

100 See, before legislative decree no. 212 of 2015, H. Belluta, *Protection of Particularly Vulnerable Victims in the Italian Criminal Process*, L. Lupária, *Victims and Criminal Justice. European standards and national good practices*, 2015, p. 251.

party in the proceedings and therefore does not have the right to evidence. If the victim wishes to play an active role in proceedings he must join proceedings as a civil party (Arts. 75 *et seq.*).[101]

3.4. Law of evidence: fundamental principles

Evidence has been one of the issues which the reform of the Italian criminal justice system has tackled with more effectiveness. Systematically, it is worth noting that the Code dedicates an entire book on evidence – the third Book – which represents an actual microsystem that has no precedent in the codifications of the European continent.[102] Book III sets out rules on evidence from a static perspective and is divided into three Titles, respectively dealing with the general principles (Arts. 187-193), the single means of evidence (Testimony, Examination of the parties, Confrontation, Formal Identification, Judicial Simulation, Expert Evidence, Documentary Evidence: Arts. 194-243) and the means for obtaining evidence (Inspections, Searches, Seizures, Interceptions: Arts. 244-271).[103] From a dynamic perspective, the norms of Book III ought to be integrated with those contained in Book V which concerns the phase of obtaining elements of evidence (Preliminary Investigations), the possible gathering of evidence that cannot be postponed in the framework of the Special evidentiary hearing (Arts. 392-404) and the possible gathering of evidence in the preliminary hearing (Arts. 421-422). With regard to the actual phase of evidence gathering at trial, the norms are outlined in Book VII (Trial). In this paper, it is worth mentioning some of the most innovative choices made by the Code with regard to three profiles: firstly, the distribution of evidentiary powers; secondly, evidence gathering at trial and, finally, standard of proof.

With reference to the first profile, it is worth mentioning that – unlike the former criminal procedure model – the Code entrusts the parties with evidentiary

101 See A. Di Amato, *Criminal Law in Italy*, 2011, p. 195; W. T. Pizzi – L. Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 1992, at 14.

102 E. Amodio, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, at 491.

103 A. Perrodet, *The Italian System*, in M. Delmas-Marty & J. R. Spencer, *European Criminal Procedures*, 2005, at 377; F. Ruggieri – S. Marcolini, *Italy*, in K. Ligeti, *Toward a Prosecutor for the European Union, Oxford and Portland*, I, 2012, p. 370.

power,[104] in all the stages of the fact-finding process. With regard to the search for sources of evidence, the Italian system recognises to the public and private parties wide investigative powers. Specifically, the Public Prosecutor has the power-duty to perform preliminary investigations with the criminal police. The suspect's and victim's lawyers have the power to perform defence investigations (Art. 327-bis): Title VI-bis of Book V governs the defence investigations that are aimed at finding sources of evidence to be taken to trial or to be directly used as evidence in special proceedings.

With regard to the phase of admission of evidence, Article 190 states that "evidence shall be admitted upon request of a party. The judge shall decide without delay by issuing an order, excluding any evidence that is not allowed by law or manifestly superfluous or irrelevant".

Finally, with regard to the gathering of evidence, the Italian CCP has introduced the tool of cross examination and governs the various stages of the gathering of oral evidence (Arts. 498-499). Nonetheless, the Italian trial is not entirely party-controlled: there are some significant departures from a purely adversarial approach to fact-finding.[105]

The Code also includes some cases in which evidence gathering is performed on the initiative of the judge (i.e., Art. 195, par. 3; Art. 224), among which the most prominent hypothesis is that of Art. 507, which reads "upon completion of the gathering of evidence, the judge may order, also ex officio, the admission of new means of evidence, if absolutely necessary". It is a controversial and criticized norm,[106] which was firstly ideologically interpreted[107] and, more recently, it has been pragmatically viewed as a tool to guarantee the completeness of criminal ascertainments.[108] The second funda-

104 E. Grande, *Italian Criminal Justice: Borrowing and Resistance*, 2000, at 244; W. T. Pizzi – M. Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 2004, at 435.

105 E. Grande, *Italian Criminal Justice: Borrowing and Resistance*, 2000, at 245; J. Herrmann, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective, in Saint Louis-Warsaw Transatlantic Law Journal*, 1996, pp. 127-137.

106 M. Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law*, 2005, at 605.

107 Corte costituzionale, 26 March 1993, n. 111 (an English version is published in S. C. Thaman, *Comparative Criminal Procedure. A casebook approach*, 2008, p. 180). See also Corte di Cassazione, Sez. Un., 6 November 1992, Martin, in Cassazione penale, 1993, p. 280. See also L. Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. Jackson – M. Langer & P. Tillers, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, at 92-93

108 Corte di Cassazione, Sez. Un., 17 October 2006, Greco, in *Cassazione penale*, 2007, p. 952.

mental principle underlying the Italian evidentiary system is the golden rule – sculpted in Art. 111, par. 4, Const. – which sets forth that, in criminal cases, "evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence". In addition, the reformed Art. 111 of the Italian Constitution establishes a confrontation clause:[109] on the one hand, paragraph 3 copies down the rule contained in Art. 6, par. 3, let. d, E.C.H.R. and recognises that the person charged with a criminal offence has the possibility, before the judge, to examine or to have examined the witnesses against him; on the other hand, paragraph 4 clearly sets out that "the accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer".

These constitutional principles are implemented by different norms of the Code. Of primary importance is the exclusionary rule outlined in Art. 526, which established that "for the purposes of deliberation, the judge shall not use evidence other than that lawfully gathered during the trial". This rule, thus, leads to understand that out-of-court statements may not be used as substantive evidence, for the truth of the matter asserted. The prior statement of a possible future witness may be invoked only to challenge the witness's credibility (Art. 500, par. 2).

In order to ensure that the trial judge approaches the case as a tabula rasa and to create a solid barrier between investigations and trial, the Italian Code established a "double dossier-system.[110]" On conclusion of a preliminary hearing with a committal to trial, two dossiers are created. On one hand, the trial dossier is formed (Art. 431) which includes all the documents the trial judge may have knowledge of, i.e., those documents the trial judge may read and use as proper grounds for the decision. This dossier contains only the documents that are strictly provided for by Art. 431: it is mainly evidence which is ab origine impossible to reproduce in court (let. b-c: i.e., interceptions of communication; searches; seizures; crime scene analysis provided for by Art. 354; non-repeatable technical ascertainments provided for by Art. 354); the

109 S. Maffei, *The Right to Confrontation in Europe. Absent, Anonymous and Vulnerable Witnesses*, Groningen, 2012.

110 E. Grande, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure, in Global Jurist*, 9, 2009, p. 10; G. Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 2005, at 572; M. Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005, at 586.

minutes of the evidence gathered during the special evidentiary hearing (let. e:); evidence gathered abroad (let. d and f); the general certificate of the criminal record of the accused (let. g); the corpus delicti (let. h). On the other hand, the investigative dossier is created (Art. 433), which contains all the documents referring to actions carried out during the preliminary phase that are not filed in the first dossier.

The judge does not have access to the investigative dossier and the parties cannot take the initiative of reading at trial any prior statements or other investigative records included in this dossier (Art. 514).

The basic rule whereby the judge shall not use evidence other than that lawfully gathered during the trial has some exceptions which can be found in Art. 111, par. 5, Const. and regard the consent of the accused, an objective impossibility to gather evidence during the trial or a proved unlawful conduct. The Code provides for an accurate implementation of this hypothesis.

A first hypothesis forming an exception to the principle of adversarial adjudication is that in which the accused gives his consent to using the out-of-court statement as substantive evidence. This exception to the hearsay rule is clearly found in the Code which establishes that "the parties may agree to gather in the trial dossier documents contained in the investigative dossier, as well as the records of defence investigative activities" (Art. 431, par. 2); secondly, Art. 500, par. 7 sets out that "upon agreement of the parties, the statements contained in the investigative dossier that had been previously made by the witness shall be included in the trial dossier" and, therefore, shall be used as proper ground for decision.

The second exception to the principle of adversarial adjudication coincides with the objective impossibility to gather evidence at trial. If this impossibility is caused by the evidence itself (as in the case of interceptions), as already mentioned, the report will be included in the trial dossier right from the beginning (Art. 431, let. b-c) and may be read in line with Art. 511. If, however, the impossibility to gather evidence is due to unforeseeable circumstances (for example the witness suddenly dies because of a car accident), Art. 512 establishes that the out-of-court statement may be read and that it may be used as substantive evidence. According to a conventionally oriented

interpretation[111], the Supreme Court of Cassation has specified that the untested declaration cannot constitute the sole or decisive evidence against the accused[112]: it must be corroborated by other evidence.

If the impossibility to gather evidence at trial is not related to the evidence but it was equally foreseeable (e.g., because the witness was terminally ill), the testimony shall be taken, from the beginning, in the special evidentiary hearing and the report shall be included, from the beginning, in the trial dossier (ex Art. 431, let. e).
The third exception to the principle of adversarial adjudication is related to a proved unlawful conduct by a third against the witness (e.g., the witness was threatened). Art. 500, par. 4, in this respect, establishes that "if, also on the basis of the circumstances emerged at the trial, there are concrete elements to believe that the witness has been subject to violence, threat, an offer or promise of money or other benefits to prevent him from testifying or to force him to give a false testimony, the statements contained in the investigative dossier that had been previously made by the witness shall be included in the trial dossier."

In any case, whether evidence has been taken during the trial or, in the above mentioned case, it is an out-of-court statement, it must be lawfully gathered. It is worth noting that the Italian Code of Criminal Procedure has introduced what appears to be "an ironclad exclusionary rule:[113]" Art. 191 establishes that "evidence gathered in violation of the prohibitions set by law shall not be used". Surely, the norm has not been interpreted extensively – the Supreme Court has rejected the doctrine known as the "fruit of the poisonous tree" with regard to the relation between illegally performed search and evidence subsequently seized[114] –, but, still, it is one of the most important innovations of the Italian evidentiary system which aims at guaranteeing the principle of legality in evidence gathering.

111 See ECHR, 18 May 2010, *Ogaristi v. Italy*; ECHR, 8 February 2007, *Kollcaku v. Italy*; ECHR, 19 October 2006, *Majadallah v. Italy*; ECHR, 5 December 2002, *Craxi v. Italy*; ECHR, 27 February 2001, *Lucà v. Italy*; ECHR, 14 December 1999, *A.M. v. Italy*; ECHR, 7 August 1996, *Ferrantelli and Santangelo v. Italy*.

112 Corte di Cassazione, Sez. Un., 14 July 2011, n. 27918.

113 See S. C. Thaman, *Contributing Authors: Miranda in Comparative Law*, 2001, at 604; S. C. Thaman, "*Fruits of the Poisonous Tree" in Comparative Law*, 2010, at 375.

114 See Corte di Cassazione, Sez. Un., 27 March 1996, Sala, in *Cassazione Penale*, 1996, p. 3268. See C. M. Bradley, *Symposium on the Fortieth Anniversary of Mapp v. Ohio: Mapp Goes Abroad, in Case Western Reserve Law Review*, 52, 2001, pp. 375-393.

3.5. The introduction of the standard of "Proof Beyond a Reasonable Doubt"

The last highly innovative profile of the evidentiary system introduced in the Italian Code of Criminal Procedure concerns standards of proof. In 1988, the CCP adopted some standards for the application of precautionary measures (Art. 273: "serious indications of guilt"), the authorization to interceptions (Art. 267: "serious indications for suspecting that an offence has been committed"), the committal to trial (Art. 425: "suitability of the evidence to sustain the prosecution before the trial judge").

With regard to the final decision, the CCP instead has solely eliminated the acquittal for insufficient evidence, which was inherited from the inquisitorial system based on the presumption of guilt. The Code only established that "the judge shall deliver a judgment of acquittal also in case of insufficient, contradictory or lacking proof that the criminal act occurred, the accused committed it, the act is deemed an offence by law, the offence was committed by a person with mental capacity." It was not clear, however, which was the required standard to convict a person and therefore Art. 530 was considered one of the least successful provisions of the 1988 reform. Despite this failure, since the Nineties the Supreme Court has made reference to the beyond-any-reasonable-doubt standard (B.A.R.D.): firstly to differentiate the standard required for conviction from that established to adopt a precautionary measure; then to clarify the evidentiary standard with regard to the issue of medical responsibility.

This was the situation until, in a historic decision taken by the Joint Chambers in 2002, the B.A.R.D. standard was declared to be fundamental as standard of proof for conviction[115] . Hundreds of decisions followed which used the formula in the way indicated by the Joint Chambers. In 2006, Law no. 46 embodied this evolution and changed Art. 533, par. 1, by introducing a norm whereby "the judge shall deliver a judgment of conviction if the accused is proven to be guilty of the alleged offence beyond a reasonable doubt.[116]" This change has represented a step towards completion, from an accusatorial viewpoint, of the Italian criminal justice system.

As it is known, the literature has underlined the ambiguity of the B.A.R.D.

115 Corte di Cassazione, Sez, Un., 10 July 2002, *Franzese, in Cass. pen.*, 2003, p. 1175.

116 See F. Picinali, *Is "Proof Beyond a Reasonable Doubt" a Self-Evident Concept? Considering the U.S. and the Italian Legal Cultures towards the Understanding of the Standard of Persuasion in Criminal Cases, in Global Jurist*, 9, 2009, p. 9.

standard.[117]

Nonetheless, the Italian legislature has transposed it in a clear manner. Unsurprisingly, the formula fits in a criminal system that is characterised by the presence of a professional judge and, mostly, by an obligation to motivate the judgment, which is ratified by the Constitution[118] and is regulated in detail by the Code.[119] Hence, the B.A.R.D. standard in the Italian system[120] does not acquire that subjective and intuitive value that it has in the American one, but rather it is considered an objective criterion.

It is a rule that imposes on the judge to accept the accusatorial hypothesis only and exclusively if the evidence that has been legitimately gathered at the trial stage is such that it can dispel either any internal doubts (self-contradiction of the prosecution's reconstruction or its explicative inability) or any doubts external to the evidence (the existence of an alternative hypothesis based on rationality and practical plausibility).[121]

3.6. An organic and innovative regulation: precautionary measures

One of the most important innovations of the Italian Code of Criminal Procedure is represented by Book IV, which deals with precautionary measures. It is a proper "code in the code" which contains a comprehensive set of rules on the measures that

117 See L. Laudan, *Truth, Error, and Criminal Law. An Essay in Legal Epistemology, Cambridge, 2006, at 30: "the concept of proving guilt beyond a reasonable doubt (…) – the only accepted, explicit yardstick for reaching a just verdict in a criminal trial – is obscure, incoherent, and muddled"; and, also ""Beyond reasonable doubt" has become a mantra rather than the well-defined standard of proof that it once was" (ivi, p. 54). See also T. V. MULRINE, Reasonable Doubt: How in the World is it Defined?, American University Journal of International Law & Policy*, 12, 1997, pp. 195-210.

118 According to Art. 111, par. 6, It. Const. "reasons must be given for all judicial decisions".

119 Not only does the Code underline the obligation of motivation in Art. 125, but it establishes in an analytical way to support the motivation: on the one hand, Art. 192 states "the judge shall evaluate evidence by specifying the results reached and the criteria adopted in the grounds of the judgment"; on the other hand, Art. 546, let. e, states that the judgment shall contain "a brief description of the de facto and de jure grounds upon which the decision relies, as well as the indication of the evidence on which the decision is based and the exposition of the reasons for which the judge believes that rebuttal evidence is unreliable". Finally, the Code establishes the possibility to propose to appeal to the Court of Cassation if "the grounds of the judgment are lacking, contradictory or manifestly illogical" (Art. 606, let. e).

120 See D. Accatino, *Certezas, dudas y propuestas en torno al estándar de la prueba penal, in Revista de Derecho de la Pontificia Universidad Católica de Valparíso*, 37, 2011, p. 507; A. Ryan, *Towards a System of European Criminal Justice. The problem of admissibility of evidence, Abingdon, Rutledge*, 2014, at 229; M. Taruffo, *Conocimiento científico y estándares de prueba judicial, in Boletín Mexicano de Derecho Comparado*, 38, 2005, p. 1305; R. W. Wright, *Proving Causation: Probability versus Belief, in R. GOLDBERG, Perspectives on Causation*, Oxford and Portland, 2011, p. 198.

121 See *ex multis* Corte di Cassazione, Sez. I, 21 October 2014, n. 48260; Corte di Cassazione, Sez. I, 18 April 2013, n. 23882; Corte di Cassazione, Sez. I, 8 November 2012, n. 41466; Corte di Cassazione, Sez. I, 26 April 2012, n. 1190.

may be adopted during the criminal process to neutralise a *periculum in mora*.

Particularly relevant is Title I, which sets the rules for the personal measures, that is those measures that are aimed at preventing that the accused, if released, either interferes with the course of justice (Art. 274, let. a), flees (Art. 274, let. b),[122] or commits a serious offence (Art. 274, let. c). They are applicable only where there are serious indications of guilt (Art. 273) related to serious offences (Art. 280).[123] The norms of Title I are particularly important because they aim at implementing some fundamental constitutional principles (Arts. 13, 27, par. 2),[124] which may be summed up in what the Constitutional Court defined the principle of the "least necessary sacrifice" for the personal liberty of the accused.[125] Under this principle, the restriction of the personal liberty of a suspect or an accused presumed innocent during the criminal proceedings must be applied within the minimum limits necessary to meet the precautionary need that ought to be satisfied in the specific case. For the fulfilment of this rule, the Code sets forth a wide range of alternative measures of increasing severity in relation to their incidence on personal liberty.[126]

Secondly, the CCP has eliminated the cases of compulsory detention and has given a discretional power to the judge in the choice of measure to be applied. The Public Prosecutor requests the application of a measures and the judge, once it has assessed the preconditions, must choose the most adequate measure in line with the precautionary needs to be satisfied in the specific case (adequacy test) and the most proportionate to both the seriousness of the offence and the sentence that has been or shall be imposed (proportionality test) (Art. 275).

One of the various changes made to the norms of the Code since it came

122 Clearly, they are the *pericula libertatis* referred to in par. 7 of the *Recommendation Rec (2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.*

123 P. Lambertina, *Italy,* in A. Van Kalmthout, *Pre-Trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the grounds for Regular Review in the Member States of the EU*, Oisterwijk, p. 552.

124 G. Di Chiara, *Italy*, in S. Ruggeri, *Liberty and Security in Europe. A Comparative Analysis of Pre-trial Precautionary Measures in Criminal Proceedings*, 2012, at 123-125

125 Corte Costituzionale, 21 July 2010, n. 265.

126 Prohibition to leave the country (Art. 281), Obligation to appear before the criminal police (Art. 282), Injunction to stay away from the family home (Art. 282-bis), Injunction to stay away from the places attended by the victim (Art. 282-ter), Prohibition and obligation of abode (Art. 283), House arrest (Art. 284), Precautionary detention in prison (Art. 285).

into force was the modification by Parliament of the second part of Art. 275, Par. 3, introducing a regime of semi-obligation for a heterogeneous series of offences: when several judgments by the Constitutional Court declared this mechanism partially illegitimate,[127] Law no. 47 of 16th April 2015 maintained it only for offences related to mafia-type activities, and subversive and terrorist associations.

Regarding the procedure, the measures are applied after a highly structured order is issued inaudita altera parte (Art. 292): after enforcement, a "discovery" of the elements of evidence submitted by the Public Prosecutor takes place, following the request which is filed with the Registry of the court that has issued the order (Art. 293, par. 3). Pursuant to Art. 5, par. 3, ECHR, the Italian CCP establishes that, in the five days following enforcement, the person subject to a precautionary detention in prison must be questioned (Art. 294): if the court does not question the detained person within the time limit, the precautionary detention immediately ceases to be effective.

Moreover, within ten days of the enforcement or service of the order directing a coercive measure, the accused may submit a request for the re-examination, even on the merits, of the decision (Art. 309): this is an unprecedented appeal remedy in Italian tradition, which recognizes to anyone deprived of his liberty the right set forth in Art. 5, par. 4, ECHR. The re-examination shall take place within a few days of the request by the accused (Art. 309, par. 9); otherwise, the order ceases to be effective and shall not be renewed, unless there are exceptional grounds for precautionary measures that must be explicitly specified.

With regard to the duration of precautionary measures, the Constitution imposes a rigid model of time limits (Art. 13, par. 5).[128] To implement this model, Art. 303 sets forth a highly complicated system of maximum duration of precautionary detention, including some elements of flexibility.[129]

127 Corte Costituzionale, 25 February 2015, n. 48; Corte Costituzionale, 23 July 2013, n. 232; Corte Costituzionale, 18 July 2013, n. 213; Corte Costituzionale, 12 February 2013, n. 57; Corte Costituzionale, 3 May 2012, n. 110; Corte Costituzionale, 22 July 2011, n. 231; Corte Costituzionale, 19 April 2011, n. 164; Corte Costituzionale, 21 July 2010, n. 265.

128 "The Law shall establish the maximum duration of preventive detention". On the Constitutional model of rigid time limits, see M. Gialuz – P. Spagnolo, *Reasonable Length of Pre-trial Detention: Rigid or Flexible Time Limits? A study on Italy from a European Perspective*, 2013, at 226.

129 M. Gialuz – P. Spagnolo, *Reasonable Length of Pre-trial Detention: Rigid or Flexible Time Limits? A study on Italy from a European Perspective*, 2013, at 228.

Another significant innovation of the Italian CCP is the introduction of a mechanism of compensation for unfair detention. For the first time, the Italian procedural system recognises the right to compensation not only in the event of wrongful conviction (Art. 643-645), but also in the event of wrongful detention during proceedings.

It must indeed be noted how this right is recognised more extensively than Art. 5, par. 5, ECHR. The right to compensation is in fact recognized both in the event of unlawful detention – that is when it is ascertained, by final decision, that the decision ordering the measure was issued or maintained although the conditions of applicability provided for in Arts. 273 and 280 were not met (Art. 314, par. 2) – and in the event of unjustified detention: Art. 314, par. 1, establishes the right to compensation if the accused is dismissed by a final judgment because the criminal act did not occur, or he did not commit it or the act does not constitute an offence or it is not deemed an offence by law.[130] In conclusion, the system of precautionary measures appears to be rich in guarantees for the accused: preconditions are defined clearly and the guarantees provided during the trial extend beyond what is established by the ECHR. Nonetheless, the Italian practice resorts widely to precautionary detention,[131] mainly due to the inefficiency of the Italian criminal process. The unusual length of the trial and the unreasonable system of the statute of limitations, in fact, cause the judges to abuse of precautionary detention in prison not as a measure to neutralize a periculum libertatis, but rather as an improper sanction. And this corresponds to disowning that precautionary nature that is the fundamental element of the measures set forth in Book IV.

130 From this viewpoint, the Italian jurisdiction seems to offer more guarantees compared to ECHR, which excludes the right to compensation in the case of *unjustified detention*: see S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, at 497.

131 According to the statistics annexed to the Green Paper Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011)327, final, eur-lex.europa.eu/procedure/EN/200571, the percentage of pre-trial detainees in Italy amounted to 43.6%, on a European average of 24.7%. It is worth pointing out that the statistics must be read taking into account that in Italy detention after a first-instance conviction is also a precautionary detention. As at 31 May 2018, detainees awaiting the first trial amounted to 16.5% of the total of detainees in Italian prisons: appellants were 8.6% and detainees awaiting trial in cassation amounted to 6.3% (https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST119037&previsiousPage=mg_1_14). For more updated statistics, see *Council of Europe Annual Penal Statistics SPACE I – Prison Populations*, http://wp.unil.ch/space/files/2018/03/SPACE-I-2016-Final-Report-180315.pdf, at 74.

3.7. A pragmatic approach: special proceedings as an alternative to the ordinary process. The ordinary first-instance criminal process is divided into three phases

The first comprises preliminary investigations, which have a limited duration (six months or twelve months for more serious offences, extendable to eighteen months or one year: Arts. 405-407). They begin with the registration of the notitia criminis in the register provided for in Art. 335 and finish with the request for committal to trial (Art. 416), filed by the Public Prosecutor if no request to drop the case is to be filed under Arts. 408 and 411. The groundlessness of the notitia criminis is the most important instance for discontinuing the case, to which decree no. 28 of 16th March 2015 has recently added the triviality of the alleged offence.

The second phase is the preliminary hearing, which is regulated by Title IX of Book IV[132]: the preliminary hearing can end with a judgment of no grounds to proceed (Art. 425) or with a decree for committal to trial (Art. 429). If the latter is issued, the third phase starts which is represented by the trial that is regulated by Book VII.

This is the ordinary procedure followed in proceedings before the Tribunal sitting as collegial court and the Court of Assizes. It is evident that this complex procedure cannot be guaranteed for every criminal case. In order to ensure that an efficient judicial response is given within reasonable times the Italian Code has introduced some streamlined mechanisms. A distinction is made between differentiated proceedings and special proceedings.

The former refer to criminal proceedings for less serious offences. The Code regulates one in Book VIII for proceedings before the single judge Tribunal: in cases of misdemeanours or crimes punishable with the penalty of imprisonment not exceeding a maximum term of four years, the preliminary hearing is excluded and the Public Prosecutor shall prosecute by means of a direct summons for trial (Art. 550). It is worth remembering that petty offences dealt with by the Justice of the Peace are regulated by a smoother procedure set forth in D.Lgs. 274/2000.

Special proceedings may instead be applied to serious offences. They are regu-

132 For more details on the three aims of the preliminary hearing, see E. Grande, *Italian Criminal Justice: Borrowing and Resistance*, 2000, at 241.

lated in Book VI and they do not feature at least one phase of the ordinary process. On one hand, the Direct trial (Arts. 449 *et seq.*) and the Immediate trial (Arts. 453 *et seq.*) skip the preliminary hearing phase and lead directly to trial, because they are based on clear and strong evidence (arrest in flagrante delicto or confession for Direct trial; indisputable evidence or precautionary detention for Immediate trial). On the other hand, the Summary trial (Arts. 438 *et seq.*) and the Application of punishment upon request of the parties (Arts. 444 *et seq.*) do not envisage the trial, while proceedings by decree (Arts. 459 *et seq.*) skip both the preliminary hearing and the trial, as long as the Public Prosecutor requests that the decree be issued during preliminary investigations if he holds that only a financial penalty should be applied.

Undoubtedly, the most innovative and significant mechanisms, from a systematic point of view, are the Summary trial and the Application of punishment upon request of the parties. They are trial-avoidance devices based on the enhancement of the accused person's consent. They are justified by the already mentioned exception set forth in Art. 111, par. 5, Const., which allows the accused to waive the trial. With a pragmatic approach, the Code provides a premium in order to encourage the accused to provide his consent and waive the constitutional right to a public trial. In the case of the Summary trial, the accused requests, during the preliminary hearing (Art. 438), to be judged on the evidence unilaterally gathered during preliminary investigations and defence investigations (Art. 442).[133] The "beyond-any-reasonable-doubt" rule is applied and, in case of conviction, the official concession is the reduction of the sentence by one third (Art. 442).

With regard to the Application of punishment upon request of the parties

133 L. Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. Jackson – M. Langer & P. Tillers, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, at 90.

(so-called patteggiamento), it is an original form of negotiated justice.[134] During preliminary investigations (Art. 447) or at the preliminary hearing (Art. 446) or at the first hearing before a single judge (Arts. 555-556), the Public Prosecutor and the accused person may request the judge to apply a sentence they have agreed on. The judge's task is to carry out a two-fold verification: on the one hand, he must rule out that the accused person's innocence has been positively proven; on the other, he must verify that the legal definition of the criminal act is correct,[135] the application and the comparison of the circumstances adduced by the parties are proper and the requested sentence is adequate[136]. The negotiated judgment issued upon request of the parties shall be considered equivalent to a conviction. No appellate remedy may be invoked against the negotiated judgment, and an appeal to the Court of Cassation is admissible only in certain cases (Art. 448, paragraph 2-bis).

It must be pointed out that the original text of the Code provided that the accused and the Public Prosecutor may request the application of a sentence of imprisonment where, considering all of the circumstances and the one-third reduction provided by Art. 444, the final punishment would not exceed two years. In order to widen the scope of application of the mechanism of sentencing at the parties' request, the above-mentioned limit has been extended to five years by Law no. 134 of 2003: today scholars talk of a wider patteggiamento (large plea bargaining) and of a traditional

134 On the Italian model of negotiated justice, see H.J. Albrecht, *Settlements out of Court: A Comparative Study of European Criminal Justice Systems, in South African Law Commission, Research Paper*, 19, Pretoria, 2001, p. 38; V. Fanchiotti, *Negotiated Justice in Italy, in Arch. Iur. Cracoviense*, 30-31, 2000, p. 31; M. Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 2010; Y. Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: a Comparative Perspective, in International Criminal Justice Review*, 2002, p. 46; S. Maffei, *Negotiations "on Evidence" and Negotiations "on Sentence". Adversarial Experiments in Italian Criminal Procedure, in Int. Crim. Just.*, 2, 2004, p. 1052; J.J. Miller, *Plea Bargaining and its Analogues under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure*, 1989-1990, p. 215; W. T. Pizzi – M. Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 2004, p. 437; R.a. Van Cleave, *An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: the Search for Truth and Efficient Criminal Justice System*, 1997, at 430; D. Vicoli, *Critical Aspects on the Italian Features Concerning "Negotiated Justice*", in M. Caianiello – J. S. Hodgson, *Discretional Criminal Justice in a Comparative Context*, 2015, p. 141.

135 No form of charge bargaining is indeed admitted (R. Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 1996, p. 88): this is forbidden by the compulsory criminal prosecution principle (Art. 112 of Italian Const.).

136 On the role of the judge and also on the issues of constitutional compatibility [constitutional challenges] of the device, see S. Maffei, S. Maffei, *Negotiations "on Evidence" and Negotiations "on Sentence". Adversarial Experiments in Italian Criminal Procedure*, 2004, at 1053; R.a. Van Cleave, *An Offer You Can't Refuse? Punishment Without Trial In Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, 1997, at 445-449.

patteggiamento (traditional plea bargaining). Despite its peculiarity, the patteggiamento has been immediately recognised as being one of the most significant expressions of negotiated justice and has become "one of the main models for guilty plea mechanisms which have been introduced in Europe.[137]" Nationally, it has been one of the most controversial mechanisms in the first thirty years of application of the Code. It has, in fact, led to an endless series of decisions issued by the Joint Chambers of the Supreme Court and the Constitutional Court which were to find solutions to the crisis of "rejection" that was gradually produced by the transplant into the Italian legal culture of an institution that did not belong to that culture: an authoritative source has written that "despite ingenuous attempts of Italian lawyers to reconcile the guilty plea with traditional domestic institutions, it stands apart from them as a corpus alienum.[138]" Actually, it must be acknowledged that – thanks to the work of the Supreme Courts – the patteggiamento has always been saved. Indeed, it has been considered an essential tool to guarantee a minimum of efficiency in an overburdened criminal justice system.

With a view to encouraging the application of the agreed punishment, the CCP sets forth a very wide range of official concessions (Arts. 444-445). Despite the numerous incentives and the wider scope of application obtained with the 2003 modification, the patteggiamento has not even remotely achieved the American percentages: in the 2001-2010 period, this procedure was applied by the preliminary investigation judge and the preliminary hearing judge to settle 13.6% of proceedings; by the single judge Tribunal to settle 17.3% of proceedings. These results depend mainly on the overall inefficiency of the criminal justice system and on its rate of indulgency. Statistical analyses have shown that the accused gives his consent to bargaining especially when he perceives that it may be the sole alternative to a sentence to certain or very likely imprisonment.[139] Another hindrance to the ample application of alternative procedures based on the accused person's consent is the statute of limitations. There is indeed an

137 S. C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*.

138 M. R. Damaška, *Negotiated Justice in International Criminal Courts, in International Journal of Criminal Justice*, 2, 2004, pp. 1018-1026.

139 A clear confirmation is given by the rate of bargaining concluded after the Direct trial: when the accused is taken before the direct trial judge (because he was arrested in *flagrante delicto* or because he confessed), the bargaining is concluded in 54.8% of cases (average of the years 2001-2010).

inverse correlation between the rate of application of patteggiamento and the rate of application of the statute of limitations.

One more factor underlying the partial failure of the Italian version of negotiated justice is the institutional structure of the Public Prosecutor's office and the lack of actual incentives for Public Prosecutors.[140]

These factors related to substantial law, the inefficiency of the system as a whole and the institutional framework within which the Public Prosecutor works have prevented consensual practices from providing a contribution to deflation similar to that of plea bargaining in Anglo-Saxon systems. The fact remains that their function is nonetheless essential in the Italian criminal justice system. In fact, in 2014, the Italian Parliament introduced a new form of probation, called "*sospensione con messa alla prova*" (Arts. 464-bis-464-novies).

This special proceeding was not introduced by the legislature only for deflation, but also to ensure a more rapid social reintegration to those accused of minor offences. Indeed, the test calls for numerous obligations to be met by the requesting party: behavior that eliminates damaging or dangerous consequences deriving from the offence; compensation of damage; entrustment of the accused to the social services to carry out a programme and perform socially-useful work (Art. 168-bis, par. 2 and 3).

The new proceedings can be ascribed to a special procedure and focuses on the will of the accused person. The request of a probation must be submitted within the time limit set to formulate the conclusions of the preliminary hearing (Art. 464-bis) or until the declaration of opening of the first instance trial with direct summons for trial (Art. 464-bis, par. 2). The request may be submitted also during preliminary investigations.

The request must include the treatment programme, set together with the External Criminal Enforcement Office. In the event where the programme has not be drawn up, submission of the request is sufficient.

The court orders the suspension of the proceedings with probation, if the sub-

140 For an economic perspective on Law, see, N. Boari – G. Fiorentini, *An economic analysis of plea bargaining: the incentives of the parties in a mixed penal system, in International Review of Law and Economics*, 21, 2001, pp. 213-218.

mitted treatment programme is deemed suitable and if it is believed that the accused will not commit other offences (Art. 464-quater, par. 3).

In the order establishing the suspension of the proceedings, the judge sets the time within which the provisions and obligations regarding the redeeming behavior must be fulfilled (Art. 464-quater, par. 5).

During suspension, the court acquires, if requested by the party and in the ways set for the trial, non-deferrable evidence and evidence that may lead to the dismissal of the accused person (Art. 464-sexies).

Upon conclusion of the period of suspension of the proceedings with test, "the court shall declare by judgment that the offence extinguished if, considering the behaviour of the accused and his compliance with the established rules, it believes probation has been successful" (Art. 464-septies). If the test has a negative outcome, the judge orders that the proceedings recommence. Finally, the so-called "*Orlando Reform*" (Law no. 103 of 2017) has re-introduced, in a new Art. 599-bis, the "Agreement also with waiver of the arguments for appeal". It is particular form of negotiated justice, in force in the original version of the Code of 1988, that was abrogated in 2008.

3.8. A "vertical" criminal justice system: the hypertrophic system of appellate remedies

The judgment issued at the end of the first-instance trial may be appealed by the parties by invoking appellate remedies. The system of appellate remedies is regulated in Book IX of the Code and it has been widely recognised as being one of the least innovative parts of the Code.[141] Surely, some innovations have been introduced for some procedural details, but the overall structure has remained unaltered. Unfortunately, despite the clear choice of favouring a process based on an accusatorial approach that viewed the first-instance trial as the key component of the process, the rights to

141 See R. Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 1996, at 89; L. Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. Jackson, M. Langer & P. Tillers, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, at 87.

appeal were overlooked.[142]

Failure to reform this part of the system is justified firstly by an idea of justice that still differs greatly from the Common Law systems. It has been said that in Common Law jurisdictions the limited scope of appeals can be explained as a consequence of the internal logic of the adversarial system – since the jury's verdict gives no reasons for its conclusions, there is little to review in appeal – but "also with the adversarial "interpretive' conception of truth: whenever fair rules have been applied in the trial contest between adversaries, the result is necessarily just;[143]"on the contrary, continental justice "with the discovery of the 'ontological' truth implies the need for direct reconsideration of the trial adjudication by a higher court.[144]" Secondly, the power of tradition has taken its toll with its hierarchical continental model based, for centuries, on a comprehensive and wide system of appeals.[145] Moreover, this "vertical" structure of the criminal justice system is, to a certain extent, recognized by the Constitution: conceived to comply with the 1930 inquisitorial model, the Constitution strengthened the system of controls. It did so by establishing, on one hand, that the presumption of innocence is extended until final judgment of conviction and, one the other, by imposing the appeal in cassation against all the judgments and decisions on personal liberty (Art. 111, par. 7).[146] Regrettably, this constitutional structure was not even modified when, at the end of Nineties, the option of supporting the accusatorial system was introduced in the Constitution. Upon formalizing the principles of fair trial – including that of a reasonable duration of the criminal proceeding – no change was made to ease the constitutional restrictions that impose numerous appellate remedies which can be invoked without any filter whatsoever. To sum up, Book IX regulates mainly ordinary appellate remedies which prevent the judgment from becoming final. The first remedy

142 M. Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005, at 593; W. T. Pizzi – L. Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 1992, at 15.

143 E. Grande, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, 2009, at 15.

144 E. Grande, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, 2009, at 16.

145 On the hierarchical model and its connection with the wide system of appeals, M. R. Damaška, *Structures of Authority and Comparative Criminal Procedure, in Yale Law Journal*, 84, 1975, p. 480.

146 "*Appeals to the Court of Cassation in cases of violations of the Law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts*".

is the appeal (Art. 593), which continues to have a hybrid two-fold function of control and novum iudicium, particularly if new evidence is gathered (Art. 603).[147] In 2006, the aforementioned Law no. 46 abolished the power of appealing judgments of dismissal by the Public Prosecutor and the accused. The Constitutional Court, however, declared that the modification to Article 593 was illegitimate due to a violation of the principle of equality of arms.[148]

The judgment that is issued at the end of the second instance of the proceedings may be appealed in cassation to challenge any errores in procedendo (Art. 606, let. c-d), errores in iudicando (Art. 606, let. b) or the fault of motivation (Art. 606, let. e).

Extensive access to the Court of Cassation and the right to challenge also defects that concern the plausibility of the grounds underlying the decision entails an absolutely enormous load of appeals, compared to the experiences of other European countries.[149]

When the judgment becomes final, some extraordinary appellate remedies may be invoked under the Code. Over the past year, the said remedies have been widened.[150]

The traditional revision (Arts. 629 ff.) has been flanked, firstly, by the extraordinary appeal in Cassation due to a clerical or factual error (Art. 625-bis) and, then, by the so-called "European revision": the Constitutional Court declared Article 630 unconstitutional and added the possibility to request revision when it is necessary to reopen the proceedings in order to comply with a final judgment of the European Court of Human Rights.[151]

Finally, with Law no. 67 of 2014 which completed the reform that eliminated in absentia proceedings, the legislature introduced a new extraordinary appellate remedy, called "rescission of the final judgment" (Art. 625-ter), then moved in a new Art.

147 See C. Callahan, *American Adversarial Transplants in the Italian Criminal Justice System: An Analysis of Italian and American Criminal Procedure through the Amanda Knox Trial*, in WULR, 5, 2012, pp. 23-44; G. J. Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 2012, pp. 229-253.

148 Corte costituzionale, 6 February 2007, n. 26, 4 April 2008, n. 85. See M. Caianiello, *Italy* – in E. Cape – Z. Namoradze – R. Smith & T. Spronken, *Effective Criminal Defence in Europe*, 2010, at 406.

149 In the period 2004-2012, the Court of Cassation had to deal with an average of 48,158 appeals per year.

150 See M. Gialuz, *Remedies for Miscarriage of Justice in Italy*, in L. Lupária, *Understanding Wrongful Conviction. The protection of innocent across Europe and America, Milan and Padua*, 2015, p. 117.

151 Corte costituzionale, 7 April 2011, n. 113.

629-bis by Law no. 103 of 2017. This mechanism allows the concerned party who has become aware of the proceeding against him only after the judgment of conviction has become final to request to the Court of Appeal to "rescind" the final judgment, that is to revoke the judgment. If the appellate remedy is accepted, "the case file is transmitted to the first instance court" (Art. 629-bis, par. 3) and it should serve as an actual remedy aimed at redeeming the rights, in the proceedings, of the person convicted in absentia, not for negligence, with delivery of a final judgment.

4. Model code or broken dream? What remains of the Code thirty years after the great reform

It is not easy to weigh the great aspirations of the reformers and the overall outcome of the introduction of the new Code. Certainly, the general structure of the system, namely the details and coordination of single parties, still seems to be of an excellent quality today, and the language used is one of clarity and logic. It has been recently stated that "the Code of Criminal Procedure of 1988 is (…) a thing of beauty. It is logically arranged and clearly written. And in consequence, it enables anyone who can read the language, even imperfectly, to discover without difficulty how Italian procedure operates.[152]" Undoubtedly, the value of a Code ought to be measured against its degree of efficiency in the pursuit of both goals of criminal justice, that is the prevention of conviction of innocent persons on one hand,[153] and, on the other, the conviction within a reasonable time of those people who have been proven to be guilty. On the latter issue, the Code may not be assessed favourably. The reasons behind this, as already mentioned, are to be sought in factors external to the Code and in its limited flexibility despite the thrusts hinted by the practice.[154] Being a Code built "in a laboratory" and not moulded around the practice, the Italian model has demonstrated it can function correctly if each and every element remains balanced, if the ingredients of the mixture are not adulterated.

152 It is the opinion of J. R. Spencer, *The Codification of Criminal Procedure*, in J. Chalmers & F. Leverick, *Essays in Criminal Law. In Honour of Sir Gerald Gordon*, Edinburgh, 2010, p. 310.

153 See L. Lupária, *Understanding Wrongful Conviction. The Protection of the Innocent across Europe and America*, 2015.

154 One of the fathers of the reform, E. Amodio, has – not surprisingly – talked about a "*fragile perfection*" of the Code in a recent paper (*Inviolabilità della libertà personale e coercizione cautelare minima*, in *Cassazione penale*, 2014, p. 20).

The opposite scenario would not develop well-rooted antibodies and would lead to an accentuated degeneration, which is what has partly occurred.

The Code is, nonetheless, still functional, it is applied every day in the courtrooms and, despite the adversities of the past thirty years, it has maintained its renowned nature of being a revolutionary project in a sector – that of criminal procedure – where it is extremely difficult to implement radical reforms.[155] The dream of transplanting an accusatorial model in continental Europe, thus, does not seem to have been in vain and it is now entrusted to the new generations, who have not lived an inquisitorial past and may, with a free mind, fully implement the ideal impetus given by jurists at the end of the twentieth century.

155 See S. Field, *Fair Trial and Procedural Tradition in Europe, in Oxford Journal of Legal Studies*, 29, 2009, p. 365; J. D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants, Cardozo Journal of International and Comparative Law*, 5, 1997, p. 51; P. J. Schwikkard, *Convergence, Appropriate Fit and Values in Criminal Process*, in Paul Roberts & Mike Redmayne, *Innovations in Evidence and Proof*, Oxford and Portland, 2007, p. 331.

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DANTE AND THE LAW: THE INFLUENCE OF LEGAL CATEGORIES ON 14TH CENTURY POLITICAL THOUGHT

ABSTRACT: *The relationships between Church and Empire were intensively discussed in European canon and Civil Law schools from the 12th century onwards. The paper aims at analyzing the political thought of Dante in the light of the great legal debates which took place in these environments. Theological, legal and political dimensions cannot be considered separately in the intellectual perspective of the 14th century. The enduring controversy over whether Dante studied law is thus deliberately overshadowed by the belief that familiarity with legal questions was simply one element of a Trecento intellectual's identity.*

In the following pages I will focus on the influence of late medieval legal debates on Italian political thought. I will start from the use of the Bible in Dante, who often relies on a theological-juridical interpretation of the Scriptures in order to discredit the most radical theses of the ecclesiastical legal thought of his time. I will then try to illustrate the reasons why Dante doesn't condemn canon legal science as a whole, but makes a distinction between the ancient and respected legal thought of Gratian's generation (12th century) – which supported the late-antique principle of non-interference between the two universal powers – and the new, hierocratic direction taken by the canon legal thought after the Gregorian Reform. The superiority of the spiritual world over the secular, claimed at length by the Church from the beginning of the 13th century, is considered by Dante, one century later, as the main source of political – and in his case, also personal – troubles. The last section of the paper is devoted to the concept of Empire in late medieval legal and political thought. I try to demonstrate why supporting the Empire cannot be reduced simply to the backing of one political faction, but it is rather expression of a sentiment of deep appreciation of the public function of imperial government, a sentiment that can be understood better if we take into account the studies on Roman public law undertaken by Italian and French lawyers in the last centuries of the Middle Ages.

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1. Political use of the Bible

"There we had yet to let our feet advance
when I discovered that the bordering bank-
less sheer than banks of other terraces
was of white marble and adorned with carvings
so accurate-not only Polycletus
but even Nature, there, would feel defeated.
[…]
There, carved in that same marble, were the cart
and oxen as they drew the sacred ark,
which makes men now fear tasks not in their charge.[1]"

Dante and Virgil, after toiling up a hard, rocky slope, arrive at the first of the seven terraces of Purgatory, where the proud are punished for their arrogance. A wall of marble stands before them, with carvings to represent the sin of pride so perfect that their craft seems to surpass not just the sculptor Polyclitus, but Nature herself.[2] Among the first carvings is one depicting the Levite Uzzah, who, the Bible tells, joined the procession of Israelites behind the cart carrying the Tablets of the Law to Jerusalem under King David's order. Uzzah held out a hand to steady the cart, which threatened to overturn because the oxen were restless. That gesture, rather than earn Uzzah divine approval, caused his death; God struck him down on the spot to punish him for his arrogance and irreverence.[3]

Apart from any poetic considerations, Dante would use the story of Uzzah

1 *Purgatory* 10, 28-33, 49-57, in Dante Alighieri, *The Divine Comedy,* A. Mandelbaum, Berkeley - Los Angeles - London, 1980-1982.

2 On these verses, see R. Hollander, *Allegory in Dante's Commedia*, Princeton, 1969, pp. 297–300; T. Barolini, *The Undivine Comedy. Detheologizing Dante*, Princeton, 1992, pp. 122–142; N. J. Vickers, *Seeing is Believing: Gregory, Trajan, and Dante's Art, Dante Studies* 101 (1983), pp. 67–85.

3 2 Sam, 6, 4-8.

again in one of his most militant Epistles, to exonerate himself of accusations from various sides that he was an enemy of the Church. In a polemical dialogue with Italian cardinals he mounted in 1314, Dante accused them in his Epistle of guiding the Church toward the wrong path and pictured himself, come to show them the way, as a second Uzzah abruptly interfering in ecclesiastical affairs. Nevertheless, he said, his intention was not to right the Ark, for that was God's task alone, but to return the oxen to the straight and narrow: that is, to correct the ecclesiastics and especially the cardinals who had distanced the Church from the right path.[4]

It was thus the political significance offered by the Biblical tale that made it appealing to Dante. Writing at the beginning of the 14th century, he could count on a long tradition: so archaic and inscrutable in the telling, the story of Uzzah had long been read as an exemplary case of the relationship between the priesthood and the lay world, and over the long years between Gregory the Great (d. 604) and the theological and juridical texts of the 12th century, it would progressively be interpreted as a reminder of the need for absolute separation between spiritual and temporal power.

At least from the beginning of the 13th century, the tale of Uzzah had started to be evoked in the context of the conflictual relations between popes and lay rulers.

In 1207, in the framework of the conflict between Rome and king John of England over the archbishop of Canterbury, the great pope Innocent III wrote a furious letter to the nobles of England, admonishing them: "to be on guard to save the King… from a policy… in enmity to God – that of persecuting our venerable brother Stephen, archbishop of Canterbury and, through him, the Church committed to his charge… Let him recall how Uzzah was smitten by the Lord for putting out his hands, piously indeed but unworthily, to touch the Ark – and let him not presume rashly to put out his hand against ecclesiastical rights… But

4 Epistola XI, 9-12 (tr. P. J. Toynbee, Dantis Alagherii Epistolae: The Letters of Dante, Oxford, 1920, p. 144): "Perchance in indignant rebuke you will ask: "And who is this man who, not fearing the sudden punishment of Uzzah, sets himself up to protect the Ark, tottering though it be?" Verily I am one of the least of the sheep of the pasture of Jesus Christ; verily I abuse no pastoral authority, seeing that I possess no riches. By the grace, therefore, not of riches, but of God, I am what I am, and the zeal of His house hath eaten me up … Nor does the presumption of Uzzah, which some may think should be laid to my charge, infect me, as though I had been rash in my utterance, with the taint of his guilt. For he gave heed to the Ark, I to the unruly oxen that are dragging it away into the wilderness. May He give succour to the Ark, who opened his eyes to bring salvation to the labouring ship!". On the same passage, P.S. HAWKINS, *Dante's Testaments. Essays in Scriptural Imagination*, Stanford, pp. 51-52.

rather let him recount the gifts of God who… has gloriously spread his name and power among the princes of the Earth through the favour of the Roman Church.[5]"

The same tones were adopted short after by Innocent III against the future emperor Frederick II, who refused to choose the candidate of the pope as archbishop of Palermo: the king of Sicily – in the words of Innocent – should be satisfied with temporal powers and not interfere with spiritual matters, remembering that Uzzah was killed by God for having touched the Ark of the Law.[6]

The frequent use of Biblical metaphors in politics as well as the high presence of political ideas in theological and legal texts come not as a surprise. As argued by Brian Tierney, until Aristotle's Politics was translated from Greek into Latin by William of Moerbeke in the second half of the 13th century, no thread of specifically political writing had emerged in the medieval Latin West.[7] Obviously, this does not mean that politics were not the subject of intense reflection until well into the 14th century, but rather that – as Dante testifies – late medieval political ideas tended not to circulate under the auspices of politics, but rather were attached to theological and juridical doctrines.[8]

The use Dante makes of the Biblical exemplum demonstrates that he had direct knowledge of the interpretation circulating in the theological and juridical texts of his time. To understand the use Dante makes of them helps to explain his complex approach to civil and canon law, fundamentally inspired by his political opposition to Pope Boniface the 8th and his uncompromising indictment of the mistaken path that in his view canon legal theory had taken, beginning especially in the mid-*Duecento*. The case of Uzzah is not isolated: Dante often relied on Biblical passages to discredit hierocratic convictions, offering a technical interpretation - a reading of the Scriptures from a theological-juridical perspective - to counter the most radical theses of the canonists.

His refutation of the pope's powers as the Vicar of Christ and thus of the pa-

5 *Selected Letters of Pope Innocent III concerning England* (1198-1216), C. R. Cheney – W. H. Semple, London, 1953, n. 32.

6 Innocentii III Romani Pontificis, Regestorum sive Epistolarum, lib. XI, n. 208 (*Patrologia Latina* 215.1523–24).

7 B. Tierney, *Religion, Law and the Growth of Constitutional Thought. 1150–1650*, Cambridge, 1982, pp. 29–30; B. Tierney, *The Crisis of Church and State. 1050–1300*, Toronto, 1988, pp. 98–99.

8 On the influence of legal categories on Dante, see the work of J. Steinberg, *Dante and the Limits of the Law*, Chicago, which looks at several juridical macro-concepts (reputation, *arbitrium*, privilege, contract) in Dante's thought.

pal faculty to unseat the emperor, expressed in a well-known passage from *Monarchia* based on an interpretation of the role of Samuel in deposing Saul, is one of the most eloquent examples of this use of Biblical passages, one in which, incidentally, Dante reveals a close familiarity with civil legal doctrine.[9]

2. The tale of Uzzah as metaphor of non-interference between Church and Empire

The biblical tale of Uzzah had always raised a lot of doubts in the minds of medieval readers. The ruthlessness of God's judgment seemed at first sight obscure and cruel: why did He punish Uzzah? The intentions of both David and Uzzah were apparently good. David wanted to bring the symbol of God's presence (the Ark) into his city and Uzzah just wanted to keep the Ark from falling. If we read the story in the narrative context of the Bible, we'd discover however that these two men had transgressed many of God's orders. But what interests us here it is not the genuine meaning of the tale in the biblical context, but rather the metaphorical meaning gradually assumed by the story in the medieval legal and theological commentaries.

As far back as the Early Middle Ages, a complex metaphorical interpretation of Uzzah's punishment began to appear, an interpretation that continued to be enriched up until the 12th century and whose popularity endured well beyond that period.

The fullest statement of that interpretation is to be found in the Decretum Gratiani, a fundamental work of canon law written around 1140 that quickly became a reference point for the jurists of Bologna, and then of other Italian and European centers of learning.[10] In that mixture of theology and ecclesiastical rules and principles that typifies Gratian's work, based on an extensive account of the story of Uzzah from 6th and 7th century theological texts, the Decretum thus spells out the meaning of the Biblical punishment: the Ark of the Covenant symbolizes the men of the church; the Levite Uzzah stands for the lay subjects; the instability of the cart did not, as some had

9 Dante Alighieri, *Monarchia* 3 6, D. Quaglioni, in *Dante Alighieri*, Opere, M. Santagata, vol. II, Milano, 2014, pp. 1286-1297; on the political use of Biblical arguments in the late Middle Ages and "*the infiltration of the biblical-latinised ideas into the vocabulary of the acting governments*", see W. Ullmann, *The Bible and Principles of Government in the Middle Ages, in La Bibbia nell'Alto Medioevo*, Spoleto, 1963, pp. 181-228.

10 For a summary of the current historical debate on the composition of the Decretum see O. Condorelli, *Graziano, in Dizionario Biografico dei Giuristi Italiani* (XII-XX secolo), I, Bologna, 2013, pp. 1058-1061.

erroneously suggested, represent wrongs done by the clergy, but was caused by the weight of those men burdening the shoulders of the fathers and doctors of the church; the unruly oxen were men who had done wrong, putting the Ark in danger by causing it to lean and risk falling.[11] No layman could accuse a man of the church or correct actions that were subject to divine judgment alone; that would be to intrude in a sphere that was not his own. Such, in essence, was Gratian's view of why Uzzah was punished.

This interpretation is one of a number of passages in the Decretum that after the death of Gratian would remain quite influential in the political and juridical thought of the *Due-* and *Trecento*, because they offered authoritative arguments that dealt with urgent ideological questions. Although the Gratian interpretation seems at first sight to condemn any lay intrusion into the spiritual realm, in reality, it came to stand for the principle of non-interference, a principle that in the two centuries after Gratian was largely upheld by opponents of hierocratic doctrine and of the corpus of canon law supporting it. Thus, to begin with, students of Civil Law, who appreciated the Decretum's late-antique notion of a division between the lay and ecclesiastical spheres, a principle formalized by Pope Gelasius (d. 496) at the end of the 5th century in a famous letter addressed to the Byzantine emperor Anastasius I: "There are two things, August emperor, by which this world is ruled: the sacred authority of the pontiffs and the royal power … Most merciful son, you know well enough that you surpass all mankind in your dignity, yet even so you must bend your head in submission to the ministers of divine things, and from them receive the pledge of your salvation. In receiving the heavenly sacraments, which it is their office to dispense, you must depend on their judgement and not desire to submit them to your will. In matters concerning public life, the ministers of religions understand that the imperial power has been given to you from above and they themselves will obey your laws.[12]"

The so-called Gelasian dualism that is here expressed became the ideological framework of the relations between Church and Empire for more than 500 years. As it is shown by the words of the letter, it was founded on the conviction that there were

11 *Decretum Gratiani*, C.2 q.7 c.27.

12 *Epistola Gelasii papae ad Anastasium Augustum*, tr. in G. Dagron, *Emperor and Priest: The Imperial Office in Byzantium*, Cambridge, 2003, p. 301.

two authorities, each ordained by God and responsible for administering separate spheres through an equal division of tasks. The spiritual realm was entrusted to the Pope, while the secular realm was fundamentally the responsibility of the Emperor.

3. Convergence of views between civilists and first canonists

Around the middle of the 6th century the Gelasian view was firmly endorsed by Justinian, who in the Novellae section of the Corpus iuris civilis quite clearly expressed the view that priesthood and Empire, both gifts of God (*dona Dei*), must not be obstacles to one another, for the first was charged with administering the divine sphere, while the second was to deal with the human one.[13] Justinian's texts thus became an important channel for Gelasian ideas in the Early Middle Ages, especially because popularizations of the *Novellae* were quite widespread and well-known compared to other sections of the *Corpus iuris*, many of which were mutilated or simplified and some, like the Digest, utterly forgotten until the 12th century.[14] A perspective, that of Gelasius adopted by the *Novellae*, which will incidentally be embraced by Dante in the *Monarchia*.[15] Gratian's essential endorsement of the early medieval political-juridical equation meant therefore that his Decretum was concordant with the views of the Bolognese Civil Law experts (and those beyond Bologna as well) then fiercely examining Justinian legal texts.[16] All the more so because in scientific circles beyond Bologna - where until the middle of the 13th century, sources that did not adhere to Roman law were viewed with suspicion and were thought to risk polluting the philological work done by the school of Irnerius (d. after 1119) on ancient legal texts - legal studies were quite

13 See especially the Novella "*Quomodo oporteat episcopos*" (Nov. 6=Auth. coll. 1.6), praef. (tr. S. P. Scott, *The Civil Law*, XVI, Cincinnati, 1932: "The priesthood and the Empire are the two greatest gifts which God, in His infinite clemency, has bestowed upon mortals; the former has reference to Divine matters, the latter presides over and directs human affairs, and both, proceeding from the same principle, adorn the life of mankind".

14 L. Loschiavo, *La Riforma gregoriana e la riemersione dell'Authenticum. Un'ipotesi in cerca di conferma, in Proceedinges of the Thirteenth International Congress of Medieval Canon Law*, P. Erdö – Sz. A. Szuromi, *Città del Vaticano*, 2010, pp. 159-170; L. Loschiavo, *La riscoperta dell'Authenticum e la prima esegesi dei glossatori*, in Novellae *Constitutiones*. *L'ultima legislazione di Giustiniano tra Oriente e Occidente da Triboniano a Savigny*, L. Loschiavo – G. Mancini – C. Vano, Napoli, 2011, pp. 111-139.

15 A. K. Cassell, *The Monarchia Controversy: An Historical Study with Accompanying Translations of Dante Alighieri's Monarchia, Guido Vernani's Refutation of the "Monarchia" Composed by Dante, and Pope John XXII's Bull Si fratrum*, Washington, DC, 2004, pp. 7–8.

16 See the civil Law glosses on the Novella 6 quoted by F. CANCELLI, *Diritto romano in Dante, in Enciclopedia Dantesca*, 2, Roma, 1970, pp. 472-479.

eclectic and Gratian was intensely scrutinized by civil legal experts as well as canonists.[17]

Gratian's ideological framework was shared by all those canonists who - prior to the publication of Liber Extra (1234) by Gregory IX (d. 1241) - made the Decretum the focus of their doctrinal analysis, building comments and apparatuses on that text that earned them the title of "*Decretists*". A growing familiarity with the Roman legal texts promoted among others by Huguccio of Pisa (d. 1210), one of the most influential writers of his generation, effectively reinforced the influence of Gelasian ideas on ecclesiastical legal thought, until in many cases it effectively "did not materially differ from the civilian standpoint.[18]" Gratian's views remain surprising today to the degree they are impermeable to Gregory VII's (d. 1085) thought, widely circulated in theological texts that made the rounds between the 11th and 12th century in France and Italy.[19]

Those new hierocratic theories had almost no effect on Gratian's work which represented, in the 12th century, more of a monument to the past than an outpost of emerging canon theory.

4. The Gregorian Reform and the prevalence of hierocratic ideas

Things were to change radically in canon law beginning in the early *Duecento*, when the pronounced hierocratic positions upheld by Alanus Anglicus and the political-ideological line followed by Innocent III (d. 1216) during his papacy made manifest the distinct change of course that took place in the collections of decretals issued by popes following Gratian (1160-1234 ca.), where a Gregorian theological outlook predominated instead. Innocent III's celebrated metaphor of the two great lights in the firmament, sun and moon, exemplifies the position that canon thought embraced at the beginning of the 13th century, when a largely horizontal vision of relationships

17 Thus, for example, Johannes Bassianus and Rolandus of Lucca: E. Cortese, *Bassiano, Giovanni, in Dizionario Biografico dei Giuristi Italiani*, I, 2013, pp. 191-193, and S. Menzinger, *Verso la costruzione di un diritto pubblico cittadino, in E. CONTE – S. MENZINGER, La Summa Trium Librorum di Rolando da Lucca, Fisco, politica, scientia iuris*, Roma, 2012, pp. cxxv-ccxviii, cxli-cxlii.

18 W. Ullmann, *Medieval Papalism. The Political Theories of the Medieval Canonists*, London, 1949, p. 142. For the consonance of Huguccio and Dante's ideas, especially in the third book of the *Monarchia*, see A. Cassell, *Monarchia Controversy*, 2004, pp. 13–16, even if Richard Kay, in the review of the book of Cassell (The Catholic Historical Review, 90.4 (2004), pp 772–773), considers Gratian the main reference point for Dante.

19 E. Cortese, *Il diritto nella storia medievale*, II, Roma, 1995, pp. 217-219

between universal powers was replaced by a strongly hierarchical model, as the claims of the spiritual world outstretched those secular. The degree to which the Empire was subordinate to the Papacy was thus likened to the distance between sun and moon, a distance that during the course of the 13th century would begin to be estimated in exact terms, using mathematical-astrological data from studies of Ptolemaic texts.[20]

The ideological shift that thus took place within the canon legal thought during the 13th century marked the end of an era: the end of that Gelasian balance born to contain late antique Caesaropapism, softened during the Carolingian age to encompass a near-fusional relationship between Church and Empire, then anachronistically reintroduced in the 12th century by Gratian and his followers. In other words, the end of the balance that, along with rediscovered sources of Roman Civil Law, had been the ideological framework structuring the relationship between Church and Empire between the 5th and the 11th century and the advent of Gregory VII. In a purely juridical sense, the decline of the Gelasian paradigm would bring new theories that posited complex superimpositions between civil and canon law, in response to a need to coordinate the two systems. Against the old idea of separate spheres, the new unitary concept of "*both law*" (utrumque ius) held that canon law and Civil Law were addressed to the same subjects, but the first to the faithful (fideles), the second, to cives. It was a more effective and functional view that however, in an effort to combine the Roman laws with Christian tradition (which tended in effect to mean, following the canonists of the second half of the Duecento, that spiritual thought overwhelmed the lay) evolved into the well-known extremist view of the papacy of Boniface VIII (d. 1303).[21] The widening category of "*sin*", which began to swallow up ever more offenses, was, according to civilist opponents from Odofredus (d. 1265) to Cynus of Pistoia (d. 1336), the

20 See D. Quaglioni, *Luminaria, Duo, in Enciclopedia Federiciana*, Roma, 2005, pp. 320-325. The expression *duo luminaria magna* was used by Innocent III in the decretal *Solitae* addressed to the emperor of Constantinople, which became part of *Compilatio III* (1210) and then of *Liber Extra* (1234); according to Othmar Hageneder the figure of speech was used by the Pope for the first time in 1198, in a letter to a Florentine consul and prior of the Tuscan League: O. Hageneder, *Das Sonne-Mond-Gleichnis bei Innocenz III. Versuch einer teilweisen Neuinterpretation, Mitteilungen des Instituts für Österreichische Geschichtsforschung* 65 (1957), pp. 340 - 368, now in O. Hageneder, *Il sole e la luna. Papato, impero e regni nella teoria e nella prassi dei secoli XII e XIII,* M. P. Alberzoni, Milano, 2000, pp. 33-68.

21 Cfr. E. Cortese, *Il diritto nella storia medievale*, II, 1995, pp. 197-245.

pretext that allowed ecclesiastical jurisdiction to expand at the expense of secular law.[22]

5. The principle of non-interference as barrier against hierocracy

Between the 13th and the 14th centuries, the Gelasian principle of non-interference took on a political cast that previously was alien to it, for in Italy at any rate, it began to be invoked by all those political and learned voices opposing the ever-more ambitious claims of the ecclesiastical sphere. We cannot really understand the role Dante assigns to Gratian in the Divina Commedia without being aware of such underlying tensions. There is a direct connection between the glorious place Gratian is assigned in Paradise and the most explicitly political verses of the 16th canto *of Purgatorio*[23] and of Monarchia in which Dante, in open opposition to the new canon legal thinking, backs the theory of the two suns as symbols of the Empire and Papacy as separate, independent and equally strong institutions. Suns that shone in Rome, and which were mentioned, not by chance, in that same Epistle to the Cardinals in which Dante uses the Gratian version of the story of Uzzah to absolve himself of any accusation he is an enemy of the Church.[24] Although there is no doubt that such views, in particular the so-called principle of non-interference, were part of what we think of as Ghibelline position, belonging to a political ideology that fostered real conflicts taking place daily between rival families and cities, nevertheless it is an oversimplification, from what we know, to classify the convictions of so many *Trecento* intellectuals according to a rigid pro-Imperial, pro-Papal dichotomy. When we look at the interchange between politics and the law during that particular period of communal history, such categories appear inadequate and quite dated. The opposition of Gratian to the canonists of the 13th

22 According to Odofredus (gl. ad C. 1.1.8), the pope *ratione peccati intromittit se de omnibus* (F. Cancelli, *Diritto romano in Dante*, 1970); for Cynus: *ecclesia sibi usurpavit ratione peccati totam iurisdictionem* (L. Chiappelli, *Vita e opere giuridiche di Cino da Pistoia*, Pistoia, 1881, p. 136).

23 *Purgatory*, 16, 106-114 (tr. The Divine Comedy, A. Mandelbaum, 1980-1982): "For Rome, which made the world good, used to have / two suns; and they made visible two paths- / the world's path and the pathway that is God's. / Each has eclipsed the other; now the sword / has joined the shepherd's crook; the two together / must of necessity result in evil, / because, so joined, one need not fear the other: / and if you doubt me, watch the fruit and flower, / for every plant is known by what it seeds".

24 Epistola XI, 21 (tr. P. Toynbee, Dantis Alagherii Epistolae, 1920, p. 146): "And that a glorious patience may foster and maintain this purpose, it behooves you to keep before the eyes of your mind, according to the measure of your imagination, the present condition of the city of Rome, a sight to move the pity even of Hannibal, not to say others, bereft as she now is of the one and the other of her luminaries, and sitting solitary and widowed, as is written above".

century, which Dante saw as the opposition of the ancient and respected canon learning to the new, suggests how important medieval juridical categories were, not merely in his thought, but across the late communal political universe.

6. The Empire as abstract model of public power

Public law was one significant area in which politics and the law met, yet historiography has long neglected that branch of medieval juridical thought and indeed, just a few decades ago, public law was thought to have been almost non-existent before well into the *Trecento*. Communal jurists were reputed to be broadly uninterested in political and juridical questions about how the State functions, and that seemed to be a natural corollary to the political fragmentation of northern and central Italy. The belief that there was but weak interest in the functioning of the State seemed to be confirmed by the legal doctrine produced in Italian cities: a doctrine, it has long been argued, entirely concerned with the private sector and passing over, as jurists undertook the massive task of reviving ancient Roman law, those sections dedicated to the State. Thanks to some major studies carried out in recent years, it now appears that public law was a far more central concern than previously thought, not only in Italy but across all schools of Civil Law from the middle of the 12th century onward.[25] Thus, while the Bolognese school of Irnerius was largely focused on private law, elsewhere matters were different: in informal circles of study in Piacenza, Modena and in Tuscany, for example, there was an early and lively interest in the last three volumes of the Codex, those in which Justinian, arbitrarily combining past Roman law and contemporary, had outlined a model of an ideal State, in reality quite distant from that of the Byzantine Empire itself in the 6th century.

If the many constitutions governing imperial administration could not but seem remote and exotic during the Roman Barbarian age, they were of great interest in Barbarossa's (d. 1190) time, when the revived figure of the Emperor met and did battle with the widespread ambitions of communal governments to embody a public political

25 An extensive bibilography is found in E. Conte – S. Menzinger, *La Summa Trium Librorum di Rolando da Lucca*, 2012, Introduzione, pp. xiii-ccxli; for the European perspective, see *Gli inizi del diritto pubblico*, G. Dilcher – D. Quaglioni, 1-3, *Annali dell'Istituto storico italo-germanico in Trento*. Contributi, vol. 19, 21 and 25, Bologna-Berlin, 2006-2011.

power.[26]That the conflict inspired civilists to a new militancy for Frederick I seems to have been a legend; what it did inspire was a deep reflection on the Empire as an abstract model and on its public aims and consequences. The Empire was thus not viewed as antithetical to urban freedoms, but as a legitimating framework, the "common homeland" (*communis patria*) uniting these new forms of public power, the Communes, whose institutions in fact drew vital force from contact with the abstract Imperial model. Supporting the Empire thus expressed a sentiment that was not really equivalent to the backing of one political faction: it was instead the result of a deep appreciation of the public function of imperial government, from which the city, irrespective of its concrete reality, could draw both inspiration and legitimation, appropriating a model of civic cohabitation.[27]

The Empire thus became a legal institution, an archetype on which to build concrete political systems in the late Middle Ages, beginning with those of the city. This was the Empire that communal jurists extrapolated from rediscovered Roman law and projected, seesaw fashion, on those flesh and blood Emperors who appeared on the Italian political scene, without ever completely identifying with them.[28] This is evident in the widespread condemnation expressed in civil legal circles, of the notion - it was supported by pro-Imperial teaching beginning with Arnald of Brescia (d. 1155) - that the Emperor could freely dispose of all the goods in this world, even those belonging to his subjects.

What prevailed was a narrow interpretation of those passages of the Corpus iuris civilis to which historians have traditionally linked the debate on late medieval sovereignty. If the expression "Lord of the world" (*mundi dominus*) of the Digest (D. 14.2.9) most probably did not even circulate for most of the 12th century, in fact, the statement sentence "everything is understood to belong to the Emperor" (*omnia prin-*

26 G. Post, *Studies in Medieval Legal Theory. Public Law and the State. 1100- 1322*, Princeton, 1964, pp. 81-86; on the destiny of *Tres Libri* in the Middle Ages, E. Conte, *Tres Libri Codicis. La ricomparsa del testo e l'esegesi scolastica prima di Accursio*, Ius commune Sonderhefte. Studien zur Europäischen Rechtsgeschichte, 46, Frankfurt am Main, 1990.

27 C.t. Davis (*Dante and the Empire, in The Cambridge Companion to Dante*, R. Jacoff, Cambridge 2007, ch. 5, pp. 257-269) traces the significance Dante attributes to the Empire primarily to a theological-philosophical mould, underestimating the extent to which the poet's theories depend on the field of Public Law.

28 See P. Costa, *Iurisdictio. Semantica del potere politico nella pubblicistica medievale* (1100-1433), Milano, 1969, p. 196. An entirely philosophical perspective is that of G. SASSO, *Dante, l'Imperatore e Aristotele*, "Roma 2002", pp. 183-252.

cipis esse intelligatur) transmitted by the Codex (C. 7.37.3.1a), was quickly the object of extensive legal opinions.[29]

7. The powers of the Emperor: legal-political thought outside Bologna

The second half of the 12th century was the founding moment, ideologically, of urban public power: it was then that juridical thought developed the theoretical means to which *Trecento* intellectuals consciously looked back when they sought to arrest the inescapable decline of municipal institutions caused by factional infighting and by the ambitions of the new signorie. It was not in Bologna, however, that such ideas were most vigorously pursued, or to be more precise, they were not part of what is considered mainstream Bolognese thought throughout the *Duecento*. *The Magna Glossa* compiled by Accursius (d. 1262) around mid-century, would be the main source – until the invention of printing and even beyond – through which the manuscripts of the Justinian *Corpus Iuris Civilis* would circulate in the late Middle Ages. The influence of Accursius and his sons (four, of which three were jurists) on the teaching of law, as professors in the Studium of Bologna and many other European cities, and on the production of legal texts, thanks to a prosperous manuscript-selling business in Bologna, meant that Accursius's *Magna Glossa* would become something of an official text.[30]

If Accursius's text had the virtue of including the thousands of annotations that the Bolognese Glossators, beginning with Irnerius, had produced on Roman law, it was nevertheless vulnerable to two major criticisms. First, that it had arrested an expanding literary genre, the gloss, which had previously been quite fluid and open; second, that the text created an effective monopoly of Accursian thought in Bologna, where it was difficult to express dissent. And while it would be wrong to see, in Dante's assignment to *Inferno* of Accursius's oldest son Franciscus (d. 1293),[31] a wholesale condemnation

29 E. Conte, *Rolando e il diritto pubblico nel XII secolo*, in E. Conte – S. Menzinger, *La Summa Trium Librorum di Rolando da Lucca*, 2012, pp. lxv-cxxiv, xcix-civ.

30 F. Soetermeer, *Utrumque ius in peciis. Aspetti della produzione libraria a Bologna tra Due e Trecento*, Milano, 1997, pp.182-194 and *passim*; M. Bellomo, *The Common Legal Past of Europe*. 1000-1800, Washington, DC, 1995, pp. 173-175.

31 *Hell*, 15, 106-110.

of the *Magna Glossa,*[32] it is nevertheless very likely that the poet saw in Franciscus Accursii an example of those Bolognese jurists who relied heavily on their earnings from the legal profession and from usury, an activity that was widely practiced by doctores legum in Bologna and elsewhere.[33] At the same time, it is true that in at least two cases, Dante did express opinions that diverged sharply from the line of the *Magna Glossa*, and the matters involved were anything but banal.[34]

Such factors helped some centers exploring an alternative legal approach to flourish, among which the most distinguished was certainly that of Orléans in north-central France, in open disaccord with Accursius's brand of Bolognese law, seen as stifling and old-fashioned. It was here, to a freer intellectual environment, that between the 13th and 14th centuries part of the Civil Law tradition excluded in Bologna - or considered minor - would migrate. Minor: so the work of all those schools that grew up in the 12th century in northern Italy and southern France, schools that were generally informal in character, has tended to be unjustly defined by historians. The technique of the comment itself, which was born later in the different environment of Orléans, was strongly shaped by the intellectual horizons of the so-called Minor Schools, where, although there had not yet occurred a conscious shift of attention from words (*verba*) to the ratio of the law (as would begin in Orléans mid-*Duecento*), scholars began to reflect deeply on the philosophical-juridical concept of *causa.*[35] Greater links with the world of the Liberal Arts and a consequent opening to extra-juridical culture meant that jurists like Johannes Bassianus at Mantua would be interested in the new Aristotelian translations made by Giacomo Veneto (active mid-12th century), including the Latin version of *Physica* II which restored Aristotle's detailed explanation of the four *causae* to Western scholars.[36] The transition from an interest in the *causa* of the contract

32 Thus reasons A. Pezard, *Dante sous la pluie de feu* (Enfer, chant XV), Paris, 1950, pp. 173-200, but the author seems to confuse the son with the father.

33 Bibiliography on Franciscus in S. Menzinger, *Francesco d'Accursio, in Dizionario Biografico dei Giuristi Italiani*, I, pp. 900-901; on the diffusion of usury among Law professors, cfr. ibid, II, *Indice delle cose notevoli*, entries "*usura*" and "*prestito a interesse*" (pp. 2176, 2188).

34 See below.

35 E. Cortese, *Il diritto nella storia medievale*, II, 1995, pp 187-195

36 E. Cortese, *Bassiano, Giovanni*, 2013.

as explored by Johannes Bassianus (d. end of 12th century) to that of the *causa or ratio* of the law, as matured at Orléans in the second half of the 13th century, is one of many signs marking a dialogue that the new French civilists had taken up, a century later, with ideas that emerged in the Italian Minor Schools. Other signs of that dialogue can be found in debates on sovereignty and on the Empire, debates that perhaps were known to Dante himself via Cynus of Pistoia, the Italian jurist who first embraced the ideas and methods of Orléans and who served as a bridge spreading those French ideas in Italy.

If only because the professors of Orléans, despite the fact they were churchmen, had close ties with the French crown, their approach was anything but hierocratic. Nor did the headstrong views of the *Duecento* canonists take hold there. It comes as no surprise that Boniface VIII's extremist thought was rejected by these particular civilists, the first to begin to consider the concept of national sovereignty.[37] One of the leading voices in this school, Pierre de Belleperche (d. 1308), joined the court of Philippe le Beau in 1296 and quickly became one of his most trusted advisors.

Belleperche opposed spiritual interference in secular jurisdiction, arguing that the sphere of ecclesiastical justice should not extend beyond matters of faith.[38] The views of Jean de Monchy, the first to posit imperial power as an abstract quantity, were transmitted by his better-known pupil Jacques de Revigny (d. 1296), who insisted that the Empire had a jurisdictional function,[39] citing a century-old constitution of Frederick I still in circulation in feudal law, and using concepts not unlike those sketched out in the 12th century by those authors in the Minor Schools who had delved into public law. All of it was material that, perhaps via Cynus, made its way into Dante's *Monarchia*, where the Empire, following Frederician law, was defined as "jurisdiction which embraces within its scope every other temporal jurisdiction" (*iurisdictio omnem temporalem iurisdictionem ambitu suo comprehendens*).[40]

37 E. M. Meijers, *Etudes d'Histoire du Droit*, III, publiées par R. Feenstra et H.F.W.D. Fischer, Leyde, 1959, pp. 21, 82.

38 K. Bezemer, *Pierre de Belleperche. Portrait of a legal puritan*, Frankfurt am Main, 2005, pp. 101-105.

39 Cfr. E. Cortese, *Il diritto nella storia medievale*, II, 1995, pp. 405-408

40 *Monarchia* (D. Quaglioni, 2014), III x 10; D. Quaglioni, "*Arte di bene e d'equitade*". *Ancora sul senso del diritto in Dante* ("Monarchia" II, V, 1), *Studi Danteschi*, 76 (2011), pp. 27-46, 37-38.

Influenced by the French thinkers, Cynus of Pistoia firmly denounced as erroneous a gloss that was part of Accursius's text, in which the Empire was said to have come forth from fate (*fortuna*), rather than from God.[41] It was one of the most controversial ideological issues of the early *Trecento*, when the *anti-Guelph* intellectual side strongly opposed the notion that the Empire derived from the Church, an idea that the canonists sought at length to impose in place of the older conception that both of the highest powers were of divine origin. It may well have been that particular gloss that aroused Dante's ire against jurists in Monarchia, a fury that, far from being generic, was most likely an attack on the mistaken interpretation of the Bolognese Glossators.[42]

In the juridical thinking of *Trecento* Italy, ideas from Orléans were sometimes accepted together with a simultaneous recovery of the earlier civilist tradition flourished mainly outside the Accursian Glossa. An interesting expression of this intellectual current came at the end of the 12th century, with the assertion of an abstract imperial power - inspired both by the newly recovered texts of Roman law, and by the historical vicissitudes of the house of Hohenstaufen - that however had not yet taken on truly anti-papal colors.

It was within this perspective that the Peace of Constance (1183) took on a new significance in *Trecento* legal thought, when a jurist as highly involved in Lombard politics as Albericus de Rosciate (d. 1360) began to reflect on the concessions made by Frederick I to Italian cities and to study Rolandus of Lucca's *Summa Trium Librorum*, the most extensive commentary on Roman public law written between the 12th and 13th centuries, and in an environment far from Bologna.[43] The ease with which Albericus combines citations from these materials with passages from Cynus, from French jurists and the authors of late-*Duecento* Bolognese quaestiones, invites us to view in a far more unified light chapters of a European political-legal culture that have mostly been

41 Cfr. E. Cortese, *Il problema della sovranità nel pensiero giuridico medioevale*, Roma, 1966, pp. 105-106

42 According to D. Quaglioni (*Monarchia*, II ix 19-21, pp. 1188-1191, and D. Quaglioni, "*Arte di bene e d'equitade*", 2011, pp. 34-36) in fact, the order to be silent (*sileant!*) that Dante directs to the jurists in Monarchia appears just after a long explanation intended to show that the Empire was a gift of Providence.

43 See D. Quaglioni, "*Arte di bene e d'equitade*", 2011, p 45; S. Menzinger, *Diritti di cittadinanza nelle quaestiones giuridiche duecentesche e inizio-trecentesche, in Cittadinanza e disuguaglianze economiche. Le origini storiche di un problema europeo (XIII-XVI secolo),* C. Lenoble – G. Todeschini, *Rome, École française de Rome, Mélanges de l'École française de Rome - Moyen Âge*, 125-2 | 2013, pp. 9-11.

considered separately. Albericus's frequent citations of Dante suggest we would do well to tear down the walls that have traditionally surrounded medieval juridical culture, for its high level of technical expertise did not preclude communications beyond the universe of the legal thought. Albericus's admiration for Dante led him to translate in Latin Jacopus de Lana's comment on the *Commedia*; Bartolo de Sassoferrato consulted *Monarchia* at length, and from a certain time onward, also shared its basic political message. He even found its literary arguments worthy of doctrinal consideration, and went so far as to include, in a comment on the Justinian Codex, a learned refutation of the idea of nobility expressed by Dante in *Le dolci rime*.[44] And the intellectual curiosity was fully mutual, for if Dante's convictions grew out of an intense dialogue with the most advanced currents of cultivated legal thought, the jurists of the Trecento also read and commented on Dante's work with great intelligence.

44 Cfr. P. Borsa, "*Sub nomine nobilitatis*": *Dante e Bartolo da Sassoferrato*, in *Studi dedicati a Gennaro Barbarisi*, C. Berra M. Mari, Milano, 2007, pp. 59-121, e M. Ascheri, *La nobiltà dell'Università medievale: nella Glossa e in Bartolo da Sassoferrato, in Sapere e/è potere. (Dalle discipline ai ruoli sociali),* L. Avellini – A. Cristiani – A. De Benedictis, Bologna, Istituto per la storia di Bologna, 1990 pp. 239-268.

GIULIO NAPOLITANO*

ADMINISTRATIVE LAW SYSTEMS AROUND THE WORLD: (INCREASINGLY) SIMILAR BUT (STILL) DIFFERENT

ABSTRACT: *Comparative legal studies show increasing convergence between administrative law systems. This is the outcome of ever tighter international and supranational constraints, as well of lateral opening of legal orders, which make transplants and imitations among jurisdictions much easier. This paper, however, sheds light on achievements and limits of legal harmonization; provides some alternative explanations of convergence, beyond transplants and imitations theories; argues that relevant differences among administrative law systems do remain. Final remarks suggest a multi-layered architecture of administrative law.*

1. Introduction

Convergence in administrative law has become a new mantra. Comparative legal studies show increasing convergence between administrative law systems.[1] This is the outcome of ever tighter international and supranational constraints, as well of lateral opening of legal orders, which make transplants and imitations among jurisdictions much easier. This paper, however, sheds light on achievements and limits of

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1 S. Rose Ackerman – P.L. Lindseth – B. Emerson, *Comparative Administrative Law*, Cheltenham-Northampton, 2017; J.s. Bell, *Comparative administrative Law*, in M. Reimann – R. Zimmermann, *Oxford Handbook of Comparative Law*, Oxford, 2006, pp. 1261-1286; F. Bignami, *Comparative Administrative Law*, in *The Cambridge Companion to Comparative Law*, Cambridge, 2012, pp. 145-170; J. Boughey, *Administrative Law: The Next Frontier for Comparative Law*, *in International and Comparative Law Quarterly*, 6, 1, 2013, pp. 55-95.

legal harmonization (part. 2); provides some alternative explanations of convergence, beyond transplants and imitations theories (part. 3); argues that relevant differences among administrative law systems do (and will) remain (part. 4). Final remarks suggest a multi-layered architecture of administrative law (part. 5).

2. Achievements and limits of legal harmonization

In the last thirty years, the ever-growing emergence of regional and global public goods, which cannot be managed by governments at the national level, explained the move towards an increasing supranational and international regulatory cooperation in many fields, in market, as well as in non-market areas. The European internal market became larger and much more deeply integrated. With the Maastricht Treaty and Lisbon Treaty, the European Union gained additional competences in other fundamental areas. At the global level, a World Trade Organization was established. Other international institutions, such as the World Bank, pushed recently democratized and countries to adopt administrative law institutions and regulations in order to protect private parties and international investors. International treaties and conventions in non-market fields, like the Aarhus Convention on the protection of the environment, further developed institutional integration, even in public law governance and accountability.[2]

The legal harmonization taking place within Europe and on a global level, through different forms of international regulatory cooperation, represented a powerful and often compulsory tool for approaching domestic administrative law systems. International organizations were established and national administrations were integrated in regional and global networks. International and supranational rules and standards started to be applied directly in the relationships between organizations, governments, and private actors. At the same time, those rules and standards transformed several areas, both substantial and procedural, of domestic administrative laws.

First, new principles of administrative organization and action, such as transparency and proportionality, and fundamental rights, such as the right to good administration and protection of legitimate expectation, were affirmed. Second, new rather

2 These changing patterns of contemporary administrative Law were signaled at the beginning of the new century, R.B. Stewart, *Administrative Law in the 21st Century, in New York University Law Review*, 2, 2003, pp. 437-460, and still are the heart of his reflection on the subject (R.B. Stewart, *State Regulatory Capacity and Administrative Law and Governance Under Globalization*, in N.R. Parrillo, *Administrative Law from the Inside Out*, Cambridge, 2017). I tried to analyze their impact on the transformations of comparative administrative Law, in a broader and partially different version of this article, in G. Napolitano, *The Transformations of Comparative administrative Law, in Rivista Trimestrale di Diritto Pubblico*, 4, 2017, pp. 997-1033.

similar regulatory institutions were established almost everywhere. The development of independent authorities, of course, has country-specific origins in every jurisdiction.

However, its expansion has been greatly favoured by EU law approximation directives, especially in network utilities regulation and financial markets oversight. As a matter of fact, these directive require the establishment of independent authorities and design commissioners' appointment requirements, financial autonomy, regulatory and supervisory powers.

Third, administrative procedure rules were increasingly harmonized by international and European rules impose standards to follow regarding notice and comments in rule-making and due process in adjudication, in many relevant areas of administrative law. Fourth, notwithstanding the formal respect for procedural autonomy of nation-states, administrative justice and judicial review were deeply affected by supranational rules, as the example of the EU "Remedies" Directive in public procurement clearly shows.

All these achievements explain the enormous success gained by new academic fields, such as European Administrative Law and Global Administrative Law.

The forerunner of European Administrative law was a German scholar, Jürgen Schwarz, who published in 1988 the first edition of his book on *Europaeisches Verwaltungsrech.*[3] The fundamental idea at the basis of this new legal field was that the European integration process had been built around a community of administrative law.[4] The entire legitimacy of the European integration process was said to lay fundamentally in the positive outcomes it granted, ensuring the efficient delivery of immaterial goods and services, like peace, market integration, and consumers' welfare. Even when the centrality of administrative law was eroded by the relevance gained by typical constitutional law, international law and fundamental rights issues, the literature on the topic

3 J. Schwarz, *Europeaisches Verwaltungsrecht*, Baden-Baden, 1988. Translated into English in 1992, its revised version was published in 2006, after the enlargement of the EU to Eastern Europe countries.

4 The idea is embraced by comparative private lawyers (e.g. V. Zeno-Zencovich – N. Vardi, *European Union as a Legal System in the Comparative Perspective, in European Business Law Review*, 2008, pp. 243-265) and US scholars too: P.L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community, Columbia Law Review*, 99, 1999, p. 628; ID., *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, 2010.

continued to grow, with reference to specific sectors and in broader general terms.[5] Global Administrative Law was inaugurated at a conference held in 2004 held at the New York University Law School. This movement assumed that a large part of the institutions ensuring a global governance could be understood as (public, hybrid or private) administrations, and that such administrations were organized and shaped in their action by principles of an administrative law character.[6] As a consequence, the Global Administrative Law scholarship – also previous study and research in international administrative law which date back to the second half of the Nineteenth century – started to refer to the structures, procedures and normative standards for regulatory decision-making – including transparency, participation, and review – that are applicable to international organizations; to informal intergovernmental regulatory networks; to regulatory decisions of national governments framed by an international or an intergovernmental regime; and to hybrid public-private or private transnational bodies.[7] Even the classic public-private divide was revised in the context of global regimes.[8] From a supranational legal harmonization perspective, differences among domestic systems of administrative law were neglected or underestimated, because merely transitional. If

5 Among the most outstanding textbooks, P. Craig, *EU administrative Law*, Oxford, 2006 and 2012; H.c.h. Hofmann – G.c. Rowe – A.h. Türk, *Administrative Law and Policy of the European Union*, Oxford, 2011; C. Harlow – P. Leino – G. Della Cananea, *Research Handbook on European Administrative Law*, Cheltenham-Northampton, 2017; J.p. Schneider, *Europäisches Verwaltungsrecht*, Berlin - Heidelberg, 2018. In the Italian literature, M.p. Chiti, *Diritto amministrativo europeo*, Milano, 1999, (updated editions in 2004 and 2008; a collective book edited by M.p. Chiti was published in 2012). The close relationship between EU constitutional and administrative Law is stressed by M. Ruffert, *The constitutional basis of EU administrative Law*, in *Comparative Administrative Law*, pp. 667-679 and P.l. Lindseth, *What's in a label? The EU as "administrative" and "constitutional", in Comparative Administrative Law*, pp. 680-697. On the transformations of the European administrative system induced by the crisis, E. Chiti, *In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum, in Cambridge Yearbook of European Legal Studies*, 17, 2015, pp. 311-333.

6 The inaugural paper was delivered by B. Kingsbury – N. Krisch – R.b. Stewart – J. Wiener, *The Emergence of Global Administrative Law*, in *Law and Contemporary Problems*, 68, 3 – 4, 2005, pp. 15-61. From a European perspective, S. Cassese, *Administrative Law without the State. The Challenge of Global Regulation, in New York University Journal of International Law & Policy*, 37, 2004, p. 663; C. Harlow, *Global Administrative Law: The Quest for Principles and Values, in European Journal of International Law*, 17, 1, pp. 187-214.

7 An assessment of the achievements of the Global administrative Law scholarship in R.b. Stewart, *The normative dimensions and performance of global administrative Law, in International Journal of Constitutional Law*, 13, 2, 2015, pp. 499-506; an up to date and enlarged perspective in S. Cassese, *Research Handbook on Global Administrative Law*, Cheltenham-Northampton, 2016 (with specific reference to the different academic paths, L. Casini, *Global Administrative Law scholarship*, pp. 548 -571).

8 From different perspectives, M. Goldmann, *A matter of perspective: Global Governance and the Distinction Between Public and Private Authority (and not Law), in Global Constitutionalism*, 5, 1, 2016, pp. 48-84; L. Casini, "*Down the rabbit-hole": The Projection of the Public/Private Distinction Beyond the State, in International Journal of Constitutional Law*, 12, 2, 2014, pp. 402-428; I.j. Sand, *Globalization and the Transcendence of the Public/Private Divide — What is Public Law under Conditions of Globalization?*, in C. Mac Amhlaigh C. Michelon – N. Walker, *After Public Law*, Oxford, 2013.

serious and relevant, relevant, these differences were deemed mostly as a failure in integration and regulatory cooperation, to address through proper enforcement measures and, when needed, to sanction following specific infringement procedures.

The political premise of global or regional legal harmonization, however, turned out to be to be delusional. Worldwide, especially after the eruption in 2008 of the financial crisis, popular confidence in the virtues of economic and technological globalization greatly decreased. In the meantime, some of the most important negotiations in multilateral free-trade agreements at the international and the macro-regional level failed. A new strategy based on purely bilateral deals and treaties emerged. In some cases, governments and political leaders announced their commitment to restore national borders. Even the European integration process entered into a phase of great uncertainty: above all, because of the sovereign debt crisis started in 2010 and of the migrants' human flow, which greatly increased since 2015. As a consequence, the citizens' satisfaction and trust towards the EU institutions and policies fell. In 2016, for the first time, a Member State decided to leave the Union. Even if fragmented inside and externally weakened, national governments tried to occupy again the centre stage and to play a relevant role on the international scene.[9]

In such a difficult context, it became very clear that even the most intense degree of legal harmonization, as the one prevailing in some areas of EU law, could push for convergence and increasing similarities, but it would be unable to generate homogeneity. Directives, including the most detailed ones, always leave room for different choices by Member States. Even when Member States simply translate the European into their own languages, or adopt the same institutional options, implementation and outcomes remain significantly different, as the example of public procurement shows.[10] These issues cannot be addressed through the opening of infringement procedures.

9 A nuanced view in M. Seyour, *The Fate of Nation-state*, Montreal, 2004. The financial crisis brought a re-launch of the role of national governments: G. Napolitano, *The Two Ways of Global Governance After the Financial Crisis: Multilateralism Versus Cooperation Among Governments,* in *International Journal of Constitutional Law*, 9, 2, 2011, pp. 310-339; with specific reference to the Eurozone, F. Fabbrini, *States'Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination, in Cambridge Yearbook of European Legal Studies*, 17, 2015, pp. 3-35; S. Rangone, *Managing the Euro Crisis, National EU Policy Coordination in the Debtor Countries*, Oxford, forthcoming 2018.

10 On this sector, see A. Sanchez-Graells, *Against the Grain? – Member State Interests and EU Procurement Law*, in M. Varju, *Between Compliance and Particularism: Member State Interests and European Union Law*, Berlin-Heidelberg, forthcoming 2018.

3. Beyond legal transplants: some alternative explanations of convergence in administrative law

Moving from a purely national to a transnational or "beyond the border" approach, the attention must be focused on the overarching logic which explains why, to a relevant extent, administrative law systems are increasingly similar. The very significant role played by legal harmonization and its limits were already discussed earlier.

Another warning is now required with reference to the widespread idea of legal transplants, and related concepts such as imitation, (voluntary, imposed, explicit or crypto) reception, solicited imposition, and inoculation.[11] Strong criticism against this conceptual framework has already been expressed in comparative law theory. In its most radical expression, legal transplants were said to be even impossible.[12] Undoubtedly, the transplants' conceptual framework reveals how deep the legacy is of nationalism (and even colonialism). In addition, that framework is often delusional, being based on two wrong implicit assumptions. The first one is that there is a leading country which is able to influence other countries' legal and institutional choices; or, at least, a best-performer country which other countries assume as a source of inspiration to achieve the same desirable outcomes. The second one is that legal systems are compact and coherent entities and that the scientific knowledge about them is based on the logic of non-contradiction.[13]

Not surprisingly, in recent years, the terminology of legal transplants was superseded by a colourful vocabulary, which highlights a more nuanced vision of choice, mobility and influence of legal institutions. As a consequence, comparative law theory embraced the use of other words and metaphors, such as grafting, implantation, repotting, cross-fertilisation, cross-pollination, engulfment, emulation, infiltration, infusion, digestion, salad bowl, melting pot and transposition, which evoke different conceptual frameworks and alternative explanation based on ideas such as collective colonisation, con-

11 A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

12 This is the position assumed by P. Legrand, *The Impossibility of Legal Transplants, in Maastricht Journal of European and Comparative Law*, 4, 2, 1998, pp. 111-124.

13 As a consequence, legal systems are considered "*pure*" and not hybrid/multi-layered structure. On this criticism see H.p. Glenn, *Quel droit comparé?, in Revue de droit de l'Université de Sherbrooke*, 43, 1, 2013, pp. 23-46.

taminants, legal irritants, layered law, hyphenated law and competition of legal systems.[14]

When the legal transplants' approach is not abandoned, the existing literature offers a more problematic conceptual framework, which accounts for the competing positive (transplanted rules and institutions work in the same way as at home), skeptical (they are largely irrelevant), negative (they are often harmful), and differentiated views (they function in a modified way).[15] The latter approach, in particular, provides a detailed map to discover standard case and variants of legal transplants with reference to the most relevant topics, such as source-destination, levels, pathways, formal or informal, objects, agency, timing, power and prestige, change in object, relation to pre-existing law, diffusion perspective, impact.[16] Furthermore, ideas and actors of legal transplants do change in a considerable way in relation to space (Europe, North and South America, colonial world, Middle East, and East Asia) and time (cultural transplants were probably more relevant than legislative ones in the nineteenth century until the mid-twentieth century; since the Second World War and even more after the fall of communism, the United States supplanted the European countries and the Americanisation of law spread worldwide; in the last twenty years, globalization and the end of the American order created a much more "multilateral" system of legal influences).[17] If one accepts this fine-tuned re-conceptualization of the theory, it can be easily acknowledged that legal transplants did exist and play a significant role in approaching one to the other the domestic rules and institutions of administrative law too. However, especially in this area of law, such an explanation does not reveal the whole truth.

Other relevant phenomena, like independent parallel invention, natural convergence and creative adaptation must be adequately considered in order to understand why domestic and supranational administrative law systems are becoming increasingly similar.

To this purpose, at least four factors must be taken into account: historical evo-

14 See for a more complete list, E. Örücü, *A Theoretical Framework for Transfrontier Mobility of Law, in Transfrontier Mobility of Law*, in R. Jagtenberg – E. Örücü – A. De Roo, *Transfrontier Mobility of Law*, The Hague, 1995, p. 5.

15 M. Siems, *Comparative Law*, Cambridge, 2014, pp. 195-200

16 W. Twining, *Globalisation and Comparative Law*, in E. Örücü – D. Nelken, *Comparative Law: A Handbook*, Oxford, 2007, pp. 69-89, in particular pp. 86-87, as re-framed by M. Siems, *Comparative Law*, 2014, pp. 200-201.

17 M. Siems, *Comparative Law*, 2014, pp. 201-214.

lution, economic and institutional efficiency ratios, public values discourse and human rights approach, major trends in policy-making as a response to social problems. Historical evolution makes clear the (parallel) independent invention and development, in every jurisdiction, of a complex bureaucratic machinery at the service of modern states and international organizations and the foundation of an always more complex system of administrative law. The growth of apparatus is the outcome of ever-increasing public tasks, which require delegation, specialization and expertise, both at the national and the supranational level.[18] Legal structures of government, agencies, public law entities, independent regulatory authorities, and state-owned corporations circulated and flourished all around the world.[19] Their survival through continuous adaptations shows that Darwinism can be applied to the study of bureaucratic organization and action too. Successful administrative institutions, such as independent agencies exercising rule-making and adjudication functions, can prevail even over venerated constitutional principles, such as separation of powers.[20] Economic and institutional efficiency ratios explain why governments everywhere receive from administrative law tasks, powers and prerogatives, which are deemed necessary to correct market failures in an appropriate way. In all jurisdictions, potential inefficiencies arising from the existence of public goods, externalities, market power, information asymmetries, macro-economic imbalances are addressed through the assignment to the government and related agencies of the duty to accomplish specific functions and through the conferral of authoritative powers in order to overcome non-cooperative behaviours of private actors.[21]

At the same time, administrative law regulations and dispute resolution mechanisms aim to prevent or correct government failures, which arise from the specific nature of public administrations as agents at the service of multiple principals (citizens,

18 An explanation based on economic efficiency in J.L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions, in Journal of Law, Economics, and Organization*, 1, 1985, pp. 81-100.

19 One of the most well-known case is that of independent agencies: a comparative overview in D. Halberstam, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies*, pp. 139-150; M. Shapiro, *A Comparison of US and European Independent Commissions*, pp. 234-250, both in S. Rose-Ackerman – P. L. Lindseth, *Comparative Administrative Law*, Cheltenham, 2010.

20 As brilliantly pointed out by B. Ackerman, *Good-bye, Montesquieu, Comparative Administrative Law*, 2010, pp. 38-43.

21 J. Stiglitz – J.K. Rosengard, *Economics of the Public Sector*, New York, 2015

groups, elected officials, and international organizations), often competing and conflicting one against the others.[22] All of this explains the diffusion at every latitude of substantial limits to administrative discretion made of general principles, such as proportionality and reasonableness, as well as objective standards, criteria and thresholds; the development of procedural constraints, based on participation and access to public information; and the establishment of sophisticated judicial review institutions.[23]

The intimate structure of administrative law is deeply influenced by public values, which guide the legitimate exercise of the authority by the state and the accomplishment of missions of general interest.[24] In every jurisdiction, public administrations are required to serve the people, to be impartial and to not discriminate, to be "good" and efficient, to be open and transparent, to be subject to effective judicial review.[25] Public administrations are also required to respect the fundamental rights of the individuals in the exercise of the public authority and to ensure the satisfaction of the population's basic needs through the provision of goods and services. As a consequence, power is limited and even duties to purchase or to directly produce those goods and services are often established. In many cases, national constitutions strengthen governmental obligations and ensure the respect of individual rights. In addition, administrative law is everywhere more and more affected by the human rights approach, which is inherently universal and is often backed by international conventions.[26] A powerful

22 D.a. Farber – P.p. Frickey, *Law and Public Choice. A Critical Introduction*, Chicago, 1991; M.j. Horn, *The Political Economy of Public Administration*, Cambridge, 1995; J.l. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*, New Haven, 1997; R.d. Cooter, *The Strategic Constitution*, Princeton, 2000; M. Mccubbins – R. Noll – B. Weingast, *The Political Economy of Law*, in A.m. Polinsky – S. Shavell, *Handbook of Law and Economics*, Amsterdam, 2007, II, pp. 1651-1738.

23 F. Bignami, *Comparative Administrative Law*, in M. Bussani – U. Mattei, *The Cambridge Companion to Comparative Law*, Cambridge, 2013, pp. 154-160; G. Napolitano, *Administrative Law, in Encyclopedia of Law and Economics*, Heidelberg - New York, 2014, ad vocem.

24 On the values underpinning public Law, M. Loughlin, *The idea of public Law*, Oxford, 2004, pp. 25- 29.

25 P. Daly, *Administrative Law: A Values-Based Approach*, in J. Bell – M. Elliot – J. Varuhas – P. Murray, in *Public Law Adjudication in Common Law Systems: Process and Substance*, Oxford, 2015; with specific reference to the problems emerging in case of privatization, L. Dickinson, *Public Law Values in a Privatized World, in Yale Journal of International Law*, 31, 2006, pp. 383-426; M. Tirard, *Privatization and Public Law Values: A View from France, in Indiana Journal of Global Legal Studies*, 15, 1, 2008, pp. 285-304; J.b. Auby, *Contracting Out and "Public Values": A Theoretical and Comparative Approach, in Comparative Administrative Law*, 2010, pp. 511-523.

26 The relevance of constitutional values and fundamental rights for administrative Law at every latitude is stressed by J.s. Bell, *Comparative administrative Law*, in M. Reimann – R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, 2006, pp. 1271-1274.

factor of natural convergence is then in action. Major trends in policy making spreading across countries play a relevant role too. Big government theory and practice pushed for an ever-continuing expansion of the role of the public sector in the first thirty years of the twentieth century and even more after Second World War. In the last two decades of the twentieth century, on the contrary, liberal ideas and government failures theories favoured a rolling back of the state and inspired market based reforms.[27] Post 2008-crisis recipes are now influencing recovery strategies, based on a more nuanced and blurred mix of public and private tools.[28] Much more than in the past, reinventing government initiatives are not insulated on a national level, since, in such a digitally connected world, policy making, even when is local, takes place under the world's eyes.

Administrative reforms, of course, are a very fertile ground for voluntary imitations and for prescribed or recommended transplants. However, convergence, whether natural or encouraged, is only partial. The dominant strategy is adaptation, which is often rather creative. In addition, late comer countries can take advantage of their alleged delay, correcting failures emerging from implementation in forerunners jurisdictions, and adopting rules and institutions in which the latest software updates have already been installed.

All these factors explain why not only legal harmonization and transplants, but also parallel independent inventions, evolutions, and adaptations bring administrative law systems closer and closer across jurisdictions at regional level and even worldwide. Opening up to international regulatory cooperation, governmental empowerment, delegation to experts, contracting out, regulatory rationalism, participation in decision making, transparency, and judicial review are the fundamental pillars of administrative law at every latitude. All jurisdictions have to face similar problems and challenges. And, by so doing, they must comply more and more with international and supra-

27 D. Osborne – T. Gaebler, *Reinventing government: How the Entrepreneurial Spirit is Transforming Government, Reading Mass. Adison Wesley Public Comp., in The Journal of Sociology & Social Welfare*, 21, 1, 1992; S. Strange, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge, 1997; S. Cassese, *The Age of Administrative Reforms*, in J. Hayward – A. Menon, *Governing Europe*, Oxford, 2003, pp. 128-138.

28 S. Kuhlmann – H. Wollmann, *Introduction to Comparative Public Administration: Administrative Systems and Reforms in Europe*, Cheltenham-Northampton, 2014; G. Napolitano, *Looking for a Smarter Government (and Administrative Law) in the Age of Uncertainty*, in S. Rose-Ackerman – P. Lindseth, *Comparative Administrative Law*, 2017, pp. 352-369.

national regulations and with common constitutional traditions. This is a very fertile ground for the further development of significant research projects. In 2006, a group of European scholars promoted an ambitious project aiming to discover the common roots and developments of the ius publicum europaeum, in the areas of both constitutional and administrative law.[29] More recently, other scholars announced their intention to extend the common core approach applied in the field of EU private law to the area of administrative law.[30] Finally, the idea of a cosmopolitan administrative law was evoked.[31]

4. The context matters: why administrative law systems still differ

Even if increasingly similar, domestic, regional and global systems of administrative law still partially differ, both in design and in implementation. The walls erected by legal nationalism fell. But the context matters, in particular in public law.[32] As a consequence, specific interdisciplinary efforts and investments are needed: history, politics, economy, society, and culture must be taken into account to understand the causes of existing differences, to make legal harmonization effective, and to avoid the rejection of transplants.[33] All these contextual factors are extremely relevant in administrative law.

The first, history, is fundamental to understand the distinctive features of sta-

29 The project was developed in six books published in German language: P. M. Huber – A. Von Bogdandy, *Handbuch Ius Publicum Europaeum*, Frankfurt am Main, 2007-2016.The English version is under publication with Oxford University Press.

30 The Common Core of European Administrative Law (CoCEAL) project, coordinated by M. Bussani and G. Della Cananea, and funded by the European Research Council (ERC) under the Horizon 2020 Research and Innovation Programme, was presented in a conference held in Trieste, May 18-19, 2017.

31 G. Napolitano, *Going Global, Turning Back National: Towards a Cosmopolitan Administrative Law*?, pp. 484-485. A broader cosmopolitan vision of public Law emerges in H.p. Glenn, *The Cosmopolitan State*, Oxford, 2013; and A. Somek, *The Cosmopolitan Constitution*, Oxford, 2014.

32 The relevance of the context, especially in the field of public Law, is stressed by U. Kischel, *Rechtsvergleichung*, München, 2015, pp. 35-41, 164 and p. 243.

33 From a general comparative Law perspective, M. Reinmann, *Comparative Law and Neighbouring Disciplines*, in *The Cambridge Companion to Comparative Law*, pp. 13-34; The quest for "*cross-disciplinary insights*" is very clear in S. Rose-Ackerman – P. Lindseth – B. Emerson, *Introduction, in Comparative Administrative Law*, 2017.

tehood and sovereignty in different jurisdictions.[34] As a matter of fact, the specific path of each nation building process has a direct effect on the role of the bureaucracy, its status and the subsequent regulations, and even performances.[35] Ancient states, like France and China, traditionally have strong and highly qualified bureaucracies, which often constitute the fundamental structure of government. Hierarchy more than rules ensures the proper working of the command and control chain. This is especially true in authoritarian governments. More recent states, on the contrary, usually have a weaker bureaucratic structure. Rules aiming at constraining it can be even extremely detailed, but are often poorly enforced. Institutional and political instability, of course, further weakens the rule of law and the administrative capacity. The well-functioning of democratic and representative institutions can be fundamental in ensuring the proper delivery of goods and service to the people and the satisfaction of their ever-changing needs. A second factor is the constitutional and political system. This factor is here more relevant than in other fields, because "administrative law cannot avoid confrontations with politics.[36]" As a matter of fact, different constitutional and political constraints deeply affect the way in which bureaucracies exercise their tasks and provide good and services to citizens. This explains why administrative law is everywhere at the centre of conflicts and strategies between different political, economic, and social players.[37]

As a consequence, critical comparative law and positive political theory, which contests the established division between law and politics, can be extremely fruitful in administrative law. Political or ideological factors can be used, on one hand, to explain similarities and differences between jurisdictions and legal systems; on the other hand,

34 In general terms, J. Gordley, *Comparative Law and Legal History*, in M. Reimann – R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, 2006, p. 753. With specific reference to comparative administrative Law, B. Sordi, *Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law*, in *Comparative Administrative Law*, 2017, pp. 23-37. Even the notion of State and its perception change across jurisdictions: O. Beaud, *Conceptions of the State*, in M. Rosenfeld – A. Sajó, *The Oxford handbook of comparative constitutional Law*, Oxford, 2012.

35 A general overview in S. Cassese, *The rise of the administrative state in Europe*, in *Rivista trimestrale di diritto pubblico*, 4, 2010, pp. 981-1008.

36 The point is made by S. Rose-Ackerman – P.L. Lindseth, *Comparative Administrative Law: Outlining a Field of Study*, in *Windsor Yearbook of Access to Justice*, 28, 2, 2010, pp. 435-449.

37 As explained by US political scientists show since the mid-Eighties of the twentieth century. More recently, with reference to agencies' strategies, Y. Givati, *Game Theory and the Structure of Administrative Law*, in *The University of Chicago Law Review*, 81, 2014, pp. 481-518; a broader view in G. Napolitano, *Conflicts and Strategies in Administrative Law*, in *International Journal of Constitutional Law,* 12, 2, 2014, pp. 357-369.

in a more normative way, to foster institutional and social change.[38] Few examples make this point very clear. The existence of a presidential (in the United States and in Latin America) or a parliamentarian system (in many European countries and in Japan) does affect the role of administrative law and its distinctive features. In the first one, the President and the Congress compete to guide and control the bureaucracy. To this purpose, the President mainly uses executive orders. At the same time, the Congress tries to shape administrative action through detailed statutes and oversight on the exercise of delegated powers.[39] In a parliamentarian system, on the contrary, the political preferences of Government and Parliament are usually aligned. As a consequence, they develop a cooperative strategy under which the first asks the second to legislate only when this is more advantageous for political or institutional reasons. Parliaments less involved in the legislative crafting of administrative law rules and in the ex ante guidance of the bureaucracy, however, play a greater role in ex post supervision and performance review.[40] Another relevant constitutional feature, which affects the nature of administrative law, is the vertical separation of powers. In a federal state, administrative law can be extremely diversified and fragmented, differently from a centralized state, where administrative law is much more homogeneous. Finally, when individual rights are protected by the Constitution and shape the political process, administrative law also is deeply affected by the nature of those rights (depending on whether they only protect fundamental liberties or social rights as well).[41]

38 A general overview in D. Kennedy, *Political ideology and comparative Law*, in *The Cambridge Companion to Comparative Law*, pp. 35-56.

39 The idea that "*differences between parliamentary and presidential systems have important implications for administrative governance*" has been recently reaffirmed by P.L. Strauss, *Politics and Agencies in the Administrative State: the U.S. Case, in Comparative Administrative Law*, 2017, pp. 44-59.

40 D.C. Mueller, *Constitutional Democracy*, Oxford, 1996; S. Rose-Ackerman, *Policymaking Accountability: Parliamentary versus Presidential Systems*, in D. Levi-Faur, *Handbook on the Politics of Regulation, Cheltenham-Northampton*, 2011, pp. 171-184. Relevant differences could emerge on the side of judicial review too, even if the usefulness of positive political theory' explanations should not be overrated: M.e Magill – D.r. Ortiz, *Comparative Positive Political Theory and Empirics, in Comparative Administrative Law*, 2017, pp. 71-84.

41 More, in general, however, while constitutions serve as "*symbols*", administrative Law systems provide "*the effective legal regulation of government*": T. Ginsburg, *Written Constitutions and the Administrative State: on the Constitutional Character of Administrative Law*, in *Comparative Administrative Law*, 2017, pp. 60-70. As a consequence, systemic administration based on its general supervisory role should be considered as a relevant part of constitutional Law: G.e. Metzger, *The Constitutional Duty to Supervise*, in *Yale Law Journal*, 6, 2015, pp. 1836-2201.

A third factor is the degree of economic development (and the nature of the market system). This is usually considered a relevant issue for legal comparison especially in the field of private, financial and company law. Comparative law and economics, in particular, investigates the impact of laws and regulations on the behaviour of groups and individuals and the relative advantages of rules in terms of efficiency and social welfare, suggesting imitations and transplants from one legal order to the other.[42] According to the prevailing literature, which however fell under strong criticism after the eruption of the 2008 crisis, Common Law provides more adequate and flexible institutions for financial markets and business transactions. Civil law, on the contrary, presupposes a greater role for detailed rule-making and state intervention, which are considered detrimental to economic freedom and market efficiency. Even though it was greatly underestimated for a long time, economics is very relevant for of administrative law too.[43]

An advanced market economy, driven by competition and technological innovation, pushes for a well-functioning administrative system, an impartial, open, and efficient bureaucracy, and the proper enforcement of a clear set of rules. The opposite is true too. A well designed administrative (and administrative law) system drives economic growth and market vitality: a virtuous circle is then established.[44] Unfortunately, however, top-down reforms are not always successful. This explains why exporting universal principles of good governance and open market sometimes risks being an an abstract operation. Less dynamic economic systems, on the contrary, often live together with a more closed bureaucratic structure and an opaque legal system. Especially when state-owned corporations play a relevant role, political distortion of market mechanisms is frequent. However, privatization can be intended in different ways and it is not always the best option, in particular when capitalism is underdeveloped or

42 A general overview in N. Garoupa – T. Ginsburg, *Economic Analysis and Comparative Law*, in *The Cambridge Companion to Comparative Law*, pp. 57-72.

43 As it clearly emerges from the papers collected in S. Rose-Ackermam, *Economics of administrative Law*, Cheltenham-Northampton, 2011. See also S. Rose-Ackerman, *The Economic Analysis of Public Law*, in *European Journal of Law and Economics*, 1, 1994, pp. 53-70; in the Italian literature, G. Napolitano – M. Abrescia, *Analisi economica del diritto pubblico*, Bologna, 2009.

44 D. Rodrik – A. Subramanian – F. Trebbi, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development, in Journal of Economic Growth*, 9, 2, 2004, pp. 131-165.

looks for rent-seeking more than for risk and innovation.[45] Fourthly, also the different relationships between society and government – in terms of strict integration or, on the contrary, stark separation – and the robustness of civic traditions deeply influence the development of administrative law. The point emerges very clearly with reference to participation and civil society involvement.[46] Participation in the decision-making process by industry, consumers, and environment protection groups and popular control on public authorities, such as historically developed in the US, can be truly effective when groups and individuals feel themselves responsible for the day-by-day management of the community.[47] In jurisdictions where civil society is less involved in public-decision making, on the contrary, those rights are weaker or are exercised by a smaller class of people, often in their own interest.

In many European countries, an alternative way to ensure civil society involvement is the direct participation of interest groups representatives (trade unions included) at the governing bodies of public administrations and other public law entities. Stakeholders' groups play a relevant role at the EU level too. Many regulations give them an advisory function in the European decision-making process. Finally, in many sectors of general economic interest, the self-production of goods and services is encouraged. Fifthly, the role exercised by legal culture must not be disregarded. This is very relevant in every field of legal comparison. However, especially in the area of administrative law, the legal culture, dominated by nationalism, was highly influential in developing the idea of very different domestic systems: the purpose was erecting and protecting the identity of the state and of its institutions. In addition, it must be considered that, at every latitude, to a great extent, administrative law grew and still develops though the work of of law professors, judges, and lawyers defending cases before courts.

They often receive a similar education and share common values, which are clo-

45 On the ever-changing dimensions and outcomes of privatization from an administrative Law perspective, D. Barak-Erez, *Three Questions of Privatization, in Comparative Administrative Law,* 2017, pp. 533-551, J. Freeman – M. Minow, *Government by Contract. Outsourcing and American Democracy*, Cambridge and London, 2009; M. Taggart, *The Province of Administrative Law*, Oxford, 1997.

46 S. Rose-Ackerman, *Citizens and Technocrats: An Essay on Trust, Public Participation, and Government Legitimacy, in Comparative Administrative Law*, 2017, pp. 251-267, (stressing the different meanings and loci of participation); F. Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 2011, pp. 887-894.

47 The role played by professors and judges in the development of administrative Law is put in evidence by J.s. Bell, *Comparative Administrative Law*, pp. 1284-1285.

sely linked to the more general cultural background of any national community . This explains why some jurisdictions prefer the use of formal institutions, often based on hard law, detailed regulations, compulsory enforcement, adversarial litigation before courts. Other jurisdictions (such as in UK and East Asia), on the contrary, privilege soft law tools, administrative guidance, negotiations and alternative dispute resolution mechanisms.[48]

5. Conclusion: the complex and multilayer architecture of administrative law

The interaction between factors of homogeneity and factors of differentiation explains why the design of administrative law emerging from a transnational legal comparison is based on a complex and multilayer architecture. There are some common pillars of administrative law across jurisdictions that can be found at the regional level and even worldwide. The buildings erected over those pillars, the cut of apartments and rooms, and even the furnishings, however, differ. This is why domestic administrative law systems still matter and why their repeated interactions with regional and global administrative law must be put at the centre of the stage. However, doors are often open, courtyards and lifts are crowded, designers are always at work, as collective needs and preferences are ever-changing and new problems and challenges continuously arise. A functional and contextual approach from a transnational perspective is therefore needed. The attention devoted to statutes and regulations must be complemented with the analysis of how bureaucracies implement policies and comply with legal constraints. Specific reference to the case law in the context of each jurisdiction and from a comparative perspective could very useful too.

48 Some significant examples of different cultural approaches in W. Bishop, *A Theory of Administrative Law, in The Journal of Legal Studies*, 19, 2, 1990, pp. 489-530.

GIORGIO RESTA*

THE COMPARATIVE LAW OF DIGNITY: AN INTRODUCTION

ABSTRACT: *This paper is aimed at providing a short comparative introduction to the law of human dignity. Intentionally, it will not delve into the details of the notion of dignity, which has captured the attention of numerous philosophers and legal theorists. Rather, it will isolate and contrast competing conceptions of dignity, which reflected in the solutions adopted by national and international courts. The attention will be focused on three main issues: a) the "juridification" of dignity; b) the different functions of dignity as a fundamental right; c) the conflict between dignity and liberty.*

1. The "juridification" of dignity

Human dignity has been perceived, for a long time, as an eminently moral, philo-

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sophical or religious notion.[1] Nowadays, it has acquired the status of a binding legal norm, being frequently referred to as the cornerstone of the edifice of human rights.[2] The duty to respect the dignity of every individual is solemnly stated by numerous international declarations,[3] covenants,[4] as well as by national constitutions[5] and supra-national bills of rights.[6] Even in domestic legal settings, in which dignity does not appear in statutes, the courts have increasingly referred to this principle when resolving disputes. Particularly significant, from this point of view, is the French experience of the last two decades;[7] but also striking is the multiplication of references to dignity in

1 On the Western roots of dignity see M. Rosen, *Dignity: Its History and Meaning*, Cambridge, 2018; P. Becchi, *Dignità umana*, in U. Pomarici, *Filosofia del diritto. Concetti fondamentali*, Torino, 2007, p. 153; P. Kondylis – V. Pöschl, *Würde*, in O. Brunner – W. Conze – R. Koselleck, *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 7, Stuttgart, 1992, p. 637. It is worth observing, at the outset, that such a rich and dense intellectual tradition has not been dispersed but continues to influence the substance of this principle. Throwing a glance at the history of ideas (see in particular C. Ruiz Miguel, *Human Dignity: History of an Idea, in Jahrbuch öffent. Rechts*, 50, 2002, p. 281), three main roots of the modern perspective on dignity must be distinguished from one another: a) the Roman notion of *dignitas*, as a manifestation of majesty and moral qualities, a sign of high social or political status, therefore a feature of the few, namely those in high office; b) the religious (Judeo-Christian) idea of man's inherent dignity, grounded on the assumption of man as *imago dei*, hence postulating the fundamental equality of every individual in *dignity*, regardless of social and economic conditions; c) the Enlightenment, and in particular the Kantian, emphasis on the linkage between dignity and autonomy, dignity being conceived as the expression of the individual's ability to form a reasoned thought and set his/her own ends. Each of these perspectives has left enduring marks on the legal conceptualization of dignity. The Roman idea of *dignitas* is behind the widespread notion of dignity of function, which was for a long time the main perspective on dignity. It is in this sense that the notion was employed in the Federalist Papers and in the earlier decisions of the US Supreme Court (see E. Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right, in Ohio N.U.L. Review*, 37, 2011, p. 381-382). Today, various Codes of Conduct refer to the "*dignity of a profession*" as a source of duties, rather than rights. The theological assumption of man's inherent dignity and the Kantian secular perspective on autonomy have also proved extremely influential, in particular in post-war constitutions. It can be safely assumed that they still shape the characters of constitutional adjudication in many Western legal systems (C. Starck, *The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions*, in E. Klein – D. Kretzmer, *The Concept of Human Dignity in Human Rights Discourse*, The Hague-London-New York, 2002, p. 179).

2 See R.D. Glensy, *The Right to Dignity, in Columbia Human Rights Law Review*, 43, 2011, p. 65-69, referring to human dignity as "*the foundational right underpinning all other rights*"; according to R. Andorno, *Human Dignity and Human Rights as a Common Ground for a Global Bioethics*, in *The Journal of Medicine & Philosophy*, 34, 2009, p. 223-227, respect of human dignity represents "*the overarching principle of international biolaw*".

3 Art. 1 of the United Nations Declaration of Human Rights.

4 Among them are the 1965 Convention on the Elimination of All Forms of Racial Discrimination; the 1966 International Covenants on Civil and Political Rights, and on Economic, social and cultural rights; and more recently the Conventions on the Rights of Children (1989), of Migrant Workers (1990) and of Disabled Persons (2007), as well as the Council of Europe Convention on Human Rights and the Biomedicine (1997).

5 Most famously, Art. 1 of the German Basic Law; see also arts. 3 and 41 of the Italian Constitution; arts. 1, 7, 10, 35, 36, 39, of the post-apartheid Constitution of South Africa.

6 Art. 1, Charter of Fundamental Rights of the European Union

7 As is well known, the French Constitutional Council, relying on the Preamble of the 1946 Constitution, stated in 1994 that the protection of dignity against all forms of degradation is a "*principle of constitutional value*" (principe à valeur constitutionnelle) (see Cons. Const., 27-7-1994, 94-343-344 DC, D, 1995, jur, p. 237), and since them both the Constitutional Council and the ordinary courts (as well as the administrative courts) systematically applied the principle of dignity in the most various types of controversies (for a comparative overview see V. Gimeno-Cabrera, *Le traitement jurisprudentiel du principe de dignità de la personne humaine dans la jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel espagnol*, Paris, 2004).

the case law of the US Supreme Court.[8] In short, dignity has undergone an impressive process of "juridification" (more precise is the German word *Ver-rechtlichu*ng) having gradually lost the role of a purely moral precept and acquired – at the same time – that of a foundational value[9] and a binding legal norm.[10]

However, it is neither easy to define "dignity", nor to point out the objective content of such a concept. According to some scholars, the characters of vagueness and indeterminacy are distinctive features of the notion of dignity.

This tends either to render it a "useless concept[11]" or to it being used as a "knock-down argument[12]" a magic formula apt to circumvent any rational argumentation, by appealing to the pathos of dignity.

Although this concern might occasionally prove well founded, in particular in the field of bioethics (where "dignity" is sometimes used as a conversation-stopper),[13] the picture is not always so grim.[14] More than fifty years of judicial confrontation with dignity have not passed in vain. By looking at national and international case law on human dignity, some clear guidelines may be inferred.[15]

8 See in particular *Planned Parenthood of Southeastern Pennsylvania* v. Casey, 505 U.S. 833 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005). For a more detailed overview, N. Rao, *On the Use and Abuse of Dignity in Constitutional Law*, in *Columbia Journal of European Law*, 14, 2008, p. 201; G. Neuman, *Human Dignity in United States Constitutional Law*, in *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis*, Baden-Baden, 2000, p. 249.

9 G. Hottois, *Dignité et diversité des hommes*, Paris, 2009, p. 16; J. Isensee, *Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten*, in AöR, 2006, p. 173

10 P. Fraisseix, *La sauvegarde de la dignité de la personne et de l'espèce humaines: de l'incantation à la "judiciarisation"*, in R.r.j. *Droit Prospectif*, 1999, p. 1133; M.l. Pavia, *La découverte de la dignité de la personne humaine*, in M.l. Pavia – T. Revet, *La dignité de la personne humaine*, Paris, 1999, p. 3.

11 R. Macklin, *Dignity is a Useless Concept*, in *British Medical Journal*, 327, 2003, p. 1419.

12 J. Simon, *Human Dignity as a Regulative Instrument for Human Genome Research, in C.M. MAZZONI, Etica della Ricerca Biologica*, Firenze, 2000, p. 39.

13 U. Neumann, *Die Tyrannei der Würde. Argumentationstheoretische Erwägungen zum Menschenwürdeprinzip*, in *Arch. Recht Sozialphil.*, 1998, p. 153; see also the interesting book by D. Beyleveld – R. Brownsword, *Human Dignity* in *Bioethics and Biolaw*, Oxford, 2001.

14 From a legal-theoretical point of view, see F. Viola, *Lo statuto normativo della dignità umana, in A. ABIGNENTE – F. SCAMARDELLA, Dignità della persona. Riconoscimento dei diritti nelle società multiculturali*, Napoli, 2013, p. 283.

15 An excellent starting point is the essay by C. Mccrudden, *Human Dignity and Judicial Interpretation of Human Rights, in European Journal of International Law*, 19, 2008, p. 655; see also, with specific regard to the Italian legal system, G. Alpa, *Dignità. Usi giurisprudenziali e confini concettuali*, in *Nuova giurisprudenza civile commentata*, 1997, II, p. 415; Id., *Autonomia privata, diritti fondamentali e "linguaggio dell'odio"*, in *Contratto e Impresa*, 2018, p. 45, pp. 66-70.

2. Three uses of dignity

There seems to be wide consensus that dignity, at its core, implies the respect and recognition of the intrinsic worth possessed by any human person, merely by virtue of being human (see Art. 1 of the Universal Declaration of Human Rights and its Preamble).[16] However, this minimum content is flexible enough to give rise to different results in concrete cases, depending on the particular conception of dignity adopted in a specific legal system.[17] The notion of dignity, in other words, is at the same time universal, relying on a shared value of humanity, and context-specific, deriving its meaning from the cultural and institutional frame in which it is embedded.[18] In order to build a preliminary taxonomy of the scholarly and judicial uses of dignity, it seems useful to disaggregate the content of dignity into three main operative functions:

a) dignity as a negative right;

b) dignity as the source of a government's duty to protect;

c) dignity as the source of a government's duty to provide social benefits.

Such a taxonomy may be helpful for any comparative inquiry, because different legal systems tend to emphasize one or more functions and disregard the others, depending on the general value-choices (libertarianism v. communitarianism; degree of secularism, etc.)[19] and the institutional features of the system (such as the presence of a constitutional complaint mechanism, the state-action doctrine, etc.).[20]

At one end of the spectrum we find legal systems - the German one is exemplary [21]- that rely simultaneously on all such functions and regard dignity as a "foundational

16 S. Rodotà, *La rivoluzione della dignità*, in Id., *Vivere la democrazia*, Rome-Bari, Laterza, 2018, pp. 46-51. The debate that preceded the adoption of Art. 1 UDHR is carefully described by M.a. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York, 2001, pp. 143-146.

17 It seems useless to discuss the legal concept of dignity without taking into account the specific (and often hidden) conceptions of dignity which are at play in a particular jurisdiction: see for instance G. Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada, Saskatchewan Law Review* 70, 2007, p. 1.

18 See amplius, G. Resta, *La dignità*, in S. Rodotà – P. Zatti, *Trattato di biodiritto, I, Ambito e fonti del biodirit*to, Milano, 2010, p. 259.

19 J.q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty, Yale Law Journal*, 113, 2004, p. 1151.

20 G. Resta, *La dignità*, pp. 272-277; see also G. Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, in G. Nolte, *European and US Constitutionalism*, Cambridge, 2005, p. 85; D. Grimm, *The Protective Function of the State*, ivi, p. 137.

21 See E. Klein, *Human Dignity in German Law*, in E. Klein – D. Kretzmer, *The Concept of Human Dignity in Human Rights Discourse*, p. 154.

value;[22]" at the other end are systems that either adopt a narrow version of dignity as a synonym of liberty, or that completely disregard the notion. Although legal borrowings are particularly frequent in this area,[23] one should never overlook the substantive variations in the uses of dignity and the possibility of its being received, in some legal settings, as a "legal irritant.[24]"

3. Dignity and the duty to respect

The most widespread conception of dignity is one based on the liberal tradition of negative liberties. Under this perspective, dignity implies a "non-interference norm," according to which the government is obliged to abstain from acts that deny the inherent worth of the individual or interfere with personal autonomy.[25] According to the German terminology, this is the so-called "duty to respect", solemnly stated by art 1 of the German Basic Law. Such a duty is directly implied by the famous "object-formula," developed in perfect Kantian style by the renowned constitutional scholar Günter Dürig[26] and adopted by the German Constitutional Court in dozens of cases.[27]
According to this formula, "individuals are not to be treated merely as objects of the will of others."

When is such a duty violated?

The first important group of cases deals with personal autonomy. Dignity is violated if the state denies the freedom of the individual to make fundamental choices affecting his or her personal sphere. Particularly relevant from this viewpoint are the decisions concerning the human body and the domain of sexuality. The US Supreme Court case

22 H. Hofmann, *La promessa della dignità umana, Rivista internazionale di filosofia del diritto*, 1999, p. 620, pp. 635-646.

23 See S. Choudhry, *The Migration of Constitutional Ideas*, Cambridge, 2006; C. Mccrudden, *Human Rights and Judicial Use of Comparative Law*, in E. Örücü, *Judicial Comparativism in Human Rights Cases*, London, 2003, p. 1.

24 As regards, the notion of legal irritant see G. Teubner, *Legal Irritants: How Unifying Law Ends up in New Divergences*, in P.A. Hall – D. Soskice, *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*, Oxford, 2001, p. 417.

25 See R.d. Glensy, *The Right to Dignity*, p. 120.

26 G. Dürig, *Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte aus Art 1 Abs I in Verbindung mit Art 19 Abs II des Grundgesetzes*, in AöR, 1956, p. 117; on this perspective see N. Hoerster, *Zur Bedeutung des Prinzips der Menschenwürde*, in *JuS*, 1983, p. 93

27 For a detailed overview, see H. Dreier, *sub Art.* 1, in *Grundgesetz Kommentar*, H. Dreier, vol. I, Tübingen, 2013.

law on constitutional privacy offers several examples of such a use of the notion of dignity.[28] *Lawrence v. Texas,*[29] which invalidated state sodomy laws, is one of the most famous cases. Bothe the European Court of Human Rights[30] and the Supreme Court of Canada[31] have also referred to the principle of dignity in resolving disputes concerning the right to die. In this field, the nexus between dignity, identity and personal choices is most clearly evidenced, even at a literal level, by the 2017 Italian law on living wills.[32] In a second category, the duty to respect dignity is also infringed in cases involving the violation of the bodily and psychological integrity of the person.[33]

The prohibition of torture and other degrading treatments flows directly from this commitment. Similarly, death penalty has been declared incompatible with human dignity by the South Africa Supreme Court in the famous *Makwanyane case;*[34] and the German Constitutional Court held a life sentence without parole to be unconstitutional.[35] In one controversial case, the German Constitutional Court[36] struck down the Aviation Security Act (*Luftsicherheitsgesetz*), insofar as the statute authorized the shooting down of a hijacked airplane in a 9/11 situation. Such an intentional act of shooting, argued the Court, would conflict with the fundamental right to life and the dignity of the innocent passengers of the plane. Indeed, they would be treated as mere objects in order to avert danger to the rest of the community.[37] In a similar line of reasoning, see also the Ontario case of *Jane Doe* v. *Metropolitan Toronto Police,*[38] criticizing

28 See generally E.J. Eberle, *Dignity and Liberty. Constitutional Visions* in *Germany and the United States*, Westport, 2002; N. Rao, *Three Concepts of Dignity in Constitutional Law*, in *Notre Dame Law Review*, 86, 2011, p. 183, pp. 202-219.

29 539 U.S. 558 (2003).

30 EuCtHR, 29-4-2002, App. N. 2346/02, *Perry v. UK*; see on this topic F. Hufen, *In dubio pro dignitate. Selbstbestimmung und Grundrechtsschutz am Ende des Lebens*, in *Neue Juristische Wochenschrift*, 2001, p. 849.

31 *Carter v. Canada*, 2015, SCC, 5.

32 See Art. 1, par. 1, Law 22-12-2017, n. 219, *Norme in materiali di consenso informato e di disposizioni anticipate di trattamento.*

33 On this see the thought-provoking analysis by P. Zatti, *Note sulla semantica della dignità, in ID., Maschere del diritto, volti della vita*, Milano, 2009, p. 29.

34 *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC).

35 BVerfG, 21-6-1977, BVerfGE 45, 187 (1978).

36 BVerfGE, 109, 279 (2004).

37 For a comment and a discussion of the underlying controversy see W. Frenz, *Menschenwürde und Persönlichkeitsrecht versus Opferschutz und Fahndungserfolg*, in *Neue Zeitschrift für Verwaltungsrecht*, 2007, p. 631.

38 (1998), 39 O.R. (3rd) 487, 160 D.L.R. (4th) 697 (Gen. Div.).

the adoption of an end/means analysis, which led the police to abstain from communicating to the women living in a certain area the risks posed by a serial rapist, with the hope of arresting him "on the scene" of the crime; or the Israeli Supreme Court ruling on targeted assassinations of unlawful combatants in the Occupied Territories.[39]

Furthermore, the respect of the intrinsic worth of the individual is denied in cases of discrimination: here, the fundamental principles of dignity and equality tend to converge,[40] leading to an important phenomenon of cross-fertilization, of which the Canadian experience is particularly illustrative.[41]

Thirdly, human dignity requires the respect of an intimate sphere, which must be shielded from unwarranted government intrusions. This has been the theoretical basis for the recognition by German courts of a right to "informational self-determination" (*informationelle Selbstbestimmungsrecht*),[42] which assumes an enormous importance in our hyper technological age of "liquid surveillance,[43]" and starkly influenced - which is not surprising - the development of the EU law on data protection.[44]

4. Dignity and the duty to protect

Conceived in this way as a negative right, dignity is a widely shared concept, which makes transnational dialogue among judicial institutions an important reality. The second function of dignity, as the basis of a governmental duty to protect citizens, is more problematic and context-specific. Art. 1 of the European Charter of Fundamental Rights, a provision literally modelled on Art. 1 of the German Basic Law, states: "Human dignity is inviolable. It must be respect and protected." The duty to protect is implied by a conception of dignity as a positive right, which would require the gover-

39 *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 (Sup. Ct. sitting as High Court of Justice, 2005).

40 On this point see S. Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, in *University of Toronto Law Journal*, 59, 2009, p. 417.

41 For specific references, see C. Mccrudden, *Human Dignity and Judicial Interpretation of Human Rights*, p. 690.

42 BVerfG, 15-12-1983, BVerfGE 65, 1 (1984); see E. Benda, *Menschenwürde und Persönlichkeitsrecht*, in E. Benda – W. Maihofer – H.J. Vogel, *Handbuch des Verfassungsrechts*, 1, Berlin-New York, 1995, p. 161, pp. 173-179.

43 Z. Bauman – D. Lyon, *Liquid Surveillance*, Cambridge, 2012

44 On this point see F. Bignami – G. Resta, *Transatlantic Privacy Regulation: Conflict and Cooperation*, in *Law & Contemporary Problems*, 78, 2015, p. 231, pp. 232-233; P.m. Schwartz – K.n. Peifer, *Transatlantic Data Privacy Law*, in *Georgetown Law Journal*, 106, 2017, p. 115, p. 126.

nment not only to abstain from any interference with it ("respect"), but also to adopt affirmative measures aimed at preventing violations of dignity arising from the action of third parties ("protect"). The logical consequence of this model is that the positive commitment to protect dignity may lead, in a wide range of situations, to the restriction of the freedoms of others (particularly freedom of speech, as exemplified by the 2104 decision of the French Council of State, banning, in the very name of dignity, a show created by the controversial artist Dieudonné M'Bala M'Bala,[45] as well as economic freedoms).[46] This is the theoretical basis of the horizontal effect of fundamental rights, which has produced significant results, particularly in the area of the protection of personality rights against the mass media.[47] I cannot explore the details here, but I would like to emphasize two related issues.

The first concerns the subjective scope of dignity.[48] If dignity is to be considered a paramount objective value, and not only a right, it should be protected regardless of the existence of a rights-bearer.[49] Consistently with this, the dignity principle has played a role in cases involving the violation of group rights,[50] and also with respect to the protection of the unborn[51] and the deceased.[52] Particularly relevant, from this point of view, is the 2011 CJEU decision in *Brüstle v. Greenpeace,*[53] which upheld the ban on the patenting of neural precursor cells derived from embryonic stem cells, on the basis that such patents would violate the principle of respect for human dignity, as

45 Cons. Etat, ord. 9-1-2014, Société Les Productions de la Plume et M. D., n. 374508

46 C. Enders, The Right to Have Rights: *The Concept of Human Dignity* in *German Basic Law*, in *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, 2010, p. 1-2.

47 See generally G. Alpa – G. Resta, *Le persone fisiche e i diritti della personalità*, Torino, 2010, pp. 506-550.

48 H. Schmidt, *Whose Dignity? Resolving Ambiguities in the Scope of "Human Dignity" in the Universal Declaration on Bioethics and Human Rights*, in *Journal of Medical Ethics*, 33, 2007, p. 578.

49 F. Hufen, *Erosion der Menschenwürde?, in Juristenzeitung*, 2004, p. 313

50 Paris, 28-5-1996, D, 1996, jur, 617.

51 See with specific regard to the protection of the unborn in the case Law of the German Constitutional Court, D. Kommers, *Liberty and Community in Constitutional Law. The Abortion Cases in Comparative Perspective, in Brigham Young University Law Review*, 1985, p. 371; E.J. Eberle, *Dignity and Liberty. Constitutional Visions in Germany and the United States*, p. 161; E. Klein, *Human Dignity in German Law*, p. 154.

52 See the famous Mephisto decisions of the German Federal Supreme Court (BGH, 20-3-1968, Mephisto, in NJW, 1968,1773) and of the Constitutional Court (30 BVerfGE, 73); and the analysis by M. Kloepfer, *Leben und Würde des Menschen*, in *Festschrift 50 Jahre Bundesverfassungsgericht, II, Klärung und Fortbildung des Verfassungsrechts*, Tübingen, 2001, p. 77.

53 Cjeu, *Grand Chamber*, 18-10-2011, C-34/10.

it applied to the embryo.[54] If one takes into account the possible consequences of this regulatory model in the area of abortion, one could easily understand the scepticism expressed by some scholars with regard to a notion that is frequently cast in term of absolutes.

The second point relates to the possible conflict between dignity and autonomy.[55] Once it is assumed that the state has a positive obligation to protect dignity, situations may arise in which the exercise of personal freedom may clash with the "*objective*" value of human dignity. In such situations, whose "dignity" should prevail? The dignity of the individual, free to make his or her own value-choices, or dignity as defined by an external decision-maker?[56]

This issue is illustrated by the famous "dwarf-tossing" case. The French Council of State[57] outlawed the spectacle, holding that dwarf-tossing was an attraction that affronted human dignity, and that respect for human dignity was an aspect of public order. The Council also held that the principle of freedom of employment was no impediment to the prohibition of an activity that violated public order. Manuel Wackenheim, who had been employed in such a spectacle, lodged a complaint before the ECHR, and, as a last resort, before the UN's Human Rights and Anti-Discrimination Committee.[58] He argued that the ban had "an adverse effect on his life" and "represented an affront to his dignity", adding that his job did not infringe human dignity, "since dignity consists in having a job". Both courts dismissed the complaint. A similar line of reasoning has been followed by the German courts in the peep shows controversies,[59] as well as by the Court of Justice of the European Union in the famous

54 For a discussion, see G. Resta, *Dignità, persone, mercati*, Torino, 2014, p. 61.

55 G. Resta, *Dignità, persone, mercati*, at 43-58; G. Piepoli, *Tutela della dignità e ordinamento della società secolare europea, in Rivista critica del diritto privato*, 2007, p. 7.

56 See S. Rodotà, *La rivoluzione della dignità*, p. 60.

57 Cons. Etat, Ass., 27-10-1995, Ville d'Aix-en-Provence.

58 *Manuel Wackenheim v. France*, Communication No 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002).

59 BVerwG, 15-12-1981, NJW, 1982, 664; BVerwG, 30-1-1990, in *Juristenzeitung*, 1990, p. 382. For an analysis see T. Discher, *Die Peep-Show-Urteile des BVerwG*, JuS, 1991, p. 642.

Omega case,[60] dealing with the ban issued by German local authorities against the commercialisation of laser games imported from the United Kingdom.

Reading these rulings critically, one gets the impression that what is really at stake is not the dignity of the individual, but the dignity of the species, or "human" dignity.[61] However, one could seriously raise the question whether it is actually possible, in a pluralistic and multicultural society, to settle on a fixed "image of man" (*Menschenbild*)[62] and impose this image on anybody, even on the right-holder. Is it possible, in other words, to set the boundaries of autonomy on the basis of the concept of dignity? Or is the formula "dignitarian limits of autonomy" an oxymoron?

The solution for the comparative lawyer would be to test such questions empirically by looking at jurisdictions characterized by different institutional settings and value-choices. If one takes into account the US experience, for instance, it is easy to find not only a strong scholarly opposition to such a "communitarian" vision of dignity,[63] but also parallel cases decided in the opposite way. For example, in *World Fair Freaks v. Hodges*[64] the Supreme Court of Florida held that the statutory ban imposed by Florida on a spectacle not too different from the French dwarf-tossing case was unconstitutional as a violation of property, in the form of the equal right to earn a livelihood and to pursue a lawful occupation. This decision is interesting not only because it frames in terms of property an interest that the French dwarf tried to present with reference to the lexicon of dignity, but also because it shows a completely different vision of the relationship between the individual and the political community. This is consistent with a conception of dignity based on the idea of negative freedom and a

60 Cjeu, 14-10-2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH c. Oberbürgermeisterin der Bundesstadt Bonn*. See the comment by C.t. Smith – T. Fetzer, *The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom v. Human Dignity*, in *Columbia Journal of European Law*, 10, 2004, p. 445.

61 B. Jorion, *La dignité de la personne humaine ou la difficile insertion d'une règle morale dans le droit positif, in Revue du droit public*, 1999, p. 197, p. 214; O. Cayla, *Le coup d'État de droit?, in Le débat, 1998, p. 108, pp. 122-132; with regard to the specific sector of biola*w, D. Beyleveld – R. Brownsword, *Human Dignity in Bioethics and Biolaw*, pp. 29-39.

62 On the specifically German notion of *Menschenbild*, M.w. Finkin, *Menschenbild*: *The Conception of the Employee as a Person in Western Law*, in *Comparative Labor Law & Policy Journal*, 23, 2002, p. 577; E. Benda, *Menschenwürde und Persönlichkeitsrecht*, p. 163.

63 N. Rao's paper, *On the Use and Abuse of Dignity in Constitutional Law*, is exemplary; see also S. Pinker, *The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Play*, in *New Republic*, 28 May 2008; and in the (not that different) English context D. Feldman, *Human Dignity as a Legal Value, I, in Public Law*, 1999, p. 682.

64 267 So.2d 817 (Fla. 1972).

model of constitutional adjudication significantly removed from post-war canons.[65] It is not by chance that the doctrine of state action has prevented the US courts from developing a consistent body of rules aimed at enforcing the state's obligation to protect fundamental rights.[66]

5. Dignity and the right to "dignified" living conditions

Can the duty to protect be expanded into a more far-reaching obligation on the state to ensure that nobody falls below "dignified" living conditions?

Art 151 of the 1919 German Constitution of Weimar, based on the social-democratic conception of dignity, contained such an affirmative duty,[67] which is now accepted, at least to a limited extent, in several jurisdictions, and first of all in the provisions (arts. 3 and 41) of the Italian Constitution.[68] The German Constitutional Tribunal famously struck down parts of the red-green reform of the labour market, holding that Art. 1 of the European Charter "imposes an obligation on the state to provide at least minimal subsistence to every individual.[69]" Similarly, the Italian Constitutional Court,[70] the French Constitutional Council,[71] and the South African Supreme Court[72] have held that "human dignity requires that decent housing be secured for all citizens as a constitutional social right". Such a use of the concept of dignity may appear troubling for those who fear that the courts will exercise uncontrolled discretion under the umbrella of dignity, interfering with the role of the legislature. Indeed, this approach seems incompatible, once again, with the more libertarian perspective on dignity. However, it cannot be

65 L. E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in S. Choudhry, *The Migration of Constitutional Ideas*, p. 84; G. Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, p. 85.

66 For a comparison Europe/US, see D. Grimm, *The Protective Function of the State*, p. 137

67 See G. Resta, *La dignità*, p. 264.

68 See generally M.r. Marella, *Il fondamento sociale della dignità umana*, in *Rivista critica del diritto privato*, 2007, p. 67.

69 BVerfG 9-2-2010, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09; for a comment see G. Delledonne, *"Minimo vitale" e Stato Sociale in una recente pronuncia del Tribunale costituzionale*, in *Forum di Quaderni Costituzionali*, 2010.

70 Corte Cost., 11-2- 1988, n. 217, Giur. it., 1988, I, 1789

71 *Conseil constitutionnel*, 94-359 DC, 19-1-1995, *Loi relative à la diversité de l'habitat*, in D., 1995, somm., 137; on this issue see V. Godfrin, *Le droit au logement, un exemple de l'influence des droits fondamentaux sur le droit de propriété*, in *Mélanges Christian Bolze*, Paris, 1999, p. 137.

72 *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (10) BHRC 84 (CC).

should not be overlooked that, in a time that has seen a steady decrease in social protections, dignity can work as the ultimate barrier against the complete dismantling of the noble utopia of "freedom from want.[73]" This was one of the most forceful messages of the late Stefano Rodotà,[74] which deserves to be seriously reflected upon in a time of unprecedented social inequality and growing democratic crises.

73 See generally J. Habermas, *Il concetto di dignità umana e l'utopia realistica dei diritti dell'uomo*, in Id., *Questa Europa è in crisi*, Roma-Bari, 2012, pp. 3-31.

74 See lastly S. Rodotà, *La rivoluzione della dignità*, p. 54; Id., *Restituire forza teorica e politica alla dignità*, in Id., *Critica del diritto privato. Editoriali e saggi della Rivista Critica del Diritto Privato*, Napoli, 2017, p. 57; Id., *Solidarietà. Un'utopia necessaria*, Rome-Bari, 2014, pp. 101-102; Id., *Il diritto di avere diritti*, Rome-Bari, 2012, p. 179.

ALEJANDRO SAIZ ARNAIZ*

INAUGURAL LECTURE A.Y. 2017-2018
EL PAPEL DE LOS JURISTAS EN EL PROCESO DE INTEGRACIÓN EUROPEA

Roma, 29 de septiembre de 2016

Mis primeras palabras en este acto, tienen que ser de agradecimiento a quienes han hecho posible mi presencia hoy entre ustedes: mi colega, el prof. Marco Ruotolo y, sobre todo, el director del Departamento de Giurisprudenza, el prof. Giovanni Serges. Para quien les habla, es un honor y un privilegio poder dirigirse en este auditorio a todos ustedes. Cuando el pasado mes de junio el prof. Serges tuvo la amabilidad de invitarme a esta Prima Lezione di Diritto, le propuse como tema de mi intervención una reflexión acerca del papel de los juristas en el proceso de integración europea.

Es bien sabido que casi nada de lo que ocurre en la Unión Europea puede explicarse al margen del Derecho. En otros términos: la imprescindible presencia del Derecho a lo largo de todo el proceso de integración supranacional, desde los primeros años cincuenta del pasado siglo, facilita una lectura del mismo a partir del papel que los juristas han jugado en estos ya casi setenta años. Jean Monnet, el gran visionario de la Europa unida, afirma en sus memorias, y cito textual: "*nada es posible sin las personas, nada es duradero sin las instituciones*". Unas instituciones para cuyo diseño y funcionamiento la tarea de los juristas se presenta como insustituible. Ese convencimiento llevó a Monnet a encargar la redacción del primero de los tratados comunitarios, el Tratado de la Comunidad del Carbón y del Acero, a Maurice Lagrange, miembro del Consejo de Estado francés, la jurisdicción administrativa suprema de la República, integrada desde siempre por juristas de altísimo nivel. Un historiador inglés, Keith Lowe, definió a Europa en el título de su obra más conocida como un "*Continente salvaj*e". La

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sucesión de guerras y enfrentamientos de todo tipo entre las naciones europeas desde que emerge el Estado moderno como forma de poder político organizado, confirma la condición brutal de nuestro continente. Pensemos solo en la primera mitad del pasado siglo. Dos guerras mundiales que convirtieron Europa en un gran campo de batalla en el que murieron más de 40 millones de personas. No debe extrañar que la voluntad de los padres fundadores de la nueva Europa de la postguerra fuera, precisamente, la paz. Así se explicita en el Manifesto di Ventotene, de Altiero Spinelli, entre otros, y en la Declaración Schuman. Hace solo dos semanas, en su discurso sobre "*el estado de la Unión*" ante el Parlamento Europeo, Jean-Claude Juncker, Presidente de la Comisión Europea, afirmó: "*Por encima de todo, Europa significa paz. No por casualidad el período de paz más largo de la historia europea se inició con la formación de las Comunidades Europeas*".

El logro de la paz en el contexto de la segunda posguerra europea se concibió a través de una doble arquitectura institucional novedosa en las relaciones internacionales y en el Derecho Internacional Público hasta entonces conocido. En ambos casos, aunque de manera mucho más explícita en el segundo, como veremos, se pretendía limitar la soberanía absoluta de los Estados que, en palabras de Spinelli en Il Manifesto di Ventotene, "*ha portato alla volontà di dominio sugli altri*"; de modo que solo "*la definitiva abolizione della divisione dell'Europa in stati nazionali sovrani*" afirmó Spinelli, haría posible "*il riordinamento dell'Europa secondo il nostro ideale di civiltà*".

A finales de los años cuarenta se creó el Consejo de Europa mediante el conocido como Estatuto de Londres, de 1949. Se trataba de una organización internacional para la promoción de la democracia, el Estado de Derecho y los derechos humanos. Nunca antes se había cooperado entre los Estados con estos objetivos.

El primer resultado de esta cooperación fue el Convenio Europeo de Derechos Humanos, abierto a la firma en esta ciudad, en concreto en el Palazzo Barberini, el 4 de noviembre de 1950. Se trató del primer tratado de la historia de la humanidad en el que varios Estados acordaban una garantía colectiva de los derechos humanos. Los individuos pasaban así a ser sujetos de Derecho Internacional, y los Estados asumían como obligación internacionalmente exigible el respeto a aquellos derechos. Se creaba un tribunal internacional, el Tribunal Europeo de Derechos Humanos, que podía dictar sentencias condenatorias contra un Estado por la violación a una o varias personas de alguno de los derechos convencionalmente declarados. Una novedad auténticamente revolucionaria que pasó desapercibida para la mayoría de los comentaristas de la época, aunque no faltó quien como Hersch Lauterpacht, uno de los más grandes estudiosos del Derecho Internacional del siglo XX, y Juez del Tribunal Internacional de Justicia entre 1955 y 1960, advirtió de que el mecanismo convencional llevado a sus últimas

consecuencias supondría una severa limitación de la soberanía estatal. Hoy, a setenta años vista, hemos de reconocer el acierto de Lauterpacht. Las sentencias obligatorias de la Corte de Estrasburgo han provocado incluso reformas constitucionales en algunos Estados parte del sistema, y aunque la garantía convencional no es ni mucho menos perfecta, supone un avance importantísimo en la protección de los derechos humanos. Europa es hoy el único lugar en el mundo en el que una persona, cualquier persona que se considere víctima de la violación de un derecho, puede llevar a un Estado ante un tribunal internacional solicitando la reparación del daño producido. En los sistemas próximos al nuestro, el Interamericano y el Africano, los individuos carecen de legitimación activa para demandar a un Estado.

Doce países participaron en la elaboración del Convenio de Roma entre 1949 y 1950; en la actualidad, 47 Estados europeos (todos excepto Bielorrusia y la Ciudad del Vaticano) participan de la garantía convencional. Esta es la mejor prueba de la relevancia del sistema: ningún Estado quiere permanecer al margen del mismo.

Casi al mismo tiempo en el que se elaboraba el Convenio Europeo de Derechos Humanos, en un continente dividido, en afortunada expresión de Winston Churchill, por el telón de acero en dos bloques antagónicos enfrentados política, económica y militarmente, se ponían en marcha las Comunidades Europeas con la primera de ellas, la ya mencionada Comunidad Europea del Carbón y del Acero. En este caso los seis Estados participantes (Alemania, Francia, Italia, Bélgica, Holanda y Luxemburgo) asumieron, en un ámbito muy limitado, y a modo de prueba, una limitación de soberanía: el mercado del carbón y del acero (dos productos muy importantes para la reconstrucción de Europa tras la Segunda Guerra Mundial) sería regulado por una autoridad supranacional, es decir, independiente de los Estados y con capacidad para vincularlos con sus decisiones, la denominada Alta Autoridad para el Carbón y el Acero (el precedente de la Comisión Europea).

Aquí sí, y a diferencia de cuanto sucedió en el Consejo de Europa, la limitación de la soberanía se convirtió en el presupuesto de la nueva organización. La voluntad última, siempre en palabras de Jean Monnet, no era unir Estados, sino unir personas, hacer ciudadanos europeos convencidos de las ventajas del vínculo de pertenencia a una unión de Estados que siguen siendo soberanos pero que comparten múltiples parcelas de esa soberanía. La Comunidad del Carbón y del Acero funcionó tan satisfactoriamente

que los Estados se animaron a ampliar más allá de estos dos ámbitos la cooperación económica. Se firmaron así, en 1957, los Tratados de Roma, institutivos de la Comunidad Económica Europea y de la Comunidad Europea de la Energía Atómica. Se pretendía la creación, a treinta años vista, de un mercado único, sin fronteras interiores, en el que los trabajadores, los prestadores de servicios, las mercancías y los capitales pudieran desplazarse y establecerse en cualquier parte del territorio de las Comunidades, sin discriminación por motivo de nacionalidad. De nuevo se trataba de una propuesta completamente revolucionaria.

Logrado en gran parte el objetivo, en 1986 se produce la primera gran reforma de los Tratados de las Comunidades mediante la denominada Acta Única Europea, que discretamente amplió las competencias de las Comunidades y reforzó el voto por mayoría en su Consejo de Ministros.

La reforma que supuso un salto cualitativo en el proceso de integración supranacional se llevó a cabo con el Tratado de la Unión Europea, también conocido como Tratado de Maastricht, ciudad holandesa en la que se firmó el mes de febrero de 1992. Al mercado único se sumó allí la unión económica y monetaria, la ciudadanía europea y la cooperación en asuntos de justicia e interior, así como de política exterior y de seguridad. La integración tocaba de este modo aspectos nucleares de la soberanía estatal: por ejemplo, las competencias de los Bancos centrales, la moneda y el derecho de sufragio en las elecciones locales y al Parlamento europeo. Antes de llegar a la entrada en vigor del denominado Tratado de Lisboa, en diciembre de 2009, y hoy vigente, todavía se sucedieron las reformas de Amsterdam (en 1997) y Niza (en 2001) y fracasó el denominado Tratado Constitucional, que los jefes de Estado y de Gobierno firmaron, de nuevo en Roma, en 2004. Todas las reformas de los tratados que se han incorporado al Derecho primario (el máximo nivel en la jerarquía del sistema de fuentes europeo) supusieron siempre, sin excepción, un reforzamiento de la idea de supranacionalidad. Se trata de un concepto que sirve para diferenciar la Unión Europea (antes las Comunidades) de otras organizaciones internacionales. Pierre Pescatore, uno de los grandes juristas de la integración europea, identificaba en las respuestas a tres preguntas las diferencias entre una y otra, entre la supranacionalidad y la intergubernamentalidad: ¿quién decide?, ¿cómo decide? y ¿con qué efectos decide?. Volverán a oír hablar de Pescatore y de la idea supranacional cuando afronten el curso de Diritto dell'Unione Europea.

Pero la historia del proceso de integración en nuestro continente no es una historia solo de éxitos. Hace poco tiempo me he referido al fracaso del Tratado Constitucional, elaborado a través de un proceso ciertamente democrático pero que fue rechazado en 2005 por los ciudadanos franceses y holandeses en referéndum. Las razones del rechazo tuvieron mucho más que ver con la política nacional que con la negativa de ambas poblaciones a avanzar en la integración. Esta es una de las claves de muchas de las crisis por las que han pasado las Comunidades y la Unión Europea. En gran medida, ambién la convocatoria del referéndum en la que los británicos decidieron el Brexit puede explicarse principalmente por razones de política interior en el Reino Unido. Convencido de la utilización interna que los gobiernos nacionales harían de los asuntos europeos y de los efectos que semejante comportamiento tendría sobre el funcionamiento de las Comunidades Jean Monnet, en una afirmación que se ha convertido en un clásico de las citas de la integración, sostuvo lo siguiente: "*He pensado siempre que Europa se hará en las crisis, y que será la suma de las soluciones que se darán a esas crisis*". Las crisis, se podría decir, como oportunidades para la integración. La historia parece haber dado la razón, al menos hasta hoy, al que muchos consideran el ideólogo de la integración europea.

Al menos hasta hoy, decía, porque nadie se atreve a pronosticar cuál será la salida a la actual crisis que padece la Unión. Una de las grandes incógnitas, la respuesta a la cual condicionará el futuro europeo, se refiere a los modos y tiempos del Brexit. Lo menos relevante parece ser el artículo 50 del Tratado de la Unión Europea, que por primera vez en la historia de la integración, diseña un procedimiento para hacer posible la salida de un Estado del club europeo. Lo que se espera es una difícil negociación en la que se discutirá, esencialmente, sobre libertad de circulación (que gusta poco a los ingleses) y mercado interior (en el que los británicos se esforzarán por permanecer). La respuesta que se dé a la tensión entre estos dos aspectos fundamentales de la integración europea puede condicionar las pretensiones "*secesionistas*" de algunos Estados miembros en el futuro. El Brexit tiene mucho que ver con las tensiones nacionalistas, y con los episodios xenófobos, que en los últimos tiempos se han sucedido en prácticamente todos los Estados de la Unión y que resultan incompatibles con los valores que enuncia el artículo 2 TUE: respeto de la dignidad humana, libertad, democracia, igualdad, Estado de Derecho y respeto de los derechos humanos, incluidos los derechos de las personas

pertenecientes a minorías. La integración de inmigrantes y la acogida de refugiados, en un contexto de recursos escasos, está sometiendo a la Unión a una difícil prueba que cuestiona la solidaridad entre los miembros. El nacionalismo "*c'est la guerre*", dijo el entonces Presidente francés Miterrand en su última comparecencia ante el Parlamento Europeo en enero de 1995. Se trata, seguramente, de una afirmación con un evidente punto de exageración pero explicable en quien había vivido dos guerras mundiales en su propio país. El hecho cierto es que hoy el nacionalismo crece en casi todos los Estados y tiene un doble objetivo: la Unión Europea y los extranjeros. La defensa del Estado-nación se hace a costa de cargar a Bruselas con la responsabilidad de todos los males, olvidando que el poder real en la Unión no reside ni en Estrasburgo ni en la capital belga, sino en los Gobiernos y Parlamentos nacionales. Es necesario construir una identidad europea, a la que se han opuesto algunos Estados a empezar por el Reino Unido. Una identidad que no compita con las identidades nacionales, que no las amenace, sino que las complemente y refuerce.

La gestión de la crisis económica ha contribuido a deslegitimar fuertemente a la Unión, en particular en algunos Estados miembros, en los que se han incrementado las desigualdades, ha crecido vertiginosamente la pobreza y la desocupación juvenil alcanza cifras inaceptables. La Unión, decía Jean-Claude Juncker hace dos semanas en Estrasburgo, no puede resignarse a que esta generación de jóvenes sea la primera de la posguerra que viva peor que sus padres. La imagen de la troika, los recortes del gasto social, la austeridad a ultranza y las dudas sobre el futuro del euro han de dejar paso a otras políticas que impliquen activamente a la Unión, que no puede presentarse permanentemente como la única responsable de medidas que impactan negativamente sobre los ciudadanos.

La lucha contra el terrorismo y la preservación de la seguridad están también poniendo a prueba a la Unión Europea. Es necesario reforzar la cooperación policial y también en materia de defensa. 20.000 millones al año cuesta a los presupuestos de los Estados miembros la falta de cooperación militar. La Unión Europea tiene que superar su imagen de "*poder blando*". Somos los primeros del mundo en cooperación al desarrollo, pero tenemos muchas dificultades para coordinar a nuestros Ejércitos cuando participan en el extranjero en misiones de paz.

Brexit, nacionalismos, xenofobia, crisis económica y desigualdades, terrorismo y seguri-

dad. Son muchos los retos a los que se enfrenta Europa en los años venideros; unos retos que en opinión de algunos pueden poner en peligro el futuro de la Unión. También hay quien opina que esta crisis puede ser una nueva oportunidad para la integración, de manera que la respuesta de los Estados (al menos de algunos de ellos) podría ser más Europa. Solo el paso del tiempo nos dará la respuesta, aunque muy probablemente se multiplicarán los casos de cooperación reforzada, haciéndose más visible la imagen de la Unión asimétrica o a dos velocidades.

Muchas de las decisiones que se adoptarán por los Estados miembros y por las instituciones de la Unión para hacer frente a todos estos problemas se tomarán mientras vosotros cursáis los estudios de Derecho en los próximos cuatro o cinco años. Seréis testigos de esas decisiones y podréis comentarlas con vuestros profesores. El Derecho ha tenido un papel fundamental en todo el proceso de integración europea. Las decisiones políticas que han ido conformando la Unión se han concretado siempre en reglas jurídicas: en el Derecho primario, en reglamentos y directivas y en otras fuentes típicas y atípicas.

La intervención de los juristas resultaba particularmente necesaria en un contexto como el de las Comunidades de los años cincuenta, en el que se transitaba por un camino hasta entonces desconocido. La cesión de soberanía para integrar una Comunidad de Estados no conocía precedentes en el Derecho Internacional Público. El Tribunal de Justicia, en una de sus Sentencias más conocidas, en el caso Van Gend, de febrero de 1963, afirmó con rotundidad que "*la Comunità costituisce un ordinamento giuridico di nuovo genere nel campo del diritto internazionale, a favore del quale gli Stati hanno rinunziato, anche se in settori limitati, ai loro poteri sovrani, ordinamento che roconosce come soggetti non soltanto gli Stati membri ma anche i loro cittadini*". Precisamente el Tribunal de Justicia ha protagonizado algunos de los momentos más relevantes del proceso de integración vistos desde el Derecho y escritos por juristas. Se dice que cuando en 1954 entró el primer caso en el Tribunal de Justicia, el entonces Presidente, el italiano Massimo Pilotti, abrió una botella de champagne para celebrarlo con sus colegas. Eran muchos los que dudaban en aquel entonces de la capacidad del Derecho, y de su intérprete último, el Tribunal de Justicia, para resolver los conflictos a los que daría lugar la integración supranacional. Se confiaba mucho más en los Gobiernos nacionales, en particular en sus Ministros de Asuntos Exteriores, y en la diplomacia, que en los Tribunales

y el Derecho. Pero el paso del tiempo confirmó que, como sugirió el primer Presidente de la Comisión Europea, el alemán Walter Hallstein, Europa era una "*comunidad de Derecho*". Idea en la que siempre que tiene ocasión insiste el propio Tribunal de Justicia. Luuk Van Middelaar, es un filósofo e historiador holandés que ha publicado recientemente una de las reflexiones más agudas sobre el proceso de integración. En su libro, Le passage à l'Europe, recuerda los tres discursos ideológicos con los que comúnmente se identifican las alternativas por las que pasa la integración: la Europa de los Estados (el confederalismo), la Europa de los ciudadanos (el federalismo) y la Europa de los despachos (el funcionalismo). El autor atribuye cada una de estas propuestas a ciertos grupos profesionales. La Europa confederal de los Estados se identifica con los historiadores y los especialistas en relaciones internacionales; la Europa de los despachos es apoyada por los economistas, los sociólogos y los politólogos, mientras que la Europa federal de los ciudadanos se asigna a los juristas, "*especialistas,* afirma Van Middelaar*, en encajar en una cierta forma situaciones desconocidas o incontroladas*". En efecto, este puede haber sido el papel de los juristas a lo largo de todos estos ya casi setenta años: dar forma desde el Derecho a una realidad desconocida que, en ocasiones, podía parecer incontrolada. En otras palabras: transformar conceptos (empezando por el de integración supranacional) mediante reglas jurídicas en hechos institucionales capaces de ordenar un modo de ejercicio del poder público nunca antes actuado. No sé si el filósofo holandés acierta al identificar a los juristas con la Europa de los ciudadanos, pero ha de reconocerse que el papel que les atribuye se corresponde con el que en efecto han cumplido desde los años cincuenta del pasado siglo. Algunos de los padres de la idea europea eran juristas, Spinelli, Adenauer, Schuman, y seguramente por ello eran conscientes de la necesidad de articular mediante las categorías del Derecho la nueva realidad organizativa y sus relaciones con los Estados miembros. Compartían fe en el Derecho (tomo la expresión prestada al gran jurista italiano Piero Calamandrei) y en su capacidad transformadora en la Europa de la posguerra, en un momento en el que se sabía muy bien que era lo que se tenía que evitar pero se desconocía casi todo acerca del destino último de un continente fuertemente dividido después de dos guerras sanguinarias y devastadoras.

Voy acabando, querido director, queridos colegas, queridos estudiantes. Aunque como ya he reconocido la Unión Europea no es solo una historia de éxitos, tiene muchos de estos. Haré una referencia final a uno de ellos, el Programa Erasmus. En su presenta-

ción al Parlamento Europeo por la entonces Presidenta de turno del Consejo Europeo, la Primera Ministra británica Margaret Thatcher se refirió al Erasmus como "*un programa de intercambio de estudiantes de modestas dimensiones*" (9 de diciembre de 1986). En el año académico 1987-1988, los participantes en el programa fueron 3.240 universitarios; en el año 2015-2016 la cifra (nada modesta) se elevó a más de 220.000 alumnos de las Universidades europeas. En todos estos años Erasmus ha "*movido*" a más de tres millones y medio de europeos, la mayoría de ellos universitarios.

El Programa Erasmus es la mejor demostración de que las identidades en Europa no compiten entre sí (al menos, no solo compiten), antes bien, resultan en muchas ocasiones complementarias. Estoy convencido de que muchos de vosotros estáis ya pensando en participar en alguno de estos intercambios. Yo os animo a hacerlo. Son muchas las ventajas, muchos más que los inconvenientes. Os podré un ejemplo: casi un millón de esos estudiantes que hasta la fecha han participado en el Erasmus ha encontrado a su pareja durante el período de estancia en el extranjero.

Quitemos la razón a Bismarck: Europa es mucho más que un mero hecho geográfico. Europa somos todos nosotros. Bienvenidos a la Universidad. Gracias por vuestra asistencia a este primera lección de Derecho.

Disfrutad de vuestros próximos años de aprendizaje como juristas.

BENEDETTO BRANCOLI BUSDRAGHI*

CATS AND DOGS IN ITALIAN BANKS: WHO CONTROLS THE BOARD OF DIRECTORS?

ABSTRACT: *Although corporate governance is paramount for the sound and prudent management of credit institutions, the organization of corporate bodies is not extensively regulated. The distribution of powers and duties between the corporate bodies, including the organization of the controls over the management body, are only partially harmonized and they broadly depend on national company law. European banks rely on three different models, which entail a different placement of the controlling body: above, within or next to the Board of Directors.*
Italian banks have specific features: (i) the transposition of the CRD4 explicitly requires banks to set up a control body; (ii) the latter has a unique duty of cooperation with the Supervisory authorities, insofar as it is obliged to report any relevant breach it may come to know in the performance of its duties; (iii) the most widespread Italian corporate model places the control body next to the Board of Directors, in a way that is quite peculiar across EU legal orders. It is contended that such a model is still a viable solution; however, the effectiveness of the control body could take advantage of a fine-tuning of its composition.

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4.2. The costs and benefits of the two-tier model. – 5. A control body within the management body (the "one-tier model"). – 5.1. The main features of the one-tier model. – 5.2. The costs and benefits of the one-tier model. – 6. Which model fits better?

1. Foreword

The 2007-2008 financial crisis was also rooted in the governance arrangements of credit institutions. In order to ensure the sound and prudent management, banks need a robust governance framework, composed of both appropriate decision-making lines and effective controls systems at all levels, starting from the top, i.e., from the corporate governing bodies.

What is then the most appropriate model to steer a bank and to control its management and its highest corporate body? Shall control bodies be placed above, aside or within the Board of Directors?

European regulation has set detailed requirements on corporate micro-organization. However, only a few provisions regard the organization and the distribution of powers and duties among the corporate bodies. Such issue mainly depends on national company law, a field that has been subject to a low level of harmonization in EU regulation.

The present paper outlines the costs and benefits of the main governance models adopted by Euro-area banks, with specific regard to in Italian banks. The latter may legitimately choose between three different administration models and some specific features of their legal order may deserve a focus: (i) the transposition of the CRD4 explicitly requires banks to set up a control body; (ii) the control body has a unique duty of cooperation with the Supervisory authorities; (iii) despite the possibility to align their corporate governance to the most widespread European schemes, most Italian banks place the control body aside the management body, in quite a peculiar way.

The paper is divided into six parts. Part two recalls the regulatory requirements for corporate bodies' organization, along with their rationale; the third, the fourth and the fifth parts define the hallmarks and the costs and benefits of the three most widespread corporate models in banks; the last part explains why (and to what extent) the establishment of an independent control body can be an appropriate solution.

2. The governance in EU regulation

The governance of European banks is subject to both hard law and soft law pro-

visions, such as Directive 2013/36/EU[1] (the so-called capital requirements directive, "CRD4") and the guidelines of the European Banking authority[2] ("EBA guidelines"), respectively. The resulting framework is rather detailed with regard to the so-called "lower governance", i.e. organization of control functions, risk management, remunerations, outsourcing, etc. However, little is provided about the corporate bodies and their relationships with the shareholders. The regulation focuses instead on the exercise of certain functions: some provisions concern the "management body" and the "management body in its supervisory function", but the regulation does not impose any specific position in the corporate chart. In a nutshell, grasping the target matters more than who does the job.

More in detail, banks shall have a "management body", identified as the corporate body bearing the overall responsibility for the institution. As such, it shall approve and oversee the implementation of the strategic objectives, as well as its business and risk strategy; Article 88 CRD4 confers on the same body the implementation and the supervision over governance arrangements. The management body shall also ensure the integrity of the reporting systems, as well as the adequacy of internal capital and liquidity, while overseeing and challenging the senior management on the daily business.
The tasks mentioned above provide colors on the real nature of the management body: despite its name, it does not simply have managerial functions, but also (mainly?) supervisory and control duties. Consistently, the management bodies of significant credit institutions shall establish an audit committee pursuant to Directive 2006/43/CC and a (non-executive) risk committee. The latter shall advise the management body on the overall risk appetite and strategy and assist it in overseeing the implementation of that strategy by the senior management (Art. 76 of CRD4).

Another batch of provisions is devoted to the management body when acting "*in its supervisory function*" (emphasis added). Such a body shall have full access to the

1 Dir. 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

2 Final Report Guidelines on internal governance under Directive 2013/36/EU, EBA/GL/2017/11, 26 September 2017.

risk situation of the bank and it is even a point of reference for the control functions.[3] Clearly, as confirmed by the General Court of the European Union, the management body in its supervisory function has a strong focus on controls and its tasks would be incompatible with the performance of executive duties.[4] Hence, CRD4 seeks to impede conflicts with business functions, e.g., preventing the chairman from exercising simultaneously the functions of chief executive officer, unless justified and authorized by the Supervisory authorities (Art. 88 CRD4). The varied set of duties of management body, ranging from active management to controls, ends up in a double hat: decision maker and supervisor.[5] However, it is unclear who or what the management body is, as CRD4 explicitly refrains from taking a position.[6]

In this respect, national law may well assign managerial and supervisory functions to different bodies or different members within the same body (Art. 3, paragraph 2, CRD4), as long as the management and the supervisory function interact effectively. Such a feature of CRD4 is consistent with the low level of harmonization of Eu company law. As Member states are free to tailor their response to the local economy needs, banking regulation has been drafted in a way to match several different models. This, in turn, requires a "reconciliation" at national level. With reference to Italy, it is worth mentioning that the transposition of CRD4 has gone beyond the wording of the Directive: Banca d'Italia's Circular no. 285 of 17 December 2013 requires banks to set bodies entrusted with "strategic oversight", "management" and "control", consistently with the provision of the Italian civil code.[7] Against this framework, the control body has to verify the proper administration of the bank and its compliance with the applicable regulation, along with the adequacy of its governance and accounting arran-

3 Accordingly, the removal of the risk manager ("CRO") shall be approved by the management body in its supervisory function (Art. 76 CRD4), as if the CRO reported to it.

4 ECJ, *Caisses regionales de crédit mutuel v. European Central Bank, Joined Cases* T-133/16 to T-136/16, 24 April 2018, § 79.

5 Recital no. 56 of CRD4 confirms that the management body shall be understood as having both executive and supervisory functions.

6 Art. 3, para. 1, num. 7 simply identifies the "*management body*" as a "*body or bodies (emphasis added), which are appointed in accordance with national Law, which are empowered to set the institution's strategy, objectives and overall direction, and which oversee and monitor management decision-making, and include the persons who effectively direct the business of the institution*"; in turn, the "*management body in its supervisory function" is defined as the management body "acting in its role of overseeing and monitoring management decision-making*".

7 Such a framework has been inherited from the former Circular no. 263 of 27 December 2006.

gements, including the internal controls system.

As mentioned above, banking regulation needs to be reconciled with national company law. Major points of attention regard the relationships between the management body and the management body in its supervisory function, as wells as the hierarchical position of the control body, which is not considered as such by banking regulation: shall it be above, aside or within the Board of Directors?

3. The separation of powers: the side-by-side control (so-called "classic model")

3.1. The main features of the "classic model"

First of all, some Members states allow the appointment of a control body next to the management body, at the same hierarchical level. Such a model envisages the set-up of two separate corporate bodies, both appointed by the shareholders: a Board of Directors and a Board of Statutory Auditors. The former is entrusted with the management of the company, while the latter is fully devoted to controls.

Such a set-up is rather precautionary for the shareholders, who retain strategic and very high level tasks and they may also rely on the assistance of an independent controlling body. Interestingly, it is only adopted in a few legal orders, e.g., Italy[8] and Portugal.[9]

In Italian banks, shareholders appoint Directors, Statutory Auditors and external accounting auditors; they also perform additional high level strategic tasks, i.e. they approve financial accounts, profit allocation and remuneration policies and they decide on whether to bring an action against the Directors (Art. 2364 of the Italian *Codice civile*, the Civil Code).[10] The general management of the company is conferred on the Board of Directors. Its tasks include whatever necessary to pursue the corporate goal, including the overall assessment of the management and of the corporate organization

8 Specific provisions are set for listed companies and for credit institutions, but they simply fine-tune the Italian civil code, whose provisions are in any case the bulk (P. Ferro-Luzzi – G. Castaldi, *La nuova Legge Bancaria*, vol. II, Milano, 1996, pp. 800 ff.). On the governance of banks, also refer to R. Costi, *L'ordinamento bancario*, Bologna, 2012; C. Brescia Morra, *Il diritto delle banche*, Bologna, 2016; F. Capriglione, *Manuale di diritto bancario e finanziario*, Milano, 2015.

9 For the Portuguese legal order, reference can be made to M.A. Ramos, *Direito comercial e das sociedades – Entre as Empresas e o Mercado*, Coimbra, 2018; A. Menezes Cordeiro, *Direito das Sociedades*, Coimbra, 2017.

10 On the Italian governance models, see G. F. Campobasso, *Diritto commerciale*, *vol. 2, Diritto delle società*, Milano, 2015; G. Ferri, *Manuale di Diritto Commerciale*, Milano, 2016.

(Arts. 2380-bis and 2381 of the *Codice civile*). In banks, the Board of Directors shall also establish a risk committee. It is therefore clear that Directors' duties encompass control tasks, also in a view to safeguard shareholders from misconduct by the managers.[11] Aside, the Board of Statutory Auditors (*Collegio sindacale*) performs a full scope control on corporate activities. It shall monitor the compliance with the applicable regulation and with the company's bylaws, the proper administration of the bank, with particular regard to the adequacy of internal governance and of the accounting system as well as to their functioning (Art. 2403 of the *Codice civile*). Due to the performance of control duties, the Statutory Auditors are required to be independent and to liaise with the internal control functions. Nonetheless, the Statutory Auditors are also entrusted with some advisory tasks (e.g., report on the financial accounts pursuant to Art. 2429) and they are even required to replace the Directors in some cases, i.e., lapsing of all of them or failure to act (e.g., Art. 2386 of the *Codice civile*). However, such tasks are so peculiar that they do not affect the controlling nature of the Board of Statutory Auditors. The Portuguese *Conselho fiscal* has features and duties similar to the Italian *Collegio sindacale*. It is set up in addition to the Management Board. In principle, the shareholders' meeting shall appoint both the Statutory Auditors and the Directors (Arts. 415, 423 and 435 of the *Código das Sociedades Comerciais*).

Pursuant to Art. 420 of the *Código das Sociedades Comerciais*, the Board of Statutory Auditors shall supervise the management of the company, monitor the compliance with the law and with the articles of association, verify the accounting policies and documents, give an opinion on the report and proposals submitted by the management and oversee the internal control system. It is acknowledged that the Statutory Auditors act primarily in the interest of the company and of its shareholders and not in the interest of third parties. In this perspective, the Portuguese *Conselho fiscal* receives notifications of irregularities (Art. 420 of the *Código das Sociedades Comerciais*). Similarly, also the Italian *Collegio sindacale* shall be keen to hear the complaints of the

11 F. Parmeggiani, *Il collegio sindacale e il comitato per il controllo interno: una convivenza possibile?, in Giurisprudenza commerciale*, 1, 2009, pp. 306-308. Such understanding of internal control was developed by A. Bearle – G. Means, *The modern corporation and private property*, New York, 1932, and also by J. Tirole, *The Theory of Corporate Finance*, Princeton-Oxford, 2006, p. 29. The Board of Directors can therefore be perceived as an intermediate principal and intermediate agent between the shareholders and the managers (R. B. Adams, *The Dual Role of Corporate Boards as Advisors and Monitors of Management: Theory and Evidence, ECGI*, 2000).

shareholders willing to report regrettable facts (Art. 2393 of the Codice civile) and it may even sue for damages the Board of Directors or address the Court (Art. 2409 of the *Codice civile*).
Nevertheless, banks are peculiar undertakings, insofar as they involve a broad variety of stakeholders that may deserve some safeguards: depositors, bondholders and financial counterparties. In this view, the banks' Statutory Auditors may be required to acts in the interest of all the stakeholders. Consistently, due to the specificities of the banking business, the Italian rule-makers have imposed a peculiar duty on the control body, that has become an ally of the Supervisory Authorities: the Statutory Auditors shall inform without delay the relevant Supervisors of any act or fact they come to know of in the performance of their duties that may constitute a breach of law (Art. 52 of the Italian legislative decree no. 385/1993 – hereinafter "Consolidated Law on Banking").
As mentioned above, the practice to set-up an independent control body alongside to the Board of Directors is not widespread in the Euro-area and it may trigger misunderstandings. However, a deeper analysis outlines that the model at stake may perfectly fit into the banking regulation. Indeed, the management body entrusted with strategic supervision can be identified in the Board of Directors.

The latter can also act as management body, whenever it retains executive powers; otherwise, the management body could be identified in the executive committee or simply in the CEO, or, in lack of it, even in the General Manager, i.e., a non-Director.
In Portugal, as the Board of Statutory Auditors is set up in addition to the Supervisory Board and to the Management Board, it does not raise concerns. In Italy, the *Collegio sindacale* acts as control body for the purposes of banking regulation. The risk committee shall be established within the Board of Directors, while the Board of Statutory Auditors shall perform as audit committee.

3.2. The costs and benefits of the "classic model"

The "side by side" control model described above entails costs and benefits. First of all, it has the non-negligible advantage of involving shareholders in the corporate life through the assignment of material powers, such as the approval of financial accounts and the appointment of corporate Boards, strengthening their grip over the

company and its Directors.[12] Besides, the Statutory Auditors provides an additional layer of controls; it has even been contended that they would act as principal of the Directors, thereby reinforcing the control over them.[13] However, from a different standpoint, the "side by side" control performed by the Statutory Auditors may appear redundant, due to the overlapping of several controlling bodies. In fact, on the one hand, the management of the company is assigned to the Directors, while controls would primarily be conferred on the Statutory Auditors; the latter were deemed to focus on corporate organization, mainly *ex post* and without interfering with the business, in a view to balance conflicting interests in the execution of the corporate contractual agreement. Nonetheless, the nature of control functions has progressively changed, through a stronger focus on business and risk management, with the goal to detect the earliest signs of a crisis[14] and eventually to perform as advisors. The formal "thick-the-box" approach have thus been relegated to the backstage.[15] Moreover, the daily business has more and more required a very high time commitment, thereby encouraging the delegation of active management from Directors to full-time managers. Hence, the Board of Directors has somehow changed its face, switching its main duties from management to control:[16] the Directors have thus started to perform themselves the control duties that were formerly assigned to the Statutory Auditors. The latter could even be considered unsuitable to act as advisors, because their controlling role would draw red line between the Board of Statutory Auditors and the top management.

It has been contended that the controls of the corporate bodies somehow differ with regard to their object and to their goal, as the Statutory Auditors would not control with the purpose of taking managerial decisions, but instead in order to report

12 In companies listed in Italy, a specific protection is granted to minority shareholders, as the Chairman of the Board of Statutory Auditors is selected from the minority list (Art. 148, para. 2-*bis*, of the Italian legislative decree no. 58/1998).

13 F. Parmeggiani, *Il collegio sindacale e il comitato per il controllo interno: una convivenza possibile?, in Giurisprudenza Commerciale*, 1, 2009, pp. 306 at 324-325.

14 P. Montalenti, *Amministrazione e controllo nelle società per azioni: riflessioni sistematiche e proposte di riforma, in Rivista di diritto societario*, 1, 2013, pp. 42-71

15 P. Ferro-Luzzi, *Per una razionalizzazione del concetto di controllo*, in M. Bianchini – C. Di Noia, *I controlli societari. Molte regole, nessun Sistema*, Milano, 2011, pp. 130-131

16 M. A. Eisenberg, *The structure of the corporation: a legal analysis*, Boston-Toronto, 1976, p. 16; M. A. Eisenberg, *The Board of Directors and Internal Control*, in *Cardozo Law Review*, 19, 1997, pp. 237-247; W. O. Douglas, *Directors who do not direct*, in *Harvard Law Review*, 47, 1934, p. 1314.

to the Directors and, more important, to the shareholders.[17] However, in large banks' practice, the boundaries between the fully-fledged controls performed by the Statutory Auditors and those carried out by the Directors have become rather thin: the duties of the former have been squeezed between the strategic supervision of the Directors and the assessment of its risk committee; downstream, ongoing controls are executed by the Risk management function, by the Compliance function and by the Internal audit, that clearly outweigh the Statutory Auditors in terms of FTEs and knowledge of the ongoing business. To a certain extent, the duties of the Board of Statutory Auditors also overlap with the role of the financial accounts auditors, e.g., with regard to the accounting system controls. As per the methodology, all corporate bodies rely on similar information packages – without prejudice to the power of the Statutory Auditors to carry out inspections (Art. 2403-bis of the *Codice civile* and Art. 420 of the *Código das Sociedades Comerciais*). The exact role of the Board of Statutory Auditors may thus be misunderstood and an unclear governance could discourage international investors.
Moreover, in Italy the benefits of the additional layer of controls provided by the Statutory Auditors are poorly demonstrated. The proof of pudding is in the eating: it can be observed that a failure of the Board of directors is usually accompanied by a failure by the Board of Statutory Auditors. As a matter of fact, in years 2016 and 2017, the Bank of Italy has imposed sanctions on members of the Board of Directors in 25 cases. All such cases have regarded banks governed through the "side by side" control model. In 23 cases (i.e., more than 90%), the fines have also been imposed on the members of the Board of Statutory Auditors, for failure to control.[18] Only in a very few cases the Statutory Auditors have avoided liability, maybe due to a proactive approach or for lack of negligence.[19]

The target of Statutory Auditors' controls is also a question mark. It is contended that deficiencies in risk management are assumed as a primary source of instability

17 G. Presti, *Di cosa parliamo quando parliamo di controllo*?, in M. Bianchini – C. Di Noia, *I controlli societari. Molte regole, nessun sistema*, Milano, 2011, p. 146.

18 Survey based on the decisions publicly available on the website of *Banca d'Italia.*

19 Liability could be avoided, e.g., by properly reporting breaches to the Board of Directors and to the Supervisory authority pursuant to Art. 52 of the Consolidated Law on banking.

for banks, but the applicable regulation does not require a focus on this issue, nor are Statutory Auditors required to have specific experience in risk management.
In light of the above, can it be contended that the side-by-side control model is ultimately out of fashion?

4. A control body above the management body (the "two-tier model")

4.1. The main features of the two-tier model

The second model of corporate organization consists in the establishment of a control body above the management body (so-called two-tier model).

Such a scheme is generally widespread in northern EU legal orders, such as France[20] and Germany.[21] Under the two-tier model, the company is run by a Management Board, normally more streamlined than the Board of Directors in the "side by side" model described above; it is typically composed by managers and carries out the daily business subject to a close oversight from the Supervisory Board.

Clearly, such system may somehow entail the weakening of equity investors. Indeed, the shareholders are usually only required to appoint Supervisory Board members, to decide on their remuneration and to approve the amendments to the articles of association. Compared with the "classic model", the two-tier model deprives the shareholders' assembly of the power/duty to approve the accounts and to appoint and remove the management body. In turn, such powers are assigned to the Supervisory Board. Hence, the latter board performs hybrid duties: on the one hand, it shall carry out strategic supervision; on the other hand, the Supervisory Board retains managerial powers, that, although high-level, are nonetheless material.

Finally, the Management Board – appointed by the Supervisory Board – concretely manages the company.

Interestingly, for a very long time, the Italian *Codice civile* has solely envisaged the classic model and it has welcomed the one-tier and the two-tier model only as late

20 Reference can be made to F. Duquesne, *Droit des sociétés commerciales*, Paris, 2018

21 See e.g., K. Schmidt, *Gesellschaftsrecht: Unternehmensrecht*, Colon, 2018.

as 2003.[22] In fact, legal constructions follow social needs and such governance models were not desired until shareholding paths were rather concentrated and the shareholders could have a direct grip on their companies. However, the opening of and the interconnections between financial markets have paved the way to a kind of regulatory competition, where legal orders sought to break the chains and facilitate the business, so as to increase the profitability outlook of the undertakings and, in turn, to maximize their value. This has led to a growing laissez-faire with regard to corporate organization, in a view to facilitate the smooth functioning of the markets and the reliance on the "invisible hand". In this view, the rule-makers have allowed alternative schemes, so as to enable a more effective governance in a globalized economy.[23] However, the implementation of the two-tier model in Italian banks has specific features, that tip the scale of the Supervisory Board on controlling tasks instead of managerial duties. In light of such a double hatting, the Italian *Codice civile* seeks to prevent managerial powers from polluting supervisory activities. In this regard, the assignment to the Supervisory Board of certain managerial powers, e.g., the power to decide on certain transactions, is a mere possibility and there is no duty for it: the Supervisory Board may approve key transactions and strategic plans only upon statement of the corporate articles of association (Art. 2409-*terdecies*, paragraph 1, lit. f-*bis*). In any case, the managerial powers conferred shall be clearly defined and limited to truly strategic transactions and the Supervisory Board members are deprived of any executive function. Italian company law thus limits the possibility to transfer managerial powers from the Management Board to the Supervisory Board. In a different perspective, in the French *société anonyme*, the Supervisory Board (*Conseil de surveillance*) shall appoint a management board (*Directoire*) and perform controls; meanwhile, art. L225-68 of the *Code de commerce* explicitly entrusts it with some management powers, such as the award of guaranties (except banks) (without prejudice to the types of transactions assigned by the articles of

22 On the one-tier and on the two-tier model in Italy, reference can be made to F. Bonelli, *Gli amministratori di s.p.a. dopo la riforma delle società*, Milano, 2004.

23 For a more comprehensive overview on the rationale and on the goals of the reform, refer to C. Angelici, *La riforma delle società di capitali. Lezioni di diritto commerciale*, Padova, 2003; M. Vietti, *Nuove società per un nuovo mercato. La riforma delle società commerciali*, Roma-Salerno, 2003.

association). Moreover, in Italy it is not permissible to refer matters to the general meeting – unlike Germany, where certain matters can be reserved to the Supervisory Board (*Aufsichtsrat*), without prejudice to the power of the Management Board (*Vorstand*) to further escalate to the shareholders' meeting (Art. 111, para. 4, AktG).[24] Besides, Italian law does not envisage the participation of labor representatives in the Supervisory Board (rather the contrary, the start of a working relationship between a Supervisory Board member and the company would trigger the lapsing of the Director concerned). Such a framework results in a full liability of the Management Board and in an increased focus of the Supervisory Board on control duties. In this regard, it is worth mentioning that the Supervisory Board, like the *Collegio sindacale* in the classic model, shall cooperate with the Supervisory Authorities, reporting breaches pursuant to article 52 of the Consolidated law on banking. These tasks require the Supervisory Board to encompass an internal controls committee.

Such a duty is unique in the Euro-area, but the idea of a link between the Supervisory Board and the Supervisory Authorities is not unusual in the Euro-area. In this regard, it is worth recalling, for example, that the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "B*a*Fin") enjoys a right to participate in shareholders' meetings, as well as in the meetings of the supervisory board (Section 44 of the *Gesetz über das Kreditwesen* – i.e., the German Banking Act). Hence, BaFin could eventually mandate representatives to attend those meetings so as to address issues directly during the summits.

The two-tier model perfectly fits into the banking regulation framework: the Management Board acts as management body and strategic supervision is assigned to the Supervisory Board. The same board also acts as control function.

4.2. The costs and benefits of the two-tier model

As hinted above, the two-tier model has been designed to match the needs of large corporations, eventually active on international markets. In this view, credit

24 V. Calandra Buonaura, *I modelli di amministrazione e controllo nella riforma del diritto societario*, in *Giurisprudenza Commerciale*, 1, 2003, pp. 535 at 543-544.

institutions with a very granular shareholders' path could take advantage from such a system, as the Supervisory Board could challenge the management and contribute to strategic decisions much better than a fistful of small stockholders.

The two-tier model even takes a firm step towards a new perception of corporate control bodies: not only *ex post* and formalistic controllers, but instead partners and advisors, that also retain strategic powers. Such activity could take advantage from a closer position between the controlling body and its main target. Moreover, the Supervisory Board would be quite influential on the Management Board, since it is entrusted with the power to remove its members and acts as its principal. In some cases, the two-tier model could facilitate a "non-core" participation of several stakeholders in corporate activities, through the means of a seat in the Supervisory Board; indeed, this would attribute a formal role in corporate life. In the same vein, the two-tier system could also facilitate the involvement of labor representatives, as well as the transfer of property in family business. In fact, some heirs could seat in Supervisory Boards and perform controls, while others could be entrusted with the management. Such as solution could also facilitate the follow-up of mergers between large banks, by assigning to the minority shareholders positions within the Supervisory Board, entailing non-negligible powers. It is worth mentioning that the two-tier model may also increase the liability towards the Supervisory authorities. In fact, supervisory concerns are mainly addressed to corporate bodies and they may be to addressed the shareholders only in very limited cases. In this perspective, unlike the shareholders in the classic model, the Supervisory Board would also be liable for the quality of the Management Board.[25]

Nevertheless, as a dark side of the moon, the two-tier model has the effect of extending the decision-making line, slowing down the process.

Finally, it is worth mentioning that the two-tier model may weaken the shareholders: not only are they dispossessed of certain powers (i.e., the approval of the accounts and the appointment of the Management Board), but the intermediation of the Supervisory Board could even shield the management body from their direct

25 The appointment of the Board of Directors lies with the shareholders, that, however, fall outside the scope of banking supervision. The link is nevertheless somehow reinforced whenever the Board itself is tasked with the proposal of a list of candidate Directors for the renewal of the Board.

control. This may typically be the case of cooperative banks, where every shareholders is entitled to a single vote, regardless to the amount of its stake. As a consequence, the shareholders' assembly of cooperative banks can be steered by associations of shareholders capable to convey several votes (e.g., trade unions). In such a context, the presence of a Supervisory Board hinders interferences. However, this is not *per se* detrimental, as long as it could eventually even benefit the governance of the company.

5. A control body within the management body (the "one-tier model")

5.1. The main features of the one-tier model

The shortcomings of the two-tier model may be partially addressed through the one-tier system. Such a model envisages a shareholders' assembly, a Management Board and a Control Committee. The tasks of the shareholders normally include the approval of financial accounts and the amendments to the articles of association, as well as the appointment of the members of the Management Board. Under the one-tier model, corporate controls are assigned to a management control committee. The latter is not separate from the Board, but it is part of it; still, such a committee has to be independent.

In this respect, in France, Art. L225-17 of the *Code de commerce* allows to assign the management to a Board of Directors (*Conseil d'administration*) appointed by the shareholders' meeting; the law does not envisage the appointment of Statutory Auditors, but controls are simply assigned to the internal controls committee.

In Italian banks, the duties of the shareholders are aligned with the tasks retained under the classic model. Moreover, pursuant to *Banca d'Italia* Circular no. 285, the by-laws shall also assign to the shareholders the duty to appoint and dismiss the members of the management control committee. Such a provision seeks to reinforce their independence *vis-à-vis* the rest of the board.

The Control Committee performs some of the controls assigned to the management body in its supervisory function, as the committee shall supervise the adequacy of the corporate organization, of the internal controls system and of the accounting and administrative software, as well as its suitability to properly reflect the management (Art. 2409-*octiesdecies* of the *Codice civile*).

As per the reconciliation with banking regulation, in Italy the Control Com-

mittee of credit institutions acts as control body; as such, it bears the responsibility to report breaches to the supervisory authorities (Art. 52 of the Italian Consolidated Law on Banking); in turn, such a task implies a duty to control the merits of the management. The committee is also vested with the power and the duty to carry out inspections.[26]

In light of such specificities, banking regulation tends to align the power of the management control committee with those of the Board of Statutory Auditors.[27] Against this backdrop, the Management Board performs both managerial and supervisory tasks, acting as both management body and management body in its supervisory function.

5.2. The costs and benefits of the one-tier model

The one-tier model could foster effectiveness. First of all, the governance structure is clearer, because such a model would avoid any overlapping between control corporate bodies – still, the one-tier model would not cast away all uncertainties on the boundaries of the control duties of the committee and those of the other non-executive Directors. In comparison with the two-tier model, the one-tier model would shorten the decision-making process, by avoiding the involvement of an additional player (such as the Supervisory Board) placed above the Management Board. In turn, the reduction in the number of corporate boards would allow saving costs and administrative resources, as the company would not be required to spend resources to select, appoint and remunerate the members of an additional corporate body.

Besides, the one-tier model entails a closer relationship between the management body and the controlling body; the members of the control committee would be in a good position to provide advices to their colleagues.

Moreover, as the one-tier model is used in several countries, it could facilitate the simultaneous listing of a company in several financial markets.

26 *Banca d'Italia* Circular no. 285, Part I, Title IV, Chapter 1, Section III, para. 3.2.3.b. The same power is attributed to the committee of listed companies (Art. 151-ter, para. 4, of the Consolidated Law on Finance) and, according to T. Di Marcello, *Sistema monistico e autonomia organizzativa*, Roma, 2012, p. 221, the specificities set for listed companies could be considered as simple specifications of the general rules.

27 A. Guaccero – T. Di Marcello, *Codice civile, società quotate, banche, intermediari e assicurazioni: un solo monistico?, in Analisi giuridica dell'economia*, 1, 2016, pp. 103-119.

However, such a model has the dangerous side-effect of leaving full powers in the hands of a single body.[28] Its powers should therefore be counterbalanced through internal governance arrangements, such as the set-up of committees, in order to enable a swift and effective control on the company.[29] In such a framework, the fact that the controlling members are part of the Management Board stretches a shadow over their impartiality and it becomes crucial to ensure both their independence from the company and their independence of mind.Worth mentioning, the savings on costs could be non-material in large companies. Finally, even the benefits of having a control body included in the Board of Directors are undemonstrated: indeed, in the "classic" model, the Statutory Auditors attend Directors' meetings and there is no reasons to believe that their information packages are thinner than those of the Directors.

6. Which model fits better?

The overview provided above allows infering that all governance models have their roots in historical development, are path-dependent and entail advantages and disadvantages;[30] the broad wording of CRD4 does not preclude any schemes and all of them may indeed fit banking regulation, depending on national transposition. But which model is more suitable to run a bank?

The decision is clearly bank specific: it shall ensure the suitability of corporate, administrative and accounting organization to the nature and to the needs of the undertaking. Such an assessment shall take into account the shareholders' path, the size and the complexity of the bank, along with its strategic goals in the medium and long term and consistently with the group's corporate structure. Hence, there is no panacea for corporate governance, no one size fits all and it is rather cumbersome to define ex ante and in abstract terms which model to choose.

More specifically, the proper functioning of the model also depends on its im-

28 In any case, according to the Ministerial report on the legislative decree no. 6/2003, the internal controls committee would not affect the quality of the internal controls, since the Committee members have the same duties and shall meet the same professional and independence requirement as the Statutory Auditors.

29 B. Libonati, *Noterelle a margine dei nuovi sistemi di amministrazione delle società per azioni*, in *Rivista delle società*, 2008, p. 301.

30 K. J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation, Law Working Paper ECGI*, 170, 2011, p. 19.

plementation, with specific regard to the selection of suitable Directors and Statutory Auditors. In fact, apart from integrity requirements, board members shall have professional skills and experiences suitable to their role and to the complexity of their company: the suitability of board composition is a key element to ensure the viability of any governance model. With specific regard to Italian banks, until the Nineties, the largest Italian banking groups were state-owned and subject to specific regulation. In 1990, Law no. 356/1990 imposed the transformation into joint stock companies and the conferral of the shares upon newly established "banking foundations.[31]" Some foundations have then progressively dismissed (part of) their shares and in the course of the new millennium some shareholding paths have become more granular. The weakening of some relevant shareholders may entail a lack of leadership, which could indeed be filled through the establishment of another principal to lead and control the company.[32] This could have hinted a widespread adoption of the two-tier model. However, despite the opportunity to opt for allegedly more "modern" models, Italian credit institutions still demonstrate a clear favor for the "classic model". The latter is the favorite scheme of banks that have different sizes, complexity and business model. In fact, out of the 30 largest Italian banks, 27 have adopted the classic model.[33]

There is no clear link between the model adopted and the role in the group (parent company, holding, or subsidiary), nor does the governance scheme seem to be linked to the size. In fact, the two-tier model has been adopted by two banks: the first one is the sixth largest bank and parent company of an Italian banking group; the other one is the 20th largest Italian bank, a subsidiary of a foreign group. Only one bank has adopted the one-tier model, i.e., the parent company of the second largest Italian banking group. All the other surveyed banks have adopted the classic model; 14 of them are subsidiaries, 16 are parent companies. Hence, it seems that there

31 E. Freni, *Le privatizzazioni*, in S. Cassese, *La nuova costituzione economica*, Roma-Bari, 2008, p. 249

32 G. Galgano, *Diritto commerciale, 2, Le società*, Milano, 2010, pp. 353-354.

33 A survey has also outlined a scarce spread of the alternative models among listed companies (also non-banking): in 2014, out of 244 companies on the Italian stock market, 237 (97%) had the classic model, 2 the one-tier model and 5 the two-tier model. Among non-listed companies, according to a survey performed by the Italian Chamber of Commerce, as of 1 March 2013, out of 48.033 *società per azioni*, only 180 companies (0,374%) had the one-tier model, while 119 (0,247%) had the two-tier model and the rest the classic model (S. Alvaro – D. D'eramo – G. Gasparri, *Modelli di amministrazione e controllo nelle società quotate Aspetti comparatistici e linee evolutive, in Quaderni Giuridici Consob*, 7, 2015, p. 20).

is no direct connection between the governance model and the size of a bank, nor between the governance and the performance. The financial crisis has demonstrated that no administration model is by itself capable of preventing failures and mistakes.[34] The scarce interest of large banks and public companies for the two-tier and the one-tier models may be attributed to several causes. A first set of reasons lay with the Italian legal background, where shareholders were not very granular and were directly linked to the corporate bodies external controlling board. Changes in the shareholders' structure may still suffer from a "left-over effect", as the corporate structures that an economy has at a given point in time are influenced by the corporate structures it had earlier.[35] Moreover, the classic "side by side" model is not on the same level as the other two. In fact, it is still the "standard" method of governance, since the others are only applicable upon explicit decision.[36] Besides, the classic model's regulation remains applicable "where compatible": this may create uncertainty on the corporate organization, leading the parties to opt for a safer harbor and chose the classic model.[37] It has therefore been argued that Italian companies may have sought to avoid the risks inherent in alternative systems, because of the difficulties in weighting *ex-ante* its costs and benefits, suggesting to avoid acting as first mover.[38]

Whatever the reasons for sticking to the classic model, such a solution seems far from unreasonable. In fact, regulated industries such as banking may entail a broad number of stakeholders. This holds especially true for banks, whose "claimants" include depositors, investors, customers and even central banks, also in their roles of last

34 G. B. Portale, *Amministrazione e controllo nel Sistema dualistico delle società bancarie, in Rivista di diritto civile*, 1, 2003, pp. 25-39. The financial crisis brought to the light severe mistakes in German banks having different types of administration model (R. E. Breuer, *Die Professionalisierung der Aufsichtsratsarbeit in der Bank*, in K.J. Hopt – G. Wohlmannstetter, *Handbuch Corporate Governance von Banken*, Munich, 2011, p. 526).

35 L. A. Bebchuck – M.J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, in *Stanford Law Review*, 52, 1999, pp. 127-170. It is contended that sunk adaptive costs, complementarities, network externalities, endowment effects and multiple optima may discourage changes. Besides, existing ownership structures might have "*persistence power*", even in the face of some inefficiencies, due to internal rent-seeking.

36 G. Caselli, *Elogio, con riserve, del collegio sindacale*, in *Giurisprudenza commerciale*, 1, 2003, p. 251.

37 P. Montalenti, *Il diritto societario a dieci anni dalla riforma*, in *Nuovo Diritto delle Società*, 11, 2014, p. 11.

38 F. Ghezzi – C. Malberti, *Corporate Law Reforms in Europe: The Two-Tier Model and the One-Tier Model of Corporate Governance in the Italian Reform of Corporate Law, in European Company and Financial Law Review*, 5, 2008, pp. 1-47; C. Bellavite Pellegrini – L. Pellegrini – A. Sironi, *Alternative vs Traditional Corporate Governance Systems in Italy: An Empirical Analysis, Problems and Perspectives in Management*, 3, 2010, para. 2.1

resort lenders.[39] The banking industry has also other specificities, considering that banks create more moral hazard concerns than a typical firm.[40] In such a framework, the Statutory Auditors of banks do not act in the sole interest of shareholders anymore, but are rather an outpost in the interest of all the stakeholders involved.[41] Seemingly, such a duty can be better performed by the Statutory Auditors than by the Supervisory Board in the two-tier model or by the Control Committee in the one-tier model. First of all, because the Board of Statutory Auditors has no links whatsoever with active management, of any kind. It is not part of the Management Board, nor does it have any duty to approve strategic goals or financial accounts. In a nutshell, it is truly independent and established at the same level as the Board of Directors, which makes it suitable to control it.

It is also worth mentioning that its appointment falls entirely in the remit of the shareholders, while an increasing number of large companies entrust the Board of Directors with the power to provide a list for the renewal of the Board of Directors, that are usually confirmed by the shareholders' assembly.[42] It is debatable whether Directors could then be tempted to refrain from raising objections, in order to gain their renewal. Needless to say, dependent managers would not be in a position to perform effective controls on the Board of Directors, for the simple reasons that they report to it. In this respect, the Statutory Auditors appears to be the best placed body to ensure both an unbiased review and the compliance with the "four-eyes principle".

The role of Statutory Auditors could be even more important in large banks with granular shareholding paths. In such "public companies", the principal-agent relationship tends to flaw, as no shareholders hold control over the company and nearly

39 J.R. Macey – M. O'hara, *The corporate governance of banks, in Economic Policy Review*, 1, 2003, p. 92; P. Ciancanelli – J. A. Reyes-Gonzalez, *Corporate Governance in Banking: a Conceptual Framework*, 2000, contend that the normal agency theory proves to be rather poor in the banking industry, due to its specific features: regulation limits the power of the market to discipline the bank and alters the normal functioning of the principal-agent relationship. It is also contended that, as part of the risk is born by regulators, the owners end up to assume more risk than unregulated firms.

40 J. R. Macey – M. O'hara, *The corporate governance of banks, in Economic Policy Review*, 1, 2003, p. 99.

41 F. Parmeggiani, *Il collegio sindacale e il comitato per il controllo interno: una convivenza possibile?, in Giurisprudenza commerciale*, 1, 2009, p. 328.

42 Such an option is fairly spread among non-banking listed corporations such as Prysmian and Eni and has been also exercised by some banks.

all of them end up being minority shareholders: in such a situation, it is questionable whether they are still capable of having a sufficient grip over the company. As a matter of fact, agency problems may occur especially when the principal does not have the power or the necessary information to control the agent.[43] It is questionable, however, whether agency problems could be better addressed through the "classic" model or through the two-tier model.

Finally, the Board of Statutory Auditors' controls have a broader scope than other control bodies. As mentioned above, the Statutory Auditors do not simply pursue business and efficiency, but perform a fully-fledged check. Internal controls may have different goals: merits, compliance and administrative adequacy.[44] Nonetheless, the full accomplishment of the Statutory Auditors' mission in Italian banks could benefit from a fine-tuning. The Board of Statutory Auditors is required to be more and more proactive to monitor business. In turn, this would require a broader scope of skills, in order to be more effective in detecting possible criticalities and to reduce the information gap between the Board of Statutory Auditors. The skills and competence required do not differ that much from those required from the Directors and the Supervisory authorities are increasingly concerned about the quality of Board members. However, the relevant regulation still imposes to the Statutory Auditors to have a background that no longer matches their duties.[45] In this regard, the Statutory Auditors would benefit from specific expertise, including not only taxation and law, but also finance, risk management, internal models and so on. Moreover, their number should also be increased, as they are usually composed of three standing members (only in a few cases they are increased up to five). A larger number, along with the enlargement of the scope of their permissible background, would facilitate the assignment of a broader variety of professional competences, experiences and background and, ultimately,

43 J. R. Macey – M. O'hara, *The corporate governance of banks, in Economic Policy Review*, 1, 2003, p. 92.

44 P. Montalenti, *Amministrazione e controllo nelle società per azioni tra codice civile e ordinamento bancario,* in *Banca borsa titoli di credito*, 2015, p. 716.

45 Pursuant to Art. 2397 of the Codice civile, at least one Statutory Auditor shall be registered as accounting auditor; the remaining may be selected among full professors of Law or economics, lawyers, accountants/tax accountants, commercial experts or labor consultants (Decree of the Minister of Justice no. 320/2004). The draft fit and proper requirements to be issued by the Minister of Economy and Finance does not specifically require Statutory Auditors to have competence in risk management.

the quality of the Board. The most recent supervisory methodology and regulations[46] move in the right direction, in order to provide the Board of Statutory Auditors with the tools to act as an increasingly effective coordinator of all controlling bodies.[47]

46 Article 10 of the draft fit and proper requirements to be issued by the Minister of Economy and Finance

47 N. Abriani, *Collegio sindacale e "Comitato per il controllo interno e la revisione contabile" nel sistema policentrico dei controlli,* in *Rivista di diritto societario*, 1, 2013, pp. 2-22.

MARIA STELLA BONOMI*

COUNTER - TERRORISM LEGISLATION IN ITALY: THE KEY ROLE OF ADMINISTRATIVE MEASURES

ABSTRACT: *The aim of the paper is to describe counter-terrorism legislation in Italy. After a brief introduction highlighting the trend among EU Member States to enact or amend anti-terrorism legislation in order to counter the recent phenomenon of "foreign fighters," the note focuses on the counter-terrorism policy adopted in Italy. In particular, after analysing the main regulatory provisions in this regard, the paper focuses on administrative measures to combat terrorism. The analysis particularly concerns the instrument of administrative expulsions, which may well be considered the most used in our country. The study also focuses on all other administrative tools envisaged by the legislator in order to prevent, combat and counter the phenomenon of international terrorism.*

1. Introduction: counter-terrorism reforms in the European Union

As a result of a series of terrorist attacks in Europe in recent years, both the European Union and its Member States have enacted or revised legislation to respond to the terrorism threat. Such legislation aims, in particular, to deal with the phenomenon of "foreign fighters" and includes measures to enhance prosecutorial powers, expand the scope of measures for extradition and revocation of travel documents, increase intelligence powers for surveillance and criminalise travel to foreign conflict zones. These measures refer, to a large extent, to substantive and procedural criminal law, but they also include several administrative instruments. The competence for tackling terrorism is shared between Member States and the European Union. On the one hand, article

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3 (2) of the Treaty on European Union (TEU) establishes that the EU shall offer its citizens an area of freedom, security and justice by preventing and combating crime.[1] The TEU specifies that the EU has competence in the field of criminal law. On the other hand, article 4 (2) of the TEU stipulates that the EU shall respect the essential functions of its Member States, which includes safeguarding national security.[2] National security, in particular, remains the sole responsibility of each Member State. When framing terrorism as a matter of national security, therefore, Member States have – and use – the competence to act outside the scope of EU law. There is a changing pattern of terrorism in many European countries. In the 1970s and 1980s most Member State authorities were concerned about terrorism from left-wing, right-wing and separatist groups. In recent years, some of these forms of terrorism do still exist but Member States have become more concerned about the threat deriving from jihadist terrorism due to its international nature and the multiple attacks that have been carried out in Europe and throughout the world.

The use of administrative measures has become a significant counter-terrorism tool in some Member States in their efforts to maintain national security. Their increasing prevalence is probably due to the perception that imposition of such administrative measures is proactive and preventive, thus protecting the population from the threat of terrorism. These measures include, for example, travel bans, expulsion orders, entry bans, control orders, assigned residence orders, area restrictions, social benefits stripping and citizenship revocation. Italy, France, Belgium, United Kingdom, Germany and Netherlands have all introduced provisions in law for the use of administrative measures in terrorism-related cases to varying degrees.

It is important to stress that on March 15, 2017 the European Parliament and the Council adopted the new Directive 2017/541/EU "on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Decision 2005/671/JHA". The deadline by which Member States must transpose into national law the changes introduced by Directive 2017/541/EU is 8 September 2018. This Directive is clearly part of wider European action to prevent and combat terrorism.

1 Article 3 (2) of the Treaty on European Union: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

2 Article 4 (2) of the Treaty on European Union: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining Law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

The reasons that led to issuance of the above-mentioned Directive are attributable to three orders of need. First, after the numerous terrorist attacks perpetrated in the last few years by the Islamic State, even the European institutions – such as the international bodies and EU Member States – have warned of the need to adapt and review existing legislation given the new face of the terrorist threat. The second factor that led to adoption of the new Directive was the need to introduce specific provisions for the protection of victims of terrorist offences. Finally, there was a need to implement international obligations in this area, in particular the provisions of Resolution no. 2178/2014 adopted by the United Nations Security Council "on threats to international peace and security caused by terrorist acts". The cross-border nature of terrorism requires a strong coordinated response and cooperation within and among Member States, as well as with and among the competent EU agencies and bodies. At the same time, the global character of terrorism necessitates an international answer, requiring the European Union and its Member States to strengthen cooperation with relevant third countries. Acts of terrorism constitute one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, and enjoyment of human rights and fundamental freedoms on which Europe is founded. They also represent one of the most serious attacks on democracy and the rule of law, principles which are common to the Member States and on which the European Union is based.

2. Italian counter-terrorism legislation and the primary role of administrative instruments

The Italian legal system has been fighting terrorism since the end of the 1960s. Although Italy has continued to fight extremists' political terrorism and Mafia organised crime, in the last few years the jihadist terrorism phenomenon has developed at an international level and has also started to be of concern in Italy. Many new counter-terrorism measures have been developed in Italy due to the rapid evolution of this international issue. Since the September 11, 2001 terrorist attack in New York, Italian legislation has followed two main pathways. First, a number of reforms have criminalised preliminary actions and expanded the scope of punishable criminal offences. In addition, new administrative and financial measures have been added to the strategy.
Italian legislation to counter international terrorism provided for by the Criminal Code,

the Criminal Procedure Code and some Special Laws is not the result of a reasoned assessment of the need to introduce counter-terrorism legislation into our legal system. Instead, starting from 2001, it arose under the form of Law Decrees as an immediate response to serious terrorist attacks committed in the world.
In particular, the main pieces of Italian anti-terrorism legislation are:
- Law Decree no. 374 of 18 October 2001, subsequently passed as Law no. 438 of 15 December 2001 ("urgent measures against international terrorism"), which was issued following the New York attacks of September 2001;
- Law Decree no. 144 of 27 July 2005, subsequently passed as Law no. 155 of 31 July 2005 ("urgent measures regarding expulsion and deportation"), which was issued following the London attacks of July 2005 against the public transport network;
- Law Decree no. 7 of 18 February 2015, subsequently passed as Law no. 43 of 17 April 2015 ("urgent measures against international terrorism and extension of the powers of the Direzione Nazionale Antimafia to terrorism-related crimes"), which was issued following the Paris attacks of January 2015 against the satirical weekly magazine Charlie Hebdo. In addition to these Law Decrees, it is also important to mention the recent Law no. 152 of 28 July 2016, which introduced new provisions against terrorism and ratified some international Conventions on the prevention of terrorist attacks, such as the Council of Europe Convention on the Prevention of Terrorism (Warsaw, 2005) and the related Additional Protocol (Riga, 2015), the UN Convention for the Suppression of Nuclear Terrorism (New York, 2005), the Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 2003) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Warsaw, 2005). At the root of legislative interventions to counter terrorism is the awareness that the fight against terrorism cannot be combated only with the "classical" tools of criminal law, but also with the use of administrative instruments. After the September 2001 terrorist attack, administrative measures have become an increasingly widespread and important component of counter-terrorism policies.

The term "administrative measures" is quite vague: they can be defined as restrictive measures aimed at preventing terrorism within the territory of a State, decided upon and ordered by the executive (or with its close involvement) and subject to limited judicial review. Administrative measures seem to fit somewhere between prevention

and repression. On the one hand, they are preventive because they are applied before the commission of a terrorist act, in order to reduce in advance the threat within a country, in defence of the public. On the other hand, they are becoming an increasingly repressive and punitive instrument to the extent that they impose more or less severe restrictions on those to whom they are applied; furthermore, they can be used as actual sanctions in some cases (for example, revocation of social benefits or, more seriously, deprivation of citizenship). Currently, administrative expulsions have become a key element of Italy's counter-terrorism policy and represent a discretionary power of the executive. The expulsion order is not subject to prior judicial validation on the merits and is immediately enforceable. The decision can be appealed before the administrative court, but its execution cannot be suspended. The expulsion implies a re-entry ban for a period of time determined on a case-by-case basis. In essence, the Italian legal system has three types of administrative expulsion (espulsione amministrativa) of non-EU citizens, as opposed to judicial expulsion (espulsione giudiziaria) ordered by a criminal judge. First, legal provisions on immigration, including expulsions of foreign citizens, are in the Testo unico sull'immigrazione (Legislative Decree no. 286 of 25 July 1998). This important piece of legislation provides that the Minister of the Interior can order the expulsion of a foreign citizen "for reasons of public order or State security". The expulsion order has to present appropriate reasons in fact and in law.

Over time, the grounds for expulsion of non-Italian nationals have been expanded. In particular, the above-mentioned counter-terrorism Law Decree of 2005 grants the Minister of the Interior – or, on delegation, the Prefect – the power to order the expulsion of a foreign citizen against whom there are "well-founded reasons to believe that his/her stay in the territory of the State may in any way facilitate terrorist organisations or activities, at the national or international level". In any case, the expulsion order can be suspended or even revoked if the individual concerned agrees to collaborate with the competent authorities. Finally, the recent counter-terrorism Law Decree adopted in 2015 expanded the hypotheses for the administrative expulsion of a foreign citizen, by order of the Prefect, for reasons of "social dangerousness" (pericolosità sociale). This Law also expressly refers to the category of – non-Italian – aspiring foreign fighters. The provision fits with the discipline of personal preventive measures that are already applied to Mafia suspects. It is important to stress that the removal (allontana-

mento) of EU citizens for reasons of security, by order of the Ministry of the Interior, is regulated by different rules – Legislative Decree no. 30 of 6 February 2007 and subsequent modifications – which are more favourable for the individual concerned and subject to judicial validation. From a counter-terrorism perspective, use of the above-mentioned administrative expulsions can help prevent the creation and stabilisation of extremist networks on national territory. It is quite clear that, in practice, administrative expulsions are often ordered when there is evidence that an individual is a threat to national security, but the evidence is considered insufficient for prosecution. In fact, the forms of behaviour that lead to an expulsion order do not need to be connected to the use of terrorist violence: many non-EU citizens were expelled from Italy because, for example, they had displayed extremist attitudes or paid tribute to jihadist organisations.

Obviously, the measure of administrative expulsion is not exempt from risks. It is possible to distinguish two main types of problem. The first is of a legal nature and is related to the question of human rights protection. The second is more pragmatic and concerns possible counterproductive consequences, from a counter-terrorism perspective.

With regard to the first issue, the administrative measure of expulsion is imposed on a suspect without the procedural guarantees associated with criminal prosecution, such as prior judicial review, appropriate standard of proof and assessment of evidence and full compliance with the principle of the presumption of innocence. In addition, the expulsion can result in violation of human rights in the country of destination. The European Court of Human Rights has upheld the prohibition on sending individuals to States in which they face a real risk of torture, inhuman or degrading treatment.

With regard to the second issue, the expulsion order may have the undesirable effect of intensifying the feelings of frustration and anger – and even sense of revenge – at the individual level. At the organisational level, it can reinforce the narrative of victimhood and persecution so recurrent in the propaganda of jihadist groups and could even facilitate the terrorist recruitment of others. Overall, Italy's extensive use of administrative expulsions of foreign citizens, associated with restrictive naturalisation laws, has so far proved to be effective from a counter-terrorism perspective. However,

other instruments are necessary, especially in the long term. It is worth mentioning that, unlike many other European countries, Italy has not yet developed fully fledged counter-radicalisation and de-radicalisation programmes. Italy's Lower House passed a bill in the summer of 2017, introducing "new measures for the prevention of jihadist radicalisation and extremism", but the procedure was not completed before the end of the legislature.

The recent reform of 2015 introduces significant changes also in terms of substantive and procedural criminal law and in terms of prevention and investigative coordination. The first articles of Law Decree no. 7 of 2015 amend various provisions of the Criminal Code for violations related to terrorism activities, such as recruitment of terrorists and endorsing or inciting to terrorism, if committed by means of computer or telematics instruments. In particular, the definition of new offences is aimed at punishing so-called "foreign fighters", defined as individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of terrorist acts, or their participation in such events, as well as providing or receiving terrorist training and, more in general, anyone organizing trips abroad aimed at terrorism. The Law Decree also pays particular attention to those activities carried out through the Internet. Paragraphs 2, 3 and 4 of article 2 provide measures for blocking and taking down of terrorism-related websites. A unit of the Ministry of Interior is empowered to generate and update a list of websites used for subversive and terrorist activities. In addition, internet service providers can be requested to filter or take down the websites in the list if asked by a public authority.

Relations between the Internet and terrorist organisations are particularly relevant, because telematics instruments are those most used for proselytism and ideological propaganda, and for transmitting instructions and messages. In this regard, the reform has opportunely introduced an aggravating circumstance when certain terrorist facts are made using the Internet. In the Italian legal system, monitoring of the Internet with purpose of preventing terrorist threats is entrusted to the Comitato di Analisi Strategica Antiterrorismo established at the Ministry of the Interior and chaired by the Direttore centrale della Polizia di Prevenzione. Another instrument provided by the reform of 2015 is the special police supervision measure (sorveglianza speciale di pubblica sicurezza), which includes several restrictions of individual fundamental rights and

freedom. In particular, the judicial authority can order dangerous people, who have not complied with an "oral notice", to maintain a lawful conduct; not to give cause of suspicion; not to associate with persons convicted for criminal offences or subjected to preventive or security measures; to return to their residence by a certain time in the evening or not to leave their residence before a certain time in the morning, except in case of necessity and after having given notice in due time to the authorities; not to own or carry fire arms; not to enter bars or night- clubs; and not to take part in public meetings. If need be, this may be combined either with a prohibition on residence in one or more given municipalities or provinces or, in the case of particularly dangerous persons, with an order for compulsory residence in a specified municipality. In any case, the special police supervision measure requires issuance by a criminal judge, under an application, which could be filed by the Questore, the head of Direzione Investigativa Antimafia and the Procuratore Nazionale Antimafia e Antiterrorismo. The special measure can only be issued after the suspect has been granted the opportunity to be heard. The decision could be subject to appeal before the Court of Appeal and the Court of Cassation. The reform of 2015 also intervenes on the coordination of investigative activities, providing for the attribution of anti-terrorism functions to the national Procuratore Nazionale Antimafia. In addition, the most recent legislation has increased the emergency power of the Questore allowing specific measures against those subjected to special police supervision, including seizure of passport and of any other travel documents.

Other instruments to combat terrorism are the financial prevention measures that are aimed at freezing, seizing and confiscating assets, in order to obstruct the access of terrorist organisations to their financial resources. In particular, Legislative Decree no. 109 of 22 June 2007 defines the freezing of funds as "the prohibition […] of handling, transfer, modification, use or management of the funds or access to them, so as to modify the volume, amount, placement, property, possession, nature, destination or any other change that allows the use of funds, including portfolio management".

For the purposes of ascertaining terrorist offences, the Law Decree of 2015 has dictated – derogating from the provisions of the Privacy Code – a temporary discipline regarding the conservation of telephone and telematics traffic data by telecommunications service operators. Subsequently Law no. 167 of 20 November 2017 – in imple-

mentation of article 20 of Directive 2017/541/EU on the fight against terrorism – has established that the deadline for the retention of telephone and telematics traffic data, as well as data on unanswered calls, is established in 72 months, notwithstanding the provisions of the Privacy Code.

Finally, it is important to stress that on 19 November 2017, Law no. 161 to combat criminal activities of the Mafia ("amending the Code of Anti-Mafia Legislation and protection measures under Legislative Decree no. 159 of 6 September 2011, the Criminal Code, the implementing, coordinating, and transitional rules of the Criminal Procedure Code, and other provisions, and delegating power to the Government for the protection of labour in companies which were sequestered and confiscated from organised crime") entered into force in Italy. The main purposes of the new Law are to speed up the application of asset protection measures, make the appointment of judicial administrators more transparent, create a government unit for the administration of seized and confiscated assets, and include corruption, stalking, and terrorism within the scope of anti-Mafia legislation. The new Law expands the application of Legislative Decree no. 159 of 2011 to those who, in groups or in isolation, carry out "preparatory, objectively relevant, or executive acts" aimed at subverting the order of the state through the commission of a crime having a terrorist purpose with international ramifications or participating in a foreign conflict in support of an organization that pursues terrorist aims. Under the new Law, a request for the application of protection measures against a person of interest must be filed with the chancellery of the sections or the tribunal of the district capital in the territory in which the person resides. Protection measures include special surveillance and the prohibition of staying in one or more municipalities, other than the habitual residence, or in one or more regions. If the suspect must be detained, he/she is to be held in detention or imprisonment at a facility located outside the jurisdictional district of the judge directing the procedures.

MARTA CAREDDA*

THE VIOLATIONS OF THE CHARTER OF FUNDAMENTAL RIGHTS AS QUESTIONS OF CONSTITUTIONALITY: NEW PERSPECTIVES FROM THE ITALIAN CONSTITUTIONAL COURT

ABSTRACT: *The aim of this note is to give a brief analysis of a significant excerpt of the Italian Constitutional Court judgment of 14 December 2017, n. 269. Indeed, the Court identifies the new criteria for the application of the provisions of the Charter of Fundamental Rights of the EU by lower judges. In cases in which a national law is potentially infringing both the Italian Constitution and the CFREU (so-called Dual Preliminarity), the Italian Constitutional Court has affirmed the need for its erga omnes intervention, even if the CFREU norms would be susceptible of direct application. Once clarified the main content of the new case law, the analysis wonders on the following of this decision, also because the Constitutional Court seems to affirm that, on the one hand, the question of constitutionality must be raised, but, on the other hand, that is left in place the possibility of making a referral for a preliminary ruling for matters of interpretation or invalidity of European Union law (Art. 267 TFEU). Maybe soon there will be occasion to better clarify the roles played by both the Italian Constitutional Court and the European Court of Justice, when dealing with issues concerning fundamental rights.*

1. Introduction

The Italian Constitutional Court decision of 14 December 2017, no. 269, con-

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cerned the constitutional review of the funding system of the Italian Competition Authority. The question of constitutionality was referred by a lower judge as, is typical in the Italian constitutional review system (the "*incidental*" constitutional review of law). The issue also concerned the compatibility between the EU law and the Italian norms, in particular between the latter and the TFEU.

However, the significant excerpt dealt within the grounds of the ruling, which the present work aims to comment on, concerns the Court's statements about the direct application of the Charter of Fundamental Rights of the European Union (hereinafter "*CFREU*") by the lower judges. Hence, the "*clarification*" did not entail important effects on the case at hand, but it is, however, relevant since it has stated something new in terms of relationships between the Italian legal system and EU law, between national courts and the European Court. These statements are very similar to those issued by the Austrian Constitutional Court in 2012: it might be affirmed that both Courts aim to strengthen the role of constitutional judges in the European system of human rights' protection.

2. The implications of the typically constitutional content of the CFREU

In para. 5.2 of the Conclusions on points of law, the Constitutional Court clarified what the lower judges should do when a national law is potentially infringing both the Italian Constitution and the CFREU.

In particular, the Court held that the criteria usually applied to regulate the relationship between national law and European law should be reconsidered, taking into account that the CFREU has a "*special*" content, a "*typically constitutional*" content. In the Court's opinion, "the principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by the other Member States' Constitutions)". As a consequence, "violations of individual rights posit the need for an erga omnes intervention by this Court"; "this Court holds that, where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the Charter of Fundamental Rights of the European Union in those contexts where EU law applies, the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE.[1]"

1 Italian Constitutional Court, Judgment no. 269 of year 2017, para. 5.2, Conclusions on points of Law.

Where an Italian provision clashes with the EU law, judges used to assess whether the EU provision was directly applicable or not:[2] if so, the EU law deserves the primacy over the national legislation, therefore direct application. In other terms, where European legislation is directly applicable to a specific legal fact, the Italian law will not be used to solve the proceeding; it seems "pointless" to rule on its constitutionality (according to constitutional procedure, Italian law would not be considered "*relevant*" in the case at hand).[3] However, it seems the Constitutional Court now considers that, in case a contrast with the CFREU arises out, even though it has the same legal status of the Treaties, what it has to be considered is neither the structure nor the effectiveness of these provisions, but the nature of their content: "the typically constitutional stamp of [their] contents". According to this substantial or axiological criterion, the violation of constitutional norms is a Constitutional Court's issue. As a consequence, the structural differences, recognized by the Charter itself (see the Explanations Relating to the CFREU), between "*rights*" and "*principles*" were not given significant relevance.

In any case, judgment no. 269 does not represent an unprecedented or isolated position. Indeed, this kind of approach can be found in recent doctrinal works; "the humus in which such a decision has grown[4]" is easily identifiable. Moreover, the decision affirms to follow the previous case law established by other European Constitutional Courts, in particular by the Austrian Constitutional Court, by referring to decision U 466/11-18; U 1836/11-13. Indeed, the latter has stated that "the CFREU has now enshrined rights as they are guaranteed by the Austrian Constitution in a similar manner as constitutionally guaranteed rights" and that "it follows from the equivalence principle that the rights guaranteed by the CFREU may also be invoked as constitutionally guaranteed rights." Furthermore, it pointed out that "this is true if the guarantee contained in the CFREU is similar in its wording and purpose to rights

2 See Ecj, "*Simmenthal*" case, C-106/77, 9 March 1978, and, concerning Italy, the Constitutional Court decision of 1984 n. 170, so called "*Granital*" case. The criteria to be used to solve contrasts among national Law and EU Law are underlined in the Constitutional Court decision here discussed, para. 5.1 of Conclusions on points of Law.

3 Most recently, see Corte cost., judgment of 2017 no. 111. Indeed, the Constitutional Court, only admitted to submit a question of constitutionality when the issues on interpretation or on the effects of EU Law were solved.

4 R. G. Conti, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura, in Forum di Quaderni costituzionali*, 2017, 2.

that are guaranteed by the Austrian Constitution", and, as a consequence, "one would therefore have to decide on a case-by-case basis which right of the CFREU constitutes a standard of review for proceedings before the Constitutional Court." The Italian Constitutional Court perhaps has kept a more general approach, assuming that most of the violations of the CFREU present cases of "*dual preliminarity*". The Constitutional Court also underlines that this approach is in line with the ECJ case law (Melki and Abdeli, C-188,189/2010), which allows, in cases of dual preliminarity, to refer the question to the Constitutional Court.

3. Reasons and aims of this case law

Depending on which part of the argument is focused on, it can be assumed that the Italian Constitutional Court wanted to fulfill different purposes.

Firstly, it can be assumed that the Italian Constitutional Court wanted to emphasize its central role when dealing with constitutional rights protection, in order to "avoid any bypassing (contourner) of the Constitutional Court's functions, caused by the direct relationship between CJEU and ordinary judges.[5]" This would lead to a different perspective, regarding the Charter of Nice, far from the content expressed by the "*Granital*" decision. On the other hand, it is plausible that the Italian Constitutional Court meant to increase the cooperation with ECJ, in human rights matters, seeking a fair dialogue between Courts, which are both aimed at safeguarding the rights provided by the Charter of Fundamental Rights. "The Court will make a judgment in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution), in the order that is appropriate to the specific case"; "moreover, all of this plays out within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ (see, most recently, Order no. 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53

5 See A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia*, in *Rivista dell'Associazione Italiana dei Costituzionalisti*, 4, 2017, p. 3. The translation of the scholars excerpts are not official; they shall be responsibility of the Author of this note.

of the EUCFR).[6]" Such a mention of the different cases in which the Constitutional Court has been requested preliminary ruling might be read as a real commitment to the dialogue,[7] which would avoid the intent to create a "monopoly" regarding the human rights protection. "The decision of the Italian Constitutional Court bears an ambivalent meaning. On the one hand, its tone and register is fully European-law friendly. […] On the other hand, [the Court seems to say that] as long as fundamental rights are protected by the national Charter, national Constitutional adjudication should prevail over the European circuit of adjudication.[8]"

Looking at the relationships between different legal systems, it can be assumed that the Italian Constitutional Court wants to avoid the so called "*spill-over effect*" of the CFREU, basically avoiding the latter from being applied by judges beyond its scope-defined within the spheres of competence of EU – as outlined in its Art. 51. Indeed, it has been argued that lower judges apply the Charter of Nice, even when the right at stake is guaranteed in the Italian Constitution.

In other words, it has been underlined that there are cases where the national rule, in conflict with the CFREU, is not applied and no question to the Constitutional Court is submitted, and not indicating whether the matter of the dispute belonged to the EU competence.

Recently the following question has been proffered "What is the main value of a Constitution if it is not perceived by the community as the place where the fundamental rights are located?.[9]" A similar *situation* concerned the European Convention of Human Rights (hereinafter "*ECHR*"), which was directly applied by the judges, entailing the uncontrolled disapplication of national provisions; furthermore, it was recommended as a parameter of constitutionality, even though there were constitutional norms aimed to play the same role. Indeed, it has been affirmed that, when possible, the national parameter had to take precedence over the conventional ones, since the

6 Textually reproduced from Judgment no. 269 of year 2017, para. 5.2, Conclusions on points of Law.

7 See Italian Constitutional Court's Orders: no. 103/2008, no. 207/2013, n. 24/2017 (mentioned in the decision).

8 P. Faraguna, *Constitutional Rights First: The Italian Constitutional Court fine-tunes its "Europarechtsfreundlichkeit*", VerfBlog, 2018.

9 A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia,* in *Rivista dell'Associazione Italiana dei Costituzionalisti*, 4, 2017, p. 4.

Italian legal system of protection of fundamental rights does not always need to be supplemented by international conventions. The ECHR "should work as a "residual" tool, only applicable when no other constitutional norms can be used properly.[10]" The enhancement of the national constitutional parameter, even though international norms have the same content, seems to be the logical premise in what was assessed in the decision here discussed. Actually, judgment no. 269/2017 establishes that "violations of individual rights posit the need for an erga omnes intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution)", as already stated by the Austrian Constitutional Court.[11]

4. Judges and the Charter of Fundamental Rights, future directions

The ruling here analyzed is particularly relevant because it pointed out that Courts have to refer a question of constitutionality to the Constitutional Court in cases where a national provision might be deemed as a violation of the CFREU. Therefore, it seems appropriate to reflect on the aftermath of this decision, and it could be useful to consider two different scenarios. When a violation of the CFREU is likely, or predictable "the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE": the two different targets objectives of the Court's regaining of a relevant role, and the intensification of the "*dialogue*" between the two courts are both involved in the reasoning, therefore it may be interpreted in two different ways.

On the one hand, the role of the ECJ as an "optional interlocutor" in the dialogue could be questioned, raising the risk that the new recommendations might be ignored. On the other hand, the new case law might be followed by judges, making the alleged violations of the CFREU questions of constitutionality. Hypothetically, enlarging upon the reasoning of this ruling, judges could also question the Constitutional

10 See M. Ruotolo, *L'incidenza della CEDU sull'interpretazione costituzionale. Il "Caso" dell'Art. 27, comma 3, Cost., in Rivista dell'Associazione Italiana dei Costituzionalisti*, 2013, p. 7.

11 See para. 5.2 of Conclusion of points of Law, judgment no. 269/2017; para. 5.5 of the *Consideration*, judgment U 466/11-18; U 1836/11-13 of 14 March 2012.

Court in cases in which the national legislation is in contrast with European provisions when the latter are considered "constitutional in a material sense", even if they are part of other European sources of law (for instance, of the TEU or the TFEU). Obviously, this approach has to be considered quite difficult, since there are many reasons to put its legitimacy in doubt. Indeed, the principle of primacy of European law over the national law and the traditional role of arbiter of the European Treaties played by the Court of Justice might be questioned.

After the no. 269/2017 ruling, two questions of constitutionality have been submitted to the Italian Constitutional Court by the *Corte di Cassazione* in cases of "*dual preliminarity*" (either Constitutional and European).[12] On the other hand, in two other similar occasions, no question of constitutionality was raised.[13] In any case, within the grounds of the referral order, the Supreme Court seeks clarification on the meanings of the new case law established by decision no. 269: specifically, it asks whether it is still abstractly possible, where the Italian provision survives constitutional scrutiny, to submit a reference for a preliminary ruling to the ECJ to decide on the compatibility with EU law and, if need be, to disapply the national provision because of this contrast.

When the Italian Court's jurisdiction is invoked, does the Constitutional Judge have the "last word"? If so, the Supreme Court seems to believe that this approach could lead to a contrast with ECJ case law, which allows for (prior) constitutional review, so long as judges are entitled to ask the Court of Justice for a preliminary ruling, when required.[14]

12 See *Corte di Cassazione civile*, order of 2018, no. 3831.

13 See *Corte di Cassazione Lavoro*, judgement of 2018, no. 13678; *Corte di Cassazione Lavoro*, judgement of 2018, no. 12108: para. 12-13 the *Corte di Cassazione* affirms that the submission of the question of constitutionality is not an obligation, it's just a "methodological advice".

14 L. S. Rossi, *La sentenza 269/2017 della Corte costituzionale italiana: obiter "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea, in federalismi.it*, 2018, argues that the Constitutional Court does not mean to prevent from referring to the Court of Justice. What really concerns the constitutional judge is to promote the constitutional review of national norms whether the CFREU is directly (or indirectly) applicable, discouraging the spread of a sort of decentralized model of constitutional review.

MARCO COLUZZI*

THE NATURE OF THE "CORPORATE RELATION" BETWEEN ITALIAN JOINT STOCK COMPANIES AND THEIR DIRECTORS

ABSTRACT: *For the last twenty years, Italian joint stock companies' directors have been generally qualified as quasi-employed fiduciaries, whose management position stemmed from, and could be formalized in, a bilateral contractual relation with the company. With their decision no. 1545/2017, the United Chambers of the Supreme Court of Cassation definitively overturned this qualification and clarified that the directors' attitude to manage the company directly originates from the shareholders' meeting appointment resolution, since the directors are associated to the company by means of a "corporate relation" and not as part of a different centre of interests.*

1. Introduction

With their decision no. 1545/2017, the United Chambers of the Supreme Court of Cassation overturned their twenty-year settled case-law approach to the issue concerning the qualification of the existing relation between Italian joint stock companies and their directors.

The legal nature of such relation has been broadly discussed for a long time by scholars and courts and this decision – though, as will be discussed later, it still leaves

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some uncertainties – represents an important opportunity to the progress of such debate.[1] The opportunity to address the issue was provided to the United Chambers of the Supreme Court of Cassation by a referral (*ordinanza di rimessione*)[2] identifying the problem of whether the limit set forth in Article 545, paragraph 4, Italian Civil Procedure Code, should also apply to joint stock companies' directors. In a nutshell, this latter provision, providing that the salary of a debtor is attachable within the limit of 1/5 of its amount, is widely considered applicable only to the remuneration accrued in connection with an employment (*rapporto di lavoro subordinato*) or quasi-employment relation (*rapporto di lavoro parasubordinato e assimilati*).[3]

Therefore, since in the case in question the attachable amount originated from the office of director of an Italian joint stock company, the Supreme Court had to preliminarily identify the nature of such relation to properly address the merit and rule on the case.[4]

In light of the above-mentioned scenario, the Court took the opportunity to reconstruct the debate on the nature of such relation by examining the two different doctrines on the point: the contractualistic theory and the organic theory.

2. The contractualistic theory

From a strictly private law standpoint, the contractualistic theory identifies directors and the company as two different, autonomous (and often also opposing) parties of a fully effective contractual agreement.[5]

Following this approach, it may be easily appreciated how the directorship position could not be regulated ab origine by the law or the articles of association nor anywhere else if not in an agreement entered into by and between directors and the

1 The United Chambers of the Supreme Court of Cassation addressed the issue last time in 1994 with the judgment no. 10680/1994 (Corte di Cassazione, Sezioni Unite, 14 December 1994, no. 10680, in *Foro Italiano*, V, 1995, p. 1485), which qualified the directorship position as a quasi-employment relation. To reach such conclusion, the Supreme Court considered the management activity carried out by directors as continuous, coordinated and personal. The same Court deemed also the partial entrepreneurial component of the management activity as well as the possible inexistence of a position of contractual weakness of the directors *vis-à-vis* the company not relevant.

2 Referral no. 3738 dated 4 December 2015.

3 On the contrary, Art. 545, paragraph 4, Italian Civil Procedure Code, is not considered applicable to independent working relations such as self-employment or other different autonomous relations (including those arising from corporate relations).

4 Consequently, had the Court decided for the qualification of the office of director as an employment or quasi-employment relation, the limit of 1/5 set forth in Art. 545, paragraph 4, Italian Civil Procedure Code, would have applied. Alternatively, had the Court differently qualified the relation, the salary would have been attachable in the overall amount.

5 Cf. G. Minervini, *Gli amministratori di società per azioni*, Milano, 1956, p. 70; G. Cottino, *Diritto commerciale*, I, Padova, 1999, p. 404; P. Spada, *Preposizione e assunzione dell'amministratore di società per azioni*, in C. Amatucci, *La remunerazione degli amministratori nelle società di capitali*, Milano, 2010, p. 60.

company at the same time of the appointment resolution.[6] The contractualistic theory faces some complications from a legal standpoint while being well supported on the factual/practical level.

Firstly, the entire directorship position and the exercise of the office of director are indeed regulated by law and, for the purposes of being appointed as director, the appointment resolution of the shareholders' meeting is *per se* self-sufficient (therefore not requiring an additional agreement to be validly carried out).[7] In addition, the entire exercise of the office of director is also regulated by the law and, in principle, does not need any integration from different sources of regulation. On the other hand, the practice of entering into management agreements to contractually regulate the fiduciary position of directors is well settled and no one has ever doubted (at least until this decision) its legitimacy.

Another important implication of embracing the contractualistic theory also comes from a labour law perspective: if the relation between directors and company is regulated in an agreement, what is the type of contract that connects their positions? In this regard, the early supporters of the contractualistic theory originally affirmed that the director's position was characterized either by an employment component or by an autonomous worker component.[8]

However, such an approach was strongly criticized and those who agreed with the contractualistic theory developed two doctrines regarding the type of contract governing the company/directors relation.[9]

The first doctrine identifies the contractual relation between directors and the company in an employment relation on the grounds that directors are subordinated to shareholders, who have the power to appoint and revoke them, and on the basis of

6 Under Italian Law, a contract is an agreement of two or more parties to establish, regulate or extinguish a patrimonial legal relation among themselves. Of course, it is not required that such contractual agreement materially exists, being the theory aimed at using the notion of agreement to indicate two contraposed centres of interests.

7 Pursuant to Art. 2383, paragraph 1, Italian Civil Code, the appointment of directors takes place at the shareholders' meeting except for the first directors, who are appointed in the articles of association. For the sake of completeness, it should be noted that some exceptions apply (see Arts. 2351, 2449 and 2450, Italian Civil Code).

8 Cf. G. Minervini, *Gli amministratori di società per azioni*, Milano, 1956, p. 71; P.G. Jaeger - F. Denozza, *Appunti di diritto commerciale*, Milano, 2000, p. 341.

9 Cf. P. Cecchi, *Gli amministratori di società di capitali*, Milano, 1999, p. 13.

directors' fiduciary duties toward the company.[10] The second doctrine – based on the vast autonomy and independence of the director's position[11] (as well as on the fact that fiduciary duties would not be strong enough to assess a subordination of the director so as to qualify him as an employee[12]) – identifies the contractual relation between directors and the company in an autonomous relation.[13]

However, after these doctrinal discussion and case law evolution, courts – until this decision – shared the first doctrine and acknowledged the director position as a quasi-employment contractual relation.[14]

3. The organic theory

If the contractualistic theory emphasizes a dualistic dimension in the relation between directors and the company, the organic theory firmly denies such dualism.

Pursuant to this theory, because the company identified is in and represented by, the directors, they would constitute a part of the same entity with the consequence that the internal prerogatives of directors and their company couldn't be regulated since their positions are reflected in a sole centre of interests. Consequently, the power to manage the company would arise directly from the article of incorporation (*contratto di società*) entered into by and between the founding shareholders. Directors' appointment would then represent a way for the company itself to pursue its corporate purpose.[15]

Therefore, the appointment of directors and their consequent acceptance of

10 V. Petino, *Rapporto di amministrazione e rapporto di lavoro subordinato*, Milano, 1968, p. 215.

11 Cf. F. Ferrara Jr. - F. Corsi, *Gli imprenditori e le società*, Milano, 1987, p. 504. See also G. Macrì, *A proposito del rapporto amministratori-società: la c.d. parasubordinazione*, in *Le Società*, 5, 1995, p. 635; Cf. F. Galgano, *Le nuove società di capitali e cooperative, in Trattato di diritto commerciale e di diritto pubblico dell'economia*, Padova, 2004, p. 259.

12 Cf. P. Cecchi, *Gli amministratori di società di capitali*, 1999, p. 13.

13 This scheme is supported on the basis of the doctrine of the Supreme Court of Cassation which – incidentally – affirmed the autonomous nature. See in particular Corte di Cassazione, 26 February 2002, no. 2861, in *Foro Italiano*, I, 2003, p. 273; Corte di Cassazione, 1 April 2009, no. 7961, Giust. civ., I, 2009, p 1242; Corte di Cassazione, 13 November 2012, no. 19714, in *Foro italiano – Repertorio*, item "*Società*" no. 540.

14 See United Chambers of the Supreme Court of Cassation decision no. 10680/1994, which clarified that in the director's position the elements of continuity, personality, and coordination that identify the quasi-employment relations referred to in Article 409, no. 3 Italian Civil Procedure Code, may be found.

15 The notion of the company agreement (*contratto di società*) is provided in Art. 2247 Italian Civil Code which evokes the concept of association contract by qualifying it as an association between two or more persons to contribute property or services for the exercise in common of an economic activity for the purposes of sharing the profits thereof.

the position would not constitute a specific contractual agreement but it would rather represent an act designating corporate body (i.e., the shareholders' meeting),[16] making the directorship position a unique legal position under Italian law.[17] Within this deeply divided framework, the case law that shared the organic approach motivated it also based on the assumption that the acts performed by the directors represent acts of the company and not acts performed on behalf of the company.[18]

4. The outcome of the decision

After having scrutinized in depht the doctrinal and jurisprudential doctrines formed on the issue, the Supreme Court, overruling its previous position,[19] embraced the organic theory. In particular, in view of the organic identification that transpires between the natural person (i.e., the director) and the entity for which such person serves (i.e., the company), the Court firstly clarified that the directorship position is neither an employment relation nor a quasi-employment relation.

Afterwards, the Supreme Court noted that, while the contractualistic theory surely permits considering the relation as quasi-employment, such an approach – especially after the 2003 company law reform – would be inconsistent with the legal framework governing the directorship position, because the directors are not subject to the coordination of the shareholders' meeting.[20] In the reasoning of the Court, indeed, directors and the company form a sole and undistinguishable position in which the directors represent the real hegemonic part.[21] Therefore, the Supreme Court embraced the organic theory and concluded that the sole director or a member of the board of

16 Cf. F. Galgano, *Le nuove società di capitali e cooperative*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia, Padova*, 2004, p. 260.

17 Cf. G.f. Campobasso, *Diritto Commerciale, Diritto delle società*, Torino, 2009, p. 360.

18 Cf. Corte di Cassazione, 21 May 1991, no. 5723, in *Giurisprudenza Italiana*, I, 1992, p 1344.

19 See note 1 *supra*.

20 Accordingly, the Court expressly excluded the application of the coordination requirement – which characterizes the quasi-employment relations and consists in an a priori determination of the modalities in which the activity shall be carried out – to companies' directors.

21 The Supreme Court recalled that directors are in a position of supremacy, as the management of the company pertains exclusively to them, having the power needed for reaching the corporate purpose (Art. 2380 *bis* Italian Civil Code) and since the power of representation is granted to the directors general (Art. 2384, paragraph 1, Italian Civil Code).

directors of an Italian joint stock company are connected to the company by a "corporate relation", which makes the directors an integral part of the same centre of interest (i.e., the company itself) and which permits the company, through the directors acting in the name thereof, to act and to pursue the corporate purpose[22].

5. The scenario after the decision

It is essential to note that it is a well-settled practice for joint stock companies to enter into management agreements with their directors for the purpose of regulating therein some aspects of the directorship position (such as remuneration, non-compete, confidentiality, golden parachutes, termination clauses, etc.).

If the newly asserted corporate relation between directors and company is clear, it may be easily appreciated how, immediately after the United Chambers of the Supreme Court of Cassation decision, scholars raised their concerns and started to question the validity of management agreements under Italian law. Indeed, it has been asked whether – notwithstanding the fact that directors are appointed and remain appointable only by means of the shareholders' meeting resolution – it would still be possible for companies to integrate such a resolution with ancillary provisions set forth in a management agreement.[23]

Moreover, since the decision juxtaposed two theories and ultimately embraced the organic one, it has been also asked what effect such judgment could provoke on the practice to enter into management agreements and whether those in force should be considered invalid or void.[24]

Under this scenario, some commentators have clarified that – notwithstanding the decision – the management agreements should be, in any case, considered legitima-

22 As a consequence of this approach, the Supreme Court ruled for the possibility to attach the director's salary without the limitation of 1/5.

23 Cf. F. Toffoletto, *L'amministratore di società non è un parasubordinato*, in *Quotidiano del Lavoro – Il Sole 24 Ore*, 9 February 2017; G. Falasca, *Amministratori, non c'è spazio per il "contratto"*, in *Quotidiano del Lavoro – Il Sole 24 Ore*, 28 February 2017; O. Patanè, *La natura del rapporto tra amministratore e società*, in *Guida al Lavoro*, 10, 2017, p. 14.

24 Cf. S. Carrà, *La natura (ancora contrattuale) del rapporto di amministrazione dopo la pronuncia delle Sezioni Unite della Suprema Corte di Cassazione* (Cass., Sez. Un., no. 1545/2017), in *Argomenti di Diritto del Lavoro*, 3, 2017, p. 672.

te and completely consistent with the outcome of the decision,[25] since the affirmation of the organic theory is neither an element in favour nor contrary to the management agreement practice.[26] In particular, the main point in favour of the validity of management agreements would be represented by non-compete clauses: since a non-compete will be effective only once the directorship position has ceased and, therefore, it couldn't be regulated in the appointment resolution, entering into an external agreement (i.e., the management agreement) would constitute the only way to bind a director to a non-compete obligation.[27]

On the contrary, it has been noted that – after the decision – with regard to contractual aspects like compensation and termination, the issue becomes crucial, being indisputable that the remuneration (both fixed and variable) and the *ex-ante* causes of termination may be well regulated in the appointment resolution. Under this standpoint, management agreements would then be rendered impractical and worthless, since these are, in any case, unable to replace the appointment resolution[28] and now definitely in contrast with the Supreme Court approach: if directors and the company are a sole part, and therefore coincide, it would not be possible for the company to enter into an agreement with itself (*rectius*, with the directors acting on behalf of the company).[29]

In conclusion, for the time being, there is an uncertain situation regarding the effects and consequences of the "corporate relation" approach affirmed by the United Chambers of the Supreme Court of Cassation.

25 Cf. S. Carrà, *La natura (ancora contrattuale) del rapporto di amministrazione dopo la pronuncia delle Sezioni Unite della Suprema Corte di Cassazione* (Cass., Sez. Un., n. 1545/2017), in *Argomenti di Diritto del Lavoro*, 3, 2017, p. 672 at 693. The same author also notes that – in any case – because Italy has a civil Law system, management agreements in force couldn't be considered invalid or void only by reason of the new qualification affirmed by the United Chambers of the Supreme Court of Cassation.

26 Cf. S. Carrà, *La natura (ancora contrattuale) del rapporto di amministrazione dopo la pronuncia delle Sezioni Unite della Suprema Corte di Cassazione* (Cass., Sez. Un., n. 1545/2017), in *Argomenti di Diritto del Lavoro*, 3, 2017, p. 672 at 693.

27 Cf. M. Tecchia – S. Tozzoli, *Il "nodo gordiano" della natura contrattuale ovvero organica del rapporto tra società di capitali ed amministratore: un dilemma (apparentemente) risolto dalle Sezioni Unite,* in *Diritto delle Relazioni Industriali*, 4, 2017, p. 1167.

28 Cf. O. Patanè, *La natura del rapporto tra amministratore e società, La natura del rapporto tra amministratore e società,* in *Guida al Lavoro*, 10, 2017, p. 14 at 16.

29 Cf. M. Tecchia – S. Tozzoli, Il "nodo gordiano*" della natura contrattuale ovvero organica del rapporto tra società di capitali ed amministratore: un dilemma (apparentemente) risolto dalle Sezioni Unite, in Diritto delle Relazioni Industriali*, 4, 2017, p. 1167. However, in light of the new approach by the Supreme Court, this logical obstacle could be overcome by making directors enter into the management agreement with the majority or controlling shareholder (instead of with the company) and then making the shareholders' meeting or the board of directors (depending on the case) resolve to "absorb" such agreement, therefore making it part of the "*corporate relation*".

At such an early stage, it is too soon to draw any far-reaching conclusions. Nevertheless, the decision is likely to affect, in one way or another, the practice of entering into management agreements it remains to be seen how companies and directors will react to the Supreme Court's approach.[30]

30 However, in the final part of the decision, the Supreme Court clarified that the director's position may co-exist with another executive position (which, in that case, may be formalized in a contractual agreement) as long as the competences attributable to each position remain different and do not overlap.

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THE TRANS - ADRIATIC PIPELINE AND THE NIMBY SYNDROME

ABSTRACT: *The note aims to describe the management of the Nimby resistance concerning the Trans-Adriatic Pipeline project through administrative compensatory measures. The Trans-Adriatic Pipeline case offers a privileged point of view to examine efficiency of administrative compensations in solving local conflicts. After the examination of interpretation theories on the Nimby syndrome, the note focuses on the administrative compensation-based strategy usually deployed to solve territorial conflicts. The compensation pattern used in relation to the Trans-Adriatic Pipeline is also discussed. The analysis will allow general reflections on the use of administrative compensations to overcome Nimby.*

1. Introduction: the Trans-Adriatic Pipeline in Italy

In 1999 some international oil corporations found a giant gas field in Caspian Sea, in front of the coast of Azerbaijan. It was one of the most important discoveries of the last decades for the production of gas and the European Union Commission decided to promote the "*Southern Gas Corridor*" project, which aimed to bring gas to Europe thanks to a pipeline from Azerbaijan to Italy.

The "*Southern Gas Corridor*" is divided into three parts: the first part is the "*South Caucasus Pipeline*" (SCP), which is the pipeline between Azerbaijan and Georgia; the second part is the "*Trans-Anatolian Pipeline*" (TANAP), which is the pipeline in Tur-

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key; the third part is the "*Trans-Adriatic Pipeline*" (TAP), which is the pipeline between Greece, Albania, Adriatic Sea and Italy.

The TAP is 878 Km long and the Italian sector is only 8 Km long. In 2010, the Italian Government authorized the start of the TAP project in Southern Italy, but it provoked an immediate Nimby[1] reaction where the pipeline was supposed to arrive. Local communities, many municipalities and the Puglia Region opposed to the TAP pipeline rising environmental concerns and evaluating many negative socio-economic impacts related to the facility. Moreover, the environmental and financial compensations proposed by the developer were considered insufficient by local authorities. As a consequence, local public administrations, environmental associations and groups of citizens showed their opposition during the environmental impact assessment of the project and tried to stop the TAP, bringing the case before the administrative tribunals in 2015. They claimed that the environmental impact assessment was incomplete and that the procedures used by the Italian Government to overcome their opposition were unlawful. The administrative tribunal of first instance and the Council of State in second instance upheld the decisions of Italian executive branch in 2016 and in 2017, confirming the lawfulness of the administrative proceeding. In any case, riots between local groups of citizens and police happened near the building site of the TAP in the first months of 2018, demonstrating that there are still local tensions.

The TAP project represents a good example of the ways deployed to manage territorial conflicts. In fact, in many legal systems, when it is necessary to build a power plant, a landfill, a gas pipeline, or other noxious facilities, it is often required to compensate for the negative impacts, both environmental and economic, on the local communities that host the infrastructures. It is also provided that local communities should take part in the decision-making process related to the infrastructural projects and programs, in order to give an active role to citizens in shaping plans that affect them. The purpose of the note is to verify if the management of the Nimby syndrome concerning the TAP project has been efficient and if the administrative compensatory measures have been able to overcome the Nimby resistance. Indeed, the TAP case offers a privileged point of view to examine the efficiency of administrative compensations in solving local conflicts.

The rest of this article is thus divided into three main parts. In part 2, the Nimby phenomenon is examined in broad terms, taking into account the interpretative

1 "Nimby" stands for "not in my backyard". This concept will be examined in par. 2.

theories of this "syndrome". In part 3, the administrative compensation-based strategy usually deployed to solve territorial conflicts is considered. The compensation pattern used in relation to the TAP is also discussed. In part 4, the limits of the efficiency of the administrative compensatory measures are analyzed. In the end, some overall reflections on the relations between Nimby and administrative procedures are proposed.

2. The Nimby phenomenon and the public negotiations

Before examining the TAP case, the nature of the citizens' protests against the pipeline, and the Italian administrative framework used to manage the Nimby crisis, it is useful clarify the concept of Nimby. The "syndrome" is an attitude of protest organized by groups of citizens who do not accept the location of a facility in their territory.[2] Nimby is the "inverse tragedy of the commons", because holders of public opinion consider the Nimby projects necessary and indispensable, but does not accept them in their own backyard.[3]

Those territorial conflicts happen everywhere in the world, both in industrialized countries and in less developed ones, in both democratic regimes and authoritarian ones. Undesirable projects are: large facilities such as highways, railways, ports, airports, telecommunication antennas, and hazardous facilities such as power plants and nuclear power plants, onshore and offshore oil wells, incinerators, landfills and pipelines.[4] Those conflicts are caused by a combination of emotional factors affecting local communities, which believe that public or private developers only think of maximizing their interests.[5]

In broader terms, two approaches to the Nimby can be distinguished. First of all, the position of those who believe that territorial conflicts pose obstacles to the

2 On the Nimby phenomenon see D. Van Der Horst, *NIMBY or not? Exploring the Relevance of Location and the Politics of Voiced Opinions in Renewable Energy Siting Controversies,* in *Energy Policy*, 35, 2007, p. 2705

3 G. Hardin, *The Tragedy of the Commons*, in *Science*, 162, 1968, p. 1243 and E. Peelle, *Testimony on Socioeconomic Effects of a Nuclear Waste Storage Site on Rural Areas and Small Communities*. Hearing of the House Subcommittee on Rural Development, Senate Committee on Agriculture, Nutrition, and Forestry, 26 August 1980, Washington, U.S. Government Printing Office, 1980.

4 M. Wolsink, *Wind Power and the NIMBY-Myth: Institutional Capacity and the Limited significance of public support, in Renewable Energy*, 21, 2000, p. 49.

5 D. Mcadam - H. Schaffer Boudet - J. Davis - R.J. Orr - W.R. Scott - R.E. Levitt, "*Site Fights": Explaining Opposition to Pipeline Projects in the Developing World*, in *Sociological Forum*, 25, p. 401.

construction of any projects: in this sense, Nimby is considered a "syndrome", an irrational phenomenon, derived from selfish motivations and extremely expensive to the society.[6] In fact, Nimby reactions often affect strategic infrastructure of a country, with extremely negative effects on services that depend on those infrastructures: think of the disadvantages of users who cannot rely on new power plants, of motorists who cannot use modern highways, of travelers who cannot use high-speed rail, and so on.[7] Then, the participation of citizens in the process of localization of facilities should be reduced; only state authorities must decide on siting facilities, because they are less influenced by local pressures.[8] According to a different approach, on the contrary, Nimby is not necessarily a negative phenomenon.[9] In fact, it may be positive because, through their opposition, citizens have the opportunity to highlight aspects that developers may have underestimated and this allows to achieve a better overall satisfaction of the various public interests.[10] Nimby protests can represent an opportunity to conceive new procedural mechanisms that can foster public participation and ensure a more transparent composition of conflicting interests, with a view to greater collaborative governance.[11] According to this approach Nimby reactions constitute, in economic and sociological terms, a social dilemma where citizens, rather than cooperating with public authorities or private developers, want to maximize their interests with a net suboptimal result.[12]

3. The compensation-based strategy to overcome Nimby

The Nimby phenomenon can be seen as a moment of impasse in territorial

6 See da D. Mazmanian - D. Morrell, *The NIMBY's Syndrome: Facility Siting and the Failure of Democratic Discourse*, in N. J. Vig - M. E. Kraft, *Environmental Policy in the 1990s: Toward a New Agenda,* Washington, D.C., 1990, p. 233.

7 M.b. Gerrard, *The Victims of Nimby*, in *Fordham Urban Law Journal*, 21, 1994, p. 495.

8 O.e. Delogu, *NIMBY is a National Environmental Problem*, in *South Dakota Law Review*, 35, 1990, p. 198.

9 C. Hager - M. A. Haddad, *NIMBY is Beautiful. Cases of Local Activism and Environmental Innovation around the World*, New York-Oxford, 2015.

10 M.e. Kraft - B.b. Clary, *Citizen Participation and the Nimby Syndrome: Public Response to Radioactive Waste Disposal*, in *The Western Political Quarterly*, 44, 1991, p. 301.

11 S.f. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, in *Cardozo Journal of Conflict Resolution*, 12, 2011, p. 331.

12 M. O'hare, *Not in My Block You Don't: Facility Siting and the Strategic Importance of Compensation*, in *Public Policy*, 25, 1977, p. 409.

negotiation that should lead to the realization of the infrastructure.[13] Since a Nimby project produces benefits beyond the burdens that the local community has to face, an adequate pattern of compensatory measures can neutralize negative externalities and overcome the resistance of citizens by redistributing benefits and burdens.[14] In order to make effective the compensation-based strategy, it is necessary, first and foremost, to abandon the traditional localization mechanisms of the projects, better known by the "DAD" acronym, i.e., "decide-announce-defend": developers choose where to build the infrastructure, then inform the political authorities and public administrations, and finally defend their decision against any local protest groups.[15] The basic idea is that any discussion of compensatory measures for hazardous facilities can be made through administrative procedures guaranteeing public participation,[16] allowing citizens to identify their needs and to overcome their doubts and fears related to the building of the infrastructure.[17]

The participation of local public authorities and citizens to the development of the TAP project was limited, because in the Italian legal system only the environmental impact assessment procedure may involve those who are affected by an economic or infrastructural project. Under the Environmental Code (Law no. 152/2006), every facility that can have significant environmental impact may be subjected to an environmental impact assessment, where every citizen is entitled to give information and to express comments and remarks on the project. However, the participation set up by the Italian Environmental Code is not sufficient to guarantee a satisfactory and abundant participation, especially when projects of big infrastructures are at stake and it is necessary to manage Nimby protests. Today, in case of projects relating to very strategic facilities, the Italian Code of Public Contracts (Law no. 50/2016) ensures

13 O.E. Williamson, *The Mechanism of Governance*, New York, 1996.

14 B. D. Richman - C. Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, in *Yale Journal on Regulation*, 23, 2006, p. 29.

15 B.G. Rabe, *Beyond NIMBY: Hazardous Waste Siting in Canada and the United States*, Washington, D.C., 1994, p. 28 and T. Lambert - C. Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, in *Yale Journal on Regulation*, 1997, p. 222.

16 B.S. Frey - F. Oberholzer-Gee, *Fair Siting Procedures: An Empirical Analysis of Their Importance and Characteristics*, in *Journal of Policy Analysis and Management*, 15, 1996, p. 353.

17 C. Zeiss - L. Lefsrud, *Developing Host Community Siting Packages for Waste Facilities*, in *Environmental Impact Assessment Review*, 12, 1995, p. 157.

public participation and a discussion about administrative compensations through the new instrument of "public debate" may be useful to provide a large public participation on major infrastructural projects. Public debate, which comes from the French legal system, is not in force, because the Italian executive has to adopt the necessary secondary regulations, but it may be useful to provide a large public participation on major infrastructural projects. In any case, it is necessary to define negotiating procedures that are open to public participation and representation of all interests, avoiding that the administrative process is excessively heavy and inconclusive.[18]

As a matter of fact, in the negotiating procedures on major projects and administrative compensatory measures there are some contracting risks that, if not taken into account, could lead to an impasse. First, it is appropriate to determine how to select the representatives of the local communities: negotiators may be appointed by the municipal commissions; they may be environmental associations; they could be other individuals.[19]

Second, there may be different opinions on the environmental impact assessment of a project, so it is necessary to rely on experts,[20] to prevent unreasonable or excessive claims of the parties regarding the compensations.[21]

Thirdly, behind the localization of the Nimby project there are strategic evaluations by the developers, so that the infrastructure can serve users at an optimal level or can represent the best choice in terms of profits for the developers. This provides a great negotiating power, similar to a veto power, to local communities.[22]

Last, there can be the opportunism of local political representatives who could use the Nimby protests to obtain popular consensus.

The problem is also to understand which public administrations should direct

18 G. Napolitano - M. Abrescia, *Analisi economica del diritto pubblico*, Bologna, 2009, p. 71. See also E. Quah - K.c. Tan, *Siting Environmentally Unwanted Facilities: Risks, Trade-offs, and Choices*, Northampton, 2002.

19 S. A. Carnes - E.d. Copenhaver - J.h. Sorensen - E.j. Soderstrom - J.h. Reed - D.j. Biornstad - E. Pelle, *Incentives and Nuclear Waste Siting: Prospects and Constraints*, in *Energy Systems and Policy*, 7, 1983, p. 324.

20 L. Susskind - J. Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, New York, 1987.

21 M. Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, in *Yale Journal on Regulation*, 11, 1994, p. 254.

22 D. B. Spence, *The Political Economy of Local Vetoes*, in *Texas Law Review*, 93, 2014, p. 351.

and guide the negotiation process:[23] for this reason, the intervention of administrations with high technical expertise, *ad hoc* agencies, or independent authorities, could be particularly useful.[24]

Another problem is the extension and the size of the backyard: if the proximity of the project is a condition for participation in the negotiating procedure, it is necessary to understand how close the facility should be to identify stakeholders.[25]

A question may arise regarding the possible structure of the negotiating procedure: is an administrative one-size-fits-all solution effective to deal with any Nimby project or is it necessary to define administrative negotiating procedures on a case-by-case basis?[26]

Another issue regards the fact that any public or private entrepreneur who decides to make investments in some facilities wants to rely on a clear legislation.[27] Any delays in the negotiations with local communities become a business loss, both in terms of costs and lack of earnings due to delay of the implementation of planned business plan.[28] It is also fundamental to determine when negotiations should take place and what should be negotiated. The question is whether public participation must be ensured both in the planning and location of facilities as well as in the definition of compensatory measures, or whether the involvement of local communities can be limited to the compensatory measures.[29]

Finally, there are "institutional hazards", such as the excessive fragmentation of competences between the administrations during the negotiation process or the

23 R.E. Kasperson, *Six Propositions on Public Participation and Their Relevance for Risk Communication*, in *Risk Analysis*, 6, 1986, p. 275.

24 F. Costantino, *La disciplina del nucleare nella prospettiva del consenso*, in *Foro amministrativo – Consiglio di Stato*, 2010, p. 2941.

25 J. Schaefer, *State Opposition to Federal Nuclear Waste Repository Siting: A Case Study of Wisconsin*, 1976-1988, Green Bay: Center for Public Affairs, University of Wisconsin-Green Bay, 1988.

26 B. D. Richman - C. Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, in *Yale Journal on Regulation*, 23, 2006, p. 33

27 J.T. Hamilton, *Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities*, in *The RAND Journal of Economics*, 24, 1993, p. 101.

28 S.H. Lesbirel, *The Political Economy of Project Delay*, in *Policy Sciences*, 20, 1987, p. 153. See also K. S. Reed - C. E. Young, *Impact of Regulatory Delays on the Coast of Wastewater Treatment Plants*, in *Land Economics*, 59, 1983, p. 35.

29 C. Hunold - I. M. Young, *Justice, Democracy, and Hazardous Siting*, in *Political Studies*, 46, 1998, p. 82.

conflicts between horizontal and vertical administrations or between local and central authorities.[30]

Even though the mechanism of compensation introduced in a coherent procedural negotiating framework has a clear advantage, because consensus-based solutions to the Nimby may emerge from the discussion,[31] the administrative procedures have to reduce the contractual risks of the participation.[32]

4. The limits of the efficiency of the compensatory measure

The Nimby syndrome allows distinguishing between two kinds of local opposition[33]: on the one hand, there are "hardcore protesters", i.e., private individuals and associations, who not only do not accept compensatory measures, but also consider useless the infrastructural projects, claiming to defend common goods and universal values, such as environment and health;[34] on the other hand, there are "switcher protesters", i.e., citizens whose opposition to the projects entails analysis on the qualitative and quantitative levels of compensatory measures.[35]

To overcome the opposition of hardcore and switcher protesters, the same tools cannot be used. In order to contrast the skepticism of the former, it is useless to point out the advantages of the compensatory measures, since it is much more important to initiate consensual localization procedures, such as public debate, to explain the strategic interest of a particular infrastructure.[36] Nonetheless, the normative and procedural approaches to widening participation may not neutralize the dissent of the hardcore protesters: in this case, the opposition becomes so radical that it can no longer be

30 R. Kasperson, *The Dark Side of the Radioactive Waste Problem*, in T. O'riordan - R. D'arge, *Progress in Resources Management and Environmental Planning*, New York, 1980, p. 133.

31 C. Doberstein - R. Hicky - E. Li, *Nudging NIMBY: Do Positive Messages Regarding the Benefits of Increased Housing Density Influence Resident Stated Housing Development Preferences*?, in *Land Use Policy*, 54, 2016, p. 276.

32 S.p. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together through Development Agreements and Community Benefit Agreements*, in *Indiana Law Review*, 42, 2009, p. 227.

33 S. Ferreira - L. Gallagher, *Protest Responses and Community Attitudes Toward Accepting Compensation to Host Waste Disposal Infrastructure*, in *Land Use Policy*, 27, 2010, p. 643.

34 D. Della Porta - G. Piazza, *Le ragioni del no. Le campagne contro la TAV* in *Val di Susa e il Ponte sullo Stretto*, Milano, 2008.

35 H. Inhaber, *Slaying the Nimby Dragon*, New Brunswick e London, 1998, p. 89.

36 P. Groothuis - J. Groothuis - J. Whitehead, *Green v. Green: Measuring the Compensation Required to Site Electrical Generation Windmills in a Viewshed*, in *Energy Policy*, 2008, p. 1545.

qualified as Nimby, but rather as Banana ("build absolutely nothing anywhere near anything"), Nope ("not on Planet Earth"), Niaby ("not in any backyard") or Cave ("citizen against virtually everything").[37] To convince the latter, on the contrary, it is crucial that "right" compensations are proposed, i.e., compensatory measures that are able to generate a broad consensus on the infrastructure project.[38] As a consequence, the idea is that there are inappropriate kinds of compensations, whose proposal, rather than soliciting approval, raises level of the rejection of the projects.

First of all, it must be considered that the challenge of hazardous facilities can derive from reasons of equity: when these projects are located in economically low developed territories, the widespread perception is that the choice is not random, but determined by the will to segregate some local communities.[39] Some local communities do not trust in the government and other public institutions,[40] because they believe to be peripheral for the central government.[41]

The socio-economic conditions of a community can influence the resistance to an infrastructure in other ways. If a municipality enjoys widespread well-being and ensures to its residents a medium-high standard of living, the compensatory measures may be more expensive in order to maintain the level of well-being threatened by the project. On the contrary, compensations to poorer communities can be quantitatively and qualitatively lower, but greater opposition to the project and compensations must be expected, since the poor citizens have no means to escape, for example moving to another city.[42] Local protests against a noxious facility can also result from moral reasons: it is intended to prevent the territory from suffering the negative consequences

37 A. Fedi - T. Mannarini, *Oltre il Nimby. La dimensione psico-sociale della protesta contro le opere sgradite*, Milan, 2008 and W.r. Freundberg - S. K. Pastor, *Nimbys and Lulus. Stalking the Syndromes*, in *Journal of Social Issues*, 48, 1992, p. 39.

38 H. S. Lesbirel, *NIMBY Politics in Japan: Energy Siting and the Management of Environmental Conflict*, Cambridge, Mass., 1998. About Ymby see B. Williams, *The YMBY Phenomenon in Henoko, Okinawa. Compensation Politics and Grassroots Democracy in a Base Community*, in *Asian Surveys*, 53, 2013, p. 958.

39 S.j. Elliott - S.e.l. Wakefield - S.m. Taylor - J.r. Dunn - S. Walter - A. Ostry - C. Hertzman, *A Comparative Analysis of the Psychosocial Impacts of Waste Disposal Facilities*, in *Journal of Environmental Planning and Management*, 47, 2004, p. 351.

40 N.q. Tuan - V.w. Maclaren, *Community Concerns about Landfills: A Case Study of Hanoi*, Vietnam, in *Journal of Environmental Planning and Management*, 48, 2005, p. 809.

41 L. Bobbio, *Conflitti territoriali: sei interpretazioni*, in *Territorio, mobilità e ambiente*, 4, 2011, p. 79.

42 S. Ferreira - L. Gallagher, *Protest Responses and Community Attitudes Toward Accepting Compensation to Host Waste Disposal Infrastructure*, in *Land Use Policy*, 27, 2010, p. 638.

and disadvantages caused by the presence of a facility that could damage the health or the environment. In this perspective, the objective is to protect not only the territory, but also the interests of the future generations.[43] If the moral reasons behind the opposition of a community are not clear, there is the risk of a complete failure of the negotiations regarding the facility siting, especially when compensatory measures are based on monetary payments. In fact, it has been shown that the monetary compensations trigger a strong local resistance, since the exchange of money against health or the environment is considered morally unacceptable.[44] It is a case of tragic or impossible choice,[45] where the local community faces the ethical dilemma of opting for a sacred value, such as the environment and health, or for a secular value such as money.[46] In particular, the proposal of monetary compensations for the creation of a noxious facility produce two adverse effects, which will strengthen the opposition to the infrastructure. The first one is the "bribe effect": the supply of economic contributions is misunderstood and welcomed as an attempt to buy the consent of the local community.[47] The second is represented by the "crowding-out of public spirit": monetary compensatory measures will put in the background much more persuasive arguments in favor of the project, for example its importance for the needs of the entire national community.[48]

As a consequence, if the offer of monetary compensations in relation to the location of non-hazardous public facilities can be useful to find a synthesis between different interests, the same compensatory measures in relation to noxious facilities produce negative effects. Then the challenge is to find more effective compensatory measures for

43 K. Smith - W. Desvousges, *The Value of Avoiding a Lulu: Hazardous Waste Disposal Sites, in The Review of Economics and Statistics*, 68, 1986, p. 293. See also D. Mcadam - H. Shaffer, *Putting Social Movements in their Place: Explaining Opposition to Energy Projects in the United States*, 2000-2005, Cambridge, Mass., 2012.

44 B. Frey - R. Jegen, *Motivation Crowding Theory*, in *Journal of Economic Surveys*, 15, 2001, p. 589

45 G. Calabresi - P. Bobbit, *Tragic Choices*, New York, 1978.

46 M. Zaal - B. Terwel - E. Ter Mors, Emma - D. Daamen, *Monetary Compensation Can Increase Public Support for the Siting of Hazardous Facilities*, in *Journal of Environmental Psychology*, 37, 2014, p. 22.

47 B. Frey - F. Oberholzer-Gee - R. Eichenberger, *The Old Lady Visits Your Backyard: A Tale of Morals and Markets,* in *Journal of Political Economy*, 104, 1996, p. 1297.

48 B. Frey - F. Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out,* in *The American Economic Review*, 87, 1997, p. 746.

hazardous facilities. Since the aim is to prevent a "taboo trade off,[49]" useful compensatory measures should be presented and viewed as public goods for the benefit of the community which host the facilities.[50] In some cases, monetary compensations may be useful, but they must be tied to public goods: for example, in the case of an incinerator, the responsible enterprise may pay for the construction of a hospital.[51] In this way, it is impossible that money is spent improperly.[52] However, even if compensatory measures in the form of public goods are more useful than monetary compensations, the concrete choice of compensatory goods is not easy.

The level of the compensations can be established by the size of the facility and by other factors,[53] for instance: the "facility ownership", since a public developer may be more generous to compensate, for political consensus; the "facility type", because invasive infrastructures require higher compensation; the "regional use of facility", because higher compensations are assigned to infrastructures of regional or national importance; the "host community use of facility", because the compensations may be lower if the infrastructure serves the local community and the "expansion status", since the compensations are lower if the project provides to extend an existing infrastructure.

5. Conclusion

Administrative compensatory measures represent a tool to balance private and public interests in the field of environmental protection and urban planning. They emerge as an efficient solution for the Nimby syndrome. Only if negotiated between developers and local communities, the administrative compensations can be effective to solve Nimby conflicts. The problem is to find a balance between public and demo-

49 M. Zaal - B. Terwel - E. Ter Mors, Emma - D. Daamen, *Monetary Compensation Can Increase Public Support for the Siting of Hazardous Facilities*, in *Journal of Environmental Psychology*, 37, 2014, p. 22.

50 C. Mansfield - G. Van Houtven - J. Huber, *Compensating for Public Harms: Why Public Goods Are Preferred to Money,* in *Land Economics*, 78, 2002, p. 368.

51 See M. Zaal - B. Terwel - *E. Ter Mors, Emma - D. Daamen, Monetary Compensation Can Increase Public Support for the Siting of Hazardous Facilities*, in *Journal of Environmental Psychology*, 37, 2014, p. 22.

52 See A. Averardi - L. Carbonara - E. Morlino - V. Turchini, *Industria petrolifera e attività amministrativa. Il caso del petrolio in Basilicata*, in L. Torchia, *I nodi della pubblica amministrazione*, Naples, 2016, p. 189.

53 See J. Himmelberger - S. Ratick - A. White, *Compensation for Risks: Host Community Benefits in Siting Locally Unwanted Facilities, in Environmental Management*, 15, 1991, p. 647.

cratic participation and the necessity to build hazardous facilities that are fundamental for the whole society.

The negotiations of the compensations show some contractual and institutional hazards and then a clear governance of the negotiation procedure becomes fundamental. Compensations are not a panacea for all environmental or Nimby conflicts, but they can be useful to re-consider the relationships between public authorities and private individuals or companies in terms of equity. Public interests can be protected in a more effective way through a dialogue of public administrations with the stakeholders. Administrative compensations should be the result of that dialogue.

In the TAP case, the project of the pipeline was not discussed with local authorities and communities. They did not have the chance to make observations about the project and administrative compensatory measures were not negotiated in a transparent way: so they were not perceived as really useful to limit the environmental and economic impacts of the project. This is the original sin of the use of compensatory measures for the Trans-Adriatic Pipeline.

GIULIA VALENTI*

GREEN LIGHT FOR THE APPOINTMENT OF EU CITIZENS AS DIRECTORS OF ITALIAN STATE-OWNED MUSEUMS. AN IMPORTANT RULING OF THE ITALIAN COUNCIL OF STATE

ABSTRACT: *Decision n. 9/2018 permits EU citizens to apply for the position of director in state-owned museums. This judgment terminates a very long legal saga and opens to a new contemporary concept of cultural diversity.*

With decision n. 9/2018, the Italian Council of State confirms the lawfulness of the governmental appointment of EU citizens as directors of Italian state-owned museums and declares Italian regulations DPCM n. 174 of 1994 Art. 1, 1° letter a), and the first sentence of DPR 487/1994 Art. 2, inapplicable, due the contrast with Article 45 of TFEU.

This Italian regulation prevents foreign citizens from applying for public administration managerial positions, pursuant to Article 45 TFEU which, declaring the freedom of movement for workers within the Union, makes an exception for public service employment.

The case started in 2016 and 2017 when two different actions challenging of the unlawful application procedure open to non-Italian museum managers were brought before the first instance administrative judge. In 2016, the first action contested the 2015 nomination by Ministry of Cultural Heritage of European workers as state museum directors, done as a part of an innovative cultural heritage reform. In 2017, the second action challenged the decision by the Ministry to open an international selection procedure also for the Colosseum.

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The first instance judge decided in both cases to uphold both actions, and the Ministry of Cultural Heritage and Activities appealed to the Council of State. In the action presented in July 2017, the 6th section of the Council decided to endorse the Ministry's view and to declare the international call for the director for the Colosseum open to a non-Italian museum manager lawful. However, in February 2018, the same 6th section – with different judges – of the Council was not so sure to declare the legitimacy of the 2015 appointment of European citizens as museum directors. Therefore, it decided to defer to the Plenary Section the decision under discussion.

The Supreme Administrative Court had to decide whether the director of Italian state museums - Palazzo Ducale in that specific case - can be a European citizen in application of the freedom of movement principle or, rather, whether such a position had to be filled by an Italian citizen, in application of the Italian legislation.

The issue is based on the fact that article 45 TFUE, as interpreted by the European Court of Justice, allows an exception to the freedom of movement principle for the public positions that are related to the public authority and to the public policy of the State: this exception is called "Nationality reserve". The Council of State had to decide whether the state museum's directors exercise such a public authority or not.

The Council decided that the director of an Italian state-museum is not a Public Authority in this sense. Therefore, the Italian regulation, which reserves all positions for general directors to Italian citizens, is not applicable to this kind of case.

The Council of State grounds its decision on the jurisprudence of the European Court of Justice: in particular, the Italian Court makes reference, *inter alia*, to the following judgments: *Commission of the European Communities v. Italian Republic Case C-283/99*; *Commission of the European Communities v. Spanish Republic Case C-114/97*; *Commission of the European Communities v. Kingdom of Belgium Case C-355/98.*

In all these cases, the European Court decided that the exception taken in consideration is restricted to the public positions that are strictly and directly related to public policy and does not consider all the other positions in which the use of public power is occasional.

In the decision-making process the Council of State refers also to the decisions of the French Council of State, Conseil d'Etat, and to the principles identified by the Commission in the interpretative communication COM /2002/0694, intitled "free movement of workers: achieving the full benefits and potential".

It is worth noting how different European courts achieve the same decisions for the same reasons. The French Council was ordered to decide if the nationality reservation can be applied also to the President of the National Research Agency, and

it established that to apply the exception the work must be connected to a direct or indirect authority (Conseil d'Etat, *avis du 11 septembre 2014*).

This position is also taken also by the European Commission. In Communication COM2002 694 "free movement of workers- achieving the full benefits and potential" published in December 2002, the European Commission confirms the European Court of Justice's position by stressing the point that the "Nationality reserve" is an exception to the principal of free movement and so it can be accepted only if the work is strictly related to the use of public authority.

Finally, the Italian Council of State compares the regulation with the Italian Constitution, in order to analyse the Italian regulation legal bases. In particular, Article 51 states that access to public employment needs to take place under equal conditions, and it adds that the Italian regulation can admit the application to public employment made by non-Italian citizen.

Therefore, after a clear analysis of the Italian and European law, the Council of State decided to allow European citizens to work as state museums directors.

With the judgment the Plenary had the occasion to confirm that every judge, specially administrative ones, can disapply *ex officio* the internal regulation in contrast with the European law.

It's useful to emphasize that the Council of State decided to take this decision in plenary section; this is because the plenary decision must be followed by all the sections of the Council of State and by the first instance administrative judge.

With this decision a very controversial case that was under the media attention comes to an end. The choice to allow an European citizen to be general manager for Italy's most important museums was strongly wanted by the Italian Government as a whole and by the Minister of Cultural Heritage in particular also to improve state-owned museums' performances.

Opening applications to European managers can be a valuable contribution to increase efficiency and competitiveness in the Italian cultural heritage system, with a new approach emphasizing internationalization in accordance with the International Council of Museums (ICOM) standards.

In fact, official data of the Ministry (MIBACT statistic office 2018) confirm that between 2016 and 2017 the number of visitors in all seven museums managed

by European general managers was increasing; for instance, in the Uffizi Museum the influx of visitors increased by 10%, while the influx of Museo di Capodimonte increased by 21%. To be clear, it's important to say that 2017 was an important year for the entire cultural heritage system that achieved the record number of 50,103,996 visitors, with an increase between 2013 and 2017 of 31% (MIBACT statistic office 2018). In any case, we cannot ignore the positive contribution of European museums directors and the importance to respect the principle of free movement within the Union in a substantive way.

GIANLUCA BUTTARELLI*

THE EU GENERAL COURT QUASHES AN ECB DECISION: TOWARDS A NEW CHAPTER ON PRUDENTIAL SUPERVISION AND JUDICIAL REVIEW?

On 13 July 2018 the General Court of the European Union (EuGC) quashed certain European Central Bank (ECB) decisions that denied derogation, as established by Art. 429 par. 14 Reg. No 575/2013 (Capital Requirements Regulation – CRR), to six French credit institutions that were subject to prudential supervision by the bank. Regulation concerns prudential requirements for credit institutions and investment firms, and introduces a new tool, the leverage *ratio*, with the aim of better addressing regulatory shortcomings that surface during financial crisises. Leverage *ratio* is a regulatory measure defined as the amount of total banks or investment-firms equity capital[1] divided by its total exposure. Leverage *ratio* constitutes a transparent, easy to calculate, and credible measure not based on risk, designed to guarantee financial strength of institutions in terms of indebtedness.

The derogation allows the ECB, as a competent authority in the Single Supervisory Mechanism (SSM), to authorize the credit institutions to exclude from calculation of the coefficient of financial leverage some expositions that meet certain requirements.

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1 Known as "Tier 1 capital", namely the money that a bank has stored to keep it functioning through all the risky transactions it performs.

In order to be granted, derogation must refer to expositions that must: a) concern a public sector entity; b) be dealt with in accordance with prudential requirements relating to exposure on public sector entities, and c) be the result of deposits which the institution is legally bond to transfer to the public sector entity referred to in point a) to finance investments in the public interest.

The ECB previously recognized that the conditions to grant the derogation had been met; however, in support of its response, the authority highlights how it still holds a discretionary power to grant or not the exclusion from the calculation of the financial leverage, as requested by the applicants. According to ECB, doubts about the imperfect nature of the mechanism of transferring the exposure constituted by sums of saving accounts from the French public body to the credit institution justify the relevant prudential concerns that led to the rejection of the application.

Such mechanism would have caused the applicants a high risk linked to an excessive leverage coefficient, with a subsequent liquidity shortage-situation. As stated by Art. 4, pt. 94, Reg. No 575/2013, risk of excessive leverage "means the risk resulting from an institution's vulnerability due to leverage or contingent leverage that may require unintended corrective measures to its business plan, including distressed selling of assets which might result in losses or in valuation adjustments to its remaining assets". The ECB considered the event at stake to be representative of one of those particular cases in which the said regulation allows the institution to use the discretionary power to arbitrate between two different goals: respecting the logic of financial leverage coefficient as a measure for the total of the credit institution and, on the other hand, the need to exclude from the estimation of the coefficient all expositions characterized by a particularly low risk profile.

The lawfulness of ECB's discretional power to grant derogation has been also challenged by the applicants.[2] The provision that establishes derogation has been introduced by a sub-delegated act adopted by EU Commission according to Art. 290 par. 1 TFEU. Applicants' arguments were mainly based on the alleged unlawfulness of such further delegation, however, the provision was not challenged on the basis of Art. 277 TFEU, but merely on interpretational grounds, so the General Court dismissed the request.[3] In any case, even if the issue was not addressed by the General Court, a thorough analysis of the preparatory works leading to the adoption of the delegated act, reveals several

2 See points 24-27 of the ruling.

3 See points 54-60.

problematic aspects; the derogation provided seems to go beyond powers granted to the EU Commission and constitute more than an adaptation of the leverage *ratio* established by the Regulation to an extent that contradicts the CRR's very *ratio legis* to introduce it.

The existence of such a discretionary power is confirmed by the reasoning from the EuGC; however, the Court alleges a breach of law and a manifest wrong assessment made by the ECB.

The bank would in fact have been mistaken in valuing the applicants' exposition towards the public French institution, as being included on the assets side of the balance sheet.

In order to justify the denial, the bank also refers in its statement to a case where the credit institutions would have to refund the paid amounts to the investors, and additionally the State guarantee may not be in this case effective due to a default by the French State. According to the Court, such assessment was given without been verified in terms of likelihood.

The Court also points out how there can be discretion as long as objectives pursued by the normative texts are not disregarded, and therefore the relative provisions are not deprived of their useful effect. The general principles behind the bank's decisions, deemed to be without a factual check of their plausibility, have the effect of rendering the derogation provided in the regulation practically inapplicable.

Furthermore, the ECB considered that excessive financial leverage in the event of a liquidity-shortage situation, occurring during the adjustment period in the respective relationships between credit institutions and the French public body, may lead to a sudden risk of forced sale of large financial resources for the applicants, with significant effects on the whole market. Such a statement is manifestly incorrect because of its abstract nature. According to the EuGC, the ECB statement was in fact made without having previously fulfilled the obligation to examine the particularity of the regulated savings of the case in hand, and to conduct with careful attention and impartiality an exhaustive examination of all the relevant facts of the case, an obligation which is even more urgent in the administrative proceedings characterized by a broad

discretion in the decision.[4]

The Court's ruling is likely to be an important step in the process of crafting judicial review on ECB measures, representing the first time that an ECB decision in the prudential supervision sector is annulled, even though it is a first-instance ruling. The decision may also exercise an influence on pending proceedings before the General Court concerning prudential supervision.

The intensity of the scrutiny of the judicial review on the bank's acts has undoubtedly a significant impact on the degree of independence and autonomy granted to the institutional functions of the ECB; a stronger or more respectful judicial review is able to restructure both the positions of the ECB and of the EuCG in the EU legal system. It is widely accepted that judicial review of ECB policy decisions not only involves a check on the compliance with the formal obligations imposed on the administrative proceeding as a minimum standard, but also forces the ECB to an adequate statement of reasons able to highlight the compliance of the proportionality principle, a correct analysis of the facts and the absence of an evident misuse of powers and of a manifestly wrong assessment.

When reviewing the legality of economic and highly technical EU institutions assessments, which are also characterized by broad discretion, Union Courts normally apply the "limited standard of review". The EU judicature in fact, not only establishes whether the evidence put forward is factually accurate, reliable and consistent, but also determines whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation.[5] Review by the General Court is limited to establish whether the evidence relied on is factually accurate and to establish the absence of a manifest error of assessment; it nonetheless remains the case that the correctness, completeness, and reliability of the facts on which a decision is based may be the subject of judicial review.[6]

It is also necessary to point out that judicial review in the supervisory pru-

4 See ECJ, *Technische Universität München v. Hauptzollamt München-Mitte*, C-269/90, 21 November 1991, § 14-27; ECJ, *Commission v. Estonie*, C-505/09 P, 17 November 2011, § 95.

5 As clarified in EJC, *Telefonica and Telefonica de Espana c. Commission*, C-295/12, 10 luglio 2014, § 54.

6 See ET, *Ryanair c. Commission*, T-342/07, § 30.

dential field appears to be more intense than in the monetary field, due to the more detailed set of regulatory rules governing the function and objectives of the ECB in the prudential field.[7]

Most recent trends show how a more severe judicial review on the ECB measures was deemed necessary taking into account the increased power of the ECB following the approval of measures against the financial crisis, such as the regulation of the case in hand. A stricter scrutiny, which has to be different from the deferential approach of the ECB traditionally used in highly technical controversies, becomes in this case necessary, considering that the ECB provision directly affects the applicants. According to C. Goodhart and R. Lastra,[8] the need for competence and expertise in the exercise of CJEU's judicial review could be served as incentive to establish a specialised chamber internal to the CJEU to deal with those highly technical disputes and consequently increase Court's capability to provide more incisive rulings on ECB's activity.

Judicial review, extended to an activity of reform of the merit and of content of the decision, is still hardly compatible, in general terms, with the degree of independence granted to the function assigned to the ECB in the EU legal system.[9] Possible risks of a substitute judgement replacing choices made by the ECB, and carried out through a direct and different judicial assessment of the facts in hand, have, in fact, been pointed out. As Advocate General Cruz Villalòn stated in its Opinion[10] in the above-mentioned Gauweiler case related to the legality of the OMT program, Courts, when reviewing the ECB's activity, must avoid the risk of supplanting the Bank by venturing into those highly technical judgements, in which its necessary to have expertise and experience. Therefore the intensity of judicial review must be characterised by a "considerable degree of caution".

7 See M. Ventoruzzo, *European Rules and Judicial Review in National Courts: Challenges and Questions*, in *Quaderni di Ricerca Giuridica*, Bank of Italy, Rome, 2018, pp. 74-75

8 C. Goodhart, R. Lastra, *Populism and Central Bank Independence*, in *Open Economies Review*, 29, 2018, pp. 49-68.

9 In this regard, see the comments on EJC, *Peter Gauweiler and Others c. Deutscher Bundestag*, C-62/14, 16 June 2015, made by C. Zilioli, *The ECB's Powers and Institutional Role in the Financial Crisis,* in *Maastricht Journal of European and Comprative Law*, 2016, pp. 183-184, and M. Goldmann, *Adjudicating Economics? Central Bank Indipendece and the Appropriate Standard of Judicial Review*, in *German Law Journal*, 15, 2, 2014, pp. 271-280. According to the latter, judicial rewiew should exercise through "rationality checks", which may stand between "full judicial rewiew" and "full discretion" approach.

10 Par. 111.

In conclusion, the ruling suggests that in this case the General Court has only conducted an accurate analysis of the relevant legal framework and also of the administrative proceeding through which the ECB came to the decisions, highlighting its shortcomings and weaknesses. EuGC avoided to conduct a direct and independent assessment on the merits of case. Attention has been given to the respect of ratio *legis* and also to the procedural requirements. By taking this into account, eventual charges based on the alleged EuGC's substitution of ECB's decision may be easily dismissed in the appeal proceeding before CJEU.

CHIARA CERSOSIMO*

PACTA SUNT SERVANDA SI, PERO BONA FIDEI: UNA REFLEXIÓN COMPARADA SOBRE LA DISCIPLINA DE LOS CONTRATOS DE LARGA DURACIÓN EN LAS RECIENTES TENTATIVAS DE RECODIFICACIÓN DEL DERECHO CIVIL

ABSTRACT: *The current social and economic trends motivated a need to adapt the law of contracts to new realities, surpassing the classical models. The Argentine Civil and Commercial Code (2015) and the French Reform of the Law of Contracts (2016) offer a specific regulation of long-term relationships aimed at providing stability to contractual relationships and at solving the problems resulting from the passage of the time. Renegotiation in good faith becomes a new obligation on contracting parties.*

1. El origin del principio pacta sunt servanda

El principio pacta sunt servanda, dogma de la ideología de la Ilustración sobre la autonomía privada, ingresó en las codificaciones modernas a través de la definición del

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contrato como "*ley misma para las partes*"[1]. Esta asimilación entre la ley y el contrato permitía considerar los acuerdos entre privados como un vínculo irretractable, dotado de una fuerza muy intensa, equiparable a la de la ley[2]. Dicha connotación se había originado en el derecho romano clásico[3], que admitía la extinción de la obligación contractual, sin responsabilidad del deudor, solo en caso de imposibilidad sobrevenida e imprevisible de cumplir[4].

La imposibilidad liberadora debía ser objetiva (no provocada por el deudor) y, sobretodo, absoluta[5]: no tenía ninguna relevancia el mero cambio de circunstancias, capaces de hacer más difícil o más oneroso el cumplimiento de una de las prestaciones, ni tampoco adquiría importancia la sobrevenida falta de interés por parte del otro contratista[6]. El derecho romano, sin embargo, contemplaba algunos casos específicos y residuales en que estaba permitida la revoca o la resolución del contrato por causa inimaginables a la hora de su conclusión. En particular, se admitía, por un lado, la revoca de las donaciones entre cónyuges en caso de divorcio[7] o en caso de hijos póstumos a la donación[8] y, por otro lado, se reconocía el derecho del arrendador a la restitución del bien arrendado por necesidad sobrevenida e imprevisible[9].

Sobre la base de estas disposiciones y de algunas obras de literatos y filósofos romanos[10], los canonistas medioevales construyeron la teoría de la cláusula *rebus sic stantibus*[11]. Dicha "*cláusola*", entendida en su sentido más largo de regla jurídica, atribuía re-

1 Art. 1134 code Civil; Art. 1372 código civil italiano 1942; Art. 1197 código civil argentino 1871.

2 J. Domat, *Les lois civiles dans leur ordre naturel*, Paris, 1723, I, 1, p. 23 ss.; G. Vettori, *Contratto e rimedi*, Padova, 2017, p. 576.

3 R. Cardilli, *Imprevisión y riesgos contractuales*, in D.f. Esborraz, *Sistema jurídico latinoamericano y derecho de los contratos*, México, 2006, p. 342 ss.

4 M. Marrone, *Istituzioni di diritto romano*, Palermo, 1989, p. 583; G. Pugliese, *Istituzioni di diritto romano*, Padova, 1986, p. 564; Arangio-Ruiz, *Istituzioni di diritto romano*, Napoli, 1972, p. 382 ss.; Bonfante, *Diritto romano*, Firenze, 1900, p. 360 ss.

5 R. Zimmermann, *The Law of obligations. Roman Foundations of the Civilian Tradition*, Cape Town (South Africa), 1990, p. 785.

6 D. 46, 3, 107 "*Verborum obligatio… naturaliter resolvitur… cum res in stipulationem deducta sine culpa promissoris in rebus humanis esse desiit*". P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, p. 76; R. Zimmermann, *Estudios de Derecho privado europeo*, Madrid, 2000, p. 140.

7 D. 12, 4, 8.

8 C. 8, 56, 8.

9 C. 4, 56, 3.

10 Cicerone, *De Officis*, libr. I, cap. 10; Seneca, *De beneficiis,* libr. IV, cap. 34.

11 G. Osti, *La così detta clausola rebus sic stantibus nel suo sviluppo storico, in Rivista di diritto civile*, 1912, p. 1; G. Ferri, *Dalla clausola rebus sic stantibus alla risoluzione del contratto per eccessiva onerosità, in Quadrimestre*, 1988, p. 54; P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto, Milano, 1992, p. 79; A. PINO, La eccessiva onerosità della prestazione*, Padova, 1952, p. 108; P. Tartaglia, *voce Onerosità eccessiva, in Enciclopedia del diritto*, Milano, 1980, p. 155 ss.; F. Candil, *La cláusula rebus sic stantibus*, Madrid, 1946, p. 21 ss.; L. Díez-Picaso, *La cláusola rebus sic stantibus, in Extinción de las obligaciones, Cuadernos de Derecho Judicial*, 1996, p. 679 ss.

levancia a los acontecimientos sobrevenidos al momento de cumplir las prestaciones[12]. Durante el Medioevo, la difusión de las ideas canonistas de justicia conmutativa y el rechazo de cualquiera forma de enriquecimiento sin justa causa, llevó los autores de la época a afirmar que el contrato debería consistir en un "*justo intercambio*": la igualdad entre las prestaciones de la partes tendría que ser mantenida en el curso del tiempo[13]. Por lo tanto, en caso de conclusión de un contrato de trato sucesivo, el equilibrio entre las prestaciones debería haberse mantenido hasta el momento de su (diferido) cumplimiento. La falta de este equilibrio habría permitido la resolución o la *reductio ad aequitatem* del contrato, en aplicación de la teoría de la cláusula *rebus sic stantibus*[14].

2. El derecho contractual en los códigos modernos

La cláusula *rebus sic stantibus* confluye en los códigos de área germánica, aún no propiamente modernos, de la segunda mitad del 1700, que trataron, de alguna manera, de establecer los presupuestos de su aplicación[15]. El Codex Maximilianeus Bavaricus preveía que, en caso de cambio imprevisible de las circunstancias, por causas distintas de la demora o de la culpa del deudor, el juez habría podido resolver o modificar equitativamente el contrato[16].

El Allgemeines Landrecht (ALR) prusiano, en cambio, establecía que la imposibilidad de alcanzar el objetivo negocial justificaba el receso por justa causa (*Zweckvereitelung*)[17]. A lo largo del siglo XIX, la doctrina europea, bajo la influencia de la filosofía liberal, abandonó la teoría de la cláusula *rebus sic stantibus*: el asunto del libre intercambio en un libre mercado no dejaba espacio para las prerrogativas medievales de justicia conmutativa y de justo precio, mientras se celebraba, de manera eufórica,

12 T. Galletto, *voce Clausola rebus sic stantibus*, in *Digesto* (Sez. Civ.), Torino, 1988.

13 R. Zimmermann, *Estudios de Derecho privado europeo*, Madrid, 2000, p 141.

14 G. Pugliese, *Laesio Superveniens*, in *Rivista di diritto civile*, 1925, I, p. 5.

15 T. Galletto, *voce Clausola rebus sic stantibus*, in *Digesto* (Sez. Civ.), Torino, 1988; H. Coing, *Derecho privado europeo*, Madrid, 1996, p. 522; C. De Amunátegui Rodríguez, *La cláusola rebus sic stantibus*, Valencia, 2003, p. 33; P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, p. 83.

16 § 12, tit. IV, cap. 15 *Codex Maximilianeus Bavaricus Civilis*.

17 § 377- 378 ALR.

el dogma de la voluntad individual[18]. Por lo tanto, no se hace ninguna referencia a la cláusula *rebus sic stantibus* entre las obras de Domat y Pothier[19], tampoco ésta aparece en el *Code Napoléon* o en los otros códigos civiles de la época[20].

El código francés establece, en el Art. 1134[21], el principio *pacta sunt servanda* y, antes de la reforma del derecho de las obligaciones del 2016[22], preveía únicamente la fuerza mayor como límite a la fuerza vinculante del contrato (Art. 1148)[23]. Sin embargo, la situación de gran desorden económico causada por la primera guerra mundial provocó una inversión de tendencia: la jurisprudencia, por un lado, y el legislador, por otro lado, sin modificar las normas contenidas en los códigos civiles, establecieron los casos en que fuera excepcionalmente posible al juez modificar o resolver los contratos por causa de acontecimientos sobrevenidos[24].

En Francia, por lo tanto, se aprobaron una serie de leyes especiales para actuar contra la emergencia nacional, en particular contra la inflación, que había causado, desde el 1914, una depreciación monedaría del 80% (por ejemplo, la ley Faillot, de 21 enero 1918, permitía, en caso de sobrevenido desequilibrio entre las prestaciones, de resolver los contratos de ejecución continuada o periódica conclusos antes del 1914)[25].

3. La théorie de la imprévision

En su lugar, la jurisprudencia civil francesa, por mucho tiempo, rechazó cual-

18 P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, p. 75; T. Galletto, *voce Clausola rebus sic stantibus*, in *Digesto* (Sez. Civ.), Torino, 1988.

19 M. Ferid, *Das französische Zivilrecht*, Berlin, 1971, p. 438; J. Domat, *Les lois civiles dans leur ordre naturel*, Paris, 1723, I, 1, p. 1777.

20 P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, p. 103.

21 Art. 1134 code Civil: "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consetement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi*".

22 *Ordonnance n° 2016-131 portant réforme du droit des contrats, du régime général et de la preuve des obligations.*

23 Art. 1148 code Civil: "*Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, la débiteur a été empêché de donner ou de faire ca à quoi il était obligué, ou a fait ce qui était interdit*".

24 P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, p. 89; R. Serozan, *General Report on the Effects of Financial Crises on Binding Force of Contracts: Renegotiation, Revision and Rescission*, in B. Başoğlu, *The effects of Financial Crises on the Binding Contracts- Renegotiation, Rescission or Revision*, Istanbul, 2016, p. 14; L. Sixto Sánchez, *Derecho contractual comparado*,Cizur Menor (Navarra), 2016, pp. 275-276.

25 L. Sixto Sánchez, *Derecho contractual comparado*, Cizur Menor (Navarra), 2016, p. 276; C. Pédamon - J. Chuah, *Hardship in Transnational Commercial Contracts*, Paris, 2013, p 33.

quiera intervención del juez sobre el equilibrio contractual. Emblemático fue el caso inherente al *affaire du Canal de Craponne*. La controversia interesaba algunos contratos, concluidos durante el 1560 y el 1567 entre la empresa que había construido el canal y los propietarios ribereños, que permitían, a dichos propietarios, de conseguir agua bajo el pago de una renta. Durante tres siglos esta renta no fue modificada, volviendo irrisoria. En el 1876 la empresa pedí la revisión del canon, pero la *Cour de Cassation*, interpretando literalmente el Art. 1134 del code Civil, negó la modifica del contrato[26]. Algunos años más tarde, la jurisprudencia administrativa, en el famoso caso del *Gaz de Bordeaux* (1916), permitió, en los contratos celebrados con la publica administración, el ajuste judicial de la contraprestación, que se había convertido en demasiado onerosa. En esta ocasión, el *Conseil d'Etat* elaboró la llamada *théorie de la imprévision*, que, en casos de eventos imprevisibles, atribuye a la parte agravada por la prestación demasiado onerosa el derecho de pedir la resolución del contrato[27]. La jurisprudencia civil, pero, no fue totalmente insensible al problema de las circunstancias sobrevendidas.

Se encuentran, pues, algunas sentencias en que, interpretando extensivamente el concepto de fuerza mayor, o recurriendo a otros expedientes (error, buena fe, abuso del derecho, injusto enriquecimiento), los jueces llevan, de hecho, a modificar las convenciones entre las partes[28].

En materia comercial, por ejemplo, la *Cour de Cassation*, ha, recientemente, establecido el deber de las partes de renegociar el contrato cuando circunstancias sobrevenidas hayan significativamente alterado el equilibrio negocial[29]. Estas pronunciaciones, pero, quedaron aisladas hasta el punto de hacer pensar que se trató de decisiones justificables solamente por las circunstancias particulares de los casos concretos, y no de un cambio de rumbo efectivo en la jurisprudencia civil francesa. Por lo demás, la

26 Cour Cass., civ., 6 marzo 1876, *Canal de Craponne*, in H. Capitant - F. Lequette - F. Terré, *Les grands arrêt de la jurisprudence civile*, Paris, 2015, II, p. 1839; P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, p. 89.

27 Conseil d'Etat, 30 marzo 1916, *Gaz de Bordeaux in Revue de droit publique* (R.D.P.), 1916, p 206; F. Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli, 1996, p. 229, n. 6

28 P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, pp. 90-91; D.m. Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle*, Bruxelle, 1986, p. 107 ss.; P. Voirin, *De l'imprévision dans les rapports de droit privé*, Thesé Nancy, 1922, p. 303 ss.; P. Delmas- Saint- Hilaire, *L'adaptation du contrat aux circonstances économiques, in P. DURAND, La tendance a la stabilité du rapport contractuel: études de droit privé*, Paris, 1960, p. 204.

29 Cour de Cassation, 1 civ., 16 marzo 2004, in D., 2004, *Jur*., p 1754 ss., n. MAZEAUD

Chambre commerciale[30] parece haber vinculado la posibilidad de modificar o resolver el contrato al concepto de causa, entendida como contrapartida de la obligación del contratista agravado.

El Art. 1131 del *Code civil*, en su formulación antecedente a la reforma de 2016, preveía que la obligación sin causa fuera sin efectos, pues, si el aumento de los costos comprometiera el equilibrio económico general del contrato queridos por las partes, el sinallagma entre las prestaciones era perjudicado de tal modo que el compromiso de un contrayente resultaba sin su contrapartida.

En definitiva, el recurso al concepto de causa expresaba la intención de la *Cassation* de circunscribir el alance de la teoría de la imprévision a casos puramente excepcionales, en que el cambio de la circunstancias hubiera provocado, además de un desequilibrio contractual de natura económica, un desequilibrio constitutivo, caracterizado por la ausencia de reciprocidad entre las prestaciones[31]. Esta pauta de la *Chambre Comercial*, a su pesar, fue objeto de duras críticas y no fue seguida por la jurisprudencia sucesiva[32]. El planteamiento diferente entre la jurisprudencia civil y administrativa podía (quizá) justificarse por la prevalencia del publico interés en los contratos de derecho público, que, en contra, no tiene ninguna relevancia en los contratos entre privados. A estos planteamientos jurisprudenciales, se añadía la amplia y varia producción doctrinal en materia, sintomática del descontento con la impostación tradicional, adoptada por el code Civil. Autorizados autores franceses afirmaban que la irrelevancia del cambio de circunstancias sobre el contrato era una mera carga del pasado, siendo, esta, una formula vacía, ya no respondiente a la realidad de las cosas[33].

4. La codificación del derecho contractual en Argentina

El primero código civil argentino (c.c. arg.) siguió, en materia contractual, casi

30 Cour de Cassation, Chambre Commerciale, n. 09-67.369, 29 giugno 2010,

31 L. Moscati, *Sulla teoria dell'imprévision tra radici storiche e prospettive attuali*, in *Contratto e impres*a, 2, 2015, pp. 427-428.

32 *Cour de Cassation, Chambre commerciale*, 18 marzo 2014, 12-29.453, con n. di Laither, *La cause n'est pas un remède aux contrats non rentables*, in *Revue des contrats*, 2014, p. 345.

33 P. Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milano, 1992, p. 93; A. Benabent, *Droit civil, Les obligations*, Paris, 1989, p. 127; B. Starck, *Droit civil, Les obligations, II, Contracted*, Paris, 1989, p. 487 ss.

ciegamente, la doctrina francesa y el modelo del *Code Napoléon*[34], y, por lo tanto, rechazó duramente la teoría de la imprevisión[35].

El Art. 1197 c.c.arg. establecía el principio general *pacta sunt servanda*[36], mientras fruto de su aplicación específica eran las normas que regulaban algunos tipos contractuales (por ejemplo, el Art. 1633[37] en temas de contrato de obra). Las solas excepciones a este principio, capaces de eximir al deudor de la responsabilidad por incumplimiento, eran la imposibilidad material o jurídica de cumplir, debidas al caso fortuito o a la fuerza mayor (Art. 513).

Este sistema podía parecer eficiente en la época de su elaboración y hasta el comienzo del siglo XX, años en que Argentina se presentaba como un país en fase de crecimiento, donde confluían miliares de inmigrantes de todo el mundo, con un economía basada principalmente en las exportaciones alimentares y en la rápida conversión de la moneda nacional en oro. Las cosas, pero, cambiaron claramente en el curso de la primera guerra mundial.

El conflicto bélico influyó de forma negativa sobre la economía del país, en primer lugar poniendo obstáculos a las exportaciones de los productos internos y a las importaciones de bienes industriales extranjeros, y después haciendo caer todo el país en la crisis financiera mundial del 1929[38]. Estos acontecimientos justificaron la intro-

34 Sobre las fuentes de inspiración del código civil argentino del 1871, S. A. B. Meira, *Direito brasileiro e direito argentino. Códigos Comercial e Civil. Influencia do "Esboco" de Teixera de Freitas no projecto de Vélez Sarsfield*, in S. Schipani, *Diritto romano, codificazioni e unità del sistema giuridico latinoamericano*, Milano, 1981, pp. 231 ss.; L. Segovia, *Introducción* in Id., *El Código Civil de la República Argentina*, I, Buenos Aires, 1881, pp. XIX-XXIV; M. C. Mirow, *The Code Napoleon: Buried but Ruling in Latin America*, in *Denver Journal of International Law and Policy*, 2005, pp. 179 ss.; C. Fernández Rozas, *El código de Napoleón y sus influencia en América Latina: Reflexiones a propósito del segundo centenario*, in C. E. Febres Fajardo - J. Albornoz Oliver, *El derecho internacional en tiempos de globalización: libro homenaje a Carlos Febres Pobeda*, Mérida (Venezuela), 2005, p. 151 ss.

35 M. A. Piantoni, *Las reformas contractuales en la Ley n° 17.711 del Código civil argentino*, Cordoba (Argentina), 1968, p. 54. El mismo autor del código civil argentino de 1871, Dalmacio Sarsfield Vélez, comentaba el Art. 943, declarando que: "d*ejeríamos de ser responsables de nuestras acciones, si la ley nos permitiera enmendar todos nuestros errores, o todas nuestras imprudencias. El consentimiento libre, prestado sin dolo, error ni violencia y con las solemnidades requeridas por las leyes, debe hacer irrevocables los contratos.*", in *Código civil (con las notas de Vélez Sársfield) y leyes complementaria*, Buenos Aires, 1958, p. 198.

36 Art. 1197 c.c.arg. 1869: "*Las convenciones hechas en los contratos forman para las partes una regla a la cual deben someterse como la ley misma*". En la nota del Art. 1197 Vélez individuaba como su fuente de inspiración el Art. 1134 c.c.fr., *Código civil* (con las notas de Vélez Sársfield), Buenos Aires, 1958, p. 247.

37 Art. 1633 c.c.arg.1869: "*Aunque encarezca el valor de los materiales, el locador bajo ningún pretexto puede pedir aumento en el precio, cuando la obra ha sido contratada por una suma determinada*".

38 J.c. Rivera, *From Crisis to Crisis: Weakness of Contracts in Argentina*, in B. Başoğlu, *The effects of Financial Crises on the Binding Contracts- Renegotiation, Rescission or Revision*, Istanbul, 2016, pp. 34-35.

misión de los poderes públicos en las contrataciones privadas (dirigismo contractual), permitiendo una excepción a la regla del Art. 1197 c.c.arg[39]. .

5. La reforma argentina del 1968

Desde el 1946 hasta el 1950 Argentina sufrió de manera constante el fenómeno de la inflación; por lo tanto, muchos autores[40] empezaron a madurar el convencimiento que el nuevo escenario económico y social obligara a suavizar el principio absoluto pacta sunt servanda. Esta regla no había de aplicarse en los casos de injusticia, como los de las partes obligadas a cumplir las prestaciones aun cuando sean cambiados los presupuestos del negocio, o cuando el cumplimento de una parte sea demasiado oneroso por causa de un evento excepcional, imprevisible y extraordinario[41].

Por estas razones, en el Tercer Congreso Nacional de Derecho Civil de 1961[42] se elaboró un proyecto de reforma al código que, a la recomendación n. 15[43], proponía que se recogiera la teoría de la imprevisión en el Art. 1198 c.c. arg. Se constataba que la única similitud entre ley y contrato era la individuación de una regla de conducta para el futuro[44]. Debería haberse excluido, todavía, una inderogabilidad absoluta del negocio jurídico porque, de otra manera, habría significado actuar en contra de equidad y buena fe, exigiendo que la parte cumpliera, en todo caso, su prestación, aun cuando se tornara excesivamente onerosa, por acontecimientos extraordinarios o imprevisibles[45].

39 Un ejemplo de dirigismo contractual son las leyes promulgadas en Argentina en el 1921 en tema de arrendamiento y algunas sentencias de la *Corte Suprema de Justicia de la Nación Argentina* (CSJN) del mes de abril de 1922, con las que se afirmó el principio de derecho, por lo cual estaba permitido, en casos excepcionales y de emergencia, la intromisión temporal y razonable de los públicos poderes entre las contrataciones privadas, J.c. Rivera, *From Crisis to Crisis: Weakness of Contracts in Argentina*, in B. Başoğlu, *The effects of Financial Crises on the Binding Contracts- Renegotiation, Rescission or Revision*, Istanbul, 2016, pp. 36-37; J. Mosset Iturraspe, *Contratos*, Buenos Aires, 1984, p 311; G.a. Borda, *La reforma de 1968 al Código civil*, Buenos Aires, 1971, p. 251.

40 L.m. Rezzónico, *La fuerza obligatoria del contrato y la teoría de la imprevisión*, Buenos Aires, 1954; J.c. Molina, *Abuso del derecho, lesión e imprevisión*, Buenos Aires, 1969; P. León, *La presuposición en los contratos*, in *Homenaje a Dalmacio Vélez Sarsfield*, Córdoba, 1935, p. 223; A.m. Morello, *Indemnización del daño contractual*, La Plata, 1974, p. 215 ss.; M.a. Risolia, *Soberanía y crisis del contrato*, Buenos Aires, 1946, p. 150.

41 M.a. Piantoni, *Las reformas contractuales en la Ley n° 17.711 del Código civil argentino*, Cordoba (Argentina), pp. 55-56.

42 La prepuesta de incluir en el código *la teoría de la imprevisión* ya había sido avanzada en el Segundo Congreso Nacional de Derecho Civil, de Córdoba de 1937 y antes en el Congreso Nacional de Abogados, de La Plata de 1959, J. Mosset Iturraspe, *Justicia contractual*, Buenos Aires, 1978, pp. 218-219.

43 J. Mosset Iturraspe, *Justicia contractual*, Buenos Aires, 1978, pp. 218-219.

44 En particular, en la ponencia di Raúl Sandler en los actos del del *Tercero Congreso de Derecho Civil*, tomo II.

45 En particular en la ponencia di Mosset Iturraspe en los actos del *Tercero Congreso de Derecho Civil*, tomo II.

El modelo utilizado por los reformadores fue el código civil italiano de 1942, que regula(ba), en los artt. 1467-1469 c.c.it., la resolución por excesiva onerosidad[46].

A pesar de las críticas de importante doctrina[47], la propuesta de reforma fue aceptada y la ley n° 17.711 del 1968[48] modificó el Art. 1198 c.c.arg.[49], en el sentido que. "*Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosímilmente las partes entendieron o pudieron entender, obrando con cuidado o prudencia. En los contratos bilaterales commutativos y en los unilaterales onerosos y commutativos de ejecución diferida o continuada, si la prestación a cargo de una de las partes se tornara excesivamente onerosa, por acontecimientos extraordinarios o imprevisibles, la parte perjudicada podrá demandar la resolución del contrato. El mismo principio se aplicará a los contratos aleatorios cuando la excesiva onerosidad se produzca por causas extrañas al riesgo proprio del contrato. En los contratos de ejecución continuada la resolución no alcanzará a los efectos ya cumplidos. No procederá la resolución, si el perjudicado hubiese obrado con culpa o estuviese en mora. La otra parte podrá impedir la resolución ofreciendo mejorar equitativamente los efectos del contrato*".

Se reproducían básicamente las disposiciones del Art. 1167 c.c.it.[50], atribuyendo el derecho a la resolución a la parte desfavorecida por los acontecimientos extraordinarios e imprevisibles y permitiendo a la otra de oponerse y proponer la modifica

46 Art. 1467 c.c. it. Contratto con prestazioni corrispettive: "*Nei contratti ad esecuzione continuata o periodica ovvero ad esecuzione differita, se la prestazione di una delle parti è divenuta eccessivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti all'Art. 1458 c.c. La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell'alea normale del contratto. La parte contro la quale è domandata la risoluzione può evitarla offrendo di modificare equamente le condizioni del contratto*"., G. Osti, *voce Clausola rebus sic stantibus*, in *Novissimo Digesto italiano*, III, Torino, 1959, p. 359; Id., *La c.d. clausola "rebus sic stantibus" nel suo sviluppo storico*, in *Rivista di diritto civile*, 1912, p. 1; Id., *Appunti per una teoria della "sopravvenienza". La cosiddetta clausola "rebus sic stantibus" nel diritto contrattuale odierno*, in *Rivista di diritto civile*, 1913, p. 471.

47 En particular, la ponencia di Risolia en los actos del *Tercero Congreso de Derecho Civil*, tomo II.

48 G. A. Borda, *La reforma de 1968 al Código civil*, Buenos Aires, 1971, p. 171 ss.; J. Mosset Iturraspe, *Justicia contractual*, Buenos Aires, 1978, p. 217 ss.; R. Martinez Ruiz, *La Reforma del Código Civil y la Seguridad Jurídica*, in *Revista del Notariado*, 1968, n. 702, p. 1390 ss.

49 M. A. Piantoni, *Contratos civiles*, I, Cordoba-Buenos Aires, 1975, p. 170 ss.

50 J. Mosset Iturraspe, *Los temas del artículo: la interpretación, la buena fe y la revisión del contratto*, in A. J. Bueres - E. I. Highton, *Código civil y normas complementarias. Análisis doctrinal y jurisprudencial, 3C, Artículos 1190/1433, Contratos*, Buenos Aires, 2001, p. 40.

equitativa del negocio[51]. Se trataba, como por el modelo italiano, de una norma excepcional[52], valida solamente para los contratos commutativos a ejecución continuada o diferida, inspirada por el favor contractus y directa a garantizar una mayor seguridad entre las relaciones contractuales[53].

6. Las características de los contratos de largo plazo

Sin embargo, en poco tiempo el fenómeno moderno de la negociación ha demostrado la insuficiencia de los remedios de gestión del riesgo contractual establecidos por el código argentino, así como reformado en el 1968[54].

La globalización de los mercados y las tecnologías han hecho más complejas las relaciones contractuales, se han desarrollado técnicas y esquemas negóciales en que el factor temporal juega un papel fundamental, relaciones que antes eran instantáneas, hoy en día se prolongan en un tiempo muy largo. Los bienes industriales, por ejemplo, se adquieren a través de contratos de leasing, transformando la causa de cambio en una finalidad de mutuo de largo plazo; los contratos de suministración incluyen cláusulas de exclusiva, directas a crear dependencia económica entre impresas; contratos, como acuello de depósito, que siempre fueron de largo plazo, se ponen complejos por causa de las nuevas tecnologías[55]. Esto tipo de vínculos generan una serie de problemas en termino de determinación del precio y de especificación de la prestación: a lo largo del tiempo, se descubren nuevas tecnologías; el nivel de especialización de las partes

51 *El nuevo Código Civil y Comercial de la Nación Argentina* (2015) regula la imprevisión en el Art. 1091, estableciendo que "Si en un contrato conmutativo de ejecución diferida o permanente, la prestación a cargo de una de las partes se torna excesivamente onerosa, por un alteración extraordinaria de las circunstancias existentes al tiempo de su celebración, sobrevenidas por causas ajenas a las partes y al riesgo asumido por la que es afectada, ésta tiene derecho a plantear extrajudicialmente, o pedir ante un juez, por acción o per excepción, la rescisión total o parcial del contrato, o su adecuación. Igual regla se aplica al tercero a quien le han sido conferidos derechos o asignadas obligaciones, resultantes del contrato; y al contrato aleatorio si la prestación se torna excesivamente onerosa por causas extrañas a su alea propia.".

52 En este sentido, J. Mosset Iturraspe, *Justicia contractual*, Buenos Aires, 1978, p. 221: "No se trata de una istitución a la cual se pueda echar mano ante la alteración producida en el contrato por un hecho o secuela de hechos cualquiera; tanto la "*sopravvenienza*" o supuesto fáctico, constituido por los hechos que sobrevienen, como su consecuencia, la "dificultas praestandi", tienen que superar lo "*normal*" y "*previsible*", para caer en el terreno de la "*excesividad*" o "*extraordinariedad*". Sobre ello no cabe duda.".

53 A.m. Morello, *Indemnización del daño contractual*, La Plata, 1974, p. 233 ss.

54 A.m. Morello, *Contrato y proceso*, Buenos Aires, 1990, pp. 43-46.

55 R.l. Lorenzetti, *Fundamentos de derecho privado. Código Civil y Comercial de la Nación Argentina*, Buenos Aires, 2016, pp. 265-266.

aumenta y, a la vez, los costos de cumplimiento encaran y el precio pactado no aparece suficiente. El tiempo modifica de manera básica el valor de las obligaciones, por esta razón las partes necesitan un remedio para modificar sus prestaciones cuando se hacen irrisorias o cuando aparecen inadecuadas respecto a las nuevas tecnologías[56].

La problemática de la adaptación de los contratos de largo plazo se hizo presente en Argentina muy pronto, como consecuencia de las repetidas crisis inflacionarias que obligaran los juristas a crear herramientas capaces de mantener firme las relaciones negociales por mucho de los cambios de valor de la moneda. El remedio del Art. 1198 c.c. arg., porque directo a la resolución del contrato, en muchos casos era ineficiente, el mantenimiento en vida del vínculo era solo solo eventual y siempre subordinado a la propuesta de modifica equitativa, proveniente de la otra parte contractual.

Por su lado, la doctrina argentina argumentó que, aparte de la inflación, los factores económicos en cambio continuo son muchos y diferentes (innovaciones tecnológicas, expectativas de las partes, caducidad de los bienes), así que los contratos de largo plazo son acuerdos provisorios, que deben someterse a constantes reajustes.

Estos reajustes pertenecen a la fisiología de los contratos de larga duración, que exigen una evaluación periódica de la compatibilidad de las condiciones negociales con los cambios económicos y sociales transcurridos durante sus cumplimiento[57]. Por lo tanto, es necesario recurrir a instrumentos normativos capaces de combinar la seguridad jurídica con la necesidad de readaptación del contrato, evitando prácticas abusivas de modificación unilateral del vínculo.

56 R. L. Lorenzetti, *Tratados de los contratos, tomo I*, Buenos Aires, p. 114 ss.

57 A. M. Morello, *Contrato y proceso*, Buenos Aires, 1990, p. 47.

7. Las diferencias entre los contratos de larga duración y los contratos a ejecución continuada o periódica

Basándose sobre la teoría estadounidense de los *relational contract*s[58], la mejor doctrina argentina, hace tiempo, distingue entre contratos de larga duración y contratos a ejecución continuada o periódica, dependiendo de si el factor temporal influye sobre el objeto del contrato o sobre las maneras de cumplimento de las obligaciones[59]. En los contratos de larga duración, las partes no determinan el contenido de las obligaciones, sino establecen las reglas para determinar, en un momento futuro, sus contenido de forma detallada[60]. A la hora de la concluir el contrato, las partes, puesto que dan vida a un vínculo jurídico duradero en el tiempo, no cristalizan el contenido substancial del acuerdo: no establecen un precio definitivo de la mercancía porque toman en cuenta la posibilidad de cambios inflacionarios del valor de la moneda; no especifican todas las características de los bienes porque suponen cambios tecnológicos; no definen las modalidades de cumplimiento porque imaginan el descubrimiento de diferentes formas de ejecutar las prestaciones.

La relación jurídica se coloca en un largo plazo temporal y pone las partes frente a los obstáculos de los cambios económicos, tecnológicos y de las reciprocas expectativas. Por esta razón, la predeterminación del contenido contractual sería imprudente, mientras parece más adecuada la definición de las reglas procedimentales para su futura determinación. En los contratos de larga duración, pues, el elemento temporal se in-

58 I. R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations*, Heaven,1980; Id., *The Many Future of Contracts, in Southern California Law Review*, 47, 1974, p. 691; Id., *Restatment (Second) of Contract and Presentation*, in *Virginia Law Review*, 60, 1974, p. 589; Id., *A Primer of Contract Planning*, in *Southern California Law Review*, 48, 1975, p. 627; Id., *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contracts Law*, in *Northwestern University Law Review*, 72, 1983, p. 340; Id., *Relational Contract: What we do and we do not know*, in *Wisconsin Law Review*, 1985, p. 483; S. Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, in *American Sociological Review*, 28, 1977, p. 507; Id., *An Empirical View of Contract*, in *Wisconsin Law Review*, 1985, p. 465; C.j. Goez - R.e. Scott, *Principles of Relational Contracts*, in *Virginia Law Review*, 67, 1981, p. 1089; G.a.g. Gottlieb, *Relationism, Legal Theory for a Relational Society*, in *University of Chicago Review*, 50, 1983; Id., *Price Adjustament in Long Term Contracts*, in *Wisconsin Law Review*, 1985, p. 527, 531.

59 F. Macario, *voce Revisione e rinegoziazione del contratto*, in *Enciclopedia del diritto Annali*, II, 2, Milano, 2008, p. 1026 ss.; Id., *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli, 1996; Granieri, *Il tempo e il contratto. Itinerario storico-comparativo sui contratti di durata*, Milano, 2007; Schneider, *Vertragsanpassung im bipolaren Dauerscheuldverhältnis*, Tübingen, 2016.

60 R.h. Coase, *The nature of the Firm: Origin*, in *Journal of Law, Economics & Organization*, 4, 1988, pp. 3-17.

corpora en el objeto como medio de satisfacción de los intereses de las partes[61]. En los contratos de ejecución continuada o periódica, en cambio, el contenido del contrato viene predeterminado a la hora de su conclusión y el elemento temporal importa solo para su tempestivo cumplimento.

Más concretamente, en los contratos a ejecución periódica, las partes cumplen idénticas prestaciones reiteradas en el tiempo; mientras en los contratos a ejecución continuada, el deudor ejecuta las prestaciones pactadas para garantizar al acreedor de gozar de una cierta situación de manera estable y prolongada[62].

Las modificaciones a las que están sometidos los contratos de larga duración no afectan al objeto del contrato, sino al objeto de las obligaciones, alias a las prestaciones: la parte permanece obligada a pagar una suma de dinero a la contraparte, pero el amontar de la suma debida muta por causa del depreciación de la moneda. Los cambios en el objeto de las obligaciones se reflejan, consiguientemente, sobre el equilibrio entre las prestaciones pactadas. Relaciones y dinamismo se convierten en rasgos identificativos de los contratos de larga duración, elementos que permiten de distinguirlos de los cambios instantáneos (c.d. discrete transactions) y de incluirlos en una categoría diferente, caracterizada por su propia autonomía[63].

En base a estas premisas, el legislador, a la hora de redactar el nuevo código civil y comercial argentino (CCC), entrado en vigor el primer de agosto 2015, recogiendo los monitos de la doctrina, ha atribuido propia autonomía a los contratos de larga duración, distinguiéndolos de aquellos a ejecución continuada y periódica, y adoptando una especie de tripartición entre la disciplina general de los contratos[64]. Tras de la aprobación del nuevo código, no hace falta distinguir entre contratos civiles y comerciales, siendo esa una distinción superada a través de la unificación de los dos códigos

61 R. E. Speidel, *Court Imposed Price Adjustments under Long-Term Supply Contracts*, in *Northwestern University Law Review*, 76, 1981, p. 373.

62 R.L. Lorenzetti, *Tratados de los contratos, tomo I*, Buenos Aires, pp. 117-120.

63 R.L. Lorenzetti, *Fundamentos de derecho privado. Código Civil y Comercial de la Nación Argentina*, Buenos Aires, 2016, pp. 266-267.

64 *Fundamentos del Anteproyecto de Código civil y comercial de la Nación, en Código civil y comercial de la Nación. Proyecto del Poder Ejecutivo Nacional redactado por la Comisión de Reformas designada por el Decreto Presidencial 191/2011*, Buenos Aires, 2012, p 520 ss.; D.F. Esborraz, *Significado y consecuencias de la unificación de la legislación civil y comercial en el nuevo còdigo argentino*, in R. Cardilli - D. F. Esborraz, *Nuovo codice civile argentino e sistema giuridico latinoamericano*, Milanofiori Assago (MI), 2017, pp. 106-107.

(civil y comercial), sino distinguir entre contratos discrecionales/relacionales, contratos de consumo[65] y contratos de adhesión[66]. Esta distinción ha tenido como su lógica consecuencia la elaboración de remedios diferentes para gestionar las superveniencias, privilegiando, en razón de la categoría contractual considerada, la solución judicial o extrajudicial.

8. El deber de renegociar

En tema de contratos de larga de larga duración, el Art. 1011 CCC establece que: "*En los contratos de larga duración el tiempo es esencial para el cumplimiento del objeto, de modo que se produzcan los efectos queridos por las partes o se satisfaga la necesidad que las indujo a contratar.*
Las partes deben ejercitar sus derechos conforme con un deber de colaboración, respetando la reciprocidad de las obligaciones del contrato, considerada en relación a la duración total. La parte que decide la rescisión debe dar a la otra la oportunidad razonable de renegociar de buena fe, sin incurrir en ejercicio abusivos de los derechos".

La norma se ubica en el Capítulo 5 "Objeto" del Título II "*Contratos en general*" del libro tercero del CCC. El objeto es un elemento esencial de cada contrato, pero solo en solos contratos de larga duración su realización depende del factor temporal. Solamente si la relación jurídica dura por el tiempo establecido por las partes, el contrato produce los efectos deseados y el fin perseguido. El legislador argentino, entonces, acoge una nueva tipología contractual, ajena a los estudios tradicionales de derecho civil, que refleja la complejidad de las operación económicas actuales. Por otro lado, la misma unificación del derecho civil y comercial en un único código toma en cargo los cambios significativos producidos en materia de globalización de los mercados con la aparición nueva y antes desconocida de negocio jurídicos, caracterizados por el durar

65 V. Ricciuto, *Dal contratto allo status. Il diritto dei consumatori nel nuovo codice civile argentino*, R. Cardilli - D. F. Esborraz, *Nuovo codice civile argentino e sistema giuridico latinoamericano*, Milanofiori Assago (MI), 2017, p. 465 ss.; D. F. Esborraz, *voce Codice civile e commerciale della Repubblica Argentina (circolazione del modello giuridico italiano nel)*, in *Digesto* (Sez. Civ.), Torino, 2016, pp. 564-576.

66 A. Parise, *The Argentine Civil and Commercial Code (2015): Igniting A Third Generation Codes for Latin America*, in *Zeitschrift für Europäisches Privatrecht*, 2017, p. 662.

en el tiempo de la relación[67]. El esquema tradicional de la relación jurídica instantánea o diferida en el tiempo, pero siempre puntual, no parece adapta para nada a reglamentar las exigencias de mercado, que necesitan relaciones al mismo tiempo estables y flexibles. En este contexto, el contrato constituye el programa de las parte para ejercer sus actividades económicas o o de empresa[68].

Consecuentemente, el párrafo segundo del Art. 1011 CCC obliga las partes a colaborar, respetando la reciprocidad de las prestaciones, por toda la durada de la relación contractual. El deber de renegociación en buena fe, establecido en el párrafo tercero, es congénito a todos los contratos que persiguen un resultado especifico y predeterminado por las partes, a menudo no aislado de la actividad de empresa y de los objetivos económicos de cada contratante[69].

El nuevo código toma en consideración las soluciones adoptadas, en materia de comercio internacional, por los Principios UNIDROIT[70], por los *Principles of European Contract Law* (PECL)[71] y, desde entonces, por el proyecto de Código europeo de contratos, que atribuyen a la parte afectada por las superveniencias el derecho de pedir la renegociación del contrato[72]. Teniendo en cuenta las dificultades como la probable ineficiencia de un intervención "*externa*" del juez sobre el contrato, el nuevo código argentino introduce por lo contratantes el deber, ope legis, de renegociación. Esta obli-

67 A. Parise, *The Argentine Civil and Commercial Code (2015): Igniting A Third Generation Codes for Latin America, in Zeitschrift für Europäisches Privatrecht*, 2017, p. 640 ff.; D.f. Esborraz, *Significado y consecuencias de la unificación de la legislación civil y comercial en el nuevo còdigo argentino*, in R. Cardilli - D. F. Esborraz, *Nuovo codice civile argentino e sistema giuridico latinoamericano*, Milanofiori Assago (MI), 2017, pp. 128-129.

68 A. M. Morello, *Contrato y proceso*, Buenos Aires, p. 54.

69 F. Macario, *Tradizione e innovazione nella disciplina generale del contratto: i contratos de larga duración*, in R. Cardilli - D. F. Esborraz, *Nuovo codice civile argentino e sistema giuridico latinoamericano*, Milanofiori Assago, 2017, p. 419.

70 M.j. Bonell, *I principi UNIDROIT 2004: una nuova edizione dei Principi Unidroit dei contratti commerciali internazionali, in Diritto del commercio internazionale*, 2004, p. 535; J.o. Rodner, *Hardship under the UNIDROIT Principles of International Commercial Contracts*, in G. Aksen, *Global Reflections of International Law, Commerce and Dispute Resolution, Liber Amicorum in Honor of R. Briner*, Paris, 2005, p. 677.

71 M. Mekki, *Hardship and Modification (or Revision) of the Contract*, in A.s. Hartkamp, *Towards a European Civil Code, Nijmegen*, 2004, p. 503; H. Rösler, *Hardship in German Codified Private Law - In Comparative Perspective to English, French and International Contract Law*, in *European Review of Private Law*, 2007, p. 483.

72 V. Art. 6.2.3 Principi UNIDROIT; Art. 6:111, para. 2 PECL; Art. 157 Código europeo de los contratos; A. PARISE, *The Argentine Civil and Commercial Code (2015): Igniting A Third Generation Codes for Latin America,* in *Zeitschrift für Europäisches Privatrecht*, 2017, p. 660; M. R. Ferrarese, *Le istituzioni della globalizzazione*, Bologna, 2000, pp. 31-50; J. Auby, *La globalisation, le droit et l'Etat*, París, 2010, pp. 75-80.

gación de fuente legislativa es finalizada al mantenimiento en vida de la relación jurídica e al retraso de un eventual fracaso de las tratativas[73]. Por lo demás, si el contrato es programa económico de las partes, como proyecto de largo plazo, supone la exigencia de sucesivos cambios, accidentes o alteraciones que obligaran los contratantes a una cooperación en vista de la renegociación, para suavizar los desequilibrios que se harán verificados o para recuperar la perdida finalidad contractual[74]. En definitiva, el equilibrio entre las prestaciones pactadas constituye, básicamente, una instancia "moral" y económica que, a través el principio de buena fe en la ejecución contractual, obliga a la ponderación entre la causa final del contrato y la adaptación racional por parte de los interesados[75].

9. La prohibición del ejercicio abusivo de los derechos

La renegociación, ex Art. 1011 para. 3 CCC, debe hacerse en buena fe, sin que ninguna de las partes incurra en el ejercicio abusivo del derecho.

El principio del buena fe introducido en el nuevo código argentino[76] comprende tanto la buena fe en sentido objetivo como la buena fe en sentido subjetivo. El ejercicio abusivo del derecho, considerado asimismo en sentido amplio, se configura cada vez que un sujeto realice una conducta contraria a los fines del ordenamiento jurídico o que exceda los límites impuestos por la buena fe, la moral o las buenas costumbres[77]. El nuevo CCC, entonces, abandona, la lógica del liberalismo económico del código de Vélez (de 1871), reconoce la peligrosidad del ejercicio ilimitado de los derechos individuales y limita su ámbito de actuación, previniendo posibles desequilibrios so-

73 R. Lorenzetti, *Fundamentos de derecho privado. Código Civil y Comercial de la Nación Argentina*, Buenos Aires, 2016, p. 269.

74 L. Nogler- U. Reifner, *Introduction: The New Dimension of Life Time in the Law of Contracts and Obligations*, in L. Nogler - U. Reifner, *Life Time Contracts. Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law*, The Hague, 2014, p. 47 ss.

75 A. M. Morello, *Dinámica del contrato*, La Plata, 1985, p. 123 ss.; F. Macario, *Sopravvenienze e gestione del rischio nell'esecuzione del terzo contratto*, in G. Gitti- G. Villa, *Il terzo contratto*, Bologna, 2009, p 183 ss.; R. Pardolesi, *Regole di "default" e razionalità limitata: per un (diverso) approccio di analisi economica al diritto dei contratti*, in *Rivista critica del diritto privato*, 1996, p. 460 ss.

76 Art. 9 CCC Principio de buena fe: "*Los derechos deben ser ejercidos de buena fé*".

77 L'Art. 10 para. 2 CCC "*La ley no ampara el ejercicio abusivo de los derechos. Se considera tal el que contraría los fines del ordinamiento jurídico o el que excede los límites impuestos por la buena fe, la moral y las buenas costumbres*".

cio-económicos[78]. Con respecto a la renegociación de los contratos de larga duración, hay ejercicio abusivo del derecho en la conducta del contratante que, en las tratativas, intenta a obligar la otra parte al respecto de las condiciones que él ha puesto de forma unilateral.

Una semejante conducta desnaturalizaría el instituto de la renegociación, como momento de recomposición conjunta de los intereses de los contratantes, finalizado a la individuación de un renovado equilibrio contractual en el mutado contexto socio-económico[79]. La renegociación de los contratos de larga duración, por cierto, está relacionada con el principio de buena fe in executivis, que permite de imaginar que las parte, si hubieran conocidos de forma preventiva las supervivencias, habrían todavía negociado, pero pactando un diferente esquema contractual, pareciendo irracional una negociación fundada sobre una situación de mercado no respondiente a realidad.

En definitiva, el deber de renegociar debe considerarse fruto de una decisión corajosa del legislador argentino, que ha reconocido la importancia del factor temporal en las relaciones contractuales de largo plazo, predisponiendo los instrumentos más eficientes para gestionar el riesgo de las supervivencias, retrasando la intervención judicial y favoreciendo la solución negocial. En el nuevo CCC se actúa, entonces, una combinación perfecta entre la tradición del derecho civil, que se quiere custodiar, y la introducción de nuevas herramientas capaces de hacer el sistema jurídico más funcional a la compleja realidad de hoy.

10. La reforma del derecho contractual francés

La *Ordonnance n° 2016-131 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, hace más de tres siglos de la entrada in vigor del

78 R. L. Lorenzetti, Las normas fundamentales de derecho privado, Buenos Aires, 1995, p. 461 ss.: "*De este modo las normas contratuales deben adecuarse a los principio jurídicos, deben revisar su coordinación con el orden macrosocial.*
El orden jurídico actual no deja en manos de los particulares la facultad de crear ordenamentos contractuales, equiparables a jurídico, sin un contralor. El Estado requiere un Derecho Privado, no un derecho de los particulares. Se trata de evitar que la autonomía privada imponga sus valoraciones particulares a la sociedad; impedirle que invada territorios socialmente sensibles. Sobre todo, se intenta evitar la imposición a un grupo, de valores individuales que le son ajenos…"

79 R. L. Lorenzetti, *Fundamentos de derecho privado. Código Civil y Comercial de la Nación Argentina*, Buenos Aires, 2016, pp. 129-131; F. Macario, *Genesi, evoluzione e consolidamento di una nuova clausola generale: il divieto di abuso di dipendenza economica*, in *Giustizia civile*, 3, 2016, p. 509 ss.; G. Vettori, *Anomalie e tutele nei rapporti di distribuzione tra imprese. Diritto dei contratti e regole di concorrenza*, Milano, 1983, p. 30.

Code civil, ha vuelto a escribir la disciplina general de las obligaciones y de los contratos, atribuyendo fundamento positivo a la teoría de la *imprévision*[80]. La decisión del legislador francés ha sido cuestión de interés para la doctrina europea y extra-europea, tanto por razones de naturaleza histórica y filosófica como de naturaleza económico-jurídica. Bajo el primer aspecto, cabe recordar que el *Code Napoléon* ha constituido el modelo a que se inspiraron buena parte de los códigos modernos, incluidos códigos ecléticos como el argentino de 1871. Bajo el segundo perfil, la reforma manifiesta la voluntad del legislador francés de hacer su sistema jurídico nacional más atractivo para las empresas extranjeras.

El principio inderogable pacta sunt servanda, establecido por el Art. 1134 del *Code civil*, llevaba los operadores de mercado a concluir muy pocos contratos de larga duración. Ellos solían concertar una pluralidad de contratos consecutivos de breve durada, cuya clausulas podían ser modificadas a la hora de concluir un nuevo acuerdo. Por estas razones, todos los proyectos de reforma de la disciplina de los contratos (l'*avant-projet Catala*; el proyecto de la *Accadémie des Sciences morales et politiques* directo por François Terré; los proyectos presentados por la Secretaría) fijaban la reglamentación de la excesiva onerosidad sobrevenida[81].

A pesar de las advertencias de la doctrina, la jurisprudencia civil francesa continuó siguiendo su orientación consolidada que prohibía al juez de modificar al contrato, de forma equitativa, por causa de los cambios acaecidos en el tiempo[82]. La *Cour de Cassation* suponía que la noción de imprevisión chocaba con el principio general de la fuerza obligatoria de los contratos (Art. 1134 *code Civil*) y, por lo tanto, representaba una amenaza a la seguridad jurídica[83]. Asimismo, la orientación de la *Chambre commercial*, que recurría al concepto de causa para justificar la resolución o la modifica de los contratos de largo plazo, ha perdido su sentido tras de la entrada en vigor de la

80 L'*Ordonnance* fue publicada el 10 febrero 2016 en el *Journal officiel de la République française* y entrò en vigor el 1 octubre 2016.

81 *Projet de réforme du droit des contrats*, 2008, Art. 136; *Projet de réform du droit des contrats*, 2009, Art. 101.

82 Cour Cass. (civ.), 6 marzo 1876, *Canal de Craponne*, in *Les grands arrêt de la jurisprudente civile, op. cit*.

83 Sobre la teoría de la imprévision, P. Voirin, *De l'imprévision dans les rapports de droit privé, op. cit*., p 294; J. Auverny-Bennetot, *La théorie de l'imprévision: droit privé, droit administratif, droit ouvrier*, Paris, 1938, p. 43 ss.

Ordonnance, consecuentemente, hoy, sería imposible respaldar acuella orientación[84]. La formulación del nuevo Art. 1195 del *Code civil*[85] atribuye al contratista, cuya prestación sea excesivamente onerosa por cambio imprevisible de las circunstancias, el derecho de pedir a la contraparte la renegociación del contrato. Si recurren los presupuestos para la renegociación, el contratista agravado, tal como prevean los Principios UNIDROIT[86], sigue siendo obligado a cumplir sus prestaciones. En caso de rechazo de la contraparte o de fallecimiento de la renegociación, las partes puede decidirse a resolver el contrato, estableciendo la fecha y las condiciones, o, alternativamente, pedir al juez el ajuste del negocio, sugiriendo métodos y criterios orientativos de la intervención judicial. Si las partes no llevan a un acuerdo en un periodo de tiempo razonable, el juez puede, a solicitud de un contratista, adecuar o resolver el contrato.

El sistema adoptado por la Ordonnance induce a las partes a llevar a un acuerdo sobre la modifica de las condiciones negociales, excluyendo, en lo posible, la intervención del juez. Sus principales fuentes de inspiración se encuentran, como en el CCC argentino, en el derecho privado europeo (PECL; DCFR), en el derecho internacional uniforme (Principios UNIDROIT) y, asimismo, en el § 313 BGB alemán[87].

La reforma de 2016 ha acercado mucho el derecho francés a las soluciones del derecho de contratos alemán, que, mediante la Schuldrechtreform, ha establecido un punto de equilibrio entre el principio de fuerza obligatoria de los contratos y las exigencias de solidaridad y lealtad en la ejecución negocial. El BGB aunque no individúe expresamente el deber de renegociar, fija una firme jerarquía entre los remedios judiciales de la modifica y de la resolución del contrato. El § 313 BGB prevé que, en caso de

84 La Ordonnance, inter alia, ha suprimido el concepto de causa como elemento esencial del contrato.

85 Art. 1195 Code civil: "*Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation. En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe.*".

86 Art. 6.2.3, par. 2 Principios Unidroit "*The request for renegotiation does not in itself entitle the disvantaged party to withhold performance*".

87 F. Tuccari, *Note sull'introduzione della "révision pour imprévision" nel codice civile francese*, in *Europa e diritto privato*, 4, 2017, p. 1517.

alteración de la base negocial, las partes pueden pedir al juez la adaptación del contrato y, solo si eso no sea posible, pueden presentar la solicitud de resolución contractual[88]. Sin embargo, el nuevo Art. 1195 *code Civil* se presenta como una norma dispositiva, que puede ser derogada por las parte a través de la inserción en el contrato de una cláusula de aceptación del riesgo de la imprevisión[89]. Dicho lo cual, parece probable que los contratistas franceses incluirán en sus contratos cláusulas que impidan la revisión judicial, procediendo a la repartición negocial de cada riesgo, tal como ocurre en los sistemas de Common Law con las clausolas de hardship[90].

Al final, se deprende, de manera explícita, la intención del legislador francés de favorecer, como el reformador argentino, una solución convencional al fenómeno del desequilibrio contractual causado por acontecimientos sobrevenidos. Las partes, de hecho, podrán acudir al juez solo en caso de fallecimiento de las tratativas de renegociación[91]. Por esta razón, las previsiones de la reforma francesa realizan tanto un homenaje al principio del *favor contractus*, como la recuperación de la unidad del ordenamiento jurídico en la temática de la *imprévision*, hasta entonces, demasiado confusa.

88 P. Schlechtriem, *Schuldrecht. Allgemeiner Teil*, Tübingen, 2002, p. 209 ss.; R. Zimmermann, *Il BGB e l'evoluzione del diritto civile*, in *La riforma del codice civile tedesco. Una riflessione di giuristi tedeschi ed italiani sul nuovo volto dello Schuldrecht*, in *Contratto e impresa*. Europa, 2004, p. 625 ss.; U. Falk, *La riforma del diritto tedesco delle obbligazioni: una valutazione critica*, in *Rivista critica del diritto privato*, 2005, p. 501 ss.; R. Schulze, *Il nuovo diritto tedesco delle obbligazioni e il diritto europeo dei contratti*, in *Rivista di diritto civile*, 2004, I, p. 57 ss.

89 P. Mazeaud, *Prime note sulla riforma del diritto dei contratti nell'ordinamento francese*, in *Rivista di diritto civile*, 2, 2016, p. 441; L. Sixto Sánchez, *Derecho contractual comparado.*

90 R.a. Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts (Comparative Perspectives)*, Cambridge, 2011, pp. 155-158.

91 N. Molfessis, *Le rôle du juge en cas d'imprévision dan la réforme du droit des contrats*, in *La Semaine juridique- Edition générale (JCP G)*, 2015, p. 1415 ss.

GIULIO NAPOLITANO*

THE US SUPREME COURT JUDGMENT ON THE TRAVEL BAN THE POWERS AND THE WORDS OF THE US PRESIDENT

In a judgment delivered on 26 June 2018, the US Supreme Court declared the lawfulness of President Trump Executive Order which prohibited the entry into the country of citizens coming from eight "suspect" or "non-collaborative" nations, of which six are majority Muslim.

Labeled as "Travel Ban," or in a more provocative way as "Muslim Ban," since its first version enacted a fwe days after President Trump's entry into office, the Executive Order immediately became the object of a bitter political and judicial battle. One year and half later, this battle was also echoed by the discussion in the Supreme Court, which ended on 26 June with a narrow majority vote 5-4 in support of the opinion delivered by the Chief Justice Roberts. The moral tension that deeply divided the Court within it can be grasped in the passionate dissenting opinion of Justice Sotomayor, who pointed out that "the United States of America was founded on the promise of religious freedom "and that" the decision taken by majority by the Court fails to safeguard the fundamental principle of religious neutrality enshrined in the Constitution."

The judgment is particularly favorable for President Trump. But it would be a mistake to read the Court's decision as a full pass to the President's policy on security and immigration. And it would be all the more wrong to understand it as an implicit universal ode to neo-nationalist movements and to the choices of closing borders to migrants and travelers that are emerging at different latitudes and in various jurisdictions.

In the ruling, the Court reiterated its well-established jurisprudence that the decision

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to admit and exclude foreigners from the national territory constitutes the exercise of a "fundamental sovereign prerogative" and pointed out that there is no constitutionally-protected right of foreigners to enter American soil. These statements should not be surprising if one considers the traditional refractoriness of the United States and its courts to assume and recognize the cogency of international restrictions and the absence of any reference to the right to asylum in the Bill of Rights. These statements however could not be formulated in the same terms in European countries, whose most recent constitutions, mindful of the horrors of the Second World War, expressly safeguard that right and operate within the common constraints voluntarily assumed in the migration policies of the European Union.

On the merits, the Supreme Court clearly stated that American law on immigration and citizenship gives a wide delegation to the President to suspend with a special "Proclamation" the entry of foreigners or classes of foreigners that may be harmful to the national interest, and in particular to its internal security. The Supreme Court underlined that the text of the statutory provision in question "exudes respect for the President in every clause." Even in this case, however, the exact scope of this demanding statement by the Court should not be misunderstood. In fact, it should be placed in the context of a more general tendency of the American legal system to strengthen what scholars have called the "Presidential Administration." This awereness should lead to the avoidance of partisan polemics, as the opinion of the Court suggests, making reference to previous similar measures ordered by both Republican and Democratic Presidents.

It should also be noted that the Court gave the go-ahead to the presidential "Proclamation" only in the third version, which appropriately amended the first two texts of the "Travel Ban." This version, in fact, also includes people coming from countries of non-Muslim religion, such as North Korea and Venezuela. In addition, the new version of the Executive Order was adopted following a wide-ranging investigation, involving various federal departments and agencies and efforts at cooperation with affected foreign governments, and after the President consulted several members of the Executive.

This confirms that important and complex decisions such as the "Travel Ban" can certainly not take place in an impromptu way or with extemporaneous and individual initiatives even by the highest political authorities.

The most sensitive point of this dispute remains the possible discriminatory nature of the announcement which excludes foreigners on the basis of their nationality, but in reality also, at least according to the applicants and to the dissenting opinion of some justices of the Supreme Court, on the basis of their religious beliefs. The knot is made up of the words with which President Trump, during the electoral campaign and once

elected, announced and accompanied his decision, with ambiguous and sometimes openly anti-Islamic public statements and messages on Twitter. The Court overcame the problem by focusing attention on the objective tenor of the measure, which is neutral on the religious level, and on the breadth of the presidential powers. But the Court did not shy away from an implicit reference to President Trump's statements, underlining the relevance of the "extraordinary power of speech" of American presidents and recalling the long and unbroken tradition of public speaking with which, from George Washington onwards, they always vigorously reaffirmed the US commitment to honor the principles of religious freedom, respect and tolerance. Of the debate in the Supreme Court, the words perhaps most impressive are those contained in the concurrent opinion with which Justice Kennedy has in fact taken leave of the Court, at the end of an extraordinary term played along the difficult ridge that has often separated conservatives and progressives within it: however broad the sphere of political discretion recognized to the members of the Government, "this does not mean that they are free to ignore the Constitution and the rights and liberties it protects." An "anxious world" must know that "our Government is always devoted to those freedoms that the Constitution seeks to preserve and protect, so that they extend also to the outside and last."

EDOARDO RUZZI*

MORE THAN JUST A CAKE: MASTERPIECE CAKESHOP AND THE FUTURE OF CIVIL RIGHTS

ABSTRACT: *The US Supreme Court's ruling in the case of* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission *has disappointed many commentators.*
The case originated by the refusal expressed by Jack Phillips, a Colorado baker, to create a cake for a same-sex couple's wedding. Charged with violation of the Colorado Anti-Discrimination Act, Mr. Phillips justified such a denial by claiming that he could not be compelled to exercise his artistic talents to support a view of marriage at odds with his own religious convictions. Phillips' case is part of a growing number of disputes that, all over the country, are challenging state public accommodation laws by invoking the Free Speech or Free Exercise Clauses of the First Amendment of the US Constitution. Therefore, the difficult question raised before the High Court was whether the First Amendment exempts businesses to serve same-sex couples for religious reasons.
The Court did not give an answer to the broader constitutional issue but ruled in favor of the baker "on narrow grounds" finding that he did not receive a fair and impartial hearing. Thus, many authors contended that the decision will not set a precedent for futures cases, except those where there is evidence of religious hostility or bias from public officials. However, this paper argues that the Masterpiece Cakeshop *ruling has set the table for a radical change in the civil rights jurisprudence. In particular, it will explain why this decision failed to bolster the principles recognized in* Obergefell v. Hodges *and, at the same time, left the door open to the creation of "a right to discriminate" in the name of religious liberty.*

1. During one public address in 2006, John Roberts, newly appointed Chief Justice of the United States, stated that he was strongly in favor of deciding cases on

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"the narrowest possible grounds.[1]" In his view, judicial restraint and pragmatism foster greater consensus on the Court, with "clear benefits" for the entire judicial system. He argued that unanimous or near-unanimous decisions would "promote clarity and guidance for the lawyers and for the lower courts interpreting what the Supreme Court meant" so that "[t]he rule of law is strengthened when there is greater coherence and agreement about what the law is". The Supreme Court, in its recent decision *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* appears, *prima facie*, to follow the Chief Justice's approach to legal reasoning.[2]

The High Court was called upon to weigh equal rights with religious liberty on a complex case involving a baker who, in the name of freedom of contract, refused to create a cake for a gay couple's wedding. In particular, the question addressed to the Supreme Court was whether compelling a business owner to engage in artistic expression, which would conflict with his religious beliefs about same-sex marriage, could violate the Free Speech or Free Exercise Clauses of the First Amendment.

In the end, the Supreme Court limited its 7-2 ruling to just an aspect of procedural fairness, thus leaving most substantive issues still open.[3] Therefore, it was not surprising that the first commentators spoke of a narrow ruling on the unique facts of the case, which would have not set a precedent for future clashes of state anti-discrimination laws and First Amendment rights.[4] This point of view is also supported by the sheer numbers of the majority opinion. Not only the opinion of the Court was delivered by Associate Justice Anthony M. Kennedy - notably a champion of individual liberty rights - , but it is worth emphasising that two justices from the court's liberal wing, Justice Elena Kagan and Justice Stephen Breyer, joined their conservative colleagues[5]. By focusing the decision on the peculiar aspects of the case it has been easier to gain a broader consensus and a solid majority in the Court. This result would have been much more difficult to achieve, had the most divisive constitutional issues at stake not been circumvented. Therefore, the *Masterpiece Cakeshop* ruling seems to prove the

1 As reported by C. R. Sunstein, *The Minimalist*, in *L. A. Times*, 25 May 2006.

2 US Supreme Court, *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al.,* 138 S. Ct. 1719, 2018.

3 The Court itself is fully aware that similar issues will likely arise again, as it is written in Justice Kennedy's majority opinion: "the outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

4 See, e.g., C. R. Sunstein, *Congrats, Supreme Court. Keep Thinking Small*, in *Bloomberg*, 21 June 2018; R. Epstein, *Symposium: The worst Form of Judicial Minimalism - Masterpiece Cakeshop Deserved a Full Vindication for Its Claims of Religious Liberty and Free Speech*, in *SCOTUSblog*, 4 June 2018.

5 Justice Kagan filed a concurring opinion, in which Justice Breyer joined.

expediency of Robert's modest, minimalist approach.

In reality, *Masterpiece Cakeshop* outcome was not "as narrow as may first appear.[6]" This paper explores the context from which this decision developed and ultimately analyzes its precedential value, considering the rising number of similar "wedding-vendor cases.[7]"

Notably, litigation is often seen as a tool for proactive social change in the American system.[8] Supreme Court decisions like *Brown v. Board of Education* (1954),[9] which abolished school segregation and implemented civil rights, and *Obergefell v. Hodges* (2015)[10], which recognized the fundamental right to marry for same-sex couples, "were not only mileposts in legal development, they are also part of the country's cultural identity"[11]. Indeed, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* may prove to be the first step toward another significant social change in American society, albeit in a very different direction from *Obergefell*.

2. The case arose in 2012. David Mullins and Charlie Craig, a same-sex couple, visited the bakery "Masterpiece Cakeshop" in Lakewood, Colorado, to evaluate ordering a cake for their wedding reception. The State of Colorado did not recognize same-sex marriages at that time. Therefore, the two men planned to marry in Massachusetts, and they were looking for a wedding cake for a reception to be held in Denver. Jack Phillips, a devout Christian and the owner of the bakery, refused to sell them a cake for their wedding, saying that creating a wedding cake for same-sex couples was at odds with his faith. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into".

6 D. Laycock – T. Berg, *Symposium: Masterpiece Cakeshop - Not as Narrow as May First Appear*, in *SCOTUSblog*, 5 June 2018.

7 See D. Laycock, *The Wedding-vendor Cases*, in *Harvard Journal of Law & Public Policy*, 41, 2017, p. 49.

8 See R. Michaels, *American Law (United States),* in J. M. Smits, *Elgar Encyclopedia of Comparative Law, Cheltenham - Northampton*, 2006, p. 66.

9 US Supreme Court, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 1954.

10 US Supreme Court, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015.

11 R. Michaels, *American Law (United States)*, p. 66.

The couple felt humiliated by Mr. Phillips's refusal to serve them. Consequently, they filed a charge with the Colorado Civil Rights Commission, alleging discrimination based on sexual orientation in violation of the Colorado Anti-Discrimination Act (CADA). The Statute, amended in 2007 and 2008, explicitly prohibits a place of public accommodation from refusing or denying to individuals the full and equal access to goods and services because of their sexual orientation.[12] For these purposes, a place of public accommodation is defined as any "place of business engaged in any sales to the public and any place offering services... to the public", with the exclusion of places that are principally used for religious purposes.[13] Following an investigation of the facts, the Colorado Civil Rights Division concluded that Craig and Mullins's claims were supported by probable cause that Phillips violated CADA and referred the matter to the Colorado Civil Rights Commission. The Commission found it proper to conduct a formal hearing, referring the case to a State Administrative Law judge. Finding no dispute as to the material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The court rejected the two constitutional claims raised by Mr. Phillips. The baker first argued that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech, by compelling him to exercise his artistic talents to express a message with which he disagreed. Moreover, Phillips asserted that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. However, the ALJ did not agree that creating a wedding cake for Craig and Mullins' wedding would force Phillips to adhere to "an ideological point of view." It also found that CADA was a "valid and neutral law of general applicability", as it regulates both religiously-motivated and secular conduct, and therefore its application to Phillips in that case did not violate the Free Exercise Clause. The court thereby ruled against Phil-

12 "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation". See Colorado Revised Statutes, §24-34-601(2)(a).

13 Col. Rev. Stat. (C.R.S.), §24-34-601(1).

lips and the cakeshop.

Both the Commission and the Colorado Court of Appeals affirmed the ALJ's decision in full. The Colorado Supreme Court denied *Masterpiece Cakeshop*'s request for further review. Therefore, Phillips filed petition for a writ of certiorari with the U.S. Supreme Court. The *certiorari* petition renewed his claims under the Free Speech and Free Exercise Clauses of the First Amendment.[14] The Supreme Court granted Phillips' petition on 26 June 2017.

3. *Masterpiece Cakeshop* became the battleground of a social and political conflict that is still polarizing the entire Nation.[15] The dramatic trend of the so-called "cultural wars" has been highlighted by a survey conducted by the Pew Research Center,[16] which found the Country evenly split on religious exemptions in the wedding-vendor cases: almost half of U.S. adults (49%) said businesses that provide wedding services should be required to provide those services to same-sex couples as they would for any other couple, while a nearly equal share (48%) said they should be able to refuse services to same-sex couples if the business owner has religious objections to homosexuality.[17] More strikingly, only eighteen *percent* of the respondents expressed at least some sympathy for both .[18] As Professor Douglas Laycock pointed out, these two sides of Americans - rather than seek "liberty and justice for all"- are openly looking to crush each other.[19] Consequently, it is no wonder that the Masterpiece Cakeshop ruling was expected to be the most important of the Court term.[20] It also saw the direct intervention of the Department of Justice, who filed an amicus brief on behalf of Jack Phillips, among more than 100 amicus briefs filed on both sides. The Trump Administration

14 *Petition for Writ of* Certiorari, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 16-111 2017 WL 2722428, 22 July 2016.

15 See D. Laycock, *The Wedding-vendor Cases*, in *Harvard Journal of Law & Public Policy*, 41, 2017, pp. 49-58; see also S. Warmiel, *SCOTUS for Law Students: Splitting the Free Speech Community*, in *SCOTUSblog,* 8 December 2017.

16 See Pew Research Center, *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, 28 September 2016.

17 See Pew Research Center, *Where the Public Stands on Religious Liberty vs. Nondiscrimination*

18 See D. Laycock, *The Wedding-vendor Cases*, p 58.

19 See D. Laycock, *The Wedding-vendor Cases*, p 58

20 See M. Walsh, *A "View" from the Courtroom: Setting the Table for a Major Ruling*, in *SCOTUSblog*, 5 December 2017.

agreed with the baker that his cakes were a form of expression and that he could not be compelled to use his talents for something that was in contrast with his religious principles.[21] As Acting Solicitor General Jeffrey B. Wall wrote: "forcing Phillips to create expression for and participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights", and that "a custom wedding cake can be sufficiently artistic to qualify as pure speech, akin to a sculptural centerpiece.[22]"

From an historical perspective, federal and state legislation against private actors' discrimination has given rise to a number of significant constitutional issues. Notably, because anti-discrimination statutes regulate private conduct in public accommodations, they inevitably interfere with freedom of contract, one of the most revered liberties of Anglo-American legal culture.[23] This tension emerged during the Reconstruction Era when Congress enacted the Civil Rights Act of 1875, prohibiting racial discrimination in public accommodations (such as railroads, hotels, inns, theaters and places of public amusement) even if privately owned.[24] The legislation did not succeed in stopping discrimination practices by private actors, while numerous cases testing its application rose across the entire country. Ultimately, the Supreme Court held that the Civil Rights Act of 1875 was not constitutional under the Thirteenth and Fourteen-

21 As reported by R. Barnes, *In Major Supreme Court Case, Justice Dept. Sides with Baker who Refused to Make Wedding Cake for Gay Couple*, in *The Washington Post*, 7 September 2017.

22 US Supreme Court, *Brief for the United States as Amicus Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S., 2018.

23 According to Professor Epstein: "an antidiscrimination Law is the antithesis of freedom of contract" (R. A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Cambridge (MA), 1992, p. 3).

24 18 Stat. 335–337. The Civil Rights Act of 1875 provided: "Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by Law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude . . . Section 2. That any person who shall violate the foregoing section . . . shall . . . be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year".

th Amendments.[25] However, in the following decades, the importance of contractual freedom began to decline.[26] Other societal and economic interests were deemed more important than the traditional doctrine of freedom of contract, and Congress passed numerous laws that limited significantly the individual's right to contract freely.[27] Moreover, pressures to recognize and challenge contractual discrimination on the basis of race, color, religion, or national origin grew. Finally, after a long legislative battle, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964, prohibiting racial discrimination in places of public accommodation.[28] The constitutionality of this provision was immediately challenged. This time, the Supreme Court unanimously held that Congress had acted within its authority and upheld the law. In Heart of Atlanta Motel, Inc. v. United States case,[29] the Court ruled that the power of Congress to promote interstate commerce also included the power to enact the prohibitions on discrimination contained in the public accommodations section of the Civil Rights

25 US Supreme Court, Civil Rights Cases, 109 U.S. 3, 1883. For the Court, the recently enacted Amendments did not invest Congress with the power to legislate against private acts of racial discrimination. On the contrary, the Court held that the Fourteenth Amendment protected African Americans only from discrimination by State or its agents. As Justice Bradley observed: "it is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment". 109 U.S. 3-11. Following the Court's "*state action doctrine*", the scope of application of constitutional rights provisions is only limited "to vertical relationships between the government and private individuals, but not to horizontal relationships between or among private parties", see J. W. Singer – I. Saidel-Goley, *Things Invisible To See: State Action & Private Property*, in *Texas A&M Law Review*, 5, 2018, pp. 439-445. For a brief description of the history of state action doctrine, see R. Hemphill, *State Action and Civil Rights*, in *Mercer Law Review*, 23, 1972, p. 519; G. Donadio, *Modelli e questioni di diritto contrattuale antidiscriminatorio*, Torino, 2018, p. 8.

26 For an analysis of the common Law of contract in the late eighteenth and early nineteenth centuries see P. S. Atiyah, *The Rise & Fall of Freedom of Contract*, Oxford, 1979.

27 Antitrust legislation is a clear example of this paradigm shift. In fact, the Sherman and Clayton Acts "consisted of unprecedent restrictions on contractual freedom" by introducing anti-discrimination measures "involving the use of economic power and coercion". See K. L. Mccaw, *Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Antidiscrimination Provisions*, in *Seton Hall Const. Law Journal*, 7, 1996, pp.195-211.

28 Title II of the Civil Rights Act of 1964 provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities . . . and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin" 42 U.S.C. § 2000(a)-(h)6 (1964). In order to be a public accommodation under the Act, an establishment must affect commerce, or its discrimination must be supported by state action. The establishment must also fall within one of the following four categories: "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests,... (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, ... (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out asserving patrons of such covered establishment". 42 U.S.C. § 2000a(b).

29 US Supreme Court, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 1964.

Act of 1964.[30] In fact, discrimination policies had a disruptive effect on interstate commerce by significantly discouraging travel by African-Americans.[31] Thus, the Supreme Court decision allowed Congress to invoke its Commerce Clause powers to eradicate racial discrimination when it had an impact on interstate commerce. Moreover, after *Heart of Atlanta Motel, Inc. v. United States* ruling, it was clear that discriminatory exercises of freedom of contract could not be reconciled with the country's "spheres of allowable and tolerated activity.[32]" Nevertheless, discriminatory practices in public accommodations did not cease to exist, also targeting women, people with disabilities and homosexuals.[33] As hostility toward these forms of discrimination grew, numerous states adopted statutes to offer protection against discrimination on the basis of disability, marital status, sex and sexual orientation. However, the inclusion of sexual orientation as "protected class" has increased "the potential for conflict between state public accommodations laws and the First Amendment rights.[34]" Indeed, Jack Phillips is one of a growing number of bakers, florists, wedding planners, and the like who are challenging modern public accommodations laws by invoking their free speech and free exercise rights.[35]

4. The issue of whether the design and creation of a cake could be considered an expressive conduct - thus protected by the First Amendment - was central during the

30 In upholding the authority of Congress to prohibit racial discrimination by a motel used by interstate travelers, Justice Tom C. Clark argued that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce". 379 U.S. 241-258, 1964.

31 379 U.S. 241-253, 1964.

32 As James Buchanan notes: "the reconciliation of individual's desires to "*do their own things*" with the fact that they live together in society is accomplished largely by mutual agreement on spheres of allowable or tolerated activity". See J. M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*, Chicago, 1975, p. 20.

33 L. G. Lerman – A. K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, in *N.Y.U. Review of Law and Social Change*, 7, 1978, pp. 215-217.

34 As noted by the Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640-657, 2000.

35 See NM Supreme Court, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M.), 2013; *NY Supreme Court, Gifford v. McCarthy*, 23 N.Y.S.3d 422 (App. Div.), 2016; *Washington Supreme Court, State v. Arlene's Flowers*, Inc., 389 P.3d 543, 2017, petition for cert. filed, No. 17-108, 2017 WL 3126218 (U.S. 14 July 2017).

oral argument.[36] Attorney Kristen Waggoner, representing Mr Phillips, claimed that the cakes created by her client (described as "highly-sculpted" and "stylized") were entitled to protection in the same way that works of art are. Justice Sotomayor contended that the Court had never given such protection to any food, regardless of their aesthetic appeal. Moreover, as she added, its primary purpose is simply "to be eaten.[37]" What was fundamental for the Justice was to stress the importance of public accommodation laws in changing society's views on civil rights. Putting the issue in an historical perspective, she pointed out that America's reaction to mixed marriages and to race had not changed "on its own." "It changed," she said, "because we had public accommodation laws that forced people to do things that many claimed were against their expressive rights and against their religious rights." In this respect, she invoked the 1968 *Newman v. Piggie Park Enterprises*, *Inc. ruling*, addressing racial discrimination in public accommodations and First Amendment liberties.[38] In that case, a restaurant owner refused to serve black customers because it was "his belief as a Christian" that, in doing so, he would have contributed to racial intermixing and "contravened the will of God." Later, the owner was sued by some customers who were turned away because his refusal was considered a direct violation of Title II of the Civil Rights Act of 1964, which bars discrimination in public accommodations.[39] In his defense, he claimed that the instant action and the Act under which it was brought constituted State interference with the free practice of his religion, in absolute violation of The First Amendment. Both the lower courts and the Supreme Court rejected the constitutional challenge to the Civil Rights Act. In a unanimous opinion, the High Court found that the owner defenses were "patently frivolous" and his conduct was in plain violation of Title II. Newman v. Piggie Park Enterprises outcome helped establishing the principle that religious views do not trump civil rights, as clearly explained by the District Court: "free exercise of

36 The audio and the transcription of the oral argument are available at www.oyez.org/cases/2017/16-111. See also H. ALVARE, *Symposium: As a Matter of Marriage Law, Wedding Cake is Expressive Conduct*, in *SCOTUSblog*, 13 September 2017.

37 Justice Gorsuch noted that a wedding cake is also chosen for its artistic quality, rather than for mere consumption. "*In fact*," he said, "*I have yet to have a wedding cake that I would say tastes great*".

38 US Supreme Court, *Newman v. Piggie Park Enterprises*, Inc., 390 U.S. 400, 1968.

39 For an analysis of the similarities between the two cases see J. P. Schnapper-Casteras, *Déjà Vu "No Cake for You",* in *Harvard Law Review Blog*, 1 December 2017.

one's beliefs, ... as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society.[40]"

The holding in *Piggie Park*, that discrimination in public accommodations is not protected by The First Amendment, was reaffirmed in the majority opinion in *Masterpiece Cakeshop*.[41] As Justice Kennedy wrote in the beginning of the court's opinion: "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodation law".

Though the Court recognized that the Constitution and the laws must protect LGBT persons in the exercise of their civil rights, the majority ruled in favor of the baker. Justice Anthony Kennedy's majority opinion found the Civil Rights Commission's treatment of Phillips' case in violation of the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In particular, the bias against Mr. Phillips' belief was shown in the remarks of one commissioner, who stated: "freedom of religion and religion have been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust... we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use their religion to hurt others.[42]"

This sentiment was found totally inappropriate by the majority.[43] Citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Court stressed that Free Exercise Clau-

40 US Supreme Court, *Newman v. Piggie Park Enterprises*, Inc., 256 F. Supp. 941 (D.S.C.), 1966.

41 See S. Ifill, *Symposium: The First Amendment Protects Speech and Religion, Not Discrimination* in *Public Spaces*, in *SCOTUSblog*, 5 June 2018.

42 As also reported in the Petition for *Certiorari*, p. 42.

43 "To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways", Kennedy explained, "by describing it as despicable, and also by characterizing it as merely rhetoric … This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination Law-a Law that protects against discrimination on the basis of religion as well as sexual orientation".

se bars even "subtle departures from neutrality" on matters of religion.[44] Because the record did not show any objection from the other six members of the Commission, Justice Kennedy concluded that these statements casted doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Other evidence of hostility was found in the Civil Rights Division's different treatment in similar cases, involving other bakers who had declined to make cakes with "religious" messages.[45] In these cases, a Christian activist named William Jack filed complaints alleging religious discrimination, as three bakeries had refused to make a cake decorated with quotations from the Bible, such as "Homosexuality is a detestable sin. Leviticus 18:22." The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. Before the Colorado Court of Appeals, Phillips pointed out that the disparity in treatment with the other bakers reflected the anti-religious animus of the government. However, the Court of Appeals rejected this argument, holding that in the previous cases there was no impermissible discrimination because of the offensive nature of the requested message.

This argument was strongly criticized in Kennedy's Opinion. In his view, a principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. In this respect, the majority referred to its precedent decision West Virginia State Board of Education v. Barnette,[46] where the Supreme Court held that neither the State nor its officials can prescribe "what shall be orthodox in politics, nationalism, religion, or other matters of opinion.[47]" According to the majority, Phillips was denied the right to a neutral decision-maker, "who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided." Because of this, the rulings of the Commission and of the State Court that

44 US Supreme Court, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520-523, 1993.

45 See D. Rodriguez, *Symposium: The Masterpiece Ruling Calls for Increased Vigilance of Discrimination in the Marketplace*, in *SCOTUSblog*, 7 June 2018.

46 US Supreme Court, *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 1943.

47 US Supreme Court, *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624-642, 1943.

enforced the Commission's order "must be invalidated."

Nevertheless, the justices left open the possibility that similar cases could have a different outcome, particularly if no evidence of unconstitutional hostility shall be found.[48] "The outcome of cases like this," Kennedy wrote, "in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." Finally, the Court reversed the judgment of the Colorado Court of Appeals, therefore invalidating the rulings of the Colorado State Administrative Law judge and the Colorado Civil Rights Commission.

Thus, it is clear that the Masterpiece decision is based exclusively on the Free Exercise Clause;[49] the Supreme Court simply avoided addressing the core issue of whether religious objectors to same-sex marriage could be exempted from laws prohibiting discrimination against same-sex couples. Moreover, the High Court is likely to sidestep such an issue for a while.

In fact, shortly after rendering the decision in the Colorado case, the Court granted the petition for a writ of certiorari in another similar wedding-vendor case brought to its attention, *Arlene's Flowers, Inc. v. Washington*, concerning a florist who declined to provide her services - original flower arrangements - to a same-sex couple for their wedding.[50] The justices remanded the case to the Supreme Court of Washington, which unanimously ruled against the florist, for further consideration in light of the *Masterpiece Cakeshop* decision.

48 See A. Howe, *Opinion Analysis: Court Rules (Narrowly) for Baker in Same-sex-wedding-cake Case*, in *SCOTUSblog*, 4 June 2018.

49 See D. Laycock – T. Berg, *Symposium: Masterpiece Cakeshop - Not as Narrow as May First Appear*, in *SCOTUSblog*, 5 June 2018.

50 See A. Howe, *Court Sends Battles over Services for Same-sex Couples, North Carolina Gerrymandering Back to Lower Courts*, in *SCOTUSblog*, 25 June 2018.

5. In reality, *Masterpiece Cakeshop* is far from being a narrow ruling, confined to the unique facts of the case.[51] And it will certainly set a precedent for the growing number of disputes against businesses that, in response to the legalization of same-sex marriage in *Obergefell v. Hodges*, are demanding exemptions from public accommodation laws that prohibit sexual orientation discrimination.[52] This trend has been fueled by the Court itself. In cases like *Burwell v. Hobby Lobby Stores, Inc*.,[53] it substantially extended to for-profit corporations the possibility to claim religious exemption from a federal statute, specifically the contraceptive mandate of the Affordable Care Act[54]. After this landmark decision, religious exemption has been frequently invoked to justify the refusal to serve LGBT people.[55] In all the abovementioned cases, the same notion of religious freedom is very far from its traditional meaning. It is indeed presented as a "right to discriminate and impose a conservative social order in the name of religion.[56]"

A right, essentially, to express his own bigotry without considering the humiliation, frustration and embarrassment inflicted to a person "when he is told that he is unacceptable as a member of the public.[57]" The Masterpiece ruling has even entitled religious motivated bigotry to gain immunity from "even being called as bigotry at all.[58]" Indeed, the Court found "the smoking gun" that proved hostility to Phillips' faith in a simple statement, from only one of the seven members of the Commission. This position is quite puzzling for several reasons. As Justice Ginsburg pointed out in her dissenting opinion, there was no concrete reason why the comments of one or two

51 As argued by E. Clark, *Symposium: And the Winner Is… Pluralism?*, in S*COTUSblog*, 6 June 2018, available at www.scotusblog.com/2018/06/symposium-and-the-winner-is-pluralism; D. Rodriguez, *Symposium: The Masterpiece Ruling Calls for Increased Vigilance of Discrimination in the Marketplace*, in *SCOTUSblog*, 7 June 2018.

52 G. Donadio, *Modelli e questioni di diritto contrattuale antidiscriminatorio*, p. 89.

53 US Supreme Court, *Burwell v. Hobby Lobby Store*s, Inc., 134 S.Ct. 2751, 2014.

54 See K. Russell, *Analysis: Hobby Lobby and Claims for Religious Exemptions from Anti-discrimination Laws?*, in *SCOTUSblog*, 30 June 2014.

55 See A. K. Hersh, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws since Obergefell*, in *Stanford Law Review*, 70, 2018, pp. 265-269; G. Donadio, *Modelli e questioni di diritto contrattuale*, p. 89.

56 P. Miller, *Religious Freedom Advocates Warn of "Theocratic Zones of Control", in Religion Dispatches*, 13 June 2016, available at www.religiondispatches.org/religious-freedom-advocates-warn-of-theocratic-zones-of-control; T. R. Day – D. Weatherby, *Contemplating Masterpiece Cakeshop*, in *Washington & Lee Law Review Online*, 74, 2017-2018, pp. 86-99.

57 US Supreme Court, *Heart of Atlanta Motel, Inc. v. United States, (Goldberg, J. Concurring)*, 379 U.S. 241-292, 1964 (quoting S. REP. No. 88-872, §16).

58 N. Zatz, *Masterpiece Cakeshop and the Constitutionalization of "Both Sides"-ism*.

Commissioners should have been taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. In fact, the proceedings involved several layers of independent decision making (the Civil Rights Division, the Commission, the Administrative Law judge and the Colorado Court of Appeals) of which the Commission was but one. Moreover, the declarative portion of these "hateful" assertions is simply true. In the entire human history, religion has often been used to justify vile acts and horrible crimes. And these statements were not aimed at Mr. Phillips own faith, but rather they constituted part of a broader reflection on religion in general. A further controversial aspect of the decision is the Court's view that Craig and Mullins' case is comparable to Jack's case.[59] In contrast to Jack - who requested special cakes decorated with biblical curses against homosexuality - , Craig and Mullins were simply looking for a wedding cake: they mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold. As Professor Noah Zatz rightly noted, the Supreme Court's ruling - rather than being narrow - has created a new standard: hostility to anti-gay sentiments is treated as the equivalent of anti-religious hostility.[60]

Masterpiece Cakeshop is not only a missed opportunity to bolster the protection against discrimination of LGBT people in public accommodations. Some considerations in Justice Thomas' concurring opinion suggest that, in the following years, the protection of anti-discrimination laws could be further weakened by an avalanche of religious exemptions. "The First Amendment gives individuals the right to disagree about the correctness of Obergefell and the morality of same-sex marriage," stated Thomas (joined by Gorsuch). "If Phillips' continued adherence to that understanding makes him a minority after Obergefell, that is all the more reason to insist that his speech be protected." For Thomas, the fact that homosexuality is embraced and advocated by increasing numbers of people is an even more compelling reason to give First Amendment protection to those "who wish to voice a different view." He then concluded with a reassurance to every Mr. Phillips of America (or, depending on the point of view, a

59 See D. Rodriguez, *Symposium: The Masterpiece Ruling Calls for Increased Vigilance of Discrimination in the Marketplace*.

60 See N. Zatz, *Masterpiece Cakeshop and the Constitutionalization of "Both Sides"-ism*.

menace for the LGBT Americans who are going to exchange vows): "in future cases, the freedom of speech could be essential to preventing Obergefell from being used to "stamp out every vestige of dissent" and vilify Americans who are unwilling to assent to the new orthodoxy.[61]"

Thomas's opinion goes beyond merely allowing people to discriminate in public accommodations, when it is religiously based.

Rather, it opens up to the possibility of using the First Amendment as a weapon against Obergefell itself, undermining marriage equality in a devious manner. And it is highly possible that his position would prevail in the near future with the support of a very influential and powerful ally: the Trump Administration. Former Attorney General Jeff Sessions recently announced the creation of a "Religious Liberty Task Force", whose objective is to implement and enforce the religious liberty guidance issued in the 2017.[62] The guidelines for executive agencies include ensuring the "government may not target religious individuals or entities through discriminatory enforcement of neutral, generally applicable laws," with a clear reference to the political impact of Jack Phillips's case. More importantly, after the announcement that moderate "swing" Justice Anthony Kennedy is to retire, President Trump had the historic opportunity to recast the Court in a more conservative posture, with a significant and decades-long effect on the definition of religious freedom in America.

After *Obergefell*, many announced the end of the "culture wars." Gay marriage legalization was deemed as the final blow to the predominance of religion in American society, a crashing and total defeat for conservative Christians.[63] However, *Obergefell* remains a Fourteenth Amendment case.

It operates only against the government and its agents. Thus, the right to civil marriage, to "equal dignity in the eyes of the law," does not apply to private actors[64].

61 Citing Justice Alito's dissenting opinion in *Obergefell*.

62 Administration of Donald J. Trump, 2017 Executive Order 13798-Promoting Free Speech and Religious Liberty Daily Compilation of Presidential Documents 1-2.

63 See, e.g., R. Dreher, *The Benedict Option. A Strategy for Conservative Christians in a Post-Christian Nation*, New York, 2017.

64 See C. H. Esbeck, *A Post-Obergefell America: Is a Season of Legal and Social Strife Inevitable*, in *The Christian Lawyer*, 11, 2015, pp. 3-5.

Moreover, there is no federal law that protects LGBT people.[65] While some States have chosen to implement marriage equality including "sexual orientation" as a protected class, the invigorate resistance of religious objectors - supported by the federal government - could seriously undermine the effectiveness of anti-discrimination acts.

A group of scholars has tried to offer a solution, attempting to reconcile religious liberty in the context of changes in the law of marriage.[66]

They argue that small businesses that sell goods and services should be exempt from the obligation to supply them to same sex weddings, unless the denial would cause substantial hardship.[67] Following this model, a local monopolist cannot be permitted to invoke religious freedom to deny same-sex couples or anyone else access to the market.[68] Nevertheless, this compromise solution leaves out the core aspect of the deprivation of personal dignity that accompanies discrimination.[69] After all, the *Masterpiece* case implicated much more than wedding cakes. It was about the "stigmatizing injury,[70]" the "feeling of inferiority,[71]" the humiliation, frustration, and embarrassment resulting from discrimination.

65 As pointed out by J. G. Culhane, *The Right to Say, but Not to Do: Balancing First Amendment Freedom of Expression with the Anti-Discrimination Imperative*, in *Widener Law Review*, 24, 2018, pp. 235-247.

66 See D. Laycock, *The Wedding-vendor Cases*, p. 65.

67 See I. C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, in *Alabama Civil Rights & Civil Liberties Law Review*, 7, 2015, pp. 1-55.

68 D. Laycock, *The Wedding-vendor Cases*, p. 66.

69 G. Donadio, *Modelli e questioni di diritto contrattuale antidiscriminatorio*, p. 93.

70 US Supreme Court, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-628, 1984.

71 US Supreme Court, *Brown v. Board of Education of Topeka*, 347 U.S. 483-494, 1954.

VIVIANA SACHETTI*

THE DESTRUCTION OF CULTURAL PROPERTIES AS A WAR CRIME: SOME CRITICAL REMARKS ON THE ICC'S AL MAHDI CASE

In its rather short life since its establishment - 2018 marking the 20th anniversary of the adoption of its founding treaty - the International Criminal Court (hereinafter: ICC) has had the chance to trial and convict, for the time being, just three people. However limited its action might appear considering only its final results, all its delivered convictions have raised a number of important questions, appearing to already establish some issues for the ICC's future jurisprudence.

This is also the case of its latest judgment in *The Prosecutor v Ahmad Al Faqi Al Mahdi* case (hereinafter: *Al Mahdi* case): following the equally controversial *Lubanga* (2012) and *Katanga* (2014) cases, Al Mahdi's conviction is certainly set to open discussion on some unprecedented and fundamental matters, as follows.

On 27 September 2016, Trial Chamber VIII found Mr Al Mahdi guilty of the war crime punished under Art. 8(2)(e)(iv) ICC Statute as a co-perpetrator in the conducts that took place in Timbuktu (Mali), between June and July 2012, which ultimately led to the destruction of ten historic monuments and buildings dedicated to religion, nine of which were listed as UNESCO protected cultural-heritage sites. Furthermore, a reparation order was issued on 17 August 2017, which became final on 8 March 2018, when confirmed in the appeal judgment raised by the Legal Representative of the Victims; such order is currently undergoing its implementation through a plan for reparations, which is still in the drafting stage.

The situation in Mali, referred to the Office of the Prosecutor (hereinafter:

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OTP) by the Government itself, pursuant to Art. 13(a) ICC Statute, was investigated starting January 2013, and benefitted since its earliest stages from the full cooperation and disclosure of the events by Mr Al Mahdi, who was later arrested on 26 September 2015. Moreover, in an unprecedented submission before the ICC, Mr Al Mahdi reached a plea agreement with the OTP and subsequently took full responsibility for his actions and made an admission of guilt at the trial's opening, thus prompting an almost instantaneous verdict by the Chamber, which sentenced him to nine years of imprisonment.

As for the reparations order, the ICC assessed Mr Al Mahdi's liability as amounting to 2.7 million euros for the reparations owned to the Timbuktu community.

Mr Al Mahdi, regarded as an expert of Islam and of the Koran, joined the Ansar Dine group in April 2012. Such a group has been considered by the U.N. as a local Islamic terrorist organization since 2013 and has taken a significant role in the undisputed non-international armed conflict that has spread throughout the whole country starting in January 2012.

The defendant has been charged with the war crime of attacking protected objects, as punished by Art. 8(2)(e)(iv) ICC Statute, which considers the intentional attacks directed against, *inter alia*, religious buildings and historical monuments, "provided that they are not military objectives".

This crime was jointly considered by Mr Al Mahdi and the OTP as a more adequate characterization than the one set forth in the more general crime sanctioned under Art. 8(2)(e)(xii) ICC Statute, particularly regarding the *mens rea* element.

When considering the circumstances of the present case, special relevance shall be accorded to Art. 16 of the 1977 Additional Protocol II to the 1949 Geneva Conventions, applicable to non-international armed conflicts, which poses a general prohibition of committing hostilities against cultural objects and places of worship "which constitute the cultural or spiritual heritage of peoples". Nine of the ten buildings destroyed with the participation of Mr Al Mahdi had been listed as UNESCO protected, thus triggering their protection as cultural properties under Art. 16. For the tenth building, a mausoleum that was not a UNESCO-listed property, the issue should have arisen as to its qualification for safeguarding, because its destruction is not therefore necessarily deemed by the ICC as inherently of "particular gravity," thus constituting a war crime.

However, it must be noted that the Trial Chamber's decision provided no explanation of any kind as to why it ruled that even the destruction of this unlisted mausoleum was a war crime. An exhaustive definition of objects that require special protection is however provided by the Second Protocol to the 1954 Hague Convention

for the Protection of Cultural Property in the Event of Armed Conflict, on which the Chamber appears to rely entirely. Particular notice shall be given to the Chamber's interpretation of the contextual element established by Art. 8(2)(e) ICC Statute of an armed conflict of non-international character. Indeed, the ICC, without contemplating any further examination nor considering any jurisprudence of the ad hoc international criminal tribunals, satisfies itself by regarding the conduct punished under Art. 8(2)(e)(iv) ICC Statute as self-sufficient, notwithstanding "a link to any particular hostilities but only an association with the non-international armed conflict more generally". While such a characterization is not to be rejected per se, it is certainly unsettling to find a criminal court relying on a self-explanatory definition and employ locutions such as "more generally" to describe the contextualisation of the conducts.

The already mentioned unprecedented application of Art. 65 ICC Statute, and the subsequent proceedings founded on an admission of guilt, wisely led the Chamber to an exhaustive explanation as to the rationale behind such institution, with adequate weight given both to the Statute's travaux préparatoires and to a comparison between Civil and Common Law legal systems on such matter.

No such clarity pertains however to the *in concreto* considerations therefrom provided by the Trial Chamber. Art. 65(1)(c) ICC Statute requires any admission of guilt to be "supported by the facts of the case": such an element is indisputably present in the Al Mahdi case, as underlined by the Chamber itself. In considering, the ICC affirms that in the present case there were "no viable affirmative defences": this assertion constitutes quite a puzzling reflection, as the defendant, while entering an admission of guilt, waived his right to "raise defences and grounds for excluding criminal responsibility, and to present admissible evidence at a full trial".

Furthermore, and in light of said requirement posed by Art. 65(1)(c) ICC Statute, wich appears to demand that the facts of the case to support the entirety of the defendant's admission, it is yet again bewildering to have a criminal court affirm that "[t]he Chamber has been able to independently corroborate almost all of Mr Al Mahdi's account with the evidence before the Chamber, *strongly indicating* that the entire account is true" (emphasis added).

As for the punishment handed to Mr Al Mahdi, the Trial Chambers first recognizes how the Statute's Preamble "establishes retribution and deterrence as the primary

objectives of punishment at the ICC", affirming then vehemently how "reintegration into society […], in particular in the case of international criminal law, […] cannot be considered to be primordial and should therefore not be given any undue weight". It is quite difficult not to argue that such approach is, indeed, primordial, as the educational purpose of criminal penalties is recognized worldwide by courts of law and constitutions.

The Chamber's line of thought becomes even more confusing as it admits Mr Al Mahdi's attitude as "likely to successfully reintegrate into society", accordingly considering such a circumstance as mitigating for the final decision upon his punishment.

Furthermore, the Chamber considers Mr Al Mahdi's initial reluctance to destroy the historic and religious sites to be a mitigating circumstance "of some relevance", as he reportedly affirmed that "it would be preferable not to destroy the mausoleums so as to preserve good relations with the population of Timbuktu". However, the Chamber itself recognizes that the defendant "fully endorsed" the attack and was "fully implicated in [its] execution". This certainly raises some perplexity as to the ICC's reasoning: indeed, Mr Al Mahdi admittedly overcame his initial hesitation, thus demonstrating the strongest intention of carrying out the incriminated conduct. Such firm resolve, developed in a rather short time, is hardly congruous with the rationale behind the application of mitigating circumstances.

The *Al Mahdi* case may prove to be a landmark decision as for a number of issues unprecedented in the ICC's jurisprudence, regarding both the crime sanctioned by the Trial Chamber and the relevance of an admission of guilt by a fully cooperative defendant.

As to the crime, it is simple to imagine for instance that, should the situation of the Syrian Civil War ever be referred to the Court by the United Nations Security Council, the ICC could certainly apply the reasoning behind the *Al Mahdi* decision in trying those responsible for the well-known destruction of UNESCO sites occurred therein. Nevertheless, some perplexities and uncertainties that the Trial Chamber generated shall necessarily find a solution in the near future, by considering in particular those general principles of criminal law to which the ICC is bound.

ELISABETTA TATI*

WHO SHALL ADMINISTER THE NATIONAL CAPITAL TERRITORY OF DELHI? THE INDIAN SUPREME COURT AFFIRMS A PRINCIPLE OF COLLABORATION BETWEEN THE FEDERAL AND THE "LOCAL" GOVERNMENT FOR THE CITY MANAGEMENT

ABSTRACT: *The Indian Supreme Court has put an end to the long-running political battle over who should have more power to administer Delhi, between the central government, in the person of the Lieutenant Governor Anil Baijal, and the Delhi's local one, represented by Arvind Kejriwal as the Chief of the Coucil of Ministers. Since the local Aam Aadmi Party has won the elections, it has struggled to govern, especially because of the 2016 Delhi High Court's judgment according to which the "Lieutenant Governor is boss of administration in Delhi". In its final decision, the five-judge constitutional bench affirms a principle of collaboration between the two levels of government. As written in the conclusion of the Court, the Lieutenant Governor and the Chief of the Council of Ministers are a "team" or a "pair on a bicycle" that share collective responsibility for the city management.*

The Indian Supreme Court has put an end to the long-running political battle over who should have more power to administer Delhi, between the central government, in the person of the Lieutenant Governor Anil Baijal, and the Delhi's local one, represented by Arvind Kejriwal as the Chief of the Council of ministers. Since the local Aam Aadmi Party has won the elections, it has struggled to govern, especially because of the 2016 Delhi High Court's judgment according to which the "Lieutenant Governor is

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boss of administration in Delhi.[1]"

The present case, *Government of NCT of Delhi v. Reportable Union of India & Another* (4 July 2018),[2] has been decided by the Supreme Court, acting as the highest Appellate Court in civil and criminal issues ("appellate jurisdiction"). At the same time, in the header of the concurring opinion issued by judge D. Y. Chandrachud, it is written that the case also falls within the "original jurisdiction" for disputes between the Government of India and the States, in this case a special Union territory (p. 238: "In the Supreme Court of India civil/criminal appellate/original jurisdiction"). In fact, when the Civil Appeals were heard, a Bench consisting of Justice A. K. Sikri and Justice R. K. Agrawal, in an order dated 15 February 2017, was of the opinion that the appeals should be heard by a Constitutional Bench, since it dealt with a substantial legal question about the interpretation of Article 239AA of the Constitution. This double jurisdiction is possible because the Supreme Court of India, in addition to acting as the guardian of the Constitution in the guise of a Federal Court, it also exercises appellate and advisory powers - arts. 124 et seq., Const.[3]

In its final decision, the five-judge constitutional bench affirms a principle of collaboration between the two levels of government. As written in the conclusion of the Court, the Lieutenant Governor and the Chief of the Council of Ministers are a "team" or a "pair on a bicycle" who share collective responsibility for the city management (p. 200). Looking at the facts, many questions arise, in particular: why is there a Lieutenant Governor who represents the central government in a city, given that India is a Federal State? Which is the legal nature of the National Capital Territory of Delhi?

The organization of the Indian Territory is peculiar: there are twenty-nine States (as in a normal Federation) and seven Union territories. The former each have a Parliament, a Council of Ministers and a Prime Minister. They each also have a Governor, who acts as a Secretary of the Indian President, and exercises his powers "only upon and in accordance" with the advice of Ministers, except in a few well-known situations (arts. 74 and 163, Const.). The latter are a type of administrative division, ruled directly by the central government (Art. 239, Const.). In fact, an Administrator governs them. He is not bound to act according to the advice of the Council of Ministers (Sec. 44, Union Terri-

1 D. Mahapatra, *Relief for AAP: Supreme Court Says Delhi Lieutenant Governor Can't Act Independently,* in *The Times of India*, 4 July 2018.

2 Supreme Court of India, *Government of NCT of Delhi v. Reportable Union of India & Another*, No. 2357/2017, 4 July 2018.

3 See K. Rana, *Jurisdiction of Supreme Court of India*, in *Important India*, July 2018. See also M. Rosenfeld – S. Sajó, *The Oxford Handbook of Comparative Constitutional Law, Oxford, 2012, passim, for a general overview on Constitutional jurisdiction traditions in common Law countries*.

tories Act, 1963). At the moment, there are three kind of Union territories: the regular ones, the Union territory of Puducherry and the sui generis National Capital Territory of Delhi (respectively arts. 239, 239A and 239 AA, Const.). Only the last two territories have their own local Parliaments, which are directly elected. The National Capital Territory of Delhi has been a special Union territory since 1991, when article 239AA was introduced in the Constitution. In the city, the local government is the expression of the Legislative Assembly. However, a form of "administrator" has been maintained, in the role of the Lieutenant Governor. Because of this national hybrid institutional structure, the Supreme Court recalls, in the decision at hand, that the Indian form of government is one of "quasi-federalism" or a "weak federalism" (the expression "quasi-federalism" can be found originally in the sentence *Shamsher Singh v. State of Punjab*, in 1974). Indeed, the "Union territory" entity was not present in the Charter at the beginning, but was incorporated only afterwards, in 1956, by the Seventh Amendment Act.

First, to solve the issue as to who has the power to administer Delhi, it is worth examining whether the city is still a Union territory or if its "special status" confers on it a semi-statehood that would justify an exception to top-down control by the federal government. In the words of the Supreme Court: "whether the inhabitants or voters of National Capital Territory of Delhi remain [de facto] where they were prior to the [recognition of the] special status [that] instils prana into the cells" (pp. 3-4).

The appellant (the chief of the Council of Ministers) claims that, after 1991, the status of the voters of the National Capital Territory of Delhi changed the principle of representativeness from a notional to a real one. Consequently, the High Court's decision has suffocated the true soul of the provision. "Thus, article 239AA, in the case of Delhi, whittled down the executive power of the centre to only three reserved subjects falling outside the […] executive power of the [chief of the Council of Ministers]" (p. 31).

The respondent (the Lieutenant Governor) affirms that, notwithstanding the special status, the National Capital Territory of Delhi has not acquired any statehood. It is still a Union territory, where a literal and true interpretation of the relevant constitutional articles is sufficient, considering also the suggestions made by the Balakrishnan Committee during the preparatory works for the introduction of art. 239 AA in the Constitution (1991). On these premises, the power of the National Capital Territory

of Delhi's Legislative Assembly is, according to article 239AA-3, "special and partial". In fact, nowhere in the Constitution has it been stipulated that the executive power of a Union territory vests in the Council of Ministers and/or in the Legislative Assembly. Article 239AA-4, in addition, employs the phrase "Lieutenant Governor and his Ministers", which implies that the Lieutenant Governor, and not the Chief of the Council of Ministers, is responsible for the administration of the Union territory. The result is that, even if there is a directly elected Legislative Assembly, there is not necessarily a parallelism between legislative and executive-administrative federalism (p. 40).

Based on the differences in the arguments on these points the Supreme Court analyzed whether if the role and powers of the Lieutenant Governor were more similar to those of a Governor of a State (following the *Shamsher Singh* case) or to those of a Union territory's Administrator (following the Deuji Vallabhbhai and others case). It concluded that, because the Lieutenant Governor is bound by the "aid and advice" of the Chief of the Council of Ministers, his role is more similar to that of a Governor of a State. However, the National Capital Territory of Delhi, (page 157): "is a class by itself but is certainly not a State" (in the sense of Part VI, Const.).

Secondly, it is necessary to focus on the interpretation of the words "aid and advice", referring to the duty of Delhi's Chief of the Council of Ministers to report to the Lieutenant Governor for matters in the competences of the local Legislative Assembly. Is there the possibility for the Lieutenant Governor, on behalf of the Indian President, to interfere in "any matters" on which there are differences of opinions between the Lieutenant Governor himself and the Chief of the Council of Ministers (Art. 239AA-4)? The answers to these further questions depend on which kind of executive power the Lieutenant Governor can exercise with respect to the Chief of the Council of Ministers' activity. The Supreme Court sheds light on the issue in the following way, (pages 168 169): "sixty-ninth Amendment wanted to establish a democratic setup and representative form of government. [This effort] turns futile if the Government of Delhi is not able to usher in policies and laws." According to a purposive interpretation, article 239AA-4 stipulates a Westminster style cabinet for the National Capital Territory of Delhi, thus, (page 178): "It can be very well said that the executive power of the Union [the Lieutenant Governor] in respect of the National Capital Territory of Delhi is confined to the three matters in the State List", that are considered as exceptions (police, public order

and land). Such an interpretation would thwart any attempt on the part of the Lieutenant Governor to seize all control, and allow the concept of pragmatic federalism and federal balance to prevail by giving the National Capital Territory of Delhi some degree of independence. However, it can not be denied that the words "any matters" indicate, in case of differences of opinions between the Lieutenant Governor and the Chief of the Council of Ministers, that the former has the power to refer to the Indian President on all matters and not only on those three exceptions that derive from articles 239AA-3 and 4. Notwithstanding the incontrovertible literal sense, this "does not mean that the Lieutenant Governor should raise an issue in every matter" (p. 188). The power of the Lieutenant Governor, to replace with his own decisions those of the Chief of Ministers, is a special one and it must be an exception to the general rule. The Chief of the Council of Ministers, on his part, has the duty to inform the Lieutenant Governor about all the agendas proposal and decisions so as to keep the latter apprised and to enable him to scrutinize the activity of the former. According to the judgement, the Business of the Government National Capital Territory of Delhi Act (1993) already contains detailed instruments to adopt mutual cooperation (rules 9, 10, 11, 14, 23, 25, 42, 49 and 50).

The Supreme Court itself recognizes that carrying out the above-proposed solution would give rise to new conflicts: "[…] that apart, when we take a broader view, we are also alive to the consequence of such an interpretation" (p. 190). However, the choice in favour of equilibrium in interests and principles through the institutional dialogue is not necessarily, a bad path. It allows clarifying the point, on the one hand, with a flashback to the Indian constitutional history, and on the other hand, by presenting the complex structure of a capital city.

On the basis of a holistic, pragmatic and purposive interpretation of the Fundamental Law, three judges explained their decision starting from the clarification of the following fundamental concepts: "representative governance", "constitutional morality", "constitutional objectivity", "legitimate constitutional trust", "collective responsibility", "federal functionalism", and "collaborative" and "pragmatic federalism". However, also the other two judges, of the five that have constituted the bench for this case, have adopted a similar method in their concurring opinions. Then, as a long preamble to the decision, the Supreme Court offers a paternalistic argumentation on

the universal value of the Constitution. It employs words such as "vital force", "sanctity of objectivity", "sacrosanctity of democracy", "solemn idea of decentralization", "spirit of the Constitution", "constitutional ethos", etc. The style of the long digression is not purely mystique but is also characterized by references to the fathers of Western political and juridical doctrines (Main, Jefferson, Locke, Montesquieu, Dicey) and to the activities of other Supreme Courts (such as the US, Canadian and Israeli ones). Why is this long part of the judgment so important? The Indian Constitution has represented the point of balance within the complex ant-colonialist movement, between the instances of nationalists (any "form" of government as long as independence is maintained) and the necessity of that part of public opinion to properly represent all religious groups (a new progressive legal order that reflects society). Because of the conflictive social system, the Constitution has been the solution to all these different positions, "imposing every constitutional act as an affirmation of juridical truth that reduces the spaces of politics.[4]" This probably explains why the Indian Constitution, with its 450 articles and numerous special provisions, is the longest in the world. However, in the present case, the traditional "constitutional ethos", instead of creating a strictly legal interpretation, is used in order to give space to negotiation and political action.

They are, precisely, the negotiation and the political action that find a favourable ground in a (global and capital) city where the incompleteness of the constitutional structure, in terms of "weak federalism", enters into a particular tension. A capital city, in fact, lives the relationship between local (the city as an autonomous political entity) and central interests (the city as an administrative unit, dependent on the central government) intensely. At the same time, its special status makes the coexistence between the federal and the unitary impulses even more problematic. The special status depends on the fact that the National Capital Territory of Delhi hosts the capital city and it is in itself a special global prototype: a megalopolis, the second in the world after Tokyo in terms of population and density.[5] The starting point is the kind of urbanization that

4 Personal translation from G. Grappi, *Stato e costituzionalismo (post)coloniali in India. Differenze e attraversamenti*, in *Scienza e politica*, XXV:48, 2013, pp. 53-73).

5 World Economic Forum, *These Will Be the World's 10 Biggest Cities in 2030*, 28 June 2017; see also Un Department Of Economic And Social Affairs, Population Division, *The World's Cities in 2016*.

is, in this case, truly widespread. The urban area of Delhi hosts 46 million of people.[6] It does not represent the administrative border but the functional unit as the sum of the territory included in the National capital region and other several districts from other Border States. To have a complete picture of the urban reality, it is important to think in terms of concentric circles. Under the National capital region, there is the National Capital Territory of Delhi with its 16 million people.[7] Below this level, there are eleven districts, among which there is also New Delhi which is both the capital city of India and of the National Capital Territory of Delhi. At this level, the population approaches the local European standards and New Delhi is around 250,000 people.[8] Indeed, the "district" is not the most appropriate term to describe it considering that it normally indicates the "rural" local units above the village and the block levels (seventy-third Amendment, Panchajati Raj Act, 1992). In the urban context the right labels for the local units are those of "municipal corporations" for areas with more than one million people; "municipal councils", for those more than 100,000, and nagar panchayati for areas in transition from rural to urban. The National Capital Territory of Delhi originally had a municipal corporation that covered eight districts, providing services for 11 million people.[9] It has been recently divided into three new local authorities for North, South and East and they can be considered as metropolitan institutions. Moreover, there are the New Delhi Municipal council, specific for the sole "district" of New Delhi, and another special authority known as Delhi Cantonment Board. Because of this complex situation, the National Capital Territory of Delhi's semi-statehood and the *ratio* of the Union-territory system are strangely overlapping with each other, to say: is Delhi an independent State? Or is it merely a decentralized authority (as an internal articulation of the federal State)? Or, even, is it a local self-government?

In conclusion, with these historical and demographic elements in mind, some of the words of the judges become clearer. In particular, the reference to a "principle of

6 National Capital Region Planning Board, Ministry Of Urban Development, Government Of India, *Annual Report 2014-2015.*

7 National Capital Territory of Delhi's population available at www.citypopulation.de/India-Delhi.html?cityid=2925

8 New Delhi's population available at www.citypopulation.de/php/india-delhi.php

9 Municipal Corporation of Delhi's population in 2011, available at www.census2011.co.in/census/state/delhi.html and www.censusindia.gov.in/2011-prov-results/paper2/data_files/India2/Table_2_PR_Cities_1Lakh_and_Above.pdf.

constitutional governance" in the meaning of the "fiduciary nature of public power and the system of checks and balance" or, in a negative form, of a "principle of non-obstinacy" of the centre towards the local government, in favour of a welfare administration (p. 58 and what has been called here: a "principle of collaboration") makes much more sense. Therefore makes much more sense, the judgment can be considered not only a signal of a more mature democracy but, also, of an improvement in the National federal structure. The latter consequence is evident even just by considering the reference the Court makes to the enumerated powers of the local Legislative Assembly in article 239AA-3 and 4, with the aim to clarify the demarcation of competences between the centre and the periphery or, otherwise, between the federal government and the "quasi-State" of Delhi.

MARIA STELLA BONOMI*

INTERVIEW WITH PROFESSOR JEAN-BERNARD AUBY**

Professor Auby, on the occasion of your lectures at Roma Tre University, I would like to ask you a few questions concerning some issues of administrative law in France and how it compares with other European legal systems, including the one in Italy.

1. According to the new Code des relations entre le public et l'administration, what are the current problems that France shares with other legal systems such as the Italian one?

I would say there are six main problems shared by the French and Italian legal systems.

The first is about the consequences of administrative inactivity and there are three

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different main solutions in the various European legal systems. In most systems, this inactivity triggers some kind of public administration liability; in other cases, such as Italy and France, it implies tacit agreement; in other systems, silence means the citizen can get the judge to force the public administration to fulfil its administrative duty (e.g., mandamus in the UK and Germany). The second shared problem consists of the so-called multi-layered proceedings that require the actions of the various administrations involved in the same proceedings to be coordinated. The different legal systems provide for two kinds of solution: some have formal consultation mechanisms: such as the conferenza di servizi, in Italy. Others rather trust in tacit agreement mechanisms in the case of inactivity from the authorities in question: this is the case of the French one. The third problem is how administrative appeals are governed, which is somewhat different in the various systems. In France, these appeals are traditionally fairly informal, while in the UK they are always more similar to judicial appeals (and in Germany most precisely regulated in the Administrative Procedure Code). The fourth category of problems common to all systems are those related to the digitalization of public administration. Computerizing procedures necessitate at least solving problems associated with using and regulating electronic instruments, data protection and automatic decisions based on algorithms. The fifth shared problem is the need to implement and continually fine-tune the ways in which citizens take part in administrative decisions. Above all, this concerns third-party opposition to unfavorable rulings, town planning, public works and regulatory acts. The last major problem is the classic one of access to administrative documents. Nowadays, all the legal systems comply with some kind of Freedom of Information Act (FOIA); the primary issue becomes the re-use of public data.

2. What are the main changes introduced by the new French Code, and what are the main differences with the Italian law on administrative proceedings?

The new French Code adopted in 2016 is essentially pragmatic, with few proclamations of principle and widespread absorption of case law. It was followed by a few important rulings clarifying the relationship between the Code and specific laws, as well as by additional laws on some of the problems we talked about earlier, such as access.

The main difference between the French and Italian systems is the significance attributed to the administrative proceedings. French administrative law focuses more on the individual administrative act. There are several rules common to both systems, such as annulment of the act for violation of procedural rules and administrative silence. Having said that, the Italian system is more complex when it comes to admini-

strative inactivity insofar as it makes provision for different forms of silence and, above all, different procedural mechanisms which can be activated depending on the type of silence in question. One of the main differences is definitely the obligation to state reasons for the administrative measure. In France, this obligation applies only to unfavorable or exceptional (special) acts, whereas in Italy, it applies to any measure excluding legislative and regulatory acts. With regard to the participation of citizens, the French system contains measures enabling citizens to be consulted via public debate or online. A further significant difference between the two systems concerns the rules governing revocation and annulment following an internal review process.

3. Regarding the stability of rights vested by administrative acts, what are the main differences between the various European legal systems in terms of rules and instruments for the protection of individuals?

The power of the public administration to amend and influence existing administrative acts is governed by various principles, including: administrative efficiency, changeability, legality, and autotutela (self-protection) in Italy and Spain. At the same time, the amendment power applicable to administrative acts is restricted by the principles of legal certainty, legitimate expectations, obligation to protect acquired rights and non-retroactivity.

The power to influence existing acts is governed differently from a conceptual perspective by the various legal systems. Some systems are based on the distinction between favorable and unfavorable acts; others are based on the distinction between acts that attribute rights and acts that do not; others, meanwhile, use the criteria of the legality or otherwise of the act.

Under Spanish law, autotutela on favorable acts is possible only if these are invalid (null or nullifiable). Unfavourable acts, on the other hand, can be automatically revoked (revocación de oficio).

Under German law, however, acts attributing economic benefits (favorable but illegitimate) cannot be withdrawn by the administration because the principle of individual legitimate expectations precludes revocation or annulment except in certain cases, such as fraud or corruption. In other cases, autotutela is possible but entails indemnification obligations. In addition, the power to withdraw may be exercised within

a year of becoming aware of the reasons justifying said withdrawal.

For legitimate favorable acts, revocation is never permitted while annulment is effective ex nunc for a period of one year with the possibility of compensation.
For unfavorable acts, there is considerable scope for withdrawal if they are illegitimate; if they are legitimate, retroactive annulment is not possible but revocation ex nunc is permitted. Articles L242-1 and L242-2 of the French Code distinguish between acts that attribute rights and those that do not create rights. In the case of the former, the administration cannot repeal or withdraw a measure at its own initiative or at the request of a third party unless the measure is illegitimate; if it is, withdrawal must take place within four months for explicit acts and two months for implicit acts. As a general rule, a legitimate act can only be withdrawn ex tunc in exceptional circumstances. In the case of the latter (acts that do not create rights), these can always be withdrawn ex nunc but ex tunc withdrawal is in general excluded by virtue of the non-retroactivity principle. In Italy, the latest version of the law on administrative proceedings includes new rules on the power of automatic revocation, which in addition to the illegitimacy of the act, presupposes that the irregularity is not only procedural or formal, and that acts attributing rights have a time frame of 18 months. The power of revocation has also incurred greater restrictions in terms of acts which are legitimate but no longer deemed to be appropriate.

4. Another area of considerable importance in Europe is that of public sector contracts. What are the measures for combating irregular procedures and what powers do judges have in the French legal system?

The public procurement sector is undoubtedly one of the most important at a European level. European directives on protecting competition in the internal market have prompted national laws that can guarantee the utmost level of competition in public tenders. The functioning of the public tender system is hugely dependent on the effectiveness of its relevant judicial procedures.

Laws on judicial reviews have taken an important step forward on the back of European directives and case law from the French Council of State.

The French Code of Administrative Justice provides for two summary judgments: the référé pré-contractuel and the référé contractuel. The former concerns bre-

aches of freedom of access to public procurement or equal treatment. The Court can order the contracting authority to comply with its obligations and suspend the implementation of any decision relating to the contract. However, this procedure can be filed only for a limited time known as the stand-still period. Once the contract has been signed, its validity can be challenged only with the référé contractuel. This is a special procedure within the judicial review.

Apart from these urgency procedures, the Code of Administrative Justice provides for two types of actions: those targeting the contract itself and those aiming for compensation.

The actions targeting the contract itself aim to have the contract-making procedure annulled or adjusted. There are also actions whose objective is to obtain monetary compensation in case of infringement of the contract, in case of "imprévision" or "fait du prince" (both concepts refer to unpredictable events coming to unbalance the implementation of the contract) or for having unlawfully deprived a party of the contract. One of the biggest problems concerning the fight against public procurement irregularities is the issue of persons entitled to directly challenge the validity of contracts. In particular, the main issue is the definition of "third parties." In recent years, the category of third party was opened to the candidates who were ousted during the award procedure. Those candidates are entitled to directly contest the contract.

In the French legal system, there is a special prerogative granted to the Prefect to bring grievances concerning the operating condition of public services before the administrative courts. Prefects can avail themselves of this power in order to control the legality of public contracts.

Nowadays, the main question is if the notion of third parties can be extended to persons outside the contract procedure.

With an important decision of 2014 (Council of State of France, 4 April 2014, no. 358994), the Council of State recognized the existence of different third parties entitled to appeal against the validity of a public contract and the lawfulness of the award procedure.

According to the Court's opinion, third parties which have a specific interest in bringing the action have the right to file an appeal before the contract judge.
The Council of State identifies different classes of third parties entitled to bring action:

priority and ordinary. The first group includes the Prefect and the member of the decision-making body of the territorial collectivity or grouping of territorial collectivities. The ordinary third parties are those who have to prove to the Court that they have a sufficient interest in filing the appeal.

FRANCESCA ASTA* – CARLO CAPRIOGLIO**

SANTI ROMANO (1917-1918), L'ORDINAMENTO GIURIDICO, ENG. TRANS., THE LEGAL ORDER, EDITED AND TRANSLATED BY MARIANO CROCE, ABINGDON-NEW YORK, 2017

One hundred years after the first appearance of *L'ordinamento giuridico*, Routledge finally fills a gap in the Anglo-Saxon legal culture, by publishing the English translation of a seminal work of the European legal theory of the twentieth century. The book has been translated and edited by Mariano Croce, Associate Professor at La Sapienza University, Roma, who also wrote the afterword. The book is enriched by an introduction by Martin Loughlin, Professor of Public Law at London School of Economics.

About the book:

The Legal Order (L'ordinamento giuridico) was first published between 1917 (Part I) and 1918 (Part II). The second edition, appeared in 1946, was translated in Spanish (1963), French (1975), German (1975) and Portuguese (2008), becoming a "classic" of continental legal thought in the twentieth century. Despite this, it has never been translated in English until now. In *The Legal Order* Santi Romano illustrates the core arguments of his "institutional theory." The book is organized in two chapters. In Chapter I, Romano critically discusses three dominant conceptions of normative legal positivism.

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The first is the reduction of the very "essence" of the law to the notion of norm. According to Romano, the norm cannot be the grounds for the definition of law, instead it is just a "derivative or secondary aspect" (Chap. I, par. 16). Romano also criticizes the idea that coercion is a sort of accessory of the norm, instead arguing that it constitutes the distinctive feature of the law as "[a] complete and unified order, that is, an institution" (Chap. I, par. 10). Finally, Romano contends that "the law is the vital principle of any institution" and, therefore, any "institution is a legal regime." By arguing as such, the author claims that many "old" problems are "straightforwardly incongruous" (Chap I, par. 15), first and foremost, the chronological relationship between the state and the law. "All the definitions of law that have been advanced so far have, without exception, a common element, that is to say, the genus proximum to which that concept is reduced. Specifically, they agree that the law is a rule of conduct, although they to a greater or lesser extent disagree when it comes to defining the differentia specifica by which the legal norm should be distinguished from the others. The first and most important goal of the present work is to demonstrate that this way of defining law, if not mistaken in a certain sense and for certain purposes, is inadequate and insufficient if considered in itself and for itself. Consequently, it is to be integrated with other elements that are usually overlooked and that, instead, appear more essential and characterizing." (Chap. I, par. 1) . In Chapter II Romano deals with a series of issues that emerge from his theory mainly related to the matter of pluralism. Romano "decidedly" rejects the dominant conception that the "state system has become the only system in the legal world" (Chap. II, par. 27). According to the author, multiple autonomous "institutions" and legal orders, other than the State, coexist, such as the Church and even criminal organisations. The latter is one of the most controversial and debated aspects of Romano's theory, but it clearly expresses the main argument of his "institutionalism": namely, that any group that shares rules within a bounded context is a legal order, or rather that any organised social body is a "legal institution." "As long as these institutions live, it means that they are constituted, have an internal organization and an order, which, considered in itself and for itself, certainly qualifies as legal. The effectiveness of this order is what it is, and will depend on its constitution, its ends, its means, its norms and the sanctions of which it can avail itself. (…) They have legislative and executive authorities, courts that settle disputes and punish, statutes as elaborate and precise as state laws. In this way they develop an order of their own, like the state and the institutions recognized as lawful by the state. Denying the legal character of this order cannot be but the outcome of an ethical appraisal, in that entities of this type are often criminal or immoral." (Chap. II, par. 30)

About the author:

Santi Romano was born in Palermo in 1875. He graduated in Administrative Law at the University of Palermo in 1896, under the supervision of Professor Vittorio Emanuele Orlando. The encounter with Orlando, "founder" of Italian Administrative law studies, had a strong influence on Romano's thought. After the degree, Romano contributed to the First Complete Treatise on Italian Administrative Law (Primo trattato completo di diritto amministrativo italiano), a series of volumes edited by Orlando and dedicated to Italian Administrative law. Between 1897 and 1928, Santi Romano taught Constitutional and Administrative Law in several Italian Universities (Camerino, Modena, Pisa, Milano). After joining the Fascist Party, he was appointed President of the Council of State (the Italian Administrative High Court). Despite his institutional activities, he did not give up teaching and became Professor of Administrative Law and, later on, of Constitutional Law at La Sapienza, University of Rome. After the liberation of the city by the Allies, in October 1944, Romano resigned from the Council of State. He died in Rome on 3 November 1947.

FRANCESCA ASTA* – CARLO CAPRIOGLIO**

INTERVIEW WITH MARIANO CROCE EDITOR AND TRANSLATOR OF SANTI ROMANO'S *THE LEGAL ORDER*

To coincide with the publication of the English translation of Santi Romano's *The Legal Order,* we interviewed Mariano Croce, Assistant Professor of Political Philosophy at the University La Sapienza - Roma, who translated and edited the volume.

I: ***In the afterword to the English edition of The Legal Order, you affirm that, when it comes to Santi Romano, reference to the socio-legal settings is inevitable. How did the Italian socio-historical context influence the legal culture during the first decades of the 20th Century and how did Santi Romano's work have an impact upon the approach to public law in Italy?***

C: While I myself think that a theory's innovative force should be severed from the historical circumstances that contributed to its development, the Italian context of the time is certainly enlightening. For the contradictions of the project of the modern state were emerging with disquieting force. The rise of mass democracy was too great a challenge to Italian oligarchic liberal parliamentary politics which had emerged out of the unification in 1870. Political participation was scarce, and the electoral system reflected the liberal nationalist minority comprising the educated and propertied middle class and the liberal aristocracy.

Unrepresented constituencies were significantly aggravated by the impact of unification carried out by the Piemontese political elites. If in the South banditry and crime mushroomed as a response to such disappointing political developments, the

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Papacy and the Catholic Church were hostile to the new nation-state. In sum, parliamentary politics reflected the interests of a narrow class and was hampered by different forms of aversion and resentment. Meanwhile, two prima facie opposite ideologies were blending together to give life to the Fascist ideology: nationalism and the kind of socialism that led to revolutionary syndicalism, influenced by French thinker Georges Sorel. But, as historian David Roberts insists, Italy was particular in its own way, as Italians were developing a radical alternative to the liberal mainstream by combining post-Marxism with radical populism – a combination that would soon culminate in Mussolini's conservative revolution. It is crucial to bear this in mind while making sense of Romano's distinctive contribution to fathoming and taming the heap of ferments that were drawing the 19th-century model of state to a close.

Romano had an enormous impact on public law in Italy. Famously, the young Romano contributed to a seminal collection of volumes, edited by his master, Vittorio Emanuele Orlando, devoted to Italian administrative law, *Primo trattato completo di diritto amministrativo italiano* (First Complete Treatise on Italian Administrative Law), published between 1900 and 1915.

The importance Orlando and his many collaborators attached to such a monumental scholarly enterprise shouldn't go unnoticed: in his preface to the first volume, Orlando emphasized his and the other contributors' conscious, and eventually successful, attempt at constructing an Italian school of public law. This collection of writings, he claimed, was the necessary counterpoint to the growing expansion of the state's competences in the public realm.

While in the past Italian scholars had been heavily influenced by the French lawyers who had been working and mulling over the *Code Napoléon* and, subsequently, by the German pandectists, Orlando insisted that the specialization and evolution of the Italian state called for a full-fledged "home-grown" scholarly apparatus. After obtaining his degree at the University of Palermo, Romano wholeheartedly adhered to this ambitious project. However, he would soon part ways with his master (though they remained good friends, with the inevitable ebb and flow of pre - and post-war times) and developed a new, seminal approach to the legal phenomenon – one that was destined to refound the status of public and administrative law.

I: ***To what extent does The Legal Order reassert a conventional idea of the state or does it represent a new way of conceiving its tasks and organization?***

C: It is my contention that debates revolving around Romano's being torn

between a pluralist theory of institutions and a conventional understanding of the state as a meta-institution lessens the imaginative potential of his proposal. I don't mean to ignore blatant traces of ambiguity in both his theorizing and his conduct as a foremost administrative official. At first sight, an oscillation characterised his pluralist theory that inhibits his theoretical account of an irreducible normative multiplicity and sacrifices it to the unifying power of state law. Likewise, one can hardly neglect the frictions between two aspects of his analysis. On the one hand, the idea that law is institution, organization, position of an entity, that is, the allocation of the necessary conditions for a normative entity to work based on a complex technological machinery. On the other hand, all the various examples of conflict between orders, provided by Romano, where the main question is how to reconcile a given institution with the legal order of the state.

Despite this, I think there's much more than meets the eye. I would argue that Romano's view is that law isn't so much the outcome of a process, but the process itself. If it is true that – as many of his detractors remarked – it's not easy to pin down the notion of institution in Romano's book, this is because he often oscillated between focusing on the characteristics of institutions and focusing on the process that turns a collective into an institution. Without a doubt, when he spoke of "things and energies" and "permanent and general ends" along with "guarantees, powers, subjections, liberties, checks," he seemed to be thinking of the observable traits of organizations. An approach of this sort rests on an empirical survey of the steps that are necessary to deploy a specific structure that, as Romano himself underlined, "consecrate the principle of the coexistence of individuals, but above all takes it upon itself to overcome the weakness and limitedness of their forces, to exceed their feebleness, to perpetuate particular goals beyond their natural life, by creating social entities that are more powerful and durable than individuals."[1] Yet, this was not Romano's main concern, as these are recurring features of all institutions, not that which brings them about.

I think it's helpful to distinguish the institution's formal structure – that is to say, the process whereby it comes to life – from its substantive characteristics. My view

1 S. Romano, *The Legal Order*, Abingdon: Routledge, 2017, p. 21.

is that, while the latter are obviously central to there being institutional phenomena, Romano concerned himself with their formal structure in the first place. His main argument was that an institution is a normative structure that allows a particular ensemble of individuals to conceive themselves, and to be conceived by others, as the members of a stable and durable collective. In § 10, he went so far as to say that "society" simply stands for "institution." While expanding on this, he singled out three main features of institutions that are not substantive characteristics but elements of a formal structure. First, within institutions the connections that tie people together must be objective, stable and permanent, in the sense that they are sheltered from the potentially variable will of individual members: "[A] class or a group of people that is not organized as such, but is only determined by mere affinities between people themselves, is not society proper."[2] Second, these connections are ordered in a way that powers and competences are internally allocated among members, whether formally or informally. In other words, "social order" simply stands for "institution." Third, the order (or the "internal law of the institution," as Romano often called it) is not a collection of norms – which may well be essential parts of the institution –, but "an organization, a structure, a position of the very society in which it develops and that this very law constitutes as a unity, as an entity in its own right."[3] In doing so, Romano coalesced the notions of institution, law, legal order, internal ordering, organizational structure: these terms are nothing but different words denoting the same phenomenon.

This is a key aspect of Romano's unique blend of institutionalism and pluralism. For if it is its formal structure that establishes whether or not an ensemble of people forms an institution, then all ensembles of people can in principle qualify as legal orders. In other words, it doesn't matter whether the purpose of an institution (one of its key substantive characteristics) has to do with religion, politics, morality, economics, or other areas of social life: "The celebrated contention that the law represents the ethical minimum is partly true and partly seriously mistaken. The law not only represents an amount of morality, but also of economy, customs, technique, etc. And this amount,

2 S. Romano, *The Legal Order*, Abingdon: Routledge, 2017, p. 12.

3 S. Romano, *The Legal Order*, Abingdon: Routledge, 2017, p. 13.

which cannot be circumscribed and measured a priori, might not be a minimum.[4]" Put otherwise, the law can be the internal normative structure of a collective regardless of its religious, moral, political or other types of nature. All institutions that stably tie people together and are ordered in a way that powers and competences are internally allocated are legal orders.

Interestingly, Romano's conclusion that all institutions are legal orders regardless of the purpose of association serves as a conclusive rejection of the idea that there is an essential connection between law and morality.

So, when I say that in Romano's view the law is a process, I mean the particular set of operations by which a formal structure emerges that might comprise this or that substantive characteristic (the latter being circumstantial and contingent vis-à-vis the process, which is what qualifies the law as the law).

I: ***In what sense was Romano's analysis on the distinctive nature of law and legal theory able to account for a society in transition?***

C: I think Romano's analysis is key to the understanding of what pluralism means today. In "*Lo Stato moderno e la sua crisi*" (The Modern State and its Crisis), Romano took issue with the multiplication of social movements and associations (mainly labour-based organizations, such as workers' federations and various kinds of trade unions) that were struggling to draw liberal constitutionalism and parliamentary politics to a close. Obviously, Romano wasn't the first to grapple with this phenomenon. Before him, French jurist Léon Duguit gnawed at French and German theories that presented the state as the only source of law. He thought that the origin of law is human beings' wilful actions and the social rules that are required for these actions to be performed and regulated. This meant that state agencies should serve as jurisdictional – rather than legislative – bodies. The state had to be reformed thoroughly. Duguit came up with the notion of functional representation, in which representation is not based on territorial distribution but mirrors the occupational composition of society

4 S. Romano, *The Legal Order*, Abingdon: Routledge, 2017, p. 22.

and the groups of social functions to be performed. According to him, only this type of representation could make sure that the state system always acts in the interest of the groups it encompassed. Just as influential at the time was Eugen Ehrlich's sociological jurisprudence that famously distinguished between Rechtssatz (legal proposition) and Rechtslebe (life of the law). Ehrlich claimed that the core of life of the law did not reside in codified state rules but consisted of the everyday rules produced and applied by the various associations of human beings that comprise complex societies. He censured mainstream legal theories in that they were blind to the non-official sub-state orderings that governed people's conduct on a daily basis, while state law rules only came into play in specific circumstances of dispute within state courts. Duguit and Ehrlich are particularly relevant in so far as they championed versions of pluralism that were largely incompatible with the state-form. In this sense, their theories help pin down a substantial difference between what today we call "multiculturalism" and a situation of genuine legal pluralism. Multicultural conflicts can by and large be resolved within the frame of constitutionalism, as all social parties agree that the meta-normativity of state law should never be jettisoned. On the contrary, legal pluralism is a condition where social groups and associations contend state law should not be granted primacy over their inner normative orders. In a legal-pluralist scenario, the state is but one order among many, so much so that it can no longer play the role of neutral arbiter among contending social parties. Juxtaposing Duguit and Ehrlich with Romano evidences that the latter moved some distance away from the two sociologists for two reasons that provide the main thread for my discussion. First, although Romano's pluralist theory was arguably more radical than those of the other two scholars,' he maintained that pluralism was not necessarily at odds with state law. Second, his main argument was that only from a "juristic point of view" – one that leaves aside sociological and philosophical considerations – can one make sense of the compatibility between pluralism and state law. In "*Lo Stato moderno e la sua crisi*" Romano made this point by arguing that sociologists' hasty dismissal of state law neglected the state's functioning as a common structure for a healthy confrontation of sub-state groups and associations within the frame of the constitution. On the one hand, he recognized that the state sprung from the French revolution had long ignored the host of societal groups that had a normative life of their own and found no representation in the state structure. On the other hand,

he averred that doing away with the state was no solution, as it would create the conditions for an overt conflict of those rival groups in a circumstance where pre-modern supra-state normative frame were no longer available. In the last pages of this short text, he adumbrated a solution that he would clarify later on in *The Legal Order*. The law should not be conceived as a set of norms issued by a body within a given group and backed by threat of sanction. Rather, it is a point of view – a purely juristic one – from which the social world can be described as an arena of smaller and bigger legal orders that can engage in a normative exchange by using the technical language of the law. While neglecting this role of state law, as sociologists tended to do, necessarily implied the end of the state, the latter should rather be viewed as one legal entity that is able to interact with other legal entities within a strictly legal-linguistic frame.

I: ***What influence has Romano had outside Italy (in particular on the work of Carl Schmitt)?***

C: Certainly, Romano had a tremendous impact on Carl Schmitt. But the latter's use of the former hardly allows measuring the impact with any accuracy. For Schmitt made an astute and manipulative use of Romano's theory, which he defines as "very significant". At the end of the first chapter of *On the Three Types of Juristic Thought*, Schmitt quoted Romano when the latter writes that "the legal order, taken as a whole, is an entity that partly moves according to the norms, but most of all moves the norms like pawns on a chessboard – norms that therefore represent the object as well as the means of its activity, more than an element of its structure.[5]" It shouldn't go unnoticed that Schmitt translated Romano's locution "taken as a whole" (*comprensivamente inteso*) into "is a unitary essence" (*ist ein einheitliches Wesen*). Such a questionable amendment to the original text lays bare Schmitt's cunning and idiosyncratic misuse of Romano's institutionalism: he aimed to integrate Romano's theory of institution into his concrete-order thinking and, at the same time, to expunge its most detestable consequence, that concrete is, legal pluralism. But, as I noted above, Romano's theory of institution

5 S. Romano, *The Legal Order*, Abingdon: Routledge, 2017, p. 7.

was at one with his pluralistic view of legal reality. Romano conceived of institutions as self-standing normative contexts where agents develop rules which attach to roles. Institutions are complex and multilayered patterns of interaction where subjects are not only rule-abiders but also, if not primarily, role-players. On this account, for instance, the word "mother" is by no means the carrier of a broader ethos of the family (at least from the vantage point of the legal theorist), but an element of a normative web whereby the term "mother" signifies a set of rules that the role-player is required to follow and her relation to the other role-players. The family is an institution for itself and in itself, whether or not it is positioned in a broader social context where it is endowed with special relevance.

On Romano's account, there is no genuine difference between the highly complex practice called "law" and the smaller normative context of, say, a sports club. Both are instances of the legal phenomenon. In substance, from a legal-theoretical viewpoint, there is no difference whatsoever between the rules laid down by the national parliament and the rules issued by a bunch of people who want to organize their coexistence by way of rules and roles. Such an understanding of institutions inevitably eventuates in a pluralistic view of the legal phenomenon. For any context where people issue rules and determine roles is an institution and, as such, Romano insisted, develops its own law. No view could be further apart from Schmitt's. When he spoke of the church or the good father of family he wanted to make the point that these are pieces of a wider fabric that stands as long as all its pieces hold together. While Romano was obviously concerned with the coexistence among institutions (and a fortiori among laws), but regarded this as a matter of composition through law, Schmitt was first and foremost preoccupied with the homogeneity of the social realm, which he viewed as law's chief end. It is important to emphasize this divergence, as it reveals two crucial features of Schmitt's legal thought. First, it rests on a pluralistic understanding of social life, not that far from Romano's and other pluralists' social ontology. Secondly, precisely because of this, Schmitt viewed pluralism as the most insidious jeopardy a political community can incur.

In 1930, while Schmitt is revising his view of law in institutional terms, he produced a revealing essay, Ethic of State and Pluralistic State, where he attended to the diffusion of a pluralistic understanding of politics and its compatibility with the

existence of the state. Schmitt treated as a truism the idea that all modern states to a greater or lesser degree rely on various societal parties, if only because states are not able to fulfil some basic social tasks. In other words, social pluralism is a widespread and possibly inescapable phenomenon. Yet, Schmitt identified a major threat posed by social pluralism when it becomes widespread and untamed: social groups tend to perceive themselves as autonomous normative entities and claim to have a right to enforce their own indigenous regulations. What Romano regarded as an innate aspect of legal life, Schmitt saw as a detrimental anomaly to be fended off.

I: ***What is the legacy of Romano's work and why translate "The Legal Order" into English in 2018?***

C: Again, the nature of pluralism today looks like a central theme to me. Contemporary legal pluralists have set the record straight by unveiling the historical and context-specific connection between the law and the state, as Marc Galanter nicely summarized when he claimed that Western state legal systems are nothing other than institutional-intellectual complexes claiming to encompass and control all the other institutions in the society and to subject them to a regime of general rules. These complexes, he said, consolidated and displaced the earlier diverse array of normative orderings in society, reducing them to a subordinate and interstitial status. Nonetheless, Romano's reading of this historical fact turns the table of legal analysis. For he never claimed that the state should prevail over other institutions; nor did he ever claim that other institutions should prevail over the state. As I strove to demonstrate in my various analyses of his writings, he was concerned with a perspectival matter: what is the point of view from where the "matter-of-factness" of the conflict between institutions can be reframed in legal terms? Can practical conflicts be transformed and tamed as they are turned into legal ones? If this is the question Romano was trying to answer, then he never pitted the law of the state against the law of other institutions. Instead, he intended to task jurists with providing an account of social reality that might find a route to make the various legal orders compatible with each other. Therefore, in the end the dilemma of the conflict between state and non-state institutions is destined not to be solved, as it isn't a genuine dilemma. Instead, it is a space, or a lexical circuit,

that jurists have to inhabit as they perform their jurisprudential practice. Doing away with fictitious portrayals positing an alleged natural superiority of the state legal order is only one of the premises to fulfil this task – it is but a step to a better understanding of the state as a legal order that is able to accommodate (and be accommodated by) other non-state orders.

Therefore, the gist of Romano's analysis is the jurists' awareness and the precise conceptualization of the juristic point of view. Certainly, he was conscious of the political outcomes of this activity, which is supposed to produce effects on reality. And yet jurists should not so much be concerned with these political outcomes as such, as they should pay heed to the purity of legal analysis. The question, highlighted by many critics of pluralism, of a connection between justice and state law doesn't fall within the scope of legal analysis (as far as Romano conceived of it), because it is a pragmatic effect that the separation between law and justice prevents approaching as a conceptual issue. And I think Romano is correct, if many scholars have shown how the state and the rule of law have played as instruments to foster the neoliberal agenda and to promote greater inequality. At the same time, the methodological pureness advocated in The Legal Order was not instrumental in furthering the project of a specific conformation of law, as some positivist theories might have been. Romano's theorizing of the juristic point of view delineated an image of the law as a virtual place from where the state can be reimagined: a space where the state appears as a concept rather than a thing and thus can be reframed in many different ways. In the end, dissolving the dilemma of pluralism is something that can't be done theoretically. For it is a conceptual line itself, more than a riddle to solve. Instead, approaching social phenomena through pluralism as a conceptual line should be the jurist's main objective, as the language and categories he applies are intended to produce a revision of the state in the sense of its compatibility with other orders and the conceptual frameworks these orders are rooted into. This doesn't imply that peaceful coexistence will always be the natural upshot or that justice will never be harmed. Nobody can predict where the juristic activity will lead to and, as Romano's historical circumstances convincingly illustrate, actual politics can always spoil the result of juristic inquiry. Yet, as long as law offers a categorial space for rethinking the state, it doesn't produce or construct it, but opens up further spaces for lay people to produce or construct it under the aegis of new legal imaginings.

CONCETTA BRESCIA MORRA*

ECB LEGAL CONFERENCE 2017. SHAPING A NEW LEGAL ORDER FOR EUROPE: A TALE OF CRISES AND OPPORTUNITIES, EUROPEAN CENTRAL BANK, FRANKFURT AM MAIN, 2017

The book contains the proceedings of the annual European Central Bank (ECB) Legal conference (2017). The conference was an interesting opportunity for an exchange of ideas between lawyers from different European countries. The topics discussed by various panels (grouped into chapters of the group) were: "the transparency and accountability of central banks and banking supervisors," "the judicial review in a central bank context - focus on fundamental rights,""Brexit - Looking inwards," and "Brexit - Looking outwards,"; "restructuring, resolution and insolvency procedures - shift of task from judicial to administrative authorities" and; "overcoming silo thinking - a cross-sectoral approach to financial market policies and rules."

Notwithstanding the variety of subjects debated, the new powers conferred upon European institutions and authorities and the need to have "check and balances" were recurring themes in many contributions. Many of them focus on the powers of the ECB regarding monetary policy as well as banking supervision. They underline the specificity of the ECB compared to other central banks in the European legal framework.

On the topic of the transparency and accountability of central banks and banking

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supervisors, Mersch points out, in his keynote lecture, that there has been progress made with respect to the quality of the accountability relationship of the ECB with the European Parliament. Lautentenshläger, Bossu, Hagan, Weenik and Türk highlighted important developments in this field in their written contributions. However, other authors (see Curtin) underline that this progress wouldn't be enough, considering the "democratic deficit" that affects the European legal order (Curtin expressly referred to the role of the European Parliament as a "fig-leaf"). Two chapters of the book focus on judicial review of the ECB acts and of the acts of new agencies created with the Banking Union. The in-depth analysis of the judicial review contained in the book shows that it could be considered a complementary system to political accountability, but it is also clear that judicial review is an imperfect substitute for the weak political legitimacy, considering the limits of judicial assessment. Many papers indeed highlight the limits of the judicial review (Zilioli, Kokott, Sobotta and Kookelo, Ventoruzzo).

The main issue debated is to what extent a court can review a technical decision based on a complex economic assessment or the exercise of discretion of the ECB or other European authorities. On this point Zilioli's contribution contains a very detailed survey of the academic literature and of the case law in the European Union as well as in the U.S. According to this comparative study, judicial review is limited to a so-called legality control; in the case of a complex economic assessment the Court focuses its review solely on the correctness of the reasoning underlying the decision. Zilioli underlines that the intensity of judicial review does not depend on the topics, but on the scope of the discretion granted by the legislature to the ECB or other European authorites. The different standards of judicial scrutiny over central bank actions were analysed by Lehmann. The author attempts to reconcile two seemingly contradictory propositions: central banks, like all other organs of the states need to be subject to the rule of law; an extensive judicial review could hamper the decisiveness and efficacy of their actions. Lehmann's contribution proposes a system of differentiated scrutiny, introducing varying standards of review for different types of measures (e.g., monetary policy, bank supervision or bank restructuring). He suggests that a limited standard of review should apply with regard to monetary policy decisions while technical tasks like bank supervision measures should be subject to stricter scrutiny: indeed where a central bank supervises credit institutions it does not play a policy role, but acts as an administrative authority.

The limits to judicial review of the powers of administrative authorities that enjoy large discretion raise very delicate issue in the field of management of bank resolution, especially from the point of view of the safeguards for fundamental rights,

considering the new allocation of powers to redress bank failures (see contributions of Ugena Torrejón, Ramon Munőz, Grünewald, Hakkarinen). Cassese underlines that the new European rules, enacted to deal with banking crises, have produced the "administrativisation" of the regime on financial institutions' insolvency, expanding the role of administrative authorities at the expense of civil courts. The recent case law of the Court of Justice shows that virtually any resolution made through an authority's decision will pass the broad suitability and proportionality test. Therefore, Cassese highlights an important issue regarding access to justice, underlining that some of the restrictions deriving from the due process of law before courts, established by European legislation, may raise problems of constitutionality. They indeed introduce limitations upon the judicial power to ascertain facts. To answer the question "*what can be done to improve the safeguards for individual rights*", Cassese suggests that the better way is to try to improve administrative independence and administrative justice. This means first, to ensure that, at national and European levels, administrative authorities are strong enough to resist "*capture*" on part of the regulated. Secondly, this means that it is necessary to give interested parties a voice before administrative authorities and to enhance contentious but administrative procedures through transparency, openness and impartiality.

The two panels dedicated to Brexit emphasize the difficulties in making progress in this very complex negotiation (see contributions of Legal, Hermann, Fabrini, Romero Requera, Ferran, Malaguti). Notwithstanding, some speakers (Coeuré and Praet) noted that constructive legal solutions are required if we want to build a secure bridge and to know where it is leading; it is be hard to disagree with Professor Weiler's keynote speech, in which he criticises the handling of these issues by both the United Kingdom and the European Union.

The final chapter that focuses on the need to take a cross-sectoral approach to financial market policies and rules, discusses many different topics: whether there is the scope for a central bank to take into account of financial-stability considerations in fulfilling its mandate (see Issing); the role of macro-prudential policies in ECB banking supervision (see Alexander); whether or not a central bank should be responsible for prudential supervision (see Tucker); the relationship between supervision and resolution and monetary policy and resolution (see Kellermann). The contributions showed

that lawyers and economist still have different views on many of these topics that are crucial to create a shared legal framework for an integrated European financial market (see Kroppenstedt).

MARGHERITA COLANGELO**

M. R. PATTERSON, ANTITRUST LAW IN THE NEW ECONOMY. GOOGLE, YELP, LIBOR, AND THE CONTROL OF INFORMATION, CAMBRIDGE, MA, 2017*

Although the move towards the "information economy" is recognized as a common and uncontested fact, competition law has traditionally devoted no attention to information problems, which have been typically addressed under other areas of law, primarily that of consumer protection, but also sector-specific rules (e.g., financial markets law). As a matter of fact the antitrust law implications of informational conduct are not clear and almost no treatment of this topic can be traced in the literature, aside from some discussions over deception and product disparagement. However, information issues pose difficult challenges also to antitrust law whenever they lead to market problems.

In the current economy, where intangible goods and services have in a certain way substituted tangible ones, the production and provision of information have gained a central role and the forum for competition has moved from the delivery of products to the delivery of information about them. In fact, an increasing number of investigations involve informational issues, implying potential competition problems, and several examples demonstrate how firms may try to exploit control over information. In particular, the fact that intermediaries, such as online platforms, play a great role in the distribution of information deserves consideration, as data clearly reveal that consumers are used to relying on these information providers in their decision-making activities.

Starting from these observations, Mark R. Patterson has conducted a comprehensive study on how information issues may affect competition and his research

* The Department of Law of the University Roma Tre organized on May 4, 2018 the lunch seminar "Abuse of Informational Power and Antitrust", with Professor Mark R. Patterson as guest speaker.

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has given birth to an innovative and brilliant book, *Antitrust Law in the New Economy. Google, Yelp, LIBOR, and the Control of Information* (Harvard University Press, 2017), stimulating critical thoughts on the topic. A first elaboration on this topic can be found in a previous paper authored by Patterson (i.e., M. R. PATTERSON, *Antitrust and Informational Restraints*, in B.E. HAWK , *Annual Proceedings of the Fordham Competition Law Institute - International Antitrust Law & Policy*, Huntington 2013, 493).

The fundamental argument sustained by Patterson is that "antitrust law should take seriously information as a product in itself" (p. 14), and that, developing an information-specific approach, it may be the proper tool to solve the particular problems posed by information. Examining the risks and the practice of manipulation and bias of the information provided, Patterson focuses on a crucial aspect, i.e., information quality.

The author begins his analysis by examining the interaction between antitrust and consumer-protection in the informational area (Chapter 1), by explaining that whereas deceptive conducts, such as false advertising, may be well addressed through consumer protection rules, when collusion and/or exclusion occur antitrust laws are the typical rules to be applied (p. 24-25). After providing a discussion of the economics of information and analysing the "information-discrimination" (Chapter 2), the book investigates if and how the traditional antitrust concept of market power may be applied to information providers (Chapter 3) and demonstrates that the evaluation of informational conduct differs from but also shares similarities with the typical competitive conduct.

With regard to market power, the author explains that its informational equivalent is the ability to influence consumers with low-quality information, since competitors are unable to deliver high-quality information to consumers. This is particularly true when information is provided for free, as typically occurs in online settings. With regard to the conduct, information can be used to both exploit consumers and exclude competitors, while the delivery of inaccurate information by a firm will rarely have a legitimate business justification that might allow it to escape antitrust liability. Four forms of conduct involving information are examined in depth in the book, i.e.: agreements regarding information production (Chapter 4); unilateral control over information by individual firms (Chapter 5); the exacerbation or exploitation of pre-existing market uncertainty (Chapter 6); and the use of personal information about consumers or their purchasing preferences (Chapter 7).

In the first category, the main example is trade association standard-setting, which inherently implies a loss of informational competition (Chapter 4). The author illustrates how the LIBOR conspiracy may also be analysed in this perspective, pointing

at the scarce attention to the preservation of the integrity of market information that such form of collaborative processes among competitors may endanger (p. 91 et seq.).

In this case the distortion of LIBOR by panel banks involved in its setting process, that were found to have agreed among themselves to submit false estimates, put into effect a collusive manipulation of "a piece of information," the benchmark rate, which is used as a reference point in markets of derivatives, thereby indirectly manipulating interest rates in those markets.

With regards to the second category, the author examines three types of unilateral informational conduct that may often lead to exclusionary effects (Chapter 5). Starting from misrepresentation, which is typically addressed by consumer protection law, the book focuses on areas that are currently not covered by other bodies of law, in particular on the aggregation of ratings or reviews of individual consumers provided by firms operating on the Internet (e.g. TripAdvisor, Yelp) and on the provision of search results by search engines. Then, the author deals with information asymmetry (Chapter 6) and its shift in the current economy toward sellers, which may try deliberately to make comparison among products difficult for consumers, giving rise to "confusopoly."

Moreover, firms may use private consumer information and big data to which they have access in their favour, tailoring prices and using discrimination for exclusionary purposes, so that not only privacy but also antitrust implications require attention (Chapter 7).

Finally, the author considers the intersection of antitrust and two other areas of law, i.e.: i) intellectual property law (Chapter 8), questioning cases where IP owners have tried to expand protection provided by IP rights to information which should be "unprotected" (e.g., the case of the information about the existence of a patent which is hidden by the patentee before standard setting organizations, also known as patent ambush); ii) freedom of speech (Chapter 9), which is decisive in the US context, where the creation and the dissemination of information are protected by the First Amendment, on which several cases rely (e.g., credit-rating agencies in Moody's case, but also some claims against Google).

At the heart of the analysis set forth in the book is the rise of powerful information providers in the online markets. Among the types of conduct analysed by Patterson, the current experience demonstrates that in this field risks for competition

may derive mainly from informational exclusion engaged in unilaterally by dominant undertakings. The author focuses on the power acquired by firms like Google, Yelp, Expedia, Amazon, which offer a wide variety of product information, including buyer reviews, arguing that such power may allow these firms to harm competing operators while also seriously affecting consumers' purchasing decisions. Information may be skewed in different ways, e.g., a search engine whose search results downgrade a potential search competitor or favor its own related products over others' products, a review site that refuses to display positive reviews for sellers that do not purchase advertising on the site, or a price-comparison website that shows prices only for sellers that paid to be included. The debated allegations of Google search bias, which have led to different outcomes in the antitrust investigations in the US and in Europe, constitute an emblematic example.

The trickiest issue is that distinguishing between high-quality and low-quality information can be very difficult for both consumers and competitors. Moreover, difficult tasks for antitrust agencies include assessing when information can be considered "accurate" and determining which standard of accuracy should be met. These issues may lead some to argue that it would not be appropriate to apply antitrust to these cases as it would be difficult to determine what what anticompetitive conduct is in this context. According to Patterson, these difficulties are not insurmountable and there are circumstances in which information providers could clearly be shown to have failed to meet the standard of delivering accurate and unbiased information (e.g., when the information provider delivers information with knowledge that consumers would prefer other information in its possession, or when it provides information without regard to its truth): (p. 236). In any case, the power of such firms to impose significant harm on consumers requires their conducts to fall within the scope of antitrust scrutiny. Quoting Patterson (at p. 233), "[i]nformation increasingly offers the same potential for anticompetitive collusion and exclusion that have long been problems in markets for other products, and antitrust analyses developed over the last one hundred years in those markets can be usefully extended to information markets."

EMANUELE CONTE* - LAURENT MAYALI**

A CULTURAL HISTORY OF LAW, ED. GARY WATT, VOLUME 1-6, LONDON-OXFORD, 2018, FORTHCOMING. VOLUME 2, MIDDLE AGES, ED. EMANUELE CONTE AND LAURENT MAYALI

On the floor of the church of San Savino, Piacenza, a 12th century bichromatic mosaic offers one of the most vivid pictures of the impressive change of mentality that marked a foundational age for Western culture.

The mosaic is centered on the figure of Atlas, sitting in the fulcrum of a fortune wheel. On each side of the central wheel, four panels display various contrasting scenes. The two top panels contrast the violence of a trial by combat, on the left side, with the image of a trial by law. Kneeling in front of the king, a judge is looking at legal rules written down in a book.

The two panels below contrast two games. On the left, under the panel representing the trial by combat, three figures are busy playing dice. On the right, under the trial by law, we can see one of the earliest representations of the game of chess.
This medieval mosaic opens the volume devoted to the Cultural History of Law in the Middle Ages, the second in a six-volume series, from Antiquity to the present, directed by Gary Watt (University of Warwick). They will be published by Bloomsbury, hopefully before the end of this year, 2018.

Each volume is dedicated to a specific time period in the history of the Western legal tradition and directed by scholars who are specialists of these respective historical

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epochs. The present book review is unusual: it is written by the very editors of the volume it reviews, who directed the work it contains. This volume covers the Middle Ages that extended over a period of covering one thousand years, from 500 AD to 1500 AD, during which some of the most important features of the Western legal systems were settled.

The Piacenza mosaic clearly displays one of the crucial moments of this basic process of foundation of the legal order. Away from the battlefield and its violence, the rational and learned procedure of a new form of trial was illustrated by the reference to the game of chess and to the law book that drew the judge's attention.

This significant legal change was not limited to justice and government. It prompted a fundamental mutation in the cultural attitudes of Western Europe, one that deserves exactly to be at the center of what is called a "cultural history" today. These legal developments reflected broader cultural changes that influenced political practices, religious beliefs and social attitudes toward justice and its role in shaping a well-ordered Christian society. Our mosaic's contrasting and forceful representation of the trial by combat and a learned decision-making process underscored also the contrast between use of force and legal reason that was redefining the legitimacy of the political powers in the feudal system.

The contributions included in this volume cast new light on the cultural significance of law in the Middle Ages. As it evolved from a combination of religious norms, local customs, secular legislations and Roman jurisprudence, medieval law defined a normative order that was more than the sum of its parts. It promoted new forms of individual and social representation. It fostered the political renewal that heralded the transition from feudalism to the early modern state and contributed to the diffusion of a common legal language with the emergence of the ius commune. Like each volume of the series, our volume is divided into eight chapters: 1, Justice, by Joshua Tate (Dallas, Texas); 2, Constitution, by Emanuele Conte, Laurent Mayali and Beatrice Pasciuta; 3, Codes, by Elsa Marmuszstejn (Reims, France); 4, Agreements, by Jonathan Garton (Warwick, UK); 5, Arguments, by Beatrice Pasciuta (Palermo, Italy); 6, Property and possession, by Tyler Lange (Seattle, Washington); 7, Wrongs, by Karl Shoemaker (Madison, Wisconsin); 8, Legal Professions, by Sara Menzinger (Roma, Italy)

FRANCESCO MEZZANOTTE*

J. HASKEL - S. WESTLAKE, CAPITALISM WITHOUT CAPITAL. THE RISE OF THE INTANGIBLE ECONOMY, PRINCETON-OXFORD, 2018

1. Mylan is a global healthcare firm focused on generic and specialty pharmaceuticals, renowned in particular for its Epipen®, by far the leading epinephedrine injector. Despite the higher cost of this product compared to non-branded, competitive alternatives available for consumers, the company has maintained its prominent position in the U.S. market for emergency allergy medications, commanding a share of more than twenty-five percent.[1] The explanation of this remarkable performance is nowhere to be found but in a successful combination of a series of intangible assets: the name and brand of the device, its refined pen-like design, together with its effective and self-explaining operability, which has secured the customer loyalty of millions of first aiders worldwide.

Capitalism without capital is exactly about this kind of story: it provides a thought-provoking exploration of the systemic corollaries descending from the dramatic change in the type of investments observed in the last decades in basically all developed countries. While up to forty/thirty years ago the expansion of productivity capacity was primarily sought by businesses and governments through spending in physical assets (machinery, vehicles, buildings, infrastructure, etc.), nowadays much of the investment is in knowledge-related assets such as software, human capital, R&D, market analyses and innovative business processes.

1 J.D. Rockoff, *Behind the Push to Keep Higher-Priced EpiPen in Consumers' Hands, in The Wall Street Journal*, August 6, 2017.

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Even from a legal perspective there is nothing particularly innovative about the observation that the locus of the economic value has progressively shifted from corporeal to intellectual, ecological, corporate, and other forms immaterial property.[2] The central, and genuinely original, argument made by Haskel and Westlake is that intangibles share peculiar economic characteristics, and that their increased importance cannot just be considered as a trivial change in the nature of the investments, but rather represents a turning point that helps understanding some of the most crucial issues faced by today's economies: innovation and growth, inequality, the role of management and financial and policy reform (p. 7).

2. The book is divided into two parts: the first one – "The Rise of the Intangible Economy" – provides the macro-economic substances of the analysis. Real-word business examples and more formal sets of data are illustrated in order to demonstrate the changed nature of investments in industrialised systems (p. 15 et seq.); and then to explain the technical criteria adopted for classifying and measuring intangibles such as computerized information (software or database development), innovative property (R&D, desing, artistic originals, etc.), economic competencies (training, market research and branding, etc.) (p. 35 et seq.).

The most relevant point made in this part of the book is the presentation of what Haskel and Westlake consider the unusual economic features of intangibles, gathered together under the attractive label of "the four S'S" (p. 61 et seq.): (i) Scalability (connected to the non-rival nature of intangibles, which allows them to be used over and over by a firm, in multiple places at the same time); (ii) Sunkness (sunk, irrecoverable, being the costs necessary for the production or acquisition of intangibles); (iii) Spillovers (depicting the non-excludable nature of immaterial assets, which make it relatively easy for competitors to take advantage of intangible investments they don't themselves make); (iv) Synergies (representing the cumulative, "*combinatorial*" nature of knowledge-based resources, relevant not only as output of a particular creation process, but also as potential input for new investments in innovation).

3. The argument that links together the chapters of the second part of the book (on "The Consequences of the Rise of the Intangible Economy") is apparently straightforward:

2 Among others, cf. C. Reich, *The New Property*, in *Yale Law Journ.*, 73, 1964, p. 733 ss.; B.a. Ackerman, *Private Property and the Constitution*, New Haven-London, 1978.

given that intangible investments behave differently from corporal investments, one may reasonably expect economies dominated by intangibles to behave differently too. First, intangible investments have an important role in exacerbating the secular stagnation that has characterised modern economies: among other reasons, this phenomenon may be explained through the scalability of immaterial assets. On the one hand, this feature allows very profitable businesses to emerge and even to appropriate the spillovers of other firms' investments; on the other, it raises huge productivity and profit from gaps between these few leading market players and a vast majority of "laggards", lowering the latters' incentives to invest (p. 116).

This argument is clearly connected with a second major effect of the intangible economy, namely the rise of inequalities, considered not only in their most obvious profile of the growing disparity of earnings, but also discussed as inequality of wealth (following in particular the study of Thomas Piketty[3]); inequality between the generations;[4] and inequality of places (expression of the contrast between few prosperous urban centres, sites of the intangible economy, and a number of "left-behind communities"). The authors surmise that intangible investments play a role in this process (p.129 et seq.): among other elements, it is observed that synergies and spillovers enlarge the gap in profitability between competing companies, increasing income inequality in favour of their qualified managers and employers; as well as the attractiveness (and property prices) of the countries and cities where these positive externalities abound. Moreover, intangible-rich firms may have the power to effectively lobby public regulators for unfair advantages, thus further enlarging the gap with other business, lowering their capability to compete and incentive to invest.

Another relevant corollary of the current state of the economy in developed countries lies in the challenges it poses to the financial system, which appears ill-suited to grant a constant access to credit for businesses' intangible investments (p. 158 et seq.). Debt finance is not appropriate for companies with sunk costs; public equity

3 Cf. T. Piketty, *Capital in the Twenty-First Century*, Cambridge (Mass.), 2014, proposing in particular the now famous (r > g) condition, suggesting that current economic policies foster wealth accumulation in the hands of the richest, in a condition where returns on capital (r) surpass the overall growth of the economy (g).

4 Cf. D. Willets, *The Pinch: How the Baby Boomers Stole Their Children's Future by David Willetts*, London, 2010.

markets tend to undervalue at least some of the intangibles in which firms have invested (either to underreporting of these assets in the balance sheets, or because of their inherent uncertain value); venture capital appears to be difficult to scale to many industries.

4. Among the main conclusions descending from these analytical points, it is apparently possible to detect a paradox policy-makers will face in the near future. To keep current economic systems thriving, it is commonly suggested that governments should encourage trust and strong institutions, increase opportunity, mitigate divisive social conflict and prevent rent-seeking activities of powerful businesses to the detriment of competitive market dynamics. At the same time, these are the very problems that an effective intangible economy seems to cause, or at least to aggravate, creating socially charged forms of inequality, threatening social capital, and determining the growth of powerful firms with a strong interest in protecting their intangible assets (p. 238).

5. There are several concurrent reasons why legal scholars might be interested in reading this book. The first is directly connected with some of the most important normative prescriptions suggested by the economic analysis proposed by Haskel and Westlake (p. 147 ss.). Intangible-rich economies do not only need different sorts of physical and technological arrangements (from affordable spaces in large cities and industrial clusters to high-bandwidth, universally-connected telecommunication systems), but also the support of a well organised "institutional infrastructure," both formal and informal.

This point is traditionally connected with the debate on the exact scope of available property rights on information, and on the effectiveness of their enforcement: in this regard, while the authors do not consider a strengthening of the current IPR regimes necessarily beneficial, they make a strong claim for their clarity (p. 211 *et seq.*). It is certainly not new for economists to predict that effective rules and precise norms encourage investments and, on the long run, they have an impact on the overall performance of economic systems.[5] At the same time, this argument is made particularly

5 For a recent overview, T. Eisenberg - G.b. Ramello, *Comparative Law and Economics*, Cheltenham, 2016.

problematic today by the difficulties encountered by jurists in framing new kinds of resources made available by the digital revolution within their traditional grid of concepts. A perfect example is provided by the ongoing debate among European institutions and academics on the legal status of personal data and on their conditions of circulation, and, even more clearly, on the evolving criteria that should be implemented for the allocation of entitlements over machine-generated information ("industrial data").[6]

Another, and possibly even more profound, motive of interest in the book derives from the new light it sheds on inequality issues. Structural disparity among legal subjects represents a focal point for lawyers: while modern administrative law appears, in its global dimension, to have changed its original nature into a legal branch based on equality principles,[7] the most relevant super-national private law interventions, promoted in particular at the EU level, address the regulation of physiological asymmetries detectable among individuals and firms.[8]

The demonstration provided in the book that "the dominant mode of production in the economy of the future is more likely to give rise to inequality" (p. 237) appears thereafter in line with the renewed attention that academics have recently shown for the regulation of "private powers".[9] The risks of abuses and unequal outcomes in private relationships appears particularly stubborn when the economic and organisational strength of market actors is coupled with an extensive availability of technological capital, as demonstrated by the growing concerns raised by the powerful internet web-platforms of the so-called "sharing economy".[10]

This phenomenon clearly invites legal scholars to take the analysis of Haskel and Westlake into serious consideration when addressing the regulatory challenges posed by evolving interactions fostered by the current "capitalism without capitals."

6 See EU Commission, "*Building a European Data Economy*" COM (2017) 9 final; and inter alia, S. Lohsse - R. Schulze - D. Staudenmayer, *Trading Data in the Digital Economy: Legal Concepts and Tools*, Oxford/Baden-Baden, 2017.

7 Cf. from different perspectives the articles collected in S. Cassese, *Global Administrative Law*, Cheltenham, 2016.

8 See, inter alia, H. W. Micklitz, *The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, 28, 2009, p. 3 ss.

9 Cf. recently P. Sirena - A. Zoppini (eds.), *I poteri privati e il diritto della regolazione*, Roma, 2018; F. Möslein (Hrgs.), *Private Macht*, Tübingen, 2016.

10 See B. Rogers, *The Social Costs of Uber*, in *Univ. Chicago Law Review*, 82, 2015.

LIST OF THE MOST IMPORTANT INTERNATIONAL CONFERENCES AND SEMINARS AT ROMA TRE UNIVERSITY (A.Y. 2017-2018)

- 16 October 2017: *Rethinking Wrongful Conviction, A Comparative Overview between Europe and America* - **Centre for the Global Study of Wrongful Convinction;**
- 30 October 2017: *Diritti fondamentali e processo all'ente, l'accertamento della responsabilità d'impresa nella giustizia penale italiana e spagnola* - **Coral Aranguena Fanego**, Universidad de Valladolid; **David Carpio Briz**, Universidad de Barcelona; **Hervè Belluta**, Università di Brescia; **Nuria Mallandrich Miret**, Universidad Pompeu Fabra de Barcelona;
- 6 November 2017: I*l pubblico ministero nel processo civile, canoni di confronto tra Italia e Brasile* - **Hermes Zanetti Jr.**, Universidade Federal do Espirito Santo;
- 8 November 2017: *Diritto e Capitalismo* - **Fiona MacMillan**, Birkbeck, University of London;
- 8 November 2017: *Cesare Beccaria e l'illuminismo giuridico* - **Philippe Audegean**, University of Nice; **Luigi Delia**, University of Geneva;
- 9 November 2*017: Competition Law, IP and Regulation in the Pharmaceutical Sector* - **Academic Society for Competition Law**;
- 12 December 2017: *Produrre per non sfruttare* - **Gigi Malarba**, **RiMaflow**; **Suleman Diara**, President of Barikamà; **Marilisa Nanna & Gianni De Giglio**, Sfruttazero Bari; **Ass. Diritti di frontiera**;
- 26 January 2018: *Critical Legal Theory in Europe* - **Emilios Christodoulidis**, University of Glasgow;
- 15 February 2018: *Two Paths of Public Law Development in China* - **Zhang Qianfan**, Peking University, Beijing Daxue;
- 20-21 March 2018: *La nascita della prigione-Beccaria oltre Foucault* – **Philippe Audegean**, University of Nice;
- 23 March 2018: *Integrazione europea e sovranazionalità*;
- 10-12 April 2018: *Contrato de trabajo en Espana: derechos y obligaciones de las partes* - **Angel Luis de Val**, University of Zaragoza;
- 16 April 2018: *Divorzio e minori nel Diritto internazionale privato europeo* **Javier Carrascosa Gonsalez**, University of Murcia;

- 16 April 2018: *Mediazione e famiglia nel Diritto internazionale privato europeo* **Maria Asunciòn Cebriàn Salvat**, University of Murcia;
- 16 April 2018: *Sottrazione illecita e restituzione dei minori dell'Unione Europea* **Isabel Lorente Martinez**, University of Murcia;
- 17 April 2018: *History and Development of the German Administrative Court System. Focus on the Evolution of the Judicial Control of Public Administration* – **Karl-Peter Sommermann**, German University of Administrative Sciences Speyer;
- 18 April 2018: *Sexual Orientation and Gender Identity Claims of Asylum? A Case Study* – **Nuno Ferreira**, University of Sussex;
- 18 April 2018: *The Legal Standing before German Administrative Courts in a Comparative Perspective* – **Karl-Peter Sommermann**, German University of Administrative Sciences Speyer;
- 19 April 2018: *Sexual Orientation and gender identity claims of asylum? A European human right challenge*, **Nuno Ferreira**, University of Sussex;
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- 26 April 2018: *Human Rights in Armed Conflict* – **Gloria Gaggioli**, University of Genève;
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- 18 April-3 May 2018: *Comparative Corporate Governance* – **Charles M. Yamblon**, Yeshiva University;
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- 15 May 2018: *Il giudizio in via incidentale in Francia* – **Thierry Di Manno**, University of Tolone;
- 18-19 May 2018: *Third Co-chairs' Circle Global Conference*;
- 22 May 2018, *La crisis econòmica internacional y su repercusiòn en las legislaciones cuncursales*, **Laura Gonzalez Pachon**, University of Valladolid
- 28 May 2018: *Las relaciones actuales de Espana con la America Hispana* – **Jesùs Manuel Gracia Aldaz**, S.E. el Emajador del Reino de Espana ante la Repùblica Italiana;
- 31 May 2018: *Integracion regional en America latina: el Mercosur* – **Cristina Boldorini**, Embajadora;
- 4 June 2018: *Verso una cultura europea delle cliniche legali – Il progetto STARS;*

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