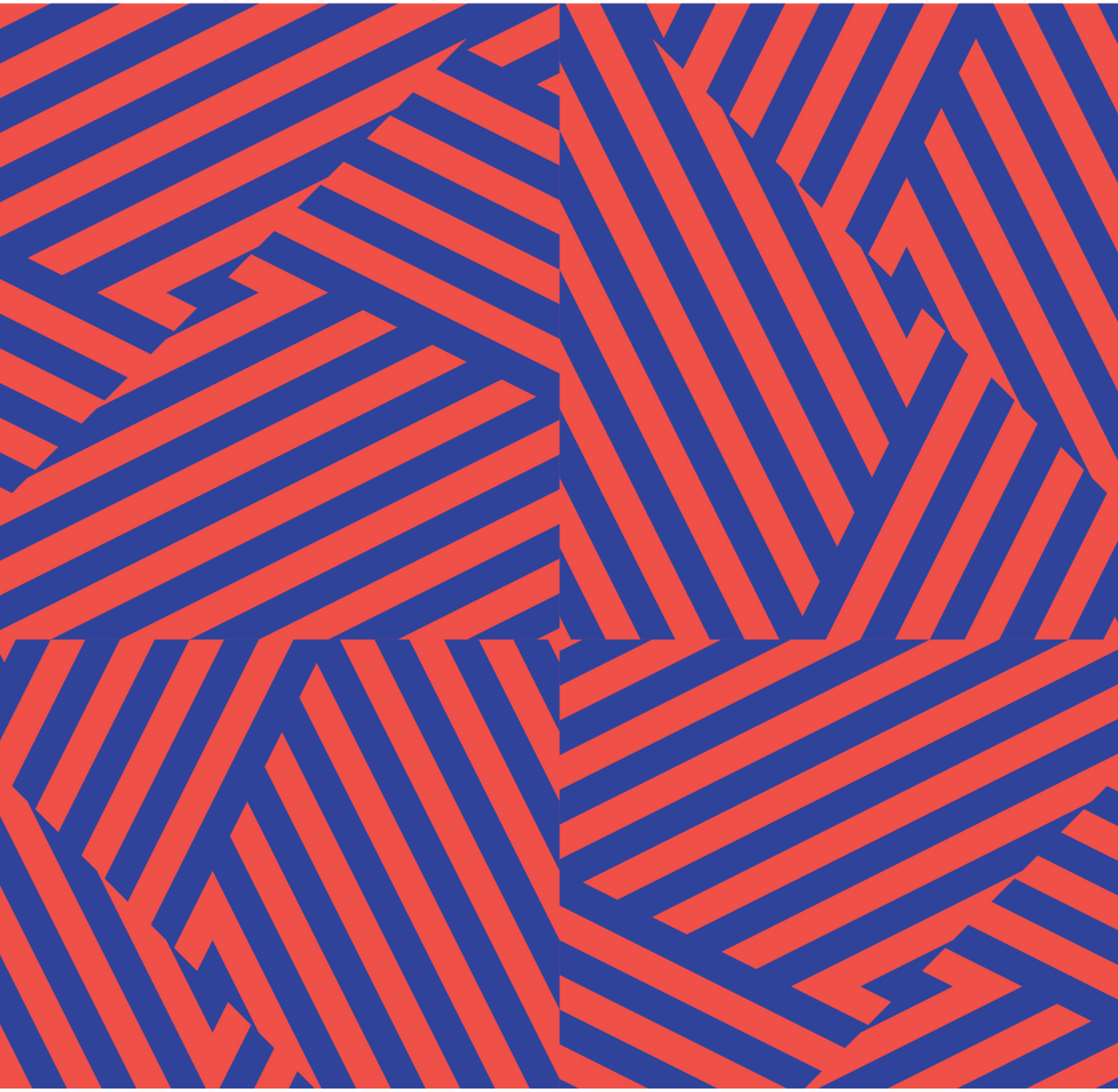
volume two / number one / twenty twenty

ROMA TRE LAW REVIEW



Roma TrE-Press
2020

ROMA TRE LAW REVIEW

volume two / number one / twenty twenty

Roma TrE-Press
2020

ROMA TRE LAW REVIEW
volume two / number one / twenty twenty

Coordinamento editoriale
Editorial Staff Roma Tre Law Review
Per informazioni in merito a contributi, articoli ed argomenti trattati
è possibile contattare la Redazione al seguente indirizzo email: law.review@uniroma3.it

I contributi pubblicati in questa Rivista sono sottoposti, in forma anonima, alla valutazione di "referees".

Rivista pubblicata nel rispetto del Codice etico adottato dal Dipartimento di Giurisprudenza dell'Università degli Studi Roma Tre, in data 22 aprile 2020.

Cura editoriale e impaginazione
teseo editore Roma teseoeditore.it

Elaborazione grafica della copertina
MOSQUITO mosquitoroma.it

Caratteri grafici utilizzati
Bodoni 72 Smallcaps Book; Didot; MinionPro-Regular (copertina e frontespizio); Adobe Garamond Pro (testo).

Edizioni Roma TrE-Press ©
Roma, luglio 2020
ISSN 2704-9043

http://romatrepress.uniroma3.it

L'attività della *Roma TrE-Press* è svolta nell'ambito della
Fondazione Roma Tre-Education, piazza della Repubblica 10, 00185 Roma.

ARTICLES

Flaminia Aperio Bella
Composite Procedures and Procedural Guarantees:
the "Borelli Doctrine" in the Light of *ReNEUAL* Model Rules 7

Stefania Gialdroni
Was the East India Company a "Democratic" Organization?
Majority Principle and Power Relations in 17th Century England 37

Barbara Cortese
'Causa' and Restitutory Conditio 55

Giulia Maria Guida
The Analogy in the Lex Aquilia: D.9.2.27.22 77

Ottavia Dora Lo Sardo
The Role of Supreme Courts in the Uniform Application of the Law 85

Sara Galeotti
"Solutio per errorem".
The Significance of the Solvens' Mistake in the Context of the Condictio Indebiti 105

Dario Ippolito
Chantiers beccariens. Loi pénale et liberté civile chez Genovesi, Filangieri et Pagano 127

Giulio Bartolini and Francesco Ferracci
Interpreters in Conflict Zones: an International Legal Assessment 145

NOTES ON ITALIAN LAW

Giacinto Parisi
New Scenarios for the Italian Class Action 173

Giorgio Pino
Forms and Methods of Constitutional Interpretation – Italian Style 187

LEGAL WORLDWATCH

Chiara Greco
The Italian Constitutional Court has changed its mind (and is not afraid to say so) 211

Federica Fedorczyk
After the Fifth Anti-Money Laundering Directive:
How EU Members States Are Expected to Implement AML/FT Regulations 227

Ilaria Capossela
The European Arrest Warrant in the Post-Brexit Era 241

Giulia Romano
Armed Drones: A Humanitarian Weapon?
Targeted Killings by U.S. Drones and the Role of Italy 259

Marta Caredda and Giulio Napolitano
The Judgement of the German Federal Constitutional Court on the Public Sector
Purchase Programme (PSPP) of the European Central Bank (ECB): has the Court gone too far? 273

INTERNATIONAL CONFERENCES AND SEMINARS

Stefania Gialdroni
9-11 May 2019: The Roman army and the dawn of Europe.
Conceptual models and social experimentations: languages, institutions, law (4th-8th centuries) 283
– organized by Luca Loschiavo, Roma Tre University and University of Teramo

Benedetta Graziani
A Conference on the Law Governing the Arbitration Agreement
and the Validity of Asymmetrical Clauses: Old Problems and New Perspectives 289

Giulio Patrizi
Antitrust and Regulation for Online Platforms: Challenges and Perspective 293

BOOKS REVIEWS

Giacinto Parisi
Piero Calamandrei, Opere giuridiche, I-X, rist., Roma, 2019 301

Antonella Massaro
The *Last Tango in Paris* case 307

LAW AND HUMANITIES

Stefania Gialdroni
An Interview with Professor Emanuele Conte 313

FLAMINIA APERIO BELLA[*]

COMPOSITE PROCEDURES AND PROCEDURAL GUARANTEES: THE "BORELLI DOCTRINE" IN THE LIGHT OF RENEUAL MODEL RULES

ABSTRACT. *In the last three dacades composite procedures have become increasingly significant in EU law, attesting the overcoming of the traditional dichotomy between direct and indirect administration. Among the case law of the European Court of Justice, the Oleificio Borelli case represents a paradigmatic example of the lack of protection that may occur during composite procedures, undermining the protection of individuals and, as a result, the principles on which EU administrative action is based. After an introduction on composite administrative procedure, sketching the main features of the European Agricultural Guidance and Guarantee Fund (EAGGF) in the context in which the Borelli case arose, this paper aims to re-read the leading case in the light of the draft of codification on administrative procedure presented by the Working Team ReNEUAL (Model Rules) in order to verify if, applying the Model Rules, the lack of procedural guarantees which emerged in that case can be dealt with. It will be argued that the insufficiencies that the Borelli case has shown can be addressed by shifting focus from the national court procedure to the lack of procedural safeguards at the confluence of national and EU law.*

CONTENT. 1. Introduction – 2. Composite procedures in EU law – 3. The Borelli Case: Preliminary Remarks on the European Agricultural Guidance and Guarantee Fund (EAGGF) – 3.1. The case and the judgment of the Court – 3.2. The reviewability of Intermediate Procedural Measures and the advice of the Liguria Region: the issue of Step 2 – 4. The codification of EU Administrative Procedure and the ReNEUAL Model Rules – 5. The solutions provided by the Model Rules in the normative framework of the Borelli Case – 6. The solutions offered by the Model Rules in the existing regulatory framework

[*] Research Fellow in Administrative Law at Roma Tre University.

1. Introduction

The increasing importance of administrative procedure at European Union (EU) level is emphasized in many studies dedicated to European administration,[1] especially after the entry into force of the Treaty of Lisbon.[2]

The first contribution to this evolution has been given by the Court of Justice (CJEU) and dates back several decades. The general principles of administrative action elaborated by CJEU case law laid the foundations for the conceptualisation itself of administrative procedure at EU level.

The method applied by the Court case law – gathering principles from the legal traditions of the Member States in order to reshape them while converging at EU level –

1 The doctrinal studies on the topic are countless. For just a few instances of the main Italian studies, see S. Cassese, *I lineamenti essenziali del diritto amministrativo comunitario*, in *Riv. it. dir. pubbl. com*., 1991, p. 3 *et seq.*; Id., *Il procedimento amministrativo europeo*, in F. Bignami-S. Cassese (eds.), *Il procedimento amministrativo nel diritto europeo*, Giuffrè, Milan, 2004, p. 31 *et seq.*; A. Adinolfi, *I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri*, in *Riv. it. dir. pubbl. com*., 1994, p. 521 *et seq.*; M.P. Chiti, *Diritto amministrativo europeo*, Giuffrè, Milan, 2004, p. 290 *et seq.*; G. della Cananea, *I procedimenti amministrativi dell'Unione Europea*, in M.P. Chiti-G. Greco (eds.), *Trattato di diritto amministrativo europeo*, Giuffrè, Milan, 2007, p. 497 *et seq*. More recently, looking beyond Italy, see H.C.H. Hoffmann, *Seven Challenges for EU Administrative Law*, in *Review of European Administrative Law*, 2009, 2, p. 37 *et seq.*; J. Ziller, *Is a law of administrative procedure for the union institutions necessary?* in *Riv. it. dir. pubbl. com*., 2011, 3-4, p. 699 *et seq.*; Id. *Alternative in Drafting an EU Administrative Procedure Law*, at <http://www.europarl.europa.eu/studies>, 2011; A. Simonati, *The Principles of Administrative Procedure and the EU Courts: an Evolution in Progress?*, in *Review of European Administrative Law*, 2011, 1, p. 45 *et seq.*; B.G. Mattarella, *The concrete options for a law on administrative procedure bearing on direct EU administration?* in *Riv. it. dir. pubbl. com*., 2012, 3-4, p. 537 *et seq.*; J. Schwarze, *European Administrative Law in the Light of the Treaty of Lisbon*, in *European Public Law*, 2012, 2, p. 285 *et seq.*; E. Nieto Garrido, *Possible Developments of Article 298 TFEU: Towards an Open, Efficient and Indipendent European Administration*, *ivi*, p. 373 *et seq.*; P. Craig, *A General Law on Administrative Procedure, Legislative Competence and Judicial Competence*, in *European Public Law*, 2013, 3, p. 503 *et seq.*; Id. *The Lisbon Treaty*, Oxford University Press, Oxford, 2013.

2 The Treaty of Lisbon recognised to the "Charter of Nice" (Charter of Fundamental Rights of the European Union of 7 December 2000), the same legal value as the Treaties, increasing the range of provisions related to administrative procedure. In particular, reconfirming the importance of the rule of law (see Preamble and Articles 2 and 21 TEU) and identifying the role of general principles simply with regard to foundamental rights (see Article 6, para. 3 TEU), the Treaty does not preclude the concurrent application of other general principles stemming from the CJEU, in particular principles of administrative law, which often refine general principles of a constitutional character (J. Schwarze, *European Administrative Law in the Light of the Treaty of Lisbon*, in *European Public Law*, 2012, 18, p. 293 *et seq.*). This aspect is also underlined in A. Simonati, *The Principles of Administrative Procedure and the EU Courts,* already quoted, p. 45; E. Schmidt-Assmann, *Principes de base d'une réforme du droit administratif*, in *Revue française de droit administratif*, 2008, p. 670 *et seq.*

led, as an outcome, to an evolution of national rules on administrative procedure. The entry into force of the Italian general law on administrative procedure (Law 241 of 1990) as well can be seen as a result of the convergence of EU and national legal systems towards certain common principles and values.[3] Moreover, eminent scholars described the increasing integration of the law systems of Member States of the (former) European Community ("Europeanisation") as one of the main evolutionary factors of national administrative systems.[4]

Whereas the written sources for procedural guarantees are growing (thanks to the CFREU being recognised the same legal value as the Treaties by the Treaty of Lisbon and the role played by the European Convention for the Protection of Human Rights and Fundamental Freedom ECHR), case law is still the "*natural habitat*"[5] for the drawing up of principles of administrative procedure.[6]

The creative law-making process of the CJEU led to a statement of principles such as due process and effective judicial protection, which contributed to the creation of European administrative law and are, without any doubt, binding on EU Institutions[7]

3 See M. Cartabria, *La tutela dei diritti nel procedimento amministrativo, la legge n. 241 del 1990 alla luce dei principi comunitari*, Giuffrè, Milan, 1991.

4 E. Schmidt-Assmann, *Recenti sviluppi del diritto amministrativo generale in Germania*, in *Dir. pub.*, 1997, 1, p. 27 *et seq.* The phenomenon is also evident with regard to the term "European administrative law". The term is developing in two different, but somehow overlapping forms: in a narrower sense it describes the administrative law which regulates the direct and indirect execution of EU law, and in a broader sense, it deals with the process of harmonisation of the legal standard of administrative action between national laws of the Member States and the EU: «*Europeanization of administrative law*» (J. Schwarze, *European Administrative Law in the Light of the Treaty of Lisbon*, *supra*, note 2, p. 290). See recently S. Torricelli, *L'europeizzazione del diritto amministrativo italiano*, in B. Marchetti-L. De Lucia (eds.), *L'amministrazione europea e le sue regole*, Il Mulino, Bologna, 2015, p. 247 *et seq.*

5 See M.P. Chiti, *Le forme di azione dell'amministrazione europea*, in F. Bignami-S. Cassese (eds.), *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 68.

6 The starting point for this judicial practice is the case of *Algera* (CJEU, 12 7 1957, C-7/56, C-3,7/57, in *Racc.*, 81, p. 464), a *leading case* concerning the question of the revocation of administrative acts. The Court derived its obligation to creative law-making from the absence of express Treaty provisions on the question concerned, using the subject matter of '*déni de justice*' (imported from the French *Code Civil*) to state that «La Cour, sous peine de commettre un déni de justice, est donc obligée de le résoudre en s'inspirant des règles reconnues par les législations, la doctrine et la jurisprudence des pays membres». See G. della Cananea-C. Franchini, *I principi dell'amministrazione europea*, Giappichelli, Turin, 2010.

7 There is now widespread agreement that the principles of law are to be applied by the institutions of the

as written rules and represent the *acquis communautaire*.[8]

The emergence of composite procedures, resulting from systems of shared administration, often called into question those principles with the risk of jeopardising them.[9]

In the framework of a complex and polycentric decisional process, where different actors, at both national and EU level, interact, following a shared and interrelated policy rather than an approach of strict separation, the rights and interests of addressees and third parties are at risk of falling into the 'black hole' between situations covered by the EU-level review and accountability mechanisms and those of the Member States.

The Oleificio Borelli case[10] represents a paradigmatic example of the lack of

Union and that the Court may condemn a breach of these principles just like a breach of any written norm. Accordingly, the term "law" used in Article 19 TEU (ex 220 TEC) to describe the parameters of judicial review of EU Courts includes unwritten principles (see J. SCHWARZE, *European Administrative Law in the Light of the Treaty of Lisbon*, *supra*, note 2, p. 288 *et seq.*, spec. 293; see also S. CASSESE, *Le basi del diritto amministrativo*, Garzanti, Milan, VI, 2000, 317 *et seq.*).

8 See M.P. CHITI, *Are there Universal Principles of Good Governance?*, in Euopean Public Law, 1995, p. 241 *et seq.*; A. ROMANO-TASSONE, *Il diritto amministrativo comunitario. Prospettive attuali e compiti della dottrina*, in R. FERRARA-S. SICARDI (eds.) *Itinerari e vicende del diritto pubblico in Italia. Amministrativisti e costituzionalisti a confronto*, Cedam, Padua, 1998, p. 109 *et seq.*

9 Regarding the concept of composite procedure, and its different classifications, see C. FRANCHINI, *Amministrazione italiana e amministrazione comunitaria*, II, Cedam, Padua, 1993; M.P. CHITI, *I procedimenti composti nel diritto comunitario e nel diritto interno*, in *Attività amministrativa e tutela degli interessati. L'influenza del diritto comunitario*, Giappichelli, Turin, 1997; G. DELLA CANANEA, *I procedimenti amministrativi composti dell'Unione europea*, in F. Bignami-S. Cassese (eds.) *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 307 *et seq.*; G. DELLA CANANEA-M. GNES, *I procedimenti amministrativi dell'Unione europea. Un'indagine*, Giappichelli, Turin, 2004; O. Jansen-B. Scöndorf-Haubold (eds.), *The European Composite Administration*, Intersentia, Cambridge, 2011; S. ANTONIAZZI, *Procedimenti amministrativi comunitari composti e principio del contraddittorio*, in *Riv. it. dir. pubbl. com.*, 2007, p. 640 *et seq.*; H.C.H. HOFMANN, *Composite Procedures in EU Administrative Law*, in H.C.H. Hofmann-A Türk (eds.), *Legal Challenges in EU Administrative Law: The Move to an Integrated Administration*, Edward Elgar, Cheltenham, 2009, p. 136 *et seq.*; C. ECKES-J. MENDES, *The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?*, in *European Law Review*, 2011, 11, p. 651 *et seq.*; M. ELIANTONIO, *Judicial Review in an Integrated Administration: the case of the Habitats Directive*, in *European Energy and Environmental Law Review*, 23, 2014, p. 116 *et seq.*

10 CJEU,V, 3 12 1992, C-97/91, with a memorable comment by E. GARCÍA DE ENTERRÍA, *La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario.* Sentencia Borelli de 3 de diciembre de 1992 del Tribunal de Justicia y el artículo 5 CEE, in *Revista española de derecho administrativo*, 1993, pp. 297-314; English version in Yearbook of European Law, 1994, pp. 19-37; today also in *Scritti in onore di Alberto Predieri*, Giuffrè, Milano, 1996, pp. 875-900; R. CARANTA, *Sull'impugnabilità degli atti*

protection that may occur during composite procedures, undermining the protection of individuals and, as a result, the principles on which EU administrative action is based.

After an introduction on composite administrative procedure and the main features of the European Agricultural Guidance and Guarantee Fund (EAGGF) in the context in which the Borelli case arose, the leading case[11] will be re-read in the light of the draft codification of administrative procedure, foreseen by scholars,[12] and presented by the Working Team ReNEUAL[13] (Model Rules). The aim of this paper is to verify if, in applying the Model Rules, the lack of procedural guarantees which emerged in that case can be dealt with.

The analysis will allow us to shed light on this ruling (which has enduring importance in legal practice and academic debate) highlighting how, despite the solution

endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione, in Foro amm., 1994, pp. 752-765.

11 The decision in the Borelli case was so innovative that eminent sholars commented that «la doctrina de esta Sentencia, con indipendencia del caso concreto en que se ha producido, tiene una enorme trascendencia» (E. García De Enterría, *La ampliación de la competencia*, supra, note 11, p. 301).

12 About the debate on codification of EU administrative procedure see G. della Cananea, *L'amministrazione europea*, in S. Cassese (eds.) *Trattato di diritto amministrativo, Diritto amministrativo generale*, II, Giuffrè, Milan, 2003, p. 1890 *et seq.*; J. Schwarze, *European Administrative Law*, Sweet & Maxwell, London, 2006, 1st ed., CLXV *et seq.* Among the first opponents of the codification see C. Harlow, *Codification of EC administrative procedures? Fitting the Foot to the Shoe or the Shoe to the Foot*, in *European Law Journal*, 1996, p. 3 *et seq.*; see also A. Weber, *Sviluppi del diritto Amministrativo Europeo*, in *Riv. it. dir. pubbl. com.*, 1998, 3-4, p. 589 *et seq.* In favour of the codification see F. Bignami, *The Democratic Deficit of the European Community Rulemaking: a Call for Notice and Comment in Comitology*, in *Harvard International Law Journal*, 1998, p. 451 *et seq.*

13 The ReNEUAL – the Research Network on EU Administrative Law, is composed of academics and experts in EU law forming a Working Group that elaborated some "*restatements*" and guidelines in a draft of a general law on administrative procedure. After the European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union, the Model Rules were presented during the ReNEUAL Conference that was held in May 2014 in Brussels (see the Reports of C. Napolitano, *EU Administrative Procedures. Presenting and Discussing the ReNEUAL Draft Model Rules,* in *Riv. it. dir. pubbl. com.*, 3-4, 2014, p. 879 *et seq.*; Id., *Verso la codificazione del procedimento amministrativo dell'Unione europea: problemi e prospettive*, ivi, 1, 2015). As some of the members of the working group underlined, the term "Code" used to describe the system of Model Rules (see G. della Cananea-D.U. Galetta, *Codice ReNEUAL del procedimento amministrativo dell'Unione Europea*, Editoriale Scientifica, Naples, 2016, p. XL) has to be understood in a broader sense, not seeking to describe a static system, but rather a positivisation of values and principles in order to regulate the administrative procedures of EU institutions (see the intervention of Prof. J. Ziller, at the Confernece *Verso la codificazione del procedimento amministrativo dell'Unione europea: problemi e prospettive*, held in November 2014 at the Università degli Studi di Milano).

given by the Court, the real lack of protection was not due to the Italian judicial review system but rather to the "grey zone" between national and EU procedural guarantees.

In the last part of the paper, the capacity of Model Rules to solve the challenge of composite procedure will be verified also in the light of the current feature of funding procedure related to the European Agricultural Guarantee Fund (EAGF), which replaced the EAGGF.

2. Composite procedures in EU law

Scholars identify three models of action in EU institutions: (i) Direct Administration, when the Commission and its bureaucratic dependencies, the array of European Agencies and the Council act directly; (ii) Indirect Administration, when EU institutions act through the authorities of national Member States (supervising the action of the latter); (iii) the specific mixed process embedding EU and national organs (developed more recently).[14] The reasons of the choice of each type of action and their scope of application is complex and cannot be examined in detail here.

Suffice to say that the features of Direct Administration, based on the binary formula of Community decision – national execution, appeared adequate at first, when the economic policies pursued by the three Communities were more limited. At this early stage the need to set up a complex administrative system was not perceived, and even avoided in order to maintain executive power at national level, encouraging the growth of the new system.

This political choice led, in combination with other well-known factors – such as the tendency to recognise juridical relevance only to the conclusive act of the

14 See S. Cassese, *Il procedimento amministrativo europeo*, in F. Bignami-S. Cassese (a cura di), *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 31; G. della Cananea, *I procedimenti amministrativi composti*, *ivi*, 307 *et seq.*; Id. *The European Union's Mixed Administrative Proceedings* in *Law and Contemporary Problems*, 2004, p. 197 *et seq.*, at <scholarship.law.duke.edu>. See also, more recently, J. Ziller, *Les concepts d'administration directe, d'administration indirecte et de coordination et le fondaments du droit administratif européen*, in J.B. Auby-J. Dutheil de la Rochere (edited by), *Traité de Droit Administratif Européeen*, Bruxelles, Bruylant, 2014, p. 327 *et seq.*; M.P. Chiti, *La legittimazione per risultati dell'Unione europea quale "comunità di diritto amministrativo"*, in *Riv. it. dir. pubbl. com.*, 2, 2016, p. 397 *et seq.*, spec. 414.

proceeding and the lack of distinction between normative and administrative acts[15] – to a lack of interest in the procedural phenomenon.[16]

Not even the earliest studies on European administration, at first, investigated procedural aspects, being focused, as happened at national level, on the study of Community institutions and their acts[17] rather than the procedure leading to those acts.[18]

The reversal of this trend is related to the changing landscape described above, to the enhancement of Community powers[19] and to the expansion of the array of European administrations, often provided with direct executive powers.[20] Also significant were the spread of new forms of action based on co-operation between national and EU authorities (co-ordinated procedures),[21] or the involvement, in the same proceeding, of national and EU administrative acts (composite procedures).[22]

15 See Articles 202 and 211 TEC today replaced, in practice, by Articles 16 TEU and 290-291 TFEU. Among sholars, G. DELLA CANANEA, *L'amministrazione europea*, in S. Cassese (eds.) *Trattato di diritto amministrativo generale*, *supra*, note 13, p. 1803 *et seq.*

16 C. FRANCHINI, *I principi applicabili ai procedimenti amministrativi europei*, in F. Bignami-S. Cassese (eds.) *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 282 *et seq.* For a comparative perspective see S. BATTINI-B.G. MATTARELLA-A. SANDULLI, *Il procedimento amministrativo*, in G. Napolitano (eds.) *Diritto amministrativo comparato*, Giuffrè, Milan, 2007, p. 107 *et seq.* See also S. STICCHI DAMIANI, *L'atto amministrativo nell'ordinamento comunitario*, Giappichelli, Turin, 2006, p. 28 *et seq.*

17 G. DELLA CANANEA, *I procedimenti amministrativi dell'Unione Europea*, *supra*, note 2, p. 502.

18 Among the earliest studies on the topic, see A. WEBER, *Il diritto amministrativo procedimentale nell'ordinamento della Comunità europea*, in *Riv. it. dir. pubbl. com.*, 1992, p. 393 *et seq.* For the first monograph on European Administrative Procedure see H.P. NEHL, *Principles of Administrative Procedure in EC Law*, Hart, Oxford, 1999.

19 Traditionally attributed to the introduction of both the Single European Act (SEA) and the Treaty on European Union (TEU) (see G. BOSCO, *Commentaire de l'Acte unique europeén des 17-28 février 1987, in Cahiers de Droit Européen*, 1987, p. 371 *et seq.*).

20 It is worth underlining that this new trend did not lead to a complete removal of the "executive federalism", still provided by Article 290 TFEU, stating, as a rule, that Member States shall adopt all measures of national law necessary to implement legally binding Union acts, and giving implementing powers to the Commission and to the Council as an exception.

21 See M.P. CHITI, *I procedimenti composti nel diritto comunitario e nel diritto interno*, *supra*, note 10, p. 55. In G. DELLA CANANEA, *I procedimenti amministrativi dell'Unione europea*, in M.P. Chiti-G. Greco (eds.), *Trattato di diritto amministrativo europeo*, *supra*, note 2, p. 528.

22 See G. DELLA CANANEA, *I procedimenti amministrativi composti dell'Unione europea*, in F. Bignami-S.

The diffusion of mixed procedures imposed to acknowledge the relevance of administrative procedure at EU level[23] also gained an organisational aspect,[24] allowing the different actors involved to exchange information and co-operate. It also raised new questions regarding the judicial protection of individual interests,[25] especially in terms of reviewability of intermediate procedural measures, but also the *audi alteram partem* principle and the guarantee of a complete gathering of information.[26]

Cassese (edited by) *Il procedimento amministrativo nel diritto europeo*, *supra*, note 2, p. 307 *et seq.*

23 On "procedural fairness" see J.A. Usher, *The CE Good Administration of European Community Law*, in *Current Legal Problems*, 1985, p. 269 *et seq.*, in which the A., observing the emergence of the principle of good administration in case law, combined with good faith, fairness, and diligence, stated that «in many cases […] the failure on the part of an EC institution to observe the principles of good administration does not in itself affect the legality of what has been done» (284). See also E. Picozza, *Il regime giuridico del procedimento amministrativo comunitario*, in *Riv. it. dir. pubbl. com.*, 1994, 321 *et seq.*, and the already quoted monograph by H.P. Nehl, *Principles of Administrative Procedure in EC Law*, *supra* note 19; A. Massera, *I principi generali*, in M.P. Chiti-G. Greco (eds.), *Trattato di diritto amministrativo europeo*, *supra* note 2, p. 356 *et seq.*; D. de Pretis, *Procedimenti amministrativi nazionali e procedimenti amministrativi europei*, in G. Falcon (eds.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario, Ricerche e tesi in discussione*, Cedam, Padua, 2008, pp. 49-72.

24 See M.P. Chiti, *I procedimenti composti nel diritto comunitario e nel diritto italiano*, *supra* note 10, p. 55 *et seq.*; G. della Cananea, *I procedimenti amministrativi dell'Unione Europea*, *supra* note 2, 508 *et seq.* For the description of European administrative proceedings as tools to ensure the uniform, or at least combined, exercise of different and separated powers, see S. Cassese, *Il procedimento amministrativo europeo*, *supra* note 2, p. 37.

25 Among general principles of EU law the very existence of effective legal protection designed to ensure compliance with EU law is the essence of the rule of law. A generally accepted principle of modern legal systems and enshrined in national constitutions (see Art. 24, 101, 111 and 113 of the Italian Constitution), as well as international treaties (see Art. 6 and 13 ECHR), the principle of effective legal protection is considered a general principle of Community law by the Court of Justice (CJEC 15 5 1986, C-222/84, *Johnston*) and lastly incorporated in Article 47 CFREU. At national level, the Italian code of administrative court procedure (Leg. Dec. 2 July 2010, no. 104 s.m.i.) states that «The administrative jurisdiction shall ensure full and effective protection in accordance with the principles of the Italian Constitution and European law». Among sholars, see M.A. Sandulli, *Fonti e principi della giustizia amministrativa*, at giustizia-amministrativa.it, 2008; Id., *Principi costituzionali e comunitari in materia di giurisdizione amministrativa (Relazione al Convegno di diritto amministrativo su Riflessioni sulla giurisdizione del giudice amministrativo svoltosi a Gaeta il 22 maggio 2009)*, at giustamm.it, 2009 also published in M.A. Sandulli (eds.) *Il nuovo processo amministrativo*, Giuffrè, Milan, 2013, I.

26 The question of the reviewability of intermediate procedural measures has been taken into account in many studies: among others see E. García de Enterria, *La ampliación de la competencia de las jurisdicciones administrativas nacionales per obra del derecho comunitario*, *supra* note 2; M.P. Chiti, *I procedimenti composti nel diritto comunitario e nel diritto italiano*, *supra* note 10, p. 63; more recently Id. *I procedimenti amministrativi composti e l'effettività della tutela giurisdizionale*, *Giorn. dir. amm.*, 2, 2019, p. 187 *et seq.* In the field of electronic communications see L. Saltari, *I procedimenti comunitari composti: il caso delle telecomunicazioni*, in *Riv. trim. dir.*

3. The Oleificio Borelli Case: Preliminary Remarks on the European Agricultural Guidance and Guarantee Fund (EAGGF)

To better outline the circumstances behind the Oleificio Borelli case, it is necessary to briefly discuss the features of funding proceedings through the EAGGF in place at the time of the relevant facts.[27]

According to the aim of increasing agricultural productivity by developing technical progress and ensuring the rational development of agricultural production, typical of the CAP (Common Agricultural Policy, Art. 39, para. 1, lett. a TEEC) the Community legislator established the European EAGGF (Art. 40, no. 4, TEEC) and regulated the founding procedure of this important European policy (see Regulation No. 25 of 1962 on the financing of the CAP, as amended by Regulation (EEC) No. 728/70).

The allocation procedure of the EAGGF represents, within the framework of CAP implementation, an example of composite procedure. As will be further analysed below, the fund disbursement field within CAP is still characterised, despite the development of the legal framework, by models of co-administration.

It is well known that the structural funds of the Union constitute enduring financing instruments, designed to support the Commission and the Member States during the establishment, implementation and funding of the EU structural policies. Essentially, the Fund contribution lies in subsidies co-financed by the beneficiary itself, by the Commission (amounting to an average 25%) and by the Member State (usually a 5% share), granted on the basis of projects approved by the Commission and the Member State involved.

pubbl., 2005, 2, p. 389 *et seq.* spec. p. 429 *et seq.* More recently H.C.H. Hofmann-M. Tidghi, *Rights and remedies in implementation of EU policies by multi-jurisdictional networks*, in *European Public Law*, 2014, spec. p. 147 *et seq.*

27 Reg. no. 1782/2003 established two new Funds: the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). The new Funds are regulated by Reg. no. 1290/2005 of the Council, of 21 June 2005, on the financing of the common agricultural policy. The current legal framework, that will be further examined below, provides for detailed "Fund-specific Regulations" for each type of Fund and a general regulation (no. 1303/2013) laying down common provisions (P. Chirulli, *Amministrazioni nazionali ed esecuzione del diritto europeo*, in B. Marchetti-L. De Lucia (eds), *L'amministrazione europea e le sue regole*, *supra* note 5). For issues arising from the new legal framework see B. Marchetti, *Fondi strutturali e tutela giurisdizionale: variazioni degli schemi regolatori e conseguenze sull'architettura giudiziaria dell'UE*, in *Riv. it. dir. pubbl. com.*, 2012, p. 1150 *et seq.*

For the limited purposes of this study, it is necessary to examine in greater detail the legislation relevant to the case.

Council Regulation (ECC) No. 335/77 outlines, providing a scant legal framework, the granting procedure for the Fund. The legislation foresees, firstly, the development by the Member States of "programmes" designed to develop the treatment, processing or marketing of one or more agricultural products. These programmes are subject to the Commission's approval, responsible for deciding on a binding opinion of the Standing Committee on Agricultural Structure. What is then expected is the drafting of "projects", bringing in state-level defined "programmes", aimed at contributing to improving the situation of the basic agricultural production sector, by ensuring producers an adequate and lasting share in the economic benefits derived from the programme itself (Art. 9). Criteria for granting aid from the Fund are listed in Article 11, while the project examination procedure is defined in Articles 13 and 19. The procedure provides for the involvement of three players: the beneficiary, the Member State and the Commission.

To benefit from the contribution, all applications for aid from the Fund, accompanied by all the information required to ascertain the matching criteria laid down in Article 11, must, first of all, obtain approval from the Member State in the territory of which the project is to be carried out, and only then they can be submitted to the Commission through the national authorities. The Commission decides on the applications submitted during the previous semester twice a year (6/30 and 12/31), after the Fund Committee has been consulted on the financial aspects. The decision, adopted on a binding opinion of the Standing Committee on Agricultural Structure, is notified to the Member State concerned and the beneficiary.

Article 21 relates to the specific circumstance in which the insufficiency of resources available prevents the granting of aid: in this case, applications can be "carried forward", in agreement with the applicants, to the next financial year. This procedure takes place through a "request to carry forward" presented by the Member State to the Commission, within thirty days following the communication of a negative outcome.

The legislative process can be illustrated as follows:

Step 1 (Applicant): presentation of the application to the Member State;

Step 2 (Member State): granting of approval;

Step 3 (Member State): forwarding the duly examined application to the Commission;

Potential steps in the event of a shortage of available funds:

Potential step 1 (Commission): communication of insufficiency of resources;

Potential step 2 (Member State): application to carry forward to the next financial year within thirty days;

Step 4 (Commission): final decision of the Commission (following consultation with the Fund Committee upon projects submitted or carried forward) with the necessary precondition of approval by the Member State.

The close cooperation provided by the Member States to the procedure of funding allocation can be attributed to the shared nature of the funding, financed both by the Commission and by the Member State. Nevertheless, the outlined procedure represents a typical hypothesis of dissociation between the authority charged with the task of gathering and providing information and the one responsible for the final decision.

3.1. The facts and the judgment of the Court

The Oleificio Borelli S.p.A. company brought an action before the Court of Justice for the annulment (ex Art. 173 EEC, now 263 TFEU) of the denial of the Commission for the issuing of the EAGGF contribution for the 1990 financial year.

The application, accompanied by the necessary approval from the Liguria Region, was initially presented for the financial year 1989, but, due to the unavailability of financial resources, was carried forward to the next financial year, in accordance with Article 21 of the above-mentioned Regulation No. 355/77. Pending the re-enactment, the Italian Authorities informed the Commission, by letter dated January 1990, of the unfavourable opinion of the Liguria Regional Council concerning the original request; in line with this, the Commission issued the contested refusal.

The appellant contested the unfavourable opinion of the regional administration directly before the Court, arguing that the related nature of "preparatory" or "intermediate" measure would have precluded its appeal before the competent Italian Courts. On that specific point, however, the Court rejected the appeal on grounds of competence, stating that it could not rule on the validity of an act issued by a national authority.

The Advocate General Darmon concluded[28] in favour of the legitimacy of the rejection stated by the Commission because of the lack of the necessary favourable opinion from the Member State. In particular, the thesis proposed by the applicant company, for which the validity of the funding application should have been assessed and "photographed" at the moment of the first submission – without taking into account that, pending the carry-forward period, the basis of the acceptance of the application with the favourable opinion of the national authority no longer prevailed – was rejected, in consideration of the crucial role played by the national opinion during the *de quo* procedure, to enforce the guarantee of the willingness of the Member State to participate in the shared funding. In his conclusion, Advocate dealt at length with the nature of the unfavourable opinion offered, concluding that it could not have been considered an intermediate measure which could not be appealed with the national legislation, since Borelli S.p.A. was responsible for bringing proceedings in the national courts and, if the action should be declared inadmissible, «to raise the question that the principle of the "right to an effective judicial remedy" may have been infringed».

The Court's decision confirmed the rejection, by adding that, since the funding proceedings preclude the Commission from examining the project facing an unfavourable opinion, it would have been precluded *a fortiori* from reviewing the lawfulness of the national opinion (pt. 11). Such a circumstance would have determined the "imperviousness" of the Court decision to any potential invalidity of the act the prerequisite of which was the competence of the Member State («any irregularity that might affect the opinion cannot affect the validity of the decision by which the Commission refused the aid applied for»).[29]

This final act, the Court stated, should have been brought before the national courts. With regard to the protested inadmissibility of the claim against the opinion, the Court stated that it is up to national judges to rule, where appropriate after obtaining a preliminary ruling from the Court, on the lawfulness of the national measure,

28 Advocate General Darmon's opinion, on 9 June 1992, case C-97/91.

29 For a more detailed look at the question of the immunity of vices in national acts at European level, see R. Caranta, *Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione*, *supra*, note 11, spec. p. 758 *et seq.*

regarding «an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case».

3.2. The reviewability of intermediate procedural measures and the advice of the Liguria Region: the issue of Step 2

The most quoted principle stated by the abovementioned *leading case* is the one in which it is claimed that the requirement «of judicial control of any decision of a national authority» reflects a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR, and it requires the overcoming of the obstacles set by the relevant internal procedure which does not allow the contesting of the unfavourable opinion provided by state organs. The Court, adopting a principle already enshrined in previous judgments,[30] specifies that the right to an effective legal remedy legitimises the restriction on the procedural autonomy of the Member States and requires additional guarantees.

It should be pointed out that the principle of "procedural autonomy", the impact of which has been thoroughly investigated by scholars,[31] was defined with increasing detail by the case law of the Court of Justice and refers to the "independent" choice, recognised to the Member States, of the means aimed to grant effectiveness to Community legislation. The principal validity shall be derived indirectly via the Treaty rules, examined from the viewpoint of the principle of conferral,[32] that do not confer the powers to legislate on procedural matters on the EU.[33]

30 CJEU, 15 10 1987, in C-222/86, quoted in the case mentioned in the text, stated that «the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the Court held in its judgment of 15 May 1986 in Case 222/84… that requirement reflects a general principle of Community law which enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms» It is well known that the right to an effective legal remedy is today enshrined in Arts. 47 CFREU and 19 TFEU.

31 See D.U. Galetta, *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost?*, Giappichelli, Turin, 2009 and the English version: *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence", of EU Member States*, Springel, Heidelberg, 2010.

32 According to the interpretation of Article 5, paragraph 1 TEU, given by the CJEU.

33 More recently M.C. Romano, *Situazioni legittimanti ed effettività della tutela giurisdizionale. Tra ordinamento europeo e ordinamenti amministrativi nazionali*, Jovene, Naples, 2013; M. Lottini, *Principio di autonomia*

"Procedural" rules, covered by the aforementioned principle, shall include the set of formal and substantive regulations which, in each Member State, govern national disputes.[34] Procedural autonomy has been raised in relation to purely procedural dispositions (such as the time limits to file claims before the courts) as much as with respect to substantive and procedural rules (for instance, limits within which a granted benefit can be legitimately withdrawn). Although the circumstance that the EU is not a competent regarding procedures implies that, within this specific field, the primacy of Community law holds only a mediated relevance, through the principle of "*effet utile*", this did not prevent case law establishing firm limits in procedural autonomy, precisely for the need of granting the *effet utile* of the principle of *direct effet*[35] and thus, *ipso facto*, the primacy of Community law,[36] regarding the obligation to interpret national law in conformity with Community law.[37] As is well known, the primacy of EU law and the obligation affecting internal judges to interpret national law so that it does not involve a limitation of rights enshrined by the EU legal system are reflected within the framework of procedural rules through the so-called *Rewe criteria*[38] of

istituzionale e pubbliche amministrazioni nel diritto dell'Unione Europea, Giappichelli, Turin, 2017 with a focus on institutional autonomy, and F. Aperio Bella, *Tra procedimento e processo. Contributo allo studio delle tutele nei confronti della pubblica amministrazione*, Editoriale Scientifica, Naples, 2017.

34 See J. Martens de Wilmars, President of the I Chamber of the CJ at the time of *Rewe case*, *L'efficacité des différentes tecniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers*, 1981, spec. p. 390.

35 The principle of direct effet, stated in the *van Gend & Loos* case (5 2 1963, in C-26/62) and repeated in the well-known *Costa c. Enel* case (15 7 1964, in C-6/64), refers to the capacity of EU law to create directly rights and duties on the adressees («*senza cioè che lo Stato eserciti quella funzione di diaframma che consiste nel porre in essere una qualche procedura formale per riversare sui singoli gli obblighi e i diritti*», G. Tesauro, *Diritto dell'Unione Europea*, Cedam, Padua, 2012, p. 189 *et seq.*).

36 D.U. Galetta, *supra*, note 32, p. 20.

37 It is well known that this principle has been derived from Art. 4, para. 3 TEU. It implies that in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (13 11 1990, in C-106/89, *Marleasing*, par 8). It follows that the national provision may not be interpreted in a way that precludes the full application of EU rights (see G. della Cananea, *Il rinvio ai princìpi dell'ordinamento comunitario*, in M.A. Sandulli (eds) *Codice dell'azione amministrativa*, Giuffrè, Milan 2017, 2ª ed., p. 133 *et seq.*).

38 See CJEU, 16 12 1976, in C-33/76, more recently, *ex multis*, CJEU, 3 9 2009, in C-2/08, *Olimpiclub.*

equivalence and effectiveness.

In the case at issue the procedural autonomy is so limited as to allow the Court of Justice to profile an obligation on the Member State (and, through that, on its judges) to grant a further remedy beyond the existing ones, ruling that «it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue… and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case».[39]

Scholars have not failed to highlight how in spite of the "aggressive" approach of the Court of Justice to the judgment under examination, the case law that took up the so-called "dottrina Borelli" in relation to the right to an effective remedy (Arts. 47 CFREU and 19 TFEU) has adopted a more moderate approach, emphasising the requirement of *necessity* to justify "supplementary" interpretations such as the one submitted in this case.[40] Only when the national system, examined as a whole, does not provide an effective remedy, has it been claimed that national judges are obliged by Community law to develop a new remedy.

By observing the facts of the Borelli case against this backdrop and within the requirement of *necessity* an immediate objection arises about the circumstance assumed to have hampered the effective compliance of Community law and imposed a revision of Italian procedural law: the preclusion to challenge the opinion before the national courts.[41] It is from such assumption that the Advocate General begins reasoning, followed by the Court, stating that «It was therefore for Borelli to bring proceedings in the national courts. It would then have been open to such a court to make a reference under Article 177 of the EEC Treaty to the Court of Justice for a preliminary ruling on

39 See paragraph 13.

40 H.C.H. Hofmann, *Art. 47 – Right to en Effective Remedy*, in S. Peers-T. Harvey-J. Kenner-A. Ward (eds.) *The EU Charter of Fundamental Rights. A Commentary*, Hart, Oxford and Portland, 2014, spec. p. 1217.

41 The issue has been specifically mentioned by scolars «*Un informe o acto consultivo no es recurrible, en efecto, en niguno de los sistemas nacionaled del contencioso-administrativo y a partir de ahora van a serlo en esta clase de procediminetos en virtud de la docrtina Borelli que comentamos*» (E. García De Enterría, *La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario*, *supra* note 11, p. 883).

questions concerning the interpretation or validity of rules of Community law to the extent to which it considered that a decision on such a point was necessary to enable it to give judgment».[42]

The assumption seems to be denied by reading the national administrative rulings which admitted, already at the time of the relevant facts, contestability of the opinions determining a procedural stop (Council of St., sect. V, 8 11 1982, no. 767; Id., Plenary Session, 10 7 1986, no. 8; Id., sect. V, 29 12 1987 no. 832).[43]

In view of this fact it is reasonable to suppose nothing would have precluded the administrative judge deciding on the opinion of the Region, therefore there would have been no reason to directly contest it before the Court of Justice nor to impose on the national legal system the establishment of any further remedy in addition to those already existing.[44]

The lack of protection criticised by the applicant company was not due to the fact that Italian administrative justice was ill-suited to deal with the instances of mixed decision making, as argued during the trial,[45] but from the particular features of the "substantive" procedure, which did not allow for a complete exchange between the applicant and the Italian State, after the transfer of information to the Commission.

42 See paragraph 33.

43 Among scholars, see A.M. Sandulli, *Manuale di diritto amministrativo*, Jovene, Naples, II, 1989, p. 1219 *et seq.* Also in the Spanish legal system, already at the time of the relevant facts, it was admissible to challenge intermediate procedural measures by means of which «*se deciden directa o indirectamente el fundo del asunto*» even if «*de tal modo que pongan término a aquélla /la vìa administrativa / o hagan imposible o suspendan su continuaciòn*» (see Art. 37 Ley de la Jurisdicciòn contencioso-administrativa mentioned by E. García De Enterría, *La ampliación de la competencia de las jurisdicciones contencioso-administrativas nacionales por obra del Derecho Comunitario*, *supra* note 11, p. 833).

44 It will be shown in the following pages that the contradiction is only apparent considering that, according to the composite feature of the procedure, the applicant became aware of the negative opinion of the Liguria Region only by receiving the denial of funding by the Commission. This is the reason why the applicant brought the proceeding before the Court of Justice seeking the annullment of both measures.

45 It seems to be stated by G. Mastrodonato, *Procedimenti amministrativi composti nel diritto comunitario*, Cacucci, Bari, 2008, p. 114 *et seq.* The A. derives the principle of inadmissibility of claims against intermediate procedural measures from case law in electoral matters. The specific features of such a matter do not contradict but confirm the abovementioned case law which admitted, at the time of the relevant facts, the contestability of opinions leading to a procedural stop.

In summary the *vulnus* was not due to the procedural rules of the Italian administrative courts, but rather shortcomings of the composite proceedings of the Fund (or, at best, to Community rules on procedure for the part where, limiting the control of the Court of Justice, redress of the aforementioned procedural shortcomings was prevented).[46]

From the procedural perspective, which specifically interests us here, Regulation 355/77 does not provide for a communicative obligation for the Member State during the delivery of the statement.

The peculiarities of the case further complicate the picture: it was an opinion stated to revoke the initial position expressed by the Region[47] and the case documents (judgment, report for the hearing, Advocate General's opinion) confirm that the adverse opinion provided by the Liguria Region was not submitted to the applicant, but only to the Commission.[48] Even if preliminary exchanges between the firm and the Region to assess the application are acknowledged[49] and there is also a preliminary inquiry

46 The issue that arose in the Borelli case should have been resolved following an alternative pattern: considering the powers of the Court of Justice as broader, allowing the Court to evaluate the lawfulness of the decision of the Commission the annulment of which was sought, also in the light of previous decisions. This solution assumes the CJEU can overcome its traditional *self-restraint* in evaluating Member States' authority measures (see R. Caranta, *Sull'impugnabilità degli atti endoprocedimentali*, *passim*, *supra*, note 11 and more recently H.C.H. Hoffmann-M. Tidighi, *Rights and Remedies*, *supra* note 27, p. 158 *et seq.*). See also F. Brito Bastos, *The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice*, in *Review of European Administrative Law*, 8, 2015, p. 269 *et seq.* where the abovementioned *self-restraint* of the CJ is described as "*substantive Borelli principle*" and compared to the so-called "*jurisdictional Borelli principle*", regarding the issue of reviewability of intermediate procedural measures. The approach of the Louxembourg's judjes on this topic seems to be evolved: see CJEU, Grand Chamber, 19 12 2018, in C-219/17, especially paragraph 49 *et seq.* and the remarks of M.P. Chiti, *I procedimenti amministrativi composti e l'effettività della tutela giurisdizionale*, *supra*, note 26.

47 See paragraph 29 AG Darmon's opinion of 9 June 1992 «That opinion therefore clearly had the effect of revoking the approval initially given by the Regional Council of Liguria».

48 See paragraph 12 AG's opinion «The Italian authorities went back on their initial decision and on 19 January 1990 informed the Commission that the Regional Council of Liguria, by Decree No 109 of 18 January 1990, had issued ad *unfavourable* opinion on Borelli's application».

49 See paragraph I Report of the hearing, where it is stated that, after the Provincial Agri-Food Department of Imperia and the competent councillors of the Regions concerned had expressed doubts as to the reliability of the contracts submitted with the application for aid, Borelli replaced the contracts giving further clarification.

initiated by the Commission itself to obtain documentary integration,[50] there is no evidence of the opinion being transmitted to the company. This circumstance seems to be confirmed since the applicant appears to fully hear the content of the opinion only during the proceedings (and this determines, accordingly, a modification of the application during the proceedings).

Here, the real issue of the application moves from the problems associated with the procedures of the national court to the lack of procedural safeguards at the confluence of national and EU law.

4. The need to turn to codification of administrative procedures and the ReNEUAL proposal

As stated in the opening paragraphs, the drawing-up of principles of administrative procedure has been traditionally a "praetorian" prerogative of the CJEU because of the significant fragmentation into sector-specific and issue-specific rules and procedures of EU administrative law. Beside the highly regulated sectors where procedural rules are varied and detailed (the public procurement sector is one example),[51] the rather experimental design of procedural rules in many other fields of EU law, or their absence, requires the use of general principles of EU administrative law to fill the gaps.

In this framework, although the administrative principles common to the Member States represented for decades the only "guidance" of CJEU case law, the abovementioned evolutions related to the entry into force of the Treaty of Lisbon accelerated the expansion of those principles. Scholars effectively described Article 41 of CFREU as «*l'axe ou la colonne vertébrale d'une future codification de la partie générale du droit administratif de l'Union*.[52]

50 See para. III Report of the hearing «the Community authorities which received the documentation relating to the contracts (Annex XVII to the application) confined themselves to asking Borelli for further particulars of a different nature».

51 G. della Cananea, *L'amministrazione europea*, *supra*, note 13, p. 1888.

52 E. Schmidt-Assmann, *Principes de base d'une réforme du droit administratif*, cit., p. 671. Among the Italian studies devoted to analysing the code of administrative procedure (Law no. 241/1990) from a comparative perspective see M.A. Sandulli (ed.), *Il procedimento amministrativo in Europa, Atti del convegno di Milano*, Giuffrè, Milan, 2000.

The growing relevance of written sources on general principles of administrative procedure and the concurrent constitutionalisation of EU law[53] imposed on legal practitioners[54] as well as on EU institutions the requirement to consider the need to "codify" common procedural standards (see the European Parliament resolution of 15 January 2013 with recommendations for the Commission on a Law of Administrative Procedure of the European Union,[55] and, more recently, the European Parliament resolution of 9 June 2016).[56]

The ReNEUAL model rules set out proposed accessible, functional and transparent rules which make visible the rights and duties of individuals and administrations alike.

The ReNEUAL *Working Team* shaped a "Model" for legal practitioners, both at academic and institutional level.

Starting from the latter, model rules attracted the attention of EU institutions (see the abovementioned resolutions of the European Parliament of 2013 and 2016) and could lead to the adoption of a Regulation or more coordinated normative acts.[57]

Irrespective of the concrete use of model rules in future legislative projects, they undoubtedly spur further academic debates offering a catalogue of rules (partially emerging from case law and partially designed *ex novo*, following an *innovative codification* approach), which can make the system of EU administrative procedure

53 See A.V. Bogdandy, *I principi costituzionali dell'Unione europea*, at *federalismi.it*, 2005; *I principi fondamentali dell'Unione europea. Un contributo allo sviluppo del costituzionalismo europeo*, Napoli, Univ. Suor Orsola Benincasa, 2010, p. 20 *et seq.*; A. Pizzorusso, *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2002.

54 The need to take into account rules on administrative procedure at EU level after the Treaty of Lisbon is demonstrated, in addition to the authors already quoted, is underlined by A. Meuwese-Y. Shuurman-W. Voermans, *Towards a European Administrative Procedure Act*, in *Review of European Administrative Law*, 2009, 2, p. 3 *et seq.* For a position hostile to the codification see G. Bertezzolo, *Serve una codificazione del procedimento amministrativo europeo?*, in M. Malo-B. Marchetti-D. de Pretis (eds) *Pensare il diritto pubblico,* Liber Amicorum *per Giandomenico Falcon*, Editoriale Scientifica, Naples, 2015, p. 75 *et seq.*

55 European Parliament resolution 2012/2024(INL).

56 European Parliament resolution 2016/2610/RSP, with attached a draft of a Regulation of the European Parliament and the Council.

57 G. della Cananea-D.U. Galetta, *Codice ReNEUAL del procedimento amministrativo dell'Unione Europea*, *supra*, note 14, XXVII.

more functional and transparent. It is well known that the process of bringing together in one document existing principles, which are scattered across different laws and regulations and in the case law of courts, is *per se* a factor of simplification, facilitating access to the rules.[58]

The ReNEUAL model rules force legal practitioners to face standard models for decision-making procedures at EU level, looking with new eyes at administrative procedure rules both at EU and national level (the influence on the national legal systems is unquestionable, at least from a "cultural" perspective).

5. The Solution Provided by the ReNEUAL Model Rules in the Regulatory Framework of the Borelli Case

After clarifying the facts and the main legal issues that arose in the Borelli case, it is worth verifying if the ReNEUAL Model Rules provide a possible answer.

For this purpose, it is Book III, concerned with single-case decision-making, that has to be taken into account first and foremost.

Although only some national codes of administrative procedure of EU Member States regulate administrative rulemaking, no codification of this kind neglects single-case decision-making, which also has a central role in Italy.[59]

The drafting technique chosen by the *Working Group* provides for an introduction devoted to "motivate" and "explain" the normative choices (as the EU law-maker does with the "Whereas"). The introduction to Book III, while highlighting that «The model rules do not seek to eliminate the particularities of sector-specific legislation», takes into account precisely the EU legislation containing «procedural and substantive conditions for eligibility to EU funds» (para. 5), stating that such conditions are mainly determined on a case-by-case basis and adding that the applicable "lex specialis" must be interpreted «in the light of the model rules» (para. 5 cit.). In more

58 Regarding the simplifying effect of the "codification process" that occured with the Italian rules on administrative court procedures see M.A. SANDULLI, *Anche il processo amministrativo ha finalmente un codice*, at federalismi.it, 2010, p. 14, *passim*.

59 C. NAPOLITANO, *Verso la codificazione del procedimento amministrativo dell'Unione europea: problemi e prospettive*, *supra* note 14, p. 297.

specific terms, according to the "*lex specialis principle*" regulating the relation with the specific procedural rules of the EU,[60] model rules play a paradigmatic but subsidiary role in the procedural and substantive conditions for eligibility for EU funds.

Article III-8, regarding the «Management of procedures and procedural rights», despite not concerning specifically composite procedures, plays an important role. It includes among the rights of the parties (*i.e.*, the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure) the right «to be notified of all procedural steps and decisions that may affect them in accordance with Article III-33» (para. 1, lett. d).[61] The wide meaning chosen to describe the object of the prescribed notification ("all procedural steps and decisions") should allow, also in composite procedures, the filling of the informative gaps between the players involved at each level.

In the same way, Article III-30 may have an impact, even if indirect, on composite administrative procedures, stating that the decision shall provide information to the addressee concerning the possibility to appeal and the competent authority.[62] The provision may be useful when the mixing of procedures jeopardises the proper identification of the competent review body.[63]

60 See Article «I-2 *Relation to specific procedural rules of the European Union*» («*Rapporto con specifiche norme procedurali dell'Unione Europea*»).

61 Article III-8 (Management of procedures and procedural rights) «1) The parties shall have the following rights related to the management of the procedure: (a) to be given information on all questions related to the procedure in a fast, clear and understandable manner; … (d) to be notified of all procedural steps and decisions that may affect them in accordance with Article III-33…».

62 Article III-30 (Duty to indicate available remedies) «(1) Decisions shall provide information to the addressee concerning: (a) the possibility of administrative appeal, where this exists, including cases where an appeal can be made to a public authority other than that which adopted the decision, and (b) the time limit for making an appeal. (2) Decisions shall also inform the addressee of the possibilities of judicial challenge, including the time limits within which this can be brought, and of possible recourse to an Ombudsman».

63 See the Conclusions of E. Schmidt-Assmann, in G. della Cananea-D.U. Galetta, *Codice ReNEUAL del procedimento amministrativo dell'Unione Europea*, *supra*, note 14, XXXIII. More recently see D.U. Galetta-H.C.H. Hofmann-O.M. Puigpelat-J. Ziller, *Proposal for a Regulation on the Administrative Procedure of the European Union's institutions, bodies, officies and agencies*, europarl.europa.eu/studies, 2015, p. 29, where is stated that «The duty to indicate available remedies…, which is foreseen in many national APAs, is very positive, since it facilitates the use of existing remedies by the parties, especially in composite procedures between the Union's

It is also worth mentioning Art. III-23, concerning the right to be heard,[64] which establishes that «every party has the right to notice of the central issues that are to be decided by the public authority and the core arguments that inform its reasoning, in order that the party can effectively make known its views on the matter and can exercise its rights of defence» (para. 3).

This fundamental procedural right is specified having regard to composite procedure in Article III-24, devoted to the «Right to be heard in composite procedures». Paragraph 4 of Article III-24 may apparently "solve" the Oleificio Borelli case, stating that «In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23(3)-(5)».[65] This concrete rule provides for the guarantee of the *right to be heard* in the segment of the composite procedure leading to a "*legally binding recommendation*".

Some remarks are necessary.

The provision: (i) seems to be applicable only to "recommendations"[66] and (ii) refers only to legally bound recommendations made by EU authorities, although it also operates having regard to domestic authorities if sector-specific legislation so provides.

administration».

64 Article III-23 (Right to be heard by persons adversely affected) «(1) Every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken.… (3) Every party has the right to notice of the central issues that are to be decided by the public authority and the core arguments that inform its reasoning, in order that the party can effectively make known its views on the matter and can exercise its rights of defence...».

65 Article III-24 ("Right to be heard in composite procedures") «…(4) In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23(3)-(5). Where sector-specific legislation renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the recommendation. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings».

66 According to Article 288 TFEU recommendations are legal acts of the Union which have no binding force.

The narrow wording of the provision is quite easy to overcome assuming that it may be extended to all intermediate measures binding on the final decision.[67] Such an interpretation seems to be confirmed by the general provision under Art. III-24, para. 1: «The application of the right to be heard will depend on the division of responsibility in the decision-making process». If it is true that the responsibility for taking a decision stems from the binding character of the contribution of the authority involved, it follows that this connection operates regardless of the *nomen iuris* of the act embodying this binding measure.[68]

The statement *sub* (ii) means that whereas the right to be heard of addressees is always safeguarded in cases of the adoption of binding internal measures by EU institutions, the same procedural rule applies to internal measures enacted by domestic authorities only «where sector-specific legislation renders Book III applicable to Member States» (para. 4).

The divergence results from the scope of application of the Model Rules, a topic which is strictly connected to another important issue: finding a legal basis for the codification of administrative procedures in the EU.[69] The issue cannot be examined here. Suffice to say that the Model Rules are applicable to EU authorities implementing EU law, but they do not apply to the authorities of Member States unless EU sector-specific law renders them applicable (Art. I-1). Books V and VI on legal aid and interadministrative information management, applicable to the administrations of the Member States irrespective of sector-specific legislation, are an exception to this rule.[70]

67 The solution is suggested by the non-binding character of recommendations. The measures in question «are not intended to produce binding effects. Consequently, they cannot create rights upon which individuals may rely before a national court» (CJEU, 13 12 1989, in C-322/88, para. 16).

68 For this principle see, *ex multis*, the quoted CJEU, in C-322/88, paraghraph 14: «the choice of form cannot alter the nature of a measure», it must nevertheless be ascertained whether the content of a measure is wholly consistent with the form attributed to it. The same principle is valuable in the Italian legal system (see R. Villata-M. Ramajoli, *Il provvedimento amministrativo*, Giappichelli, Turin 2006, p. 628).

69 See *Introduction of the ReNEUAL Model Rules* pp. 14-21; among scholars, P. Craig, *A General Law in Administrative Procedure, Legislative Competece and Judicial Competence*, *supra*, note 2, *passim*; most recently M. Ruffert, *The Constitutional Basis of EU Administrative Law*, *Lecture* hold at the University of Rome, Tor Vergata, on 16 October 2016.

70 Scholars did not fail to underline the "indirect" effects of Model Rules. Even if they are in general not

In accordance with the aforementioned overall intention, the legislation regarding the «right to be heard in composite procedures» provides for a differentiated regime for EU authorities and national administrations.

To compensate for a possible deficiency in sectoral legislation, imposing a respect of the rules on the Member States, and the lack of any other provision of Community law where procedural requirements are specified, the abovementioned Article III-24, Section 4 provides for the national authority to apply national legislation regarding administrative proceedings necessarily complying with EU general principles on "*fair hearings*."[71]

This last legal provision, intervening in a residual manner to grant respect of the observance of the procedural adversarial principle in the part of the composed procedure taking place before the national administrative authorities, even in the lack of an "*ad hoc*" provision, seems, almost standing as "closure rule," to prevent the risk of a "protection void," such as the one in the Oleificio Borelli case. Continuing with the analysis of the *Rules*, Section 5 of Article III-24 might actually offer a key to solving the case in question. The rule proposes a second-degree solution, assuming the failure of the analysed provisions in view of the not formally binding nature of the recommendation.[72] According to paragraph 5, in multi-step proceedings «where the EU authority's decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing before such a public authority,» the right to be heard before a decision is taken «shall include knowledge of the recommendation and the ability to contest its findings.» Basically, the provision,

applicable to the authorities of Member States, they can indirectly influence the actions of those authorities. As far as the law of Member States provides for discretion concerning the concrete design of administrative procedures by the competent authorities or even leaves normative gaps, officials of Member States can find guidance in the ReNEUAL Model Rules (Preamble of Book I, I-3, the Italian version in G. DELLA CANANEA-D.U. GALETTA, *Codice ReNEUAL del procedimento amministrativo dell'Unione Europea*, *supra*, note 14, p. XXVIII).

71 This rule is to be considered applicable to the authorities of Member States if involved in a composite procedure and competent to adopt measures with binding effects.

72 Scholars underlined that «L'articolo III-24(5) affronta una variante della situazione trattata nel precedente paragrafo. Si tratta della situazione in cui esiste una raccomandazione di un'altra autorità pubblica ma essa non è formalmente vincolante per l'autorità pubblica che prende la decisione finale» (G. DELLA CANANEA-D.U. GALETTA, *Codice ReNEUAL*, *supra* note 14, p. 110).

encompassing the protection system laid out by the outlined institutes, provides for the recovery, before the final decision-maker, of the procedural participation that did not take place before the public authority involved during the infraprocedural stage (in this case too, the obligation lies with the EU authorities and, where required, with the Member States).[73]

The circumstance that the final decision should somehow include and consider the outcomes of the procedural stage conducted at a different institutional level, is furthermore confirmed in Article III-29 on the subject of «Duty to give reasons»[74], in which «the duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision.»

By applying the presented rules to a specific case, imagining that a case similar to the one decided by the Court of Justice in December 1992 would unfold during the validity of the Model Rules, it is ultimately possible to state that the regulatory framework under analysis would successfully avoid the "information asymmetry" which prevented the Oleificio Borelli company from enjoying an effective protection of its rights.

In particular, in the first place the fine web of communicative obligations (Art. III-8, Section 1, Point d and III-30) and the compulsory establishment of the adversarial procedure (see Art. III-24, Section 4 and the abovementioned Art. III-23, Sections 3-5) would have allowed the company to challenge the legitimacy of the favourable opinion withdrawn by the Liguria Region before the Italian authorities (in view of the described case law, which already allowed the appeal of infraprocedural acts likely to cause a procedural interruption). Moreover, even where the aforementioned means proves to be insufficient (for instance, due to a lack of specific legislation imposing compliance of the procedural guarantees by the Italian State), the Model Rules would have allowed the rectification of the *gap* in protection detected in

73 Article III-24, paragraph 5.

74 Article III-29 (Duty to give reasons) «The public authority shall state the reasons for its decisions in a clear, simple and understandable manner. The statement of reasons must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review. The duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision, as set out in Article III-24».

the case at hand, by allowing the deficiencies of the part of the trial carried out before the internal authorities to be "counterbalanced" by a full adversarial procedure before the EU institutions (Art. III-24, Section 5).

The case analysed above confirms that the set of principles and rules provided by ReNEUAL implement a system of procedural guarantees which is effective and may overcome the complexity of composite procedures.

6. The Solutions Offered by the Model Rules in the Existing Regulatory Framework

The foregoing considerations represent an outdated delineation of the solutions offered by the *Rules*, moving from an obsolete regulatory framework established by Regulation n. 355/1977.

As previously mentioned,[75] Regulation n. 1782/2003 introduced a new and simplified payments system for farmers, managed through the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), replacing the European Agricultural Guidance and Guarantee Fund (EAGGF). In this new policy context, the relevant financial rules are laid down in Regulation n. 1290/2005.

In light of the foregoing considerations, we could say that Model Rules can manage critical issues arising from composite procedures, even in the renewed regulatory framework.

The current system is based on the devolution of competences to the Member States for granting and withdrawing funding. In particular, it is up to each Member State, under the EU regulatory framework, to manage the grants, to carry out all the necessary controls to prevent irregularities and frauds and to recover undue financing.[76] The national authorities (the so-called national paying agencies) play a very special role for

75 See *supra*, note 27.

76 See CGA, 14 September 2009, n. 812, where it is clear that Member States shall comply with the European regulatory framework («i fondi stanziati per il sostegno ai nuovi insediamenti agricoli non appartengono alla Regione, ma sono alla stessa "assegnati", affinché vengano adoperati per il sostegno alla imprenditoria, secondo i principi e le regole fissate dall'ordinamento comunitario da cui provengono, restando all'ordinamento statale di riferimento ed alle singole regioni spazi operativi e regolamentari nei soli ambiti consentiti dalla disciplina comunitaria di riferimento»).

the beneficiaries of EU funding, since they have no direct contacts with the Commission. The EU Commission plays thus the mere role of ultimate controller of the management activities conducted by the national agencies and, where it is ascertained that there has been an undue disbursement of funds, it can suspend or withdrawn funding.[77]

The above-mentioned new features of the procedure affect the distribution of competences set out in Regulation 1290/2005.

Although the national paying agencies – in an early stage internal to the Member State – examine the requests, control that the financial transactions of the Fund are carried out fairly, prevent and pursue irregularities and recover wrongly paid funds for infringement of the EU regulation (Art. 9, para. 1), the Commission intervenes *ex post*, through the monitoring of the activities of the Member State. In particular, by verifying all documentation submitted by the national agencies (its sole interlocutors), the Commission shall check that management and control systems exist and function properly in the Member States and, if not, it shall reduce or suspend payments (Art. 9, para. 2, Regulation 1290/2005) and comply with the relevant recovery obligations. The Commission may take its decision on the clearance of the accounts on the basis of the completeness, accuracy and veracity of the annual accounts submitted by the Member State (Art. 30) and it may decide to pursue a conformity clearance procedure when it considers that expenditure was not in compliance with Union and national rules, by excluding any expenditure affected by the non-compliance with the procedure. Before any decision to refuse financing is taken, the Commission shall inform the Member State in writing (Art. 31, para. 3).

In summary, on a opposite course to the previous system, the management of the Funds is in the hands of the Member States: only the national paying agencies adopt the necessary acts and measures to ensure correct financial contributions, offer reasonable assurance that the necessary controls have been carried out and have contacts with third beneficiaries. When conformity clearance is carried out, the findings from the Commission's inspection and the Member State's replies shall be notified in writing.

77 B. Marchetti, *Fondi strutturali e tutela giurisdizionale: variazioni degli schemi regolatori e conseguenze sull'architettura giudiziaria dell'UE, supra,* note 27.

Therefore, the Member State may be required to initiate a recovery procedure.

It is worth noting that, where irregularities or negligence are detected and recovery procedures shall be undertaken by Member States, two exceptions are allowed in Article 32, paragraph 6: (i) if the costs likely to be incurred total more than the amount to be recovered; (ii) if recovery proves impossible owing to the insolvency of the debtor. This, albeit limited, freedom of action of the Member States may affect the protection of the third beneficiary's position because, according to the case-law,[78] since Member States have discretion in the decision to recover undue payments, their discretionary power precludes the right of beneficiaries to contest the Commission's decision under Article 263 TFUE.

This regulatory framework creates thus a "protection void", such as the one of the Oleificio Borelli case. In that case, the final decision of the Commission was based on a binding opinion issued by the Member State (*sub specie* the opinion of the Region) whose proceeding did not allow to contest the decision itself. In this case, the recovery procedure undertaken by the Member State is the result of a decision of the Commission that, although binding on the national agencies, cannot be contested in legal proceedings[79] by the adversely affected beneficiary.

Beyond all issues relating to legal proceedings, Model Rules offer a possible answer to the above-mentioned protection needs.

In particular, it is worth mentioning the second and third sentence of paragraph

78 See *ex multis*, TUE, 6 June 2002, in *C 105/01, SLIM Sicilia c. Commissione e CGUE*, 2 May 2006, in C-*417/04, Regione Siciliana c. Commissione*, where it is established that «in accordance with settled case-law, the condition that the decision forming the subject-matter of the proceedings must be of direct concern to a natural or legal person, as laid down in the fourth paragraph of Article 230 EC, requires the contested Community measure to affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (see, in particular, *Case C-404/96 P Glencore Grain v Commission [1998] ECR I-2435, paragraph 41, and Case C-486/01 P National Front v Parliament [2004] ECR I-6289, paragraph 34)*» (pt. 28).

79 B. Marchetti, *Fondi strutturali e tutela giurisdizionale*, cit., *passim*. Special emphasis is put by the Author on the necessity to recognize the third beneficiaries' standing to contest the Commission's acts before the Court of Justice, since actions in national courts are often referred to the Court of Justice for a preliminary ruling. On the binding nature of the "intermediate" decisions taken in composite procedures concerning the judicial protection of people affected by the final provision, see Brito Bastos, *The* Borelli *Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice*, cit., p. 279 *et seq.*

5 of Article III-24. This specific (and limited) reference is justified by the peculiar structure of the new financing procedure of the common agricultural policy, different from the procedure in force during the Borelli case, which, as already mentioned, could be examined in the light of a number of dispositions of the Model Rules.

We can say that the main features of the new regulatory context are: (i) the "recommendation" adopted by the Commission is not always legally binding; (ii) the final decision is taken by the Member State.

The first element refers to paragraph 5 of Article III-24 (instead of para. 4, concerning binding recommendations), while the need of a national agency's decision restricts our analysis to the second and third sentence of the aforesaid paragraph 5.

As already mentioned, the basic rule in case of decisions taken on the basis of non-binding recommendations preventing the defendant from defending himself is that the right to be heard before the final decision is taken shall include: «knowledge of the recommendation and the ability to contest its findings» (Art. III-24, para. 5, first sentence). Where, as in the present case, sector-specific legislation of the EU renders Book III applicable to Member States and it is up to the Member States to take the final decision, the preceding obligation applies *mutatis mutandis*.

By applying the Model Rules to an act of secondary legislation, the introduction in the regulatory system governing the common agricultural policy of a disposition making the Model Rules applicable to such sector would oblige Member States to allow third beneficiaries to contest the Commission's decision during the recovery procedure.

In the absence of such sector-specific legislation or of any EU legislation specifying the aforementioned procedural requirements, the sole guarantee of protection of the third beneficiary's position would be the aforesaid "closure rule" (Art. III-24, para. 5, third sentence). Such disposition shall include that «the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings».

In conclusion, the case at hand and the examined articles implement a system of procedural guarantees, which is particularly effective and able to overcome the complexity of composite procedures even in the current regulatory context.

It is worth noting that, even if the Model Rules are not translated into rules on administrative procedure covering the non-legislative implementation of EU law and

policies, they still represent an important guide for academia, institutions and, more in general, legal practitioners of EU law. As demonstrated in the previous pages, the Model Rules offer an original and pragmatic solution to a number of critical issues that have arisen in EU procedural practice, which, in accordance with the multi-level evolution of EU administrative law, are certain to arise more and more.

STEFANIA GIALDRONI[*]

WAS THE EAST INDIA COMPANY A "DEMOCRATIC" ORGANIZATION? MAJORITY PRINCIPLE AND POWER RELATIONS IN 17TH CENTURY ENGLAND

ABSTRACT. *According to a widespread historiographic* topos*, the English East India Company – the richest, biggest, most powerful and long-lasting of all chartered companies –, was a "democratic" organization. Founded by Queen Elizabeth I on December 31st 1600, this joint-stock company, originally conceived to import spices and silk from the islands of Southeast Asia, became, during the course of the 18th century, the main tool of British colonial expansion in the Indian sub-continent, until its liquidation in 1858. In the 17th century, though, it still was, essentially, a company of "adventurers" trying to challenge the Portuguese and Dutch merchants in the East-Indies spice race. On the basis of the assumption that to decide by majority means to decide democratically, this essay aims at reconsidering the supposed democracy of the business corporation EIC, by way of the enforcement of the majority principle in modern England. It focuses on three issues: overview of the historiography devoted to the topic; description of the rooting of the principle in England (courts of justice, Parliament and legal-political doctrine, with a particular focus on Locke's thought); analysis of the development of the voting systems within the EIC in the time-frame 1600-1700. We will see that it was possible to define the EIC as a "democratic" organization, but only at the beginning of its very long history*.

CONTENT. 1. Introduction – 2. Is the majority principle "natural"? A historical and historiographic overview – 3. When was the majority rule first applied in England? From the medieval courts of justice to the 17th century Parliament – 4. How did the assemblies of the EIC work? Voting rights in progress – 4.1. The General Court – 4.2. The Court of Committees – 5. When did the EIC abandon the "democratic" one-man-one vote rule? 1657: The year when everything changed

[*] Assistant Professor in Medieval and Modern Legal History at Roma Tre University, Law Department.

1. Introduction

The East India Company was incorporated when it received its first royal charter from Queen Elizabeth I on December 31, 1600 under the name of "The Governor and Company of Merchants of London trading into the East-Indies", but is better known as the East India Company, or Honourable Company, or simply EIC.[1] This chartered company, originally conceived (especially) to import spices from the islands of Southeast Asia, became, during the course of the 18th century, the main tool of British colonial expansion in the Indian sub-continent. It retained this function until its liquidation in 1858, when the administration of India passed under the direct control of the Government of the United Kingdom.[2] We will focus on the 17th century, when it still was, essentially, a company of "adventurers" trying to challenge the Portuguese and Dutch merchants in the East-Indies spice race.

The English business corporations of the Modern Era have been placed at the center of a debate on the establishment of democratic institutions, in the sense that it has been speculated that the development of "political democracy" in England was influenced by "economic democracy."[3] In particular, several scholars have agreed on the "democratic" nature of the richest, biggest, most powerful and long-lasting of all business corporations: the EIC.[4] Considering that it is a common assumption that to

1 This paper is a revised and updated version of part of chap. V of my book on the EIC: S. GIALDRONI, *East India Company. Una storia giuridica (1600-1708),* Bologna, 2011. For an overview of the EIC's history: J. KEAY, *The Honourable Company. A history of the English East India Company*, London, 1993 (1991); for an economic perspective: K.N. CHAUDHURI, *The trading world of Asia and the English East India Company, 1660-1760*, Cambridge, 1978; for a legal perspective, still fundamental: W.R. SCOTT, *The constitution and finance of English, Scottish and Irish joint-stock companies to 1720*, vols. I-III, Cambridge, 1910-1912; for a wider understanding of Eurasian trade in the Modern Era see the very recent: R. HARRIS, *Going the distance. Eurasian trade and the rise of business corporation, 1400-1700*, Princeton/Oxford, 2020. All the 17th century royal charters of the EIC are available in print: J. SHAW, *Charters relating to the East India Company from 1600 to 1761*, Madras, 1887.

2 Government of India Act of 1858 (21 & 22 Vict. C. 106).

3 We will discuss in detail Francesco Galgano's thesis: F. GALGANO, *La forza del numero e la legge della ragione. Storia del principio di maggioranza*, Bologna, 2007, pp. 100 *et seq.*

4 A. MIGNOLI, *Idee e problemi nell'evoluzione della "company" inglese,* in *Rivista delle società,* 1960, now in *La società per azioni. Problemi – letture – testimonianze*, Milano, 2002, vol. I, pp. 13-64, pp. 16-19; R. HARRIS, *The East India Company and the history of company law*, in E. Gepken-Jager-G. Van Solinge-L. Timmermann (eds.), *VOC 1602-2002. 400 years of company law*, Deventer, 2005, pp. 217-247, p. 229; N. ROBINS, *The corporation that changed the world.*

decide by majority means to decide democratically,[5] the first thing to do in order to verify the supposed "democracy" of the EIC is to understand what the majority principle is and how it was applied in England up to the 17th century. We will first provide an overview of the opinions of contemporary European and American scholars on the topic; we will then provide a description of the rooting of the principle in England, taking into account courts of justice, Parliament and legal-political doctrine (with a particular focus on Locke's thought); and finally, we will analyze the development of the voting systems within the EIC in the time-frame 1600-1700.

2. Is the majority principle "natural"? A historical and historiographic overview

Speculation on the political role of majorities is probably as old as western political thought. In terms of legal-historical research on the issue, the majority principle was studied in depth by the Italian scholar Edoardo Ruffini, in 1920s' Italy.[6] Ruffini was one of the few university professors who refused to sign the oath of allegiance to the Fascist government in 1931. According to his biography, it wasn't just chance that he decided to concentrate his research on majority rule at the same time as the Fascist dictatorship in Italy was enjoying an unstoppable rise. Any reflection on the majority principle is, in fact, directly or indirectly, a reflection on the rules of democracy, in the broad sense of a «system, or organization in which everyone has equal rights and opportunities, and can help make decisions».[7]

The great value of Ruffini's monograph "Il principio maggioritario. Profilo storico",[8] relies on the fact that it retraces the historical evolution of the majority principle in different juridical systems across a very long time-frame: from ancient

How the East India Company shaped the modern multinational, London, 2006, p. 30; R. Harris, *Going the distance*, 2020, pp. 304-305 (see also Harris' comparison with the Dutch VOC: pp. 318-323).

5 See for example Elias Berg's overview: E. Berg, *Democracy and the majority principle: A study of twelve contemporary political theories*, Göteborg, 1965; F. Galgano, *Principio di maggioranza*, *in Enciclopedia del diritto*, Milano, 1986, vol. XXXV, p. 548.

6 See for example: E. Ruffini, *I sistemi di deliberazione collettiva nel medioevo italiano*, Torino, 1927.

7 *Cambridge Dictionary*, entry "Democracy": <https://dictionary.cambridge.org/it/dizionario/inglese/democracy>. Accessed 10 April 2020.

8 E. Ruffini, *Il principio maggioritario. Profilo storico*, Milano, 1976 (1927).

Greece and Rome up to the international organizations of the 20th century, via Church councils, medieval Italian city-states institutions and the natural law theories of the Modern Era. How to reach a collective will is not only a legal question, but also a political and philosophical one, as an ancient tradition, dating back to the Greek city-states in general and to Aristotle in particular, clearly demonstrates.[9] It comes as no surprise, therefore, that the most important natural law philosophers of the 17th century, focusing on the social contract and its mechanisms, devoted close attention to the majority rule: Grotius and Pufendorf for example and, above all, John Locke.[10] According to Locke, the decision which marked the transition from state of nature to civil society was taken unanimously but, from that moment on, decisions started to be taken according to the majority rule. This means that the majority rule is one of the most important (if not *the* most important) objects of the contract but not a principle of natural law. This distinction is significant because one could easily be "tempted" to think that the fact that the will of the majority must bind the entire community is, in a certain sense, "natural."[11] Ruffini himself was very aware of this temptation, underlying that it is natural and obvious only as long as it is opposed to its absurd inverse: the minority principle.[12]

In reality, the means adopted over the centuries to determine the will of a group have been the most varied. An interesting example is that of the canonistic *sanior pars*, which has been defined as a spiritual and qualitative system.[13] It can be traced back to the 5th century, when Pope Leo I mentioned it in a letter to Anastasius, bishop of

9 In the debate about democracy, ancient Greece is (almost) always present. See for example: D.L. Schaeffer (ed.), *Democratic decision-making: Historical and contemporary perspectives*, Lanham *et al.*, 2012.

10 H. Grotius, *De iure belli ac pacis*, Amsterdam, 1646 (1625), II.5.17: «Habent autem omnes hoc commune, quod in iis rebus ob quas consociatio quaeque instituta est, universitas, & eius pars major nomine universitatis obligant singulos qui sunt in societate»; S. Pufendorf, *De iure naturae et gentium,* Amsterdam, 1688 (1672), VII.2.15; J. Locke, *Second treatise of government*, London, 1690, VIII.95. On Locke see more *infra*.

11 J.G. Heinberg, *History of the majority principle,* in *The American Political Science Review*, 20.1 (1926), pp. 52-68, p. 52.

12 E. Ruffini, *Il principio maggioritario*, 1976, p. 11.

13 See on this point: P. Grossi, *Unanimitas. Alle origini del concetto di persona giuridica nel diritto canonico,* in *Annali di storia del diritto*, Milano, 1958, vol. II, pp. 229-331, pp. 324 *et seq.*

Thessaloniki, but it was first enforced in the Benedictine Rule (chap. 64), in the part devoted to the election of the abbot: «sive etiam pars congregationis quamvis parva saniore consilio elegerit».[14] The Rule assumed that the majority, *i.e.*, the *maior pars*, coincided with the *sanior pars*, the wiser and fairer part of those entitled to vote. This was a groundbreaking idea, as canon law had for centuries favored the unanimity rule. In this way the Church managed to reconcile the hierarchical principle, so dear to the ecclesiastical tradition, with the well-known Roman law *fictio*, according to which the will of the majority is the will of all (Dig. 50.17.160.1).[15] It is comprehensible that the Church devoted much attention to decision making mechanisms, including the majority rule, which have to be inspired by the Holy Spirit.[16] Otto von Gierke found the first explicit mentions of the majority rule in canon law in the works of some of the most famous decretalists, like Goffredus of Trani («hoc est generale in cunctis actibus ecclesiae, ut obtineat sententia plurimorum») and Johannes Andrea («et si discordant in aliqui, majori parti standum est»).[17]

Before Ruffini's contributions (and except for the illustrious precedent of Gierke's essay "Über die Geschichte des Majoritätsprinzips"[18]), the topic of the majority rule had been approached only in a fragmentary and cursory way. Later on, the inputs of lawyers remained rare and never devoted much attention to the majority rule as

14 Rule of Saint Benedict (534), chap. 64.1: «In abbatis ordinatione illa semper consideretur ratio ut hic constituatur quem sive omnis concors congregatio secundum timorem Dei, sive etiam pars quamvis parva congregationis saniore consilio elegerit» («At the election of an abbot let this principle be always observed, that he be appointed whom the whole community, being of the same mind and in the fear of God, or even a part albeit a small part of the community shall with calmer deliberation have elected». Translated into English: *A Pax Book*, preface by W.K. Lowther Clarke, London, 1931, available online at: <https://www.solesmes.com/sites/default/files/upload/pdf/rule_of_st_benedict.pdf>. Accessed 09 April 2020).

15 Ulpian: «Refertur ad universos, quod publice fit per majorem partem».

16 Very interesting indeed is also the analysis of the decision-making process in the Islamic world: E. Sinanovic, *The majority principle in Islamic legal and political thought*, in *Islam and Christian-Muslim Relations*, 15.2 (2004), pp. 237-256.

17 Goffredus Of Trani, *Summa Decretalium*, in X 1.6 *De electione*, n. 8; Johannes Andrea, X 1.31.3 *De officio iudicis ordinarii*, n. 14. Quoted in: O. Von Gierke, *Das deutsches Genossenschaftsrecht*, Berlin, 1881, vol. III, p. 322, footnote 241.

18 O. Von Gierke, *Über die Geschichte des Majoritätsprinzips*, in P.G. Vinogradov (ed.), *Essays in legal history*, London, 1913, pp. 312-335.

applied within business organizations. That is, until 2007, when Francesco Galgano published his "La forza del numero e la legge della ragione," proposing a "parallel history" of political and economic institutions, starting from Athens' "democracy without majority" and Rome's "majority without democracy" up to the contemporary "decline of majority," typical (according to Galgano) of our "post-democratic" and "techno-democratic" society.

From our perspective, what matters most is the role assigned by Galgano to the EIC in the development of democratic institutions in England. That the EIC's shareholders (at least at the beginning) voted by majority is a widespread notion and is not really striking. Very original though, is the idea that the voting mechanisms of the general assembly of the EIC had an impact on the thought of one of the most influential philosophers of the Modern Era: John Locke. According to this viewpoint, Locke was inspired, in drawing up a model-state consisting in a community of equals governed by the majority rule, by the voting systems of the colonial companies in general and by the General Court of the EIC in particular. A model-state that would have had an impact on the very development of the British Parliament.[19] But was it true that each member of the EIC, whether merchant or aristocrat, had the same voting rights, regardless of the sum invested as a share in the joint-stock? If so, "economic democracy" would have anticipated the political one even in its philosophical formulation. The idea that business companies can be conceived as a form of democracy is not completely new.[20] Nevertheless, because voting rights are nowadays directly proportional to the amount of capital subscribed, the most widespread opinion is that business corporations are "plutocracies" rather than "democracies". On the other hand, the linking the EIC-Locke-English Parliament seems brand new and deserves to be deepened.

Ruffini wrote about the majority rule under the dark shadow of Mussolini's dictatorship, and it was in the early years of WW2 that an important book on the work of John Locke and the doctrine of majority-rule was written by Willmoore Kendall in the

19 F. GALGANO, *La forza del numero*, 2007, pp. 103 *et seq.*

20 This idea is particularly evident in the French historiography. See for example: Y. GUYON, *La société anonyme, une démocratie parfaite!,* in *Propos impertinents de droit des affaires, Mélanges en l'honneur de Christian Gavalda*, Paris, 2001, pp. 133-146.

United States.[21] Reflections on the majority principle seem to flourish in times of crisis of democracy, as is also the case of a series of works on the justification of power published immediately after the end of the Second World War: "Du pouvoir" (1945) by Bertrand de Jouvenel, "Philosophie du pouvoir" (1948) by Alfred Pose and the four volumes of the "Arcana imperii" (1947-1948) by Pietro de Francisci, just to give some examples.[22] These works range from philosophy to Roman history but they all demonstrate an interest in the mechanisms of legitimizing power, exactly like the contributions of Ruffini at the beginning of the Fascist Era and Kendall's monograph at the dawn of the United States' entry into the war.

The role of Locke in modern political thought is very well known. What matters here, in short, is that he managed to combine the concept of equality (already present among the Stoics), that of majority voting (already present in Plato and Aristotle), and that of popular sovereignty, that can be found already, for examples, in the work of the German jurist and philosopher Johannes Althusius.[23] The traditional image of Locke as the prince of individualism was challenged by Kendall, who arrived at «the striking conclusion that Locke was not an individualist at all but a 'collectivist' in that he subordinated the purposes of individuals to the purposes of society».[24] Not surprisingly, Kendall began his analysis from paraagraph 95 of the VIII book of the "Second treatise of government":

> «Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any,

21 W. KENDALL, *John Locke and the doctrine of majority-rule*, Urbana: Illinois, 1941.

22 B. DE JOUVENEL, *Du pouvoir. Histoire naturelle de sa croissance*, Paris, 1998 (1945); A. POSE, *Philosophie du pouvoir*, Paris, 1948; P. DE FRANCISCI, *Arcana Imperii*, 4 vols, Milano, 1947-48.

23 W. KENDALL, *John Locke,* 1941, pp. 39-40.

24 C.B. MACPHERSON, *The social bearing of Locke's political theory,* in *The Western Political Quarterly,* 7.1 (1954), pp. 1-22, p. 2.

> that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest».

According to Francesco Galgano, Locke was inspired, especially for his combining equality and majority, by the assemblies of the colonial companies, where lords and commoners stood side by side, and together discussed and voted. When Locke composed the "Second treatise of government" though – probably some ten years before the first publication in 1689-90 – , the members of the EIC were no longer considered equal: those who had not contributed enough capital, in fact, had no voting rights. However, for more than fifty years one of the characteristic features of the General Court of the EIC had been, indeed, the equality of its members. This character derives, we think, from the strict connections between the chartered companies of the Elizabethan period, like the EIC, and the medieval merchant guilds, where, for centuries, the rule one-man-one vote was applied.[25]

3. When was the majority rule first applied in England? From the medieval courts of justice to the 17h century Parliament

Although it is known that political theory has dealt with the majority principle since antiquity, it was only between the 17th and 18th centuries – the era of the conception, if not of the birth, of modern democracies – that the principle became the object of an autonomous and in-depth philosophical and juridical reflection. A prominent role in the philosophical elaboration of the principle in a democratic sense is often attributed to John Locke, who had the merit of having been the first, in the

25 S. GIALDRONI, *A commercial soul in a corporate body: From the medieval merchant guilds to the East India Company*, in B. Van Hofstraeten and W. Decock (eds.), *Companies and company law in late medieval and early modern Europe,* Leuven *et al.*, 2016, pp. 149-170; see also: R. HARRIS, *Going the distance*, 2020, p. 305 («This principle was also followed by the traditional voting scheme in corporations, regulated companies, colleges, cities, guilds, and the like»).

history of political thought, to link equality and majority.[26]

Contemporary English legal historiography has not dedicated particular attention to studying the issue of the majority principle in the century that ended with a Revolution, which was glorious because (almost) bloodless, and with a Bill of Rights which marked a point of no return in English constitutional history. When the issue is taken into account, the contexts analyzed are usually two: Parliament and courts of justice. Apart from the pages devoted to the majority principle in the classic "History of English law before the time of Edward I" by Frederick Pollock and Frederic W. Maitland (1895),[27] few are the scholars that wrote on this topic with a particular focus on England: Thomas Baty in 1912[28] and J.G. Heinberg in 1926. And then again other important histories of English law, in particular those by William Holdsworth and J.H Baker.[29] Perhaps the topic was regarded as unworthy of attention because it was considered, as Ruffini acutely observed, a "natural" principle. Yet even a quick look at the application of the majority rule in medieval and modern England shows that it took a while to get over the more reassuring unanimity principle.

One of the first mentions of the application of the majority principle in England is attested by clause 61 of the Magna Carta (1215),[30] which granted to a committee made up of twenty-five barons the right/duty «to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter». It was then specified that: «in the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these

26 F. GALGANO, *La forza del numero*, 2007, p. 39 *et seq*.

27 F. POLLOCK-F.W. MAITLAND, *History of English law before the time of Edward I*, vols. I-II, Cambridge, 1898 (1895).

28 T. BATY, *The history of majority rule,* in *The Quarterly Review*, 216 (1912), pp. 1-28.

29 W. HOLDSWORTH, *A history of English law*, 17 vols., ed. by A.L. Goodhart-H.G. Hanbury-S.B. Chrimes, London, 1956-1991 (1903-1966); J.H. BAKER, *An introduction to English legal history*, London, 2002 (1971).

30 English translation available on the internet website of the British Library: <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>: «In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear».

were all present or some of those summoned were unwilling or unable to appear». It is interesting that this article was omitted in all subsequent versions of the Magna Carta.[31] One could deduce that the principle was not yet rooted and the decisions of the majority remained exceptional with respect to the unanimity rule, as the wording of clause 61 itself seems to suggest. However, as mentioned before, there are two contexts in which the application of the principle has aroused particular attention of scholars: Parliament and courts of justice. It is precisely in the latter that we can find traces of the application of the majority principle prior to the Magna Carta.

At the time of the Norman conquest, there was still no system of centralized courts for the administration of justice: the numerous and concomitant existing laws were applied in equally numerous local courts. At the beginning of the 12th century, the customary rules applied in these courts were written down into several collections, including the *Leges Henrici Primi* (ca. 1118), which is often considered the most important one. It is precisely in this collection that a reference to the majority principle can be found. It had to be applied in the communal courts and, more precisely, in the county courts, i.e., the courts of justice competent for certain territorial circumscriptions (shire or county). It was foreseen that «Quod si in judicio inter pares oriatur dissensio, de quibus certamen emerserit, vincat sententia plumororum».[32] Nevertheless, it was still not a well-established principle, as in the very same collection other principles were also applied, like that of the *sanior pars*, which has, as we already know, a "canonistic flavor": "Vincat sentencia meliorum".[33] This state of affairs lasted until 1367,[34] the year in which it was established that in a verdict, the decision taken by the majority had to be considered void.[35] The only valid sentence became the unanimous one, which definitively passed to represent not the opinion of twelve men, but rather the verdict of

31 J.G. HEINBERG, *History of the majority principle*, 1926, p. 63.

32 Leg. Henr. I, 5: *De causarum proprietatibus: Leges Henrici Primi,* in D. WILKINS (ed.), *Leges anglo-saxonicae ecclesiasticae et civiles*, Londini, 1721, pp. 231-283, p. 236

33 Leg. Henr. I, 31: *De capitalibus placitis*, *ibid.*, p. 248.

34 For other examples of the enforcement of the majority rule before this date see: J.H. BAKER, *An introduction to English legal history*, 2002, p. 76.

35 Y.B. 41 Ed. III Mich. pl. 36, quoted in W. HOLDSWORTH, *A history of English law,* vol. I, p. 318.

the entire community («of a pays, a 'country', a neighborhood, a community»[36]).

On the other hand, according to William Holdsworth, the English Parliament accepted the majority principle from the beginning of its history, meaning from the 14th century, when it became a real governing body, separate (and often in conflict) with the King and his Council. In the second part of the 15th century, the same principle became ordinary, as testified by the Year Books in a case written in the characteristic "law-French", the legal language of England at the time: «Sir, en le Parliament si le greindre partie des Chivaliers des Countys assentent al feasans d'un acte du Parliament, et le meindre partie ne voillent my agreer a cel act, uncore ce sera bon statute a durer en perpetutity».[37] According to others, the application of the majority principle is attested in the House of Commons starting from 1430.[38] And still others tend to minimize the role played by the majority principle in Parliament up to more recent times, arguing that it was, for a long time, the principle of unanimity that governed the English Parliament on the basis of testimonies such as that of Jeremy Bentham who, still in 1791, wrote that 99 out of 100 motions were accepted or rejected without division.[39]

One of the greatest difficulties in understanding whether the Parliament voted unanimously or by majority lies in the reluctance with which the two branches of the English Parliament allowed the minutes of their sessions to be disseminated, given that the first records of the Commons Journal date back to the mid-17th century and the first detailed reports are even more recent. According to Thomas Baty, there are two options: either the decisions of the House of Commons were taken unanimously for a long time, so that the minority was forced to accept the will of the majority; or the majority principle was accepted without contestation by the House of Commons from the beginning of its history. Baty doesn't agree with this last opinion, since the Chamber had existed for about three hundred years when minutes began to be drawn up, allowing outsiders to follow its procedure in detail. In any case, the House of Commons, in the

36 F. POLLOCK / F. W. MAITLAND, *History of English law*, vol. II, p. 621.

37 Y.B. 15 Ed. IV Mich. pl. 2 p. 2, quoted in W. HOLDSWORTH, *A history of English law,* vol. II, p. 431.

38 T. BATY, *The history of the majority rule*, 1912, p. 9.

39 J. BENTHAM, *Essay on political tactics*, VI, in *Works*, ed. by J. Bowring, vol. II, Edinburgh/London, 1995, repr. 1843 ed. (1st ed. 1791), p. 319.

17th century, was still a restricted assembly, whose electoral body comprised just one sixth of the entire male population: the end of monarchical absolutism had certainly not opened the doors to universal suffrage, but rather to the oligarchy (double and antagonist) of the aristocracy (House of Lords) and the upper bourgeoisie (House of Commons). It is precisely for this reason that Francesco Galgano believed that Locke did not find inspiration for his theories in the parliamentary system, but rather in the assemblies of the EIC, where lords and commoners had voted together (in his opinion) for almost a century when the "Second treatise" was published.

Even before the foundation of the EIC though, we can observe that, at least in some cases, the courts of justice recognized the majority rule within the framework of corporations, which, before the 16th century, usually had no business aim: corporations were at that time more likely to be municipalities, churches, hospitals, etc. In the Abbot of Hume's Case, for example, the "ubi major pars ibi tota" rule was recognized in the case of acts approved by a corporate body.[40] More evidence of the general application of the majority principle to corporations are attested in the following century, even though only Holdsworth seems to focus on this.[41] In 1591 the King's Bench recognized the rule, already imposed by the King ca. fifty years earlier, according to which all powers of a corporation could be exercised by the majority of the members. This judgment was essentially based on an act of Henry VIII (1541-1542)[42] as well as on a case known as The Chamberlain of London's Case (1591), which we know of thanks to three different reports. We will take into account Edward Coke's one.[43] In reality, looking at it in more detail, the Chamberlain of London's Case is rather ambiguous: if it is true that the majority of the inhabitants of a city (obviously incorporated) were recognized as having the power to issue by-laws that would also bind the minority even in the absence of a specific custom, this rule was valid only if the by-laws were aimed at the "general good of the public", as in the case of the restoration of a church or a street; on the contrary, if they were issued for the pursuit of private interests ("their own private profit"), "the

40 Y.B. 21 Ed. IV Mich. pl. 53, quoted in W. HOLDSWORTH, *A history of English law,* vol. III, p. 485.

41 *Ibid.*, vol. X, p. 54.

42 33 Henry VIII, c. 27.

43 5 Co. Rep. 62b, 77 ER 150.

greater part should not bind the less".[44]

4. How did the assemblies of the EIC work? Voting rights in progress

When writing about the "democracy" of the EIC, scholars usually refer to the voting mechanisms of the company's assemblies (General Court and Court of Committees, later Court of Directors) and in particular, of course, to the application of the majority principle, because today democracy and majority are two inseparable concepts.

The governance structure of the EIC foreseen by the 1600 incorporation charter included a Governor, a Deputy Governor, a Court of Committees and a General Court. The latter is, of course, particularly important for judging the company's "level of democracy" as it was composed of all members of the EIC. Its duties were not limited to the election of the Governor, of the Deputy Governor and of the twenty-four members of the Court of Committees (to be chosen among all members), but included a series of judicial and deliberative functions, useful for assessing the effective participation, at least theoretically, of the universality of the shareholders in the management of the company.

4.1. The General Court

The general meeting of members had to be convened at least twice a year (on the 1st of July and on the second Tuesday of May) and had, in general, powers to revise and ratify the decisions of the Court of Committees, which was in charge of the every-day management, but on the basis of the instructions of the General Court. In 1661, King Charles II's charter moved the annual date for the election of the governing bodies (Governor, Deputy-Governor, Treasurer and Committees) between April 10 and April 30.

If we combine the royal charters (the most important ones of the 17th century are dated 1600, 1609, 1661 and 1693)[45] with a very interesting, yet neglected, document called "The Lawes or Standing Orders of the East India Company" (1621), we

44 *Ibid.*, 63 a.

45 43 Elizabeth I, 31st Dec. 1600; 7 James I, 31st May 1609; 13 Charles II, 3rd Apr. 1661; 5 William & Mary, 7th Oct. 1693. All are available in: J. SHAW, *Charters relating to the East India Company,* 1887. Unfortunately, the 1657 charter granted by Oliver Cromwell is lost.

obtain a clear and quite detailed picture of the operating mechanisms of the EIC.[46] The by-laws opened with the list of the powers or, more generally, of the functions of the shareholders' meetings (courts). The first article concerned the election of the Governor, the Deputy-Governor, the Treasurers and the Committees (the number of which was not specified): every year, on the 1st of July or during the following five days, a General Meeting had to be convened to this end. The matter was already regulated in the 1600 incorporation charter, with the important exception of the Treasurers (also to be elected by the General Court), on whose election the sovereign's provisions were silent. The content of the charters and of the regulations was almost identical, apart from some small, negligible differences (for example the days within which to convene the meeting after the 1st of July were six in the first case and five in the second), but the style was very different: the one of the royal chancery was redundant and sometimes obscure; the one of the (anonymous) by-laws of 1621 was simple and direct. The incorporation charter also provided that all governing bodies (including the Governor and Deputy-Governor) were "removable" «at the pleasure of the said Governor and company, or the greater part of them». In summary, not only were the governing bodies in charge for a very limited period (one year), perhaps all the more surprising considering that the voyages lasted at least a couple of years, but they could also be removed at any time, should their work not be appreciated by the members.

The principle adopted for the decisions of the General Court was that of the relative majority, that is, of the majority of those present at the meetings, as can be deduced from the formula «the said Governor and company [...] or the more part of them» or «the greater part of them, which then shall happen to be present». On the contrary, as we will see, the decisions of the Court of Committees were to be taken by absolute majority. Once the methods were established, the men remained to be chosen: the regulation recommended that they be suitable men, experts in the trade, but above all men who could and really wanted to deal with the business.

46 *The lawes or standing orders, made and ordeyned by the Governor and Company of Merchants of London trading to the East Indyes, for the better gouerning of the affaires and actions of the said Company heere in England residing*, London, 1621, repr. Farnborough, 1968.

4.2. The Court of Committees

The functions of the twenty-four members of the Court of Committees, elected annually, were regulated in a special section of the by-laws entitled "Committees general" (Arts. XLIV-LI of "The lawes or standing orders"), except for a couple of rules that were set out in the first part, the one devoted overall to the courts and essentially to the general assembly of all members (Arts. I-XV). The Court of Committees was summoned at least once a week (and whenever it was deemed necessary) and compulsorily on June 24 for the election of the officers.[47] According to the royal charters it was the competence of the Court of Committees (together with the Governor) to organize travel, equip ships, sell goods from India, and deal with all matters pertaining to the management of the company. To organize all these activities, the Court used special commissions, made up of its own members and, in case of need, of salaried employees. Between the 1660s and the 1670s, when the organization of the company became more stable, these commissions acquired a permanent character, and appeared in the court minutes according to the different peculiar competences: "Accounts, Buying goods, Coast and bay, Lawsuit, Private trade, Shipping, Surat, Treasury, and Writing letters."

Within this Court, the criterion applied was the one of absolute majority ("thirteen committees at least"), as was specified in the by-laws. The charter granted by Elizabeth I in 1600 determined the voting mechanisms of the General Court, and left the discipline of the decision-making process within the Court of Committees to the company's self-regulation. In the case of the election of the officers, given the silence of the royal charters on this matter, it was necessary to introduce a special section in the regulation: "Election of officers." Also in this case the principle of absolute majority was applied. The method of voting was via the raising of hands or of the "ballating box." In addition to the (manifest) method of raising the hand, therefore, at least within the Court of Committees, the (secret) method of the ballot box was allowed. It is usually stated that in the General Court people voted by raising hands but perhaps one could hypothesize, by analogy, that the secret vote was admitted, in some cases, also in the

47 "Officers" were for example: the *secretary*, in charge of writing the court minutes, or the *remembrancer*, a kind of deputy-secretary.

general assembly. Charles Gross showed that, contrary to what most people believed at the time of the English Ballot Act (1872) (when there was a widespread belief that secret ballot using the ballot box method had never been used in England before for the election of public officers), the method was known and applied in England since the Middle Ages and was in vogue at the beginning of the 17th century, when it was not uncommon to cast a vote by inserting bullets of different colors in a box. Particularly interesting is an order in council (*i.e.*, an order of the Privy Council made in the name of the King, in this case Charles I) dated 17 September 1637, in which the use of balloting boxes by corporations and companies is clearly attested because it is explicitly prohibited. Gross admitted that he did not know exactly the reasons that led the King to enact this ban, but assumed that the secret vote could be unwelcome to a sovereign who wanted to check that his subjects managed their activities, including the commercial ones, in accordance with his desires.[48]

5. When did the EIC abandon the "democratic" one-man-one-vote rule? 1657: The year when everything changed

According to the voting mechanisms described, the EIC appeared to be an organization structured so as to guarantee the maximum participation to all members, regardless of social status, wealth and capital subscribed. However, things not only changed over the 258 years of the Honourable Company's history, but over the course of that same 17th century that had opened with its foundation. Opinions are different, though, about the exact date of this change.[49] Certainly the one-man-one-vote rule was definitely abandoned after the mid-17th century. On 19 October 1657, some Committees drew up, on behalf of the General Court, a "preamble" which, in view of the subscription of a new joint-stock, should attract new adventurers. On that occasion it was established that the right to vote should be linked to the amount of capital subscribed.

48 C. Gross, *The early history of the ballot in England,* in *The American Historical Review*, 3.3 (1898), pp. 456-463.

49 R. Harris, *Going the distance*, 2020, p. 305.

«Each adventurer present at any general court to vote and rule in the government of this stock and trade according to his adventure, that is, every 500 l. adventured entitles him to one vote; those whose adventures do not amount to so much to be allowed to join together to make up that sum and choose one of their number to vote for the rest».[50]

More generally, 1657 was a very important year in the history of the EIC, since several other decisive measures were adopted: a new (unfortunately lost) charter, and a new joint-stock (which became finally permanent).[51] From 1600 to 1612, in fact, during the first uncertain years of activity, the joint-stocks lasted only until the end of a single voyage. A bit later on, they were extended slightly, usually from eight to fifteen years.[52] Until the 1657 turning-point.[53]

The charter by Charles II, issued in 1661, recognized the voting rule of the 1657 "preamble".[54] The following 1693 charter by William & Mary confirmed the previous privileges but only a month later a new charter changed, or better doubled, the amount of the subscription which gave the right to one vote: from £ 500 to £ 1.000, with the maximum limit, however, of ten votes per capita. Furthermore, the possibility of gathering multiple subscriptions, in order to reach the sum required, disappeared from the charter and small shareholders seemed now out of the game. Five years later, for the members of the so called "New company", £ 500 became sufficient again and the Committees started to be called Directors.[55]

50 E. Bruce Sainsbury (ed.), *A calendar of the court minutes etc. of the East India Company*, 1655-1659, Oxford, 1917, p. 173.

51 J. Pollexfen, *Discourse of trade, coyn and paper credit*, London, 1700 (1st ed. 1697), p. 98: «the last stock was underwrit by vertue of a charter granted *Anno* 1657, since often confirmed, and augmented». See also: K.N. Chaudhuri, *The trading world of Asia*, 1978, p. 14 and p. 460; P. Lawson, *The East India Company: A history*, London / New York, 2014 (1993), p. 21, pp. 40-42.

52 For a detailed analysis of the amount and duration of the joint-stocks until 1657, see: R. Harris, *Going the distance*, 2020, pp. 297 and 302.

53 W.R. Scott, *The constitution and finance,* 1910, vol I, p. 17.

54 13 Charles II, 3rd Apr. 1661. See: J. Shaw, *Charters relating to the East India Company*, 1887, pp. 32-47, in particular p. 44.

55 At the end of the 17th century a "New" East India Company was created, in addition to the so called "Old" East India Company. This crisis was solved by merging the two companies in 1708. See: S. Gialdroni, *East India Company*, 2011, pp. 60-62.

As Norberto Bobbio wrote, the majority rule is a necessary but not sufficient condition for a democratic regime to function properly.[56] If anything, it is universal suffrage that characterizes democracy. If we apply these criteria to the EIC, the result is that it could be considered a "democratic" organization but only at the beginning of its history. As for contemporary public limited companies it would seem, in fact, that economic conditions have led to derogations from the principles of equality to introduce a vote proportional to the contribution. This change occurred many years before Locke wrote the "Second treatise of government" which, according to Francesco Galgano, should have been influenced by the voting mechanism of the colonial companies, including the most important one, the EIC. Certainly, in the 1661 charter granted by Charles II, the adventurers were no longer considered equal as they were at the very beginning of the company's history, when the whole organization of the company was still very much influenced by the structure of the merchant guilds. Moreover, Locke could only have indirect knowledge of the EIC assemblies, as it seems that he never joined this company. He was instead a shareholder of the Royal African Company (1672-1752), a commercial company born with the aim of trading gold, silver and slaves from Africa to the British colonies. In this company, from the very beginning, those who had subscribed less than £ 100 had no voting rights. Each £ 100 subscribed gave the right to one vote, with no limit on the number of votes per capita.[57] Constructing an argument that seeks to link the experience of the EIC, John Locke's thought and the English Parliament is therefore, on careful observation, not completely convincing.

In conclusion, although the majority rule principle was initially applied in the General Court of the EIC, it is important to underline that the strongest shareholders started, quite soon, to exclude the small ones from the right to vote, introducing a mechanism of participation based on money rather than on people. A mechanism that we do not associate with our idea of democracy today.

56 N. Bobbio, *La regola della maggioranza e i suoi limiti*, in V. Dini (ed.), *Soggetti e potere. Un dibattito su società civile e crisi della politica*, Napoli, 1983, pp. 11-12.

57 K.G. Davies, *The Royal African Company*, London *et al.,* 1957, p. 154.

BARBARA CORTESE[*]

'CAUSA' AND RESTITUTORY CONDITIO

ABSTRACT. *The difficulties of the civil doctrine in reconstructing the institution of undue payments have projected themselves for a long time also on the interpretation of the roman sources. In particular, the readings about the roman jurisprudential conception of undue payments often turn out to be false, creating numerous problems of coherence and coordination with regard to internal solutions within the individual legal systems.*
What is needed is a more attentive study to the text of the sources and to analysis of the case, deleting the interpretative superstructures of the dogmatic theory. And this particularly in relation to the phenomenon of the cause of restitution and its relationship with the cause of attribution.

CONTENT. 1. Introduction – 2. The causality of the *traditio* – 3. Considerations on the *iusta causa* – 4. The *iusta causa* as an expression of the qualified translational agreement – 5. The restitutory obligation

[*] Associate Professor of Roman Law at Roma Tre University and Director of OGiPaC – Legal Observatory on the Protection of Cultural Heritage.

1. Introduction

It is interesting to note that the difficulties of the civil doctrine in reconstructing the characters of the institution of undue payments have projected themselves for a long time also on the interpretation of the Roman sources. We frequently see references to Roman law as the historical foundation of civil doctrines, on the basis of readings that often turn out to be false, with respect to the panorama offered by Roman law.

A reconstruction of the Roman jurisprudential conception of undue payments, more attentive to the text of the sources and to their articulated case studies, accompanied by the "descaling" of classical jurisprudential thought from the interpretative superstructures of theory, should allow to better understand the configuration of the institution in its essential structure.

Given the particular perspective of this meeting, the reflection on the structure of the *indebiti solutio* and the relative *condictio* will be limited to the aspects that are considered relevant.

In general, as is well known, the *condictio*, as an *actio in personam*, occupied, in the classical era, a vast field of application, constituted by the various hypotheses identified by the *prudentes* through the casuistic interpretative method.

The *condictio*, then named '*indebiti*', represented the procedural remedy aimed at correcting the transfers made without recourse in the mistaken conviction of the duty of the act of payment.[1]

1 Among the most relevant studies on *solutio indebiti* and *condictio*, U. Robbe, *La 'condictio' nel diritto romano classico*, in *Studi Urbinati*, XIV, Milano, 1940, p. 85 *et seq.*; C. Sanfilippo, *'Condictio indebiti'. I. Il fondamento dell'obbligazione da indebito,* Milano, 1943*;* S. Solazzi, *Le 'condictiones' e l'errore*, in *Scritti di diritto romano*, V, Napoli, 1972, *passim;* G. Donatuti, *Le "causae" delle 'condictiones'*, in *Studi parmensi*, 1951, *passim*; F. Schwartz, *Die Grundlage*, cit., *passim*; G.G. Archi, *Variazioni in tema di 'indebiti solutio',* in *Studi in onore di Vincenzo Arangio Ruiz nel XLV anno del suo insegnamento,* III, Napoli, 1953, p. 355 *et seq.*; P. Di Iorio, entry *Condictiones,* in *Noviff. dig. it.,* III, Torino, 1959, p. 1062 *et seq.*; R. Santoro, *Studi sulla 'condictio'*, in *Aupa*, 32, 1971, p. 181 *et seq.*; D. Liebs, *The history of the roman 'Condictio' up to Justinian*, in *The legal mind. Essays for T. Honoré*, Oxford, 1986, p. 163 *et seq.*; B. Kupisch, entry *Arricchimento nel diritto romano, medievale, e moderno*, in *Dig. disc. priv.,* sez. civ., Torino, 1987, I, 430 *et seq.*; V. Giuffrè, *Studi sul debito tra esperienza romana e ordinamenti moderni*, Napoli, 1997; p. 10 *et seq.*; L. Pellecchi, *L'azione in ripetizione e le qualificazioni del 'dare' in Paul. 17 'ad Plaut.' D. 12.6.65. Contributo allo studio della 'condictio'*, in *SDHI*, LXIV, 1998, p. 69 *et seq.*; I. Fargnoli, *'Alius solvit alius repetit'. Studi in tema di indebitum condicere*, Milano, 2001, *passim*; A. Saccoccio, '*Si certum petetur'. Dalla condictio dei veteres alle condictiones giustinianee,* Milano, 2002, *passim*; L. Vacca, *Osservazioni in tema di "condictio" e arricchimento*

From this point of view, it is therefore necessary to bear in mind that the *condictio indebiti* did not constitute a "coupled" action to the specific case "payment not due": the *indebiti solutio* constituted one of the numerous practical applications of the general *condictio*. This is because the *condictio* was an action that, for its structure, lent itself to different uses, all united by the claim to a *certum,* independently of the foundation. What we can define 'the area of restitution obligations' was also based on some rules developed by the jurisprudence, related to the problem of unjustified attributions, whose general scope allowed to identify casually the recurrence of the need to return, determining the extension of the application field of *condicere*.

Taking into account an absence of typing of the different *condictiones* (at least up to Justinian), we can try to deepen the concept of *indebiti solutio* as a case of unjustified attribution, placing it with the necessary caution in a perspective of substantive law, since it is an open jurisprudential law, mainly elaborated precisely in relation to the evolution of the scope of the procedural actions.

In particular, what seems appropriate to me to analyze is the profile of the translational mechanism that presupposes the institution of *indebiti solutio*, since it is the profile that has most seriously undermined the reconstruction of the relationship between the restitution of unjustified attributions and the Roman transferring ownership model.

The *indebiti solutio* represented a subspecies of the *solutio*, a formal act, fruit of the pontifical work of interpretation, which constituted the main mode of liberation from a constraint, first of a corporeal nature, such as that deriving from the *nexus*, later of a purely juridical nature, such as that deriving, for example, from *sponsio*.[2]

senza causa nel diritto romano classico, in *Appartenenza e circolazione dei beni*, Padova, 2006, p. 571 *et seq*.; C.A. Cannata, '*Cum alterius detrimento et iniuria fieri locupletiorem'. L'arricchimento ingiustificato nel diritto romano*, in *Scritti scelti di diritto romano*, II, edited by Letizia Vacca, Torino, 2012, pp. 533-566; and, if permitted, also B. Cortese, Indebiti solutio *e arricchimento ingiustificato. Modelli storici, tradizione romanistica e problemi attuali*, Napoli, 2013; Ead., Quod sine iusta causa est posse condici, Napoli, 2013; M. Varvaro, Condictio *e* causa actionis, in *AUPA*, LVII, 2014, p. 265 *et seq*.

2 See G. Longo, entry *Pagamento (dir. rom.),* in *Noviss. dig. it.*, XII, Torino, 1965, p. 316 *et seq*.; M. Sargenti, entry *Pagamento (dir. rom.),* in *Enc. dir.*, XXXI, 1981, p. 532 *et seq*.; Pugliese, *Istituzioni*, cit., pp. 622-624. The *solutio* was originally a strictly formal act, characterized by symmetry with respect to the act with which the bond was assumed, such as the need to resort to the ritual book, in case the bond was derived from *nexus,* or as

The evolution of the Roman legal system has gradually led to the abandonment of the formalism of the *solutio*, which has become an ordinary act of fulfillment of a satisfying nature, following which the obligation on the debtor was considered to be definitively settled.[3]

As regards the specific hypothesis of *indebiti solutio*, as can be seen from the same denomination, this constituted the extinction act of an undue obligation because it did not exist or did not exist on the performer or, although the *solvens* required payment, it was an obligation on a person other than the recipient.

This is clearly stated by Paul, who in a text extracted from his commentary *ad Plautium*, distinguishes the hypothesis of the 'objective undue' from those of the undue *ex latere accipientis* and the undue *ex latere solventis*:

> D.12.6.65.9 (Paul. 70 *ad Plaut.*): *Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id quod alius debebat alius quasi ipse debeat solvat*.

In the hypothesis of payments not due, the *solvens* had the right to recover what was paid:

> D. 12.6.7 (Pomp. 7 *ad Sab*.): *Quod indebitum per errorem solvitur, aut ipsum aut tantundem repetitur.*

In the perspective of our investigation, the statement by Cannata assumes

an example, the verbal *acceptilatio*, in the case of a bond contracted by *sponsio*. It was a real act of liberation, functionally aimed at regaining freedom from the debtor, and it remained such even during the historical development of Roman law, when the *solutio per aes et libram* became an imaginary *solutio*, that is, a mode of liberation in solemn form adaptable to every type of *obligatio civilis*, in which more than the aspect of payment (*aes* was no longer the instrument of liberation, payment in the *solutio per aes et libram* is symbolic) prevails the fact of the dissolution of the bond: Gai. 3.173; D. 46.3.54; D. 42.1.4.7. For an analysis of the negotiation forms *per aes et libram*, see Cannata, *Per un storia*, cit., pp. 62-64.

3 This is how he reconstructs the history of the institute Kupisch, entry *Arricchimento,* cit., p. 426; see also G. Pugliese-F. Sitzia-L.Vacca, *Istituzioni di diritto romano* 3, Torino, 2012, pp. 421 *et seq*.

particular relevance, according to which the persecution, by *condictio*, of the payment of undue is the result of an interpretation work on the attributions made through *dationes*.[4]

It is essential to investigate the transferring mechanism assumed by the *solutio* and which generates the restitutory obligation, as there has often been an overlap of the two problems, confusing the problem of the cause of attribution, inherent in the transferring moment, with the cause of justification of the attribution, pertaining to the restitution case.

Meanwhile, it should immediately be noted that the use of the *condictio,* as a personal action aimed at the recovery of the loan in pecuniary terms, assumed that, despite the non-existence of the obligation, the attribution was not due to have produced its effects anyway.

It should thus be held, just as a function of the *indebiti solutio*, that the acts of attribution, generally the *datio rei*[5] in which the *solutio* materialized, had a transferring efficacy completely independent of the existence or validity of the obligation in function of which the attribution had taken place.

The attention, therefore, must be turned mainly to the nature of the transfer acts or deeds; and the investigation must be addressed, in particular, to the structure of the *traditio*,[6] omitting here the *mancipatio* and *in iure cessio*, because their structure does not involve any particular interpretative problem, as acts of an abstract nature and therefore perfectly able to produce effects, even in the absence of an obligation that integrates the 'cause of the transfer'.

4 Cannata, *Cum alterius detrimento*, cit., p. 548.

5 C. Sanfilippo, *Condictio indebiti*, p. 76 *et seq*.; A. d'Ors, *Rèplicas panormitanas IV. Sobre la sopuesta 'condictio' sin 'datio'*, in *Iura,* XXV, 1974, p. 27; Kupisch, entry *Arricchimento*, cit., p. 432 *et seq*.; Cannata, *Cum alterius detrimento*, cit., p. 553. Actually not all doctrine agrees on the identifiability of essential assumptions for the experiment of the action; according to some, in fact, the *condictio* presupposed the data, but it was also possible to experience it in cases of patrimonial attributions *ex iniusta causa* as a result of *delegatio, consumptio nummorum, commixtio, acceptilatio, usucapio*: Donatuti, *Le 'causae'*, cit., pp. 713-717. Santoro (*Studi,* cit., p. 185 *et seq*.) denied that the *datio* generally constituted the presupposition of the *condictio*; last Fargnoli, Alius solvit, cit., p. 246 *et seq*., which identifies among other things a wide use of undue *condictio* in triangular relationships.

6 In addition to the various works on the institutions of Roman law, see B. Albanese, *Gli atti negoziali nel diritto privato romano*, Padova, 1982, *passim*.

2. The causality of the traditio

The interpretative problem that poses the *traditio* is due to the (apparent) contradictory nature of the sources about the necessity of a cause supporting the act:

> D. 41.1.31(Paul. 31 *ad ed.*): *Nunquam nuda traditio trasfert dominium, sed ita, si venditionis aut aliqua iusta causa praecesserit propter quam traditio sequeretur*.

Paul states that the "naked" *traditio*, hence the mere delivery, cannot transfer the domain, but it is necessary that there is a "cause", such as that related to the sale, or to another cause considered "right".

Gaius also expresses himself in the same sense:

> Gai. 2.20: *Item si tibi vestem vel aurum vel argentium tradidero sive ex venditionis causa, sive ex donationis, sive quavis alia ex causa statim tua fit ea res, si modo ego eius dominus sim.*[7]

In order for the domain to be transferred («that the thing becomes yours as I am its dominus», says Gaius) it is necessary that the thing be delivered as a sale, donation or other cause.

On the basis of these texts, the theory of the causality of the *traditio*[8] has been

7 Gaius, unlike Paul in D. 41.1.31 who does not report that the cause must be "iusta", reports a relationship prior to the *traditio*, to which the requested cause must be traced.

8 The idea of the causal *traditio* was born among the jurists of the intermediate period in part also because of the Justinian compilation of the texts mentioning the *mancipatio*: See C. 2.3.20: *Traditionibus ed usucapionibus dominia rerum, non nudis pactis transferuntur*. In the field of modern Roman doctrinal "architecture", it was Betti who gave new vigour to the theory of causality, in particular, see *Sul carattere causale della traditio,* in *Studi in onore di Salvatore Riccobono,* IV, Palermo, 1936, especially pp. 113-118. Betti links the translation effect to the relationship that the parties intend to make, that is to say to the typical cause, as an element necessarily intrinsic to the *traditio*. On the necessity of a causal element, see also G. Grosso, entry *Causa (dir. rom)*, in *Enc. dir.*, VI, Milano,1960, p. 532 *et seq*.; J.G. Fuchs, *Iusta causa traditionis in der Romanistischen Wissenschaft*, Helbing & Lichtenhastein, 1952, p. 130 *et seq*.; M. Kaser, *Zur iusta causa traditionis*, in *BIDR*, LXIV, 1961, p. 61 *et seq*. The *traditio* is also defined as a shop with multiple causes or with alternative causes, Pugliese-Sitzia-Vacca, *Istituzioni*, cit., p. 277. See also Kupisch, entry *Arricchimento*, cit., p. 421 *et seq*. and C.A. Cannata, «*Traditio*» *causale* «*traditio*» *astratta: una*

elaborated, widely shared by most doctrine.

It must immediately be observed that the controversial point, even in the light of the texts cited, is not so much the need for a cause that allows the production of the transferring effect, but the concept of "*causa traditionis*".

In this regard, the major interpretative difficulties were presented: this is because, probably, the Civilians, starting from the Common law, as well as the Romanist doctrine, may have put modern practical questions on the interpretation of classical sources.[9]

The difficulties encountered by modern jurists in reconciling the transferring model based on the principle of causality with the restorative remedy envisaged in the case of undue are considerable; and the same Romanist criticism has clashed with the incompatibility of a remedy such as the *condictio indebiti*, with the configuration of the *traditio* as an intrinsically causal transfer, in which the cause is constituted by purposes recognized by the order as typical, essentially identified with the negotiation agreements.[10]

This construction of the causality of the '*traditio*' implies the recognition of a valid transfer of ownership only when the *traditio* had been carried out for the purpose of sale, loan, or due to donation or dowry; the causal agreement could correspond to a contract, as in the case of the sale or the mortgage, just as it could not correspond to it, as in the case of the *donatio* or the *costitutio dotis* that were not considered contracts by the Romans.

This reading would not pose particular problems if it were not for the well-known question about the space occupied by an *actio in personam*, such as the *condictio*, which sanctioned unjustified attributions, in a system in which the 'typical cause' allowed an 'upstream' check on the justification of the transfer of the property: this even

precisazione storico-comparatistica, in *Scritti scelti di diritto romano*, II, edited by Letizia Vacca, Torino, 2012, pp. 141-152: they consider the *traditio* a causal translation shop, but with ideas about the 'cause' different from the traditional ones.

9 L. Vacca, *Condictio e iusta causa traditionis*, in *Studi in memoria di Berthold Kupisch e Paolo Maria Vecchi*, edited by S. Patti e L. Vacca, Napoli, 2019, p. 139 *et seq*.

10 Betti, *Sul carattere causale,* cit., p. 117.

more evident in the case of undue *solutio* carried out by means of *traditio*, in which the absence of a just cause would have had to prevent the occurrence of the translational effectiveness and render the appeal completely useless to the *condictio*.

Moreover, the figure of the *causa solutionis* is well connected to another historical misunderstanding that is not possible to face, at least not in the in-depth way that the problem would require.

The doctrine of the 'putative cause' is referred to.

This is a juridical construction of particular historical importance because it has greatly influenced the legal formulations of property transfer models and it is ideally suited for a parallel with the construction of the figure of the *causa solutionis* and the theoretical consequences produced by it.

The medieval juridical science met first with the apparent contradiction between the structure of the *condictio* and the principle of causality of the *traditio*.[11]

The answer to this contradiction was given by the invention of the putative cause.

In this regard, let us examine the well-known gloss by Accursio to the fragment of Paul[12] on the *iusta causa traditionis*:

> Gl. *Iusta causa ad* D. 41.1.31 pr. "*iusta causa*": *vera vel putativa, alioquin, id est si dicas ex causa putativa non trasferri dominium, totus titulus de condictione indebiti repugnaret: qui titulus habet locum quando transfertur dominium alicuius rei ex putativa causa…*

The reflection of the glossator is extremely "practical": Accursio writes, in fact, that the right cause of which Paul speaks can be both true and putative, *i.e.*, only in the intentions of the parties. This is because, otherwise, the entire title (of the Digest) dedicated to *condictio indebiti* («totus titulus de condictione indebiti repugnaret») should be eliminated.

This is supposed to avoid running into a macroscopic contradiction with the transfer system built by medieval jurists.

11 Cannata, «*Traditio*» *causale,* cit., 153; Vacca, *Osservazioni,* cit., pp. 581-583.

12 Cannata, «*Traditio*» *causale,* cit., 153; Vacca, *Osservazioni,* cit., pp. 581-583.

This is an interpretation rendered in a state of difficulty in identifying a coherent connection between remedy and structure of the transfer method: the reasoning is independent of any investigation into the phenomenon of the cause of the transfer; Accursio limits himself to attributing validity to the cause that the parties had mistakenly and in good faith considered valid.

This is the impasse generated by the idea of the binomial *causa remota-causa proxima*, typical of the elaborations around the figure of the 'cause' in medieval law,[13] which is made to coincide with the other binomial expressing the functioning of the models of transferring of the property, that of the titulus and of the modus,[14] characterizing the real rights that the sixteenth-century legal science had accepted, and that followed precisely the interpretation of the sources concerning the cause of the *traditio*.[15] According to this reading, the causal transfer is characterized by the need for a valid juridical foundation that justifies the transfer of property in a definitive way (*causa remota*, that is, the most modern titulus)[16] and from an external act that realizes the transfer (*cause proxima* or, in modern key, the modus).[17]

In this way the *traditio* ends up being identified with the modus, the material act of ownership, constituted by the delivery of the good accompanied by the will of the parties to transfer; while the titulus is identified with the negotiating cause, on which the *traditio* depends, completely distorting the Roman setting and attributing to the causal agreement made with *traditio* the double value of titulus and modus, to use the

13 See I. Birocchi, *Vendita e trasferimento della proprietà nel diritto comune*, in *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica*, in *Atti del congresso internazionale Pisa-Viareggio-Lucca (17-21 aprile 1990)*, edited by Letizia Vacca, I, Milano 1991, p. 139 *et seq*.

14 F. Hofmann, *Die Lehre vom titulus adquirendi und vom der iusta causa traditionis*, Wien, 1873, p. 21 *et seq*. and p. 36 *et seq*.; Fuchs, *Iusta causa*, cit., p. 73 *et seq*.

15 H. Coing, *Europäisches Privatrecht, I: Älteres gemeines Recht (1500 bis 1800)*, Müchen, 1985, p. 179 *et seq*., p. 303 *et seq*.

16 Hofmann, *Die Lehre,* cit., p. 42.

17 The development of this doctrine will lead to the "pure causal" system adopted by the Prussian Code (ALR §§ 1-2 I, 9; § 1 I, 10) and the Austrian Code (ABGB § 423-426 e § 431) as well as to the transfer system based on the principle of translational consent typical of the civil Code (Art. 1196 of the Civil Code after the reform of 1 October 2016) and of the Italian Civil Code of 1865 (Art. 1125) and of 1942 (Art. 1376). See Kupisch, *Causalità e astrattezza*, in *Vendita e trasferimento*, cit., p. 433 *et seq*.

same categories.

Since Accursio was not able to justify the occurrence of the transfer of the ownership of the asset in the hypothesis of *indebiti solutio* given the absence of the remote cause – the obligation to be fulfilled originated by a titulus – he resorted to the elaboration of the figure of the putative cause, integrating the mere belief of the parties of the existence of the obligation to be extinguished, and that constitutes a valid remote cause, or, if you will, a valid titulus.[18]

Moreover, the doctrine of the titulus and of the modus leads to an abstract model of transfer of property going in the opposite direction to the first ideas of the medieval legal science.[19]

3. Considerations on the iusta causa

The observations to be made are manifold, also because none of the readings of the sources examined so far would seem to accurately reflect the model of transfer of Roman property.

The juxtaposition operated here between the 'putative cause' of the glossators

18 On the question of the *cause-condictium* relationship in medieval science, see in particular A. SÖLLNER, *Die Causa im Konditionen und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten,* in *Z.R.G., Rom. Abt.,* LXXVII, 1960, pp. 182-269.

19 From the putative cause to the abstractness of the transfer by *traditio*, the step was relatively short: Baldo observed that the consent of the parties to the transfer by contract is sufficient to produce the translational effect. (*Opera omnia*, VIII, ed. Venetiis, 1615, *super* C. 4.50.6: *ex consensu propter contractum: ita quod causa immediata id est consensus in traslatione dominiii est sufficiens ad dominium transferendum*); the commentator also considered that an invalid *titulus adquirendi* was sufficient as an element in support of the act of transfer: BALDUS, *Opera,* cit., *ad* C. 2.3.20: *Consensus tradentis habentis trasferendi dominium potestatem, subsistente causa vera vel putativa, ad traslationis dominii ordinata, inducit traslationem dominii. Quaelibet ergo traditio ordinatur a sua causa*. The importance for the translational effect of the encounter between the will of the *tradens* and the will of the *accipiens* will be underlined by the Donello, *Commentarii,* cit., XIV, 16 n° 9, and by Pothier, *Traité de l'action condictio indebiti*, n° 178. The latter, however, was not followed by the compilers of the civil code, while his own idea found expression in the German legal science. The abstractness of the *traditio* and, in general, of the transfer of property, in fact, was taken up and affirmed with vigour by F.C. VON SAVIGNY, *Das Obligationenrecht als Teil des heutingen Römischen Rechts* II, Berlin, 1853, pp. 256 *et seq*., who, criticizing the *titulus+modus* mechanism, claimed, using the example of giving alms to the beggars, that the translational effect is linked only to the will to transfer, while the cause is nothing more than the testimony, the index of that will, so that the delivery with the agreement to the transfer of ownership gives rise to a single act, or rather a contract with real effect, the *dinglicher Vertrag*, what is the *traditio* (ID., *Das Obligationenrecht*, cit., pp. 257 *et seq*.).

and the constructions of the modern romanistic science on the *traditionis causa* (like that of Cannata or of Kupisch) ends up in affirming the impossibility of attributing to the payment, especially to an undue payment, a structure modeled on the typical legal acts, primarily when this typicality takes on the appearance of causality in a "traditional" sense.

This incongruity has also strengthened the parallel idea of abstract *traditio*, a construction that is part of the Romanist doctrine[20] based on the most significant datum[21] of an absence of concordance in the same Roman sources about the necessity of the cause in support of the *traditio*.

In a fragment extracted from the *Res cottidianae*, it is stated that, according to the principles of natural law, nothing is more effective for transferring the property than the will of the owner himself, that meets the will of the *accipiens* to buy.

> D.41.1.9.3. (Gai. 2 *aur.*): *Haec quoque res quae traditione nostrae fiunt, iure gentium nobis adquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi*.

In a text by Giuliano,[22] it is reported that the lack of agreement between the parties on the cause does not invalidate the real effect of the *traditio*, noting for the purposes of transferring essentially only the agreement on the '*tradere*', namely on the transfer:[23]

20 We owe to Voci the most important reinterpretation of the theory of the abstractness of the *traditio*: see above all P. Voci, *Modi d'acquisto della proprietà*, Milano, 1952, p. 138 *et seq*. The *traditio* is configured as an abstract translational shop on the basis of the elaborations of the German pandettism: A. Burdese, *Manuale di diritto privato romano*, Torino, 1987, p. 307 *et seq*.; M. Marrone, *Istituzioni di diritto romano*, Palermo, 1989, p. 435 *et seq*. For a consideration of the *iusta causa traditionis* as integration of the will of the parties to the realization of the transfer, see also M. Talamanca, *Istituzioni di diritto romano*, Milan, 1990, pp. 436-437.

21 It is an interpretative path followed by a part of the science of *ius commune*, while the School of natural law, like Savigny, comes to the idea of the translational will transcending the cause on the basis of conceptual reflections based on the role of consensus and the role of the force of the will in the context of translational delivery.

22 See C.A. Cannata, *Iul. D. 41,1,36: una* "*interpolazione occasionale*". *Incontro con Giovanni Pugliese (18 aprile 1991),* Milano, 1992, pp. 67-76, in *Scritti scelti di diritto romano*, II, edited by L. Vacca, Torino, 2012, p. 23, pp. 25-27.

23 See L. Vacca, *'Iusta causa' e 'bona fides' nell'usucapio' romana a proposito del titolo 'pro suo'*, in *Appartenenza e circolazione dei beni*, Padova, 2006, p. 79 *et seq*.

> D. 41.1.36.13 (Iul. 13 *dig.*): *Cum in corpus quidem quod traditur consentiamus, in causis vero dissentiamus, non animadverto cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existemes ex stipulatu tibi eum deberi, nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi accipias, constat proprietatem ad te transire nec impedimento esse quod circa causam dandi atque accipiendi dissenserimus.*

According to the theory formulated on these texts the agreement of the parties would produce the real effect, while the right cause would not be understood in a modern sense as a typical obligatory relationship that underlies the transfer deed, but as an index of the parties' wishes.[24] This implies that the cause, whether 'actual' or 'putative', has no practical relevance, being only a mere proof, a sort of index, of the existence of a reciprocal transferring will.

The clear separation – stemming from the construction of the *traditio* – between obligatory and transferring act does not take into account the relevance of the cause in the ways of acquiring property in the Roman order. Such cause is expressed in rather articulated ways and does not certainly exhaust the mere probative function of the will of the parties in the negotiation.

One cannot avoid giving the right relevance, within the framework of real effectiveness, to the transferring agreement.[25]

4. The iusta causa *as an expression of the qualified translational agreement*

The considerations made on the texts related to the *traditio* support the idea that the cause of the *traditio* would preferably be identified not with the negotiating agreement, but with the transferring agreement: the *traditio*, first of all, would produce the transfer of the goods when the will of the *tradens* and the will of *accipiens* agree on

24 Voci, *Modi d'acquisto*, cit., p. 138 *et seq*. according to which the *iusta causa* represents the formal expression of the will of the parties, the only element to which the transferring effectiveness is attributed.

25 Vacca, *Osservazioni,* cit., pp. 588-589. She notes «his reconstructive scheme undoubtedly appears much closer to the conceptualization of Roman jurists than it is the recourse to the distinction between cause of attribution and cause of justification, or the scheme of the putative cause, but it can appear in its whole in a certain sense 'over-structured 'with respect to the solutions of classical jurisprudence».

the passage of dominical ownership and the essential cause would be the agreement of the transferring wills.[26] This would seem to be the meaning of Giuliano's statement, which notes that if one agrees to do the transfer but disagrees with its cause, there is no reason why the *traditio* should be considered ineffective («cum in corpus quidem quod traditur consentiamus, in causis vera dissentiamus, not animadverto cur inefficax sit traditio...»); and it would seem to consist of the reference ex D. 41.1.9.3 about the *iure gentium* origin of the *traditio*: «nothing complies with natural law and equity as the will to transfer dominion and the will to acquire it».[27]

As for the reference to the 'cause' of Paul, I believe that the jurist understood the interest in the realization of the goal of the transferring agreement, defined precisely as a just cause: Paul takes as a specific example the *causa venditionis* – whose negotiating order, among other things, presented strong peculiarities with regard to the translation aspect linked to the seller's obligation[28] – referring in a rather vague way to the external cause. One could think that it was not necessarily a question of typical *iustae causae*, for example those of negotiation, but of *causae* which could be reconnected to the *traditio* and be "*iustae*" according to the set of parameters of the order. Furthermore, it does not seem at all negligible that the Severian jurist precisely stated that the good cause must precede the *traditio* of the good, and that it is thus preexistent with respect to the transferring and non-contextual act as is largely deduced from the use of the '*praecedere*' and '*sequerere*'.[29] In this sense, it seems to refer explicitly to an extrinsic element with respect to the *traditio*, rather than to its constitutive factor, as instead the traditional doctrine on causality wanted.[30] The extrinsic element can be related to the wider context of the juridical-patrimonial interest that the parties intend to realize through the transferring agreement.

Conversely, the naked *traditio* that, according to Paolo, does not allow the

26 See Vacca, *Osservazioni,* cit., p. 589, who speaks about "*causa minima necessaria*".

27 D. 44.7.55 (Iav. 12 *epist.)* Undoubtedly, there are "oscillations" in the Roman jurisprudence: Vacca, *Annotazioni*, cit., 181 nt. 23, Id., *Osservazioni*, cit., pp. 589-590.

28 Vacca, *Annotazioni*, cit., 173, nt. 11.

29 For Cannata this precedence is merely logical: Cannata, «*Traditio*» *causale*, cit., p. 143.

30 Betti, *Sul carattere causale*, cit., p. 114.

domain to be transmitted from the *tradens* to the *accipiens* shall be identified with the mere material delivery, unqualified by the "transferring will" of both parties.

Therefore, the statements contained in the texts can be coherently related to each other: while Giuliano, in D. 41.1.36.13, addresses the question from the point of view of the transferring effect of the *traditio*, whose real effectiveness is linked to the agreement (*consentiamus*) to transfer (*quod traditur*); Paul, in D. 41.1.31, deals with the aspect of completeness and finality of attribution carried out by *traditio*, for which the good cause is necessary. Paul emphasizes that the absence of a valid justification is going to affect not the realization of the real situation (which is only affected by the completion of a naked *traditio* in the sense explained above) but rather the justification of the purchase that, I would add, becomes susceptible to potential removal by *condictio.*

In this sense, the *traditio* would have to be constructed as a causal transfer act, where, however, the transferring cause consists not of the obligation or of the underlying negotiating relationship or of the purpose recognized as typical, but of the agreement of the parties to the production of the translational effect. This does not make the *traditio* a purely abstract store, separated from the juridical foundation of the transfer: the cause identified with the agreement of the *tradens* and *accipiens* aims at realizing, through a real transfer, a specific set of interests, which in some cases is concluded in a negotiation context (for example sale, mortgage, dowry or donation promise), but which can also be detached from such context and be constituted by the purpose that the parties intend to achieve, absorbed directly by the act of delivery (as donation or dowry). This interest determines the "destiny" of the transfer with respect to its consolidation; in this sense, the just cause coinciding with the interest pursued by the parties, which can be identified with a typical negotiating cause or not, is absolutely necessary: precisely its possible absence justifies the presence of the *condictio* as remedial measure.

However, this does not affect the immediate transferring purpose. I believe that the same Giuliano endorses this critical reading when referring to the disagreement over the cause, it seems he distinguishes between the transfer plan and the general cause of the transfer, or it seems he separates the 'cause of the attribution' from the 'cause of justification'.[31] This leads us to consider as confirmed and further reinforced the idea

31 In the opposite sense Vacca, *Osservazioni,* cit., p. 586.

that the Roman *prudentes* clearly distinguished the plan of patrimonial attributions from the plan of causal justifications, and that they would take appropriate remedial measures according to the scope of realization of the attribution, whether the cause of justification be real or invalid.

5. The restitutory obligation

The idea that the justification of attribution is dependent on a mechanism different from the one governing the transferring event and the idea that the foundation of the restorative obligation is to be found outside the attribution is not shared in doctrine.[32]

The foundation of the restoring obligation, which must be isolated from the level of the rights *in rem*, is connected to an assessment of the justification of the act of attribution,[33] an evaluation stemming from, and I agree with Cannata, criteria of substantial justice.

In this sense, substantive justice operates as a complement to the strict law: the failure to achieve the interests of the subjects of the patrimonial juridical relationship (the just cause) represents a deficiency relative to an element of the case, a deficiency that affects the entire affair of the attribution, preventing the crystallization of the patrimonial consequences from the arising attribution.

32 BETTI, *Sul carattere causale*, cit., p. 117. Among those who consider the *traditio causale* in the typical sense, the obligation of *restitutoria* of the *solutio undbiti* derives from the absence of the cause, and the need to resort to the *condictio* would be dictated by the purchase *ex alia causa* of the goods object of the *traditio*, being mainly money that enters the assets of the *accipiens* for confusion. GROSSO, voce *Causa*, cit., p. 532 *et seq*.; FUCHS, *Iusta causa traditionis*, cit., p. 138 *et seq*.; KASER, *Zur iusta causa,* cit., p. 69. Differently SANFILIPPO*, 'Condictio indebiti'*, cit., pp. 41-42, who considers the cause of the *traditio* to be identified with the *cause adquirendi*, whereas the basis of the obligation to *restitutoria* resides in the absence of the *cause retinendi*. Contrary to the idea of Sanfilippo, Talamanca observes that speaking of a lack of the *cause retinendi* presupposes an evaluation in positive terms of a phenomenon that would be more appropriate to evaluate in negative terms: in the sense that the perspective of the jurists is that of the *solvens*, so that it is preferable to speak of *cause condicendi* with regard to the lack of cause of attribution, rather than of lack of cause of retention of the purchase by the *accipiens*: TALAMANCA, *Rec. a Schwarz*, in *AG*, 1953*,* 172 f.

33 The interest that the *solvens* intends to pursue consists in the extinction of the obligation, but this is not relevant at the time of assignment, in which only the translational agreement is relevant; the interest, on the other hand, is relevant in the second instance, that is, in the cause justifying the restitution. Also VACCA, *Osservazioni,* cit., p. 587 *et seq*.

Clearly, even these parameters of substantive justice merge into principles that jurisprudence establishes through practical interpretation: the articulation of these principles revolving around the concept of *sine causa* constitutes the application area of the *condictio* in function of the so-called non-contractual restitution.

The main characteristic allowing the *condictio*[34] to cover the vast range of the obligations to a *certum* has already been mentioned: the high degree of abstractness of the formula.[35] Such abstractness allowed the jurisprudence to foresee the use of the *actio* every time the solution of a case in point required it. It is certain that the original field of application of the action was that of protecting debts deriving from certain types of contracts (mortgage, stipulation, literal contracts).[36]

However, the use of the *condictio* as a sanction for unjustified attributions was common at a fairly early date, as reported by Ulpiano in his book XVII of the commentary *ad Sabinum*:

> D. 12.5.6: *Perpetuo Sabinus probavit veterum opinionem existimantim id, quod ex iniusta causa apud aliquem sit, posse condici: in qua sententia etiam Celsus est.*

The text is a clear example of the opinion of the *veteres* (the *fundatores* of the *ius civile* up to and including Quinto Mucio)[37] according to which what is found in

34 The protection of the obligation in the technical sense is mainly linked to the birth of the process *per formulas* and its evolution (Cannata, *Per una storia,* cit., pp. 180-182). The formula was composed of several parts, including mainly *intentio* and *condemnatio*: see D. Mantovani, *Le formule del processo privato romano*. *Per la didattica delle Istituzioni di diritto* romano, 2, Padova, 1999.

35 The intention, part of the formula in which the claim of the actor is reproduced, was characterized by abstractness. It affirmed the existence of a debt of certain pecuniary or certain *res* without mentioning the cause, or the constitutive source of giving work. Thus, it has been reconstructed the structure of the formulation of the *condictio certae pecuniae*: «Si paret N. Negidium A. Agerio sestertium X mila dare oportere». For the *condictio certae rei*: «Si paret N. Negidium AAA. Agerio tritici Africi optimi modios centum dare oportere».

36 Cic. *Pro Roscio com*. 5.14; Gai.4.4; D. 12.1.9pr.-3. See for example Donatuti, *Le 'causae'*, cit., p. 706; B. Albanese, *Per la storia del'creditum'*, in *AUPA*, XXXII, 1971, p. 5 *et seq*.; Cannata, *La classificazione*, cit., pp. 272-273.

37 R. von Mayr, *Die* '*condictio' des römischen Privatrecht,* Leipzig, 1900, p. 124; O. Behrends, *Les 'veteres' et la nouvelle jurisprudence à la fin de la république*, in *RHDFE*, LVI, 1977, p. 8 *et seq*.; M. Talamanca, *Pubblicazioni pervenute alla direzione*, in *BIDR*, XCVI-XCVII, 1983-1984, p. 916; M. Horak, *Wer wassen die* veteres*? Zur*

someone's property for an unjust cause can be recovered by *condictio*; the opinion was shared by Sabino and Celso. Therefore, Ulpiano not only refers us to the conceptual data but also tells us that it is an opinion shared by much of classical jurisprudence.

The principle condensed in the *opinio* refers to the hypotheses of patrimonial attributions which, albeit valid and effective on a real level, are devoid of a cause (*iusta*) and therefore subject to removal by *condictio*; *actio* that allowed the recovery, in pecuniary terms, of the *certum* unjustly attributed. Considering that the statement of the *veteres* is very general, this has inevitably given rise to different interpretations both on the meaning to be attributed to the '*quod apud aliquem est',*[38] and on the meaning of the 'unjust cause'. As far as concerns the first aspect, over time the jurisprudence has shown different oscillations, which make it possible to identify *dationes* as privileged context, even if with openings towards forms of attribution, even indirect, that is to say attributions that are not directly related to behaviors implemented by the subjects involved in the unjustified attribution.[39]

As for the general meaning of the unfair cause, it is also specified with time by the overlapping of the casuistic solutions.[40]

This is what I believe needs to be highlighted, especially from the perspective of this study: starting from a consolidated opinion in the first "creative" jurisprudence, a system of protection based on the condition that developed through the concepts of '*ex iniusta causa*' or '*sine* (*iusta*) *causa*' and of '*quod est apud aliquem*', whose scope has

Terminologie der klassischen römischen Juristen, in *Vestigia Iuris Romani. Festschrift für G. Wesener zem 60. Geburstag am 3. Juni 1992*, edited by Klingeberg-Rainer-Stiegler, Graz, 1992, p. 201 *et seq*.; Vacca, *Osservazioni*, cit., p. 576 *et seq*.; see also Cannata, *Cum alterius detrimento*, cit., p. 559.

38 The remedy covered a rather wide field of application, that of transfers of goods, mainly occupied by the *dationes*. Nevertheless, the translational data did not exhaust the cases of attributions for which the *condictio* was operational; among the first to dismantle this assumption in doctrine see R. Santoro, *Studi sulla condictio*, cit., p. 185 *et seq*.; recently Saccoccio, *Si certum petetur*, cit., p. 98; p. 103.

39 On the oscillations, evidence of this can be found in the texts: D. 12.1.32 (Cels. 5 *dig*.) D. 12.6.33 (Iul. 39 *digest*.) D. 12.1.23 (Afr. 2 *quaest*.) in which the concession of the *condictio* is alternated only for the recovery of the *certum* deriving from a shop between the parties and the overcoming of the assumption of the *negotium contractum*: S. Perozzi, *Le obbligazioni romane*, cit., p. 102 *et seq*.; Sanfilippo, *Condictio indebiti*, cit., p. 54; Kaser, *Das römische Privatrecht*, I, cit., p. 497; L. Pellecchi, *L'azione in ripetizione*, cit., 80; Cannata, *Cum alterius detrimento*, cit., p. 563 *et seq*.; Saccoccio, *Si certum petetur*, cit., p. 378 e p. 390.

40 D. 12.7.2; D. 12.1.32; D. 19.1.30pr.; D. 12.6.23pr.

been specified by the stratification of practical solutions.

This is confirmed by Papiniano in

> D.12.6.66 (Pap. 8 *quaest.*): *Haec condictio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consuevit.*
> «This condition is an action created according to what is right: allowing to recover what someone, without cause, has taken from others».

Papiniano says 'introduced,' which I think gives the idea of a use of the *condictio* in a negotiating context different from what was originally foreseen, and this new interpretation follows the way paved by the previous jurists.

Not even Papiniano defines the concept of *sine causa*, on which the granting of the *condictio* depends, as well as the generic anchor is the *quod alterius apud alterum deprehenditur*. I believe this is due to the fact that it is intended to express the expansive force of a rule which, at the time of Severian, provides a unique way to offer solutions regarding refunds.[41]

A general picture of the '*sine causa*' that seems to summarize the results of the previous jurisprudential reflections is the one proposed in the opening fragment of title D.12.7.1 which contains a text of the XLIII book of the commentary *ad Sabinum* by Ulpiano:

> *Est et haec species condictionis, si quis sine causa promiserit vel si solverit quis indebitum. qui autem promisit sine causa, condicere quantitatem non potest quam non dedit, sed ipsam obligationem.* 1: *Sed et si ob causam promisit, causa tamen secuta non est, dicendum est condicctionem locum habere.* 2: *Sive ab inizio sine causa promissu est, sive fuit causa*

41 This has not prevented a reflection in terms of substantial application with regard to the *'repetere'* as shown by the long fragment of Paul. 12.6.65pr.-9 (17 *ad Plaut.*) which at the beginning states: *In summa, ut generaliter de repetitione tractemus, sciendum est dari aut ob transactionem aut ob causam aut propter condicionem aut ob rem aut indebitum: in quibus omnibus quaeritur de repetitione.* The Pauline treatment of the *dationes* that gives rise to the *repetitio* offers a glimpse of the large space occupied by unjustified translational data in the area of unjustified attributions sanctioned by *condictio*: on this point, see above all Pellecchi, *L'azione di ripetizione*, cit., *passim*, p. 158 *et seq*.

promittendi finita est vel secuta non est, dicendum est condictioni locum fore. 3: *Constat id demum posse condici alicui, quod vel non ex iusta causa ad eum pervenit, vel redit ad non iustam causam*.

In the text the jurist states that the condition applies to the *stipulatio* without a cause, as well as to the debtor. Even the one who promised without cause, who cannot recover what he did not give, can act to be released from the obligation. Ulpiano then, in point 2, goes on to clarify that the action finds application even when there was a *stipulatio*, furnished with cause, to which the cause then did not follow up; the *condictio* therefore will be had both when it has been promised without cause, and when there has been a cause that then has not been realized. The passage ends at point 3, when he affirms that all the assets included in the patrimony of a subject not because of a just cause can be object of *condictio*.

The text of Ulpiano presents the different articulations posed by the *sine causa*, so not necessarily a lack of justification *ab origine* of the attribution, but also its disappearance or its subsequent exhaustion.

The theorizing of the '*sine causa*' of Ulpiano must be placed in connection with the general statements concerning unjustified attributions, as well as with the solutions that the jurisprudence has formulated throughout the classical period. The overlap of the solutions underlying the reflections of the jurists allows to grasp a conceptual identity between the *sine causa* of Papiniano and Ulpiano and the unfair cause the *veteres* referred to, as well as Sabino and Celso.

On the matrix of the principle that provides for the removal of unjustified attributions, a specific in-depth analysis is needed.[42] For the purpose of the present paper, I will limit myself to observing that the evaluation of the existence of a suitable justification for attributions occurs according to parameters of the *bonum et aequum*.

As we have tried to highlight, this sketching of the restorative duty has its roots in a rule elaborated by Republican jurisprudence that remains constant throughout the

42 Kupisch, entry *Arricchimento,* cit., p. 427 *et seq*. Cannata, *Cum alterius detrimento*, cit., p. 544; Vacca, *Osservazioni*, cit., p. 576 *et seq*.; Cortese, *Quod sine iusta causa*, cit., p. 29 *et seq*.; p. 83 *et seq*.

long phase of the so-called classic creative jurisprudence:

> D. 12.5.6: *Perpetuo Sabinus probavit veterum opinionem existimantim id, quod ex iniusta causa apud aliquem sit, posse condici: in qua sententia etiam Celsus est.*

The progressive design of the individual cases has led the Roman criticism to the identification of the necessary preconditions for the possibility of the *condictio*: *the datio and the sine causa*. However, although the texts report the frequent recurrence of some substantial elements in the context of granting the *condictio*, it is more appropriate not to become rigid in the formulation of specific application requirements. It was not a matter of jurisprudence to elaborate a restorative system of the *condictio* based on fixed presuppositions; on the contrary the malleability of the *actio* allowed the named progressive delineation of its applicative sphere, in relation to the resolution of the single cases.

As for the specific profile of the *sine* (*iusta) causa*, I wanted to highlight here the necessary separation, although not conceptually formalized in the context of the *prudentes*, between the cause of the transfer and the cause of the restitution.

We have tried to demonstrate, precisely through the example of *indebiti solutio*, that the aspect of the case supporting the attributions was articulated in a complex way: on the one hand, relevance was attributed to the cause of the transfer, with the elaboration of substantial mechanisms or of procedural tools that allowed a purchase of the property perfectly legitimate and valid for the sorting; on the other hand recourse was made to corrective tools of translational events which, although permitted by the real order, were not justified according to the more strictly equitable instances, also parts of the complex Roman order.

The interpretative problem that has arisen in both Roman and civil law doctrine is due to the rigid overlap of the two causal levels, an overlap that has led to serious problems of compatibility between the construction of substantial cases and the procedural action of repetition.

In some cases, the cause of the transfer and the cause of the justification certainly converge: this is the typical example of the legal acts imposing obligations to give; here, however, the control of the justification cause is absorbed upstream by the cause of the transfer recognized as typical by the law and therefore valid, “fair”.

But in various hypotheses the coincidence between causes does not exist and while the transfer story "lives" of its own rules on the basis of preordained mechanisms (as in the case of *indebiti solutio*), the aspect of the justification of the attribution assumes relevance in the general context of the balances an order is called to protect, and that here determines the need to return.

This is the field in which the Roman jurisprudence has undertaken that work of tracing of the discussed *condictio restitutoria* guided by the well represented common thread in the principle of *quod sine iusta causa apud aliquem est, potest condici.*

GIULIA MARIA GUIDA*

THE ANALOGY IN THE LEX AQUILIA: D. 9.2.27.22**

ABSTRACT. *The analogy in Roman law is one of the instruments that have allowed the best adaptation of 'rigid' law to the new legal cases that appeared at first unregulated by the legal system and that needed protection. In particular, in matters of extra-contractual liability, the role of analogy has been central to the evolution of the application of the* Lex Aquilia. *The aim of the contribution is precisely to analyse the linchpin fragment through which it was extended the extra-contractual liability.*

* PhD in Roman Law, Roma Tre University.

** This article is based on the speech delivered in the framework of the PhD seminar '*La réparation du dommage*' held at the Università degli Studi Roma Tre - Dipartimento di Giurisprudenza with Faculté de Droit et des Sciences sociales Université de Poitiers (27 September 2018).

The brief reflections made in this paper focus on the extra contractual liability, a broad topic that has become central in legal reflection. I will focus, in particular, on a text by the jurist Ulpiano, reporting a response of the jurist Bruto, on the subject of *Lex Aquilia*,[1] which strongly contributed to developing and extending the field of enforcement of this type of responsibility in the Roman legal system through the instrument of analogy.[2]

In D.9.2.27.22, in fact, an applicative criterion has been developed, the result of a new approach in the treatment of typical behaviour subject to liability as well as in the identification of the different kinds of goods subject to protection. In this way, protection has been extended to cases not directly covered by the legal text, but no less deserving of protection provided by judicial reflection.

In order to frame the context in which Bruto's thought must be placed, as reported by Ulpiano, which we will shortly be examining, it is first useful to remember that the content of the Aquilia Law concerned cases of damage[3] (or killing) supported by *iniuria*.[4] This *lex* was structured in three parts: (i) the first one dealt with the subject found guilty of unjustly killing (use of the verb '*occidere*') a slave or an animal belonging

1 B. Albanese, *Studi sulla legge Aquilia*, in *Aupa*, XXI, 1950, p. 5 *et seq*.; C.A. Cannata, *Sul testo della* Lex Aquilia *e la sua portata originaria*, in *Scritti scelti di diritto romano*, II, edited by L. Vacca, Torino, 2012, p. 173 *et seq*.; F.M. de Robertis, Damnum iniuria datum. *Extra-contractual liability in Roman law, with particular regard to the* lex Aquilia de damno, Bari, 2002, *passim*; G. Valditara, Damnum iniuria datum, Turin, 1996, p. 5 *et seq*.; L. Desanti, *La Legge Aquilia. Tra* verba legis *e interpretazione giurisprudenziale*, Turin, 2015, p. 39; A. Corbino, *Il danno qualificato e la* Lex Aquilia, Padova, 2008, p. 102; F. Musumeci, *"*Quasi ruperit*", "*Quasi rupto*"*, in *Studi in onore di A. Metro*, IV, Milano, 2010, p. 358 *et seq.*

2 For further information on the theme of analogy: E. Betti, *Forma e sostanza della* interpretatio prudentium, Milan, 1951, *passim*; Ead, *Interpretazione della legge e degli atti giuridici*, Milan, 1949, *passim*; N. Bobbio, voce *Analogia*, in *Noviss. dig. it.*, I, Turin, 1957, p. 601 *et seq*.; E. Melandri, *La linea e il circolo. Studio logico-filosofico sull'analogia*, Macerata, 2005, p. 9 *et seq*.; A. Mantello, *L'analogia nei giuristi tardo repubblicani e augustei. Implicazioni dialettico-retoriche e impieghi tecnici*, in *Il ragionamento analogico. Profili storico-giuridici (Convegno. Como, 17-18 novembre 2006)*, edited by C. Storti, Napoli, 2010, p. 3 *et seq*.; L. Vacca, *Metodo casistico e sistema prudenziale*, Padova, 2006, p. 39 *et seq*.; Ead., *Diritto giurisprudenziale romano e scienza giuridica europea*, Torino, 2017, p. 167 *et seq.*

3 G. Valditara, *Sulle origini del concetto di* damnum, Torino, 1998, 71; A.D. Manfredini, *Contributi allo studio dell'*iniuria *in età repubblicana*, Milano, 1977, p. 47 nt. 88.

4 B. Beinart, *The relationship of* iniuria *and* culpa *in the* lex Aquilia, in *Studi in onore di V. Arangio-Ruiz*, I, edited by M. Lauria, Napoli, 1953, pp. 279-303; S. Schipani, *Responsabilità* ex lege Aquilia. *Criteri di imputazione e problemi della* culpa, Torino, 1969, pp. 51-86.

to someone's herd, who was condemned to repay the respective owner the maximum value that the slave or the animal had reached during the same year in which the fact was committed; (ii) the second part provided, instead, for an action against the *adstipulator*, who, in fraud against the main *stipulans*, had a credit for a certain amount in its book of accounts; (iii) the third part, finally, concerns all the other cases of damage, including those unjustly caused to inanimate things, whose penalty provided that the damaging individual should be ordered to pay the same amount of the value of the *res*, determined not by the maximum quotation of that year but by the value of the *res* in the thirty days preceding the event of damage.[5]

As we have already mentioned, the *Lex Aquilia* concerned the repression of the *damnum iniuria datum*:[6] both the first and the third chapter,[7] in fact, focus on the *iniuria*, that is, they are related to the consequences of a behaviour not supported by a legally relevant justification.

The cases in question therefore determined the different methods for quantifying damages resulting from an injury to the individual property.

This fragment, which we will shortly analyze, therefore extends the protection to cases which would not otherwise have led to the restoration of the injury suffered.

It should be noted, in this regard, that it is from the original notion of Aquilian damage that the fundamental institution of compensable damage has developed, over time, up to the present day, which has also included kinds of damage other than just the financial one. In other words, the fortune of the configuration of the Aquilian damage, from the beginning, lies in its openness and thus in its interpretability, in an almost always extensive sense.

The mentioned fragment uses the extensive method in matters of non-contractual liability and this is testified by Ulpian, who reports a response of Brutus

5 G. Longo, *Appunti esegetici e note critiche in tema di* lex Aquilia, in *Ricerche romanistiche*, Milano, 1966, p. 713 *et seq.*

6 C.A. Cannata, *Per una storia della scienza giuridica europea*, I, Torino, 1997, p. 212; M.F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, Napoli, 2010, *passim*; I. Piro, Damnum corpore suo dare rem corpore possidere. *L'oggettiva riferibilità del comportamento lesivo e della* possessio *nella riflessione e nel linguaggio dei giuristi romani*, Napoli, 2004, p. 188.

7 Schipani, *Responsabilità* ex lege Aquilia, cit., p. 47.

(2nd century BC). In this case it can be clearly seen how an anti-legal situation in itself would risk going 'unpunished' if the instrument of analogy were not used, thus guaranteeing protection to those who suffer the damage:

> D. 9.2.27.22-23 *(Ulp. XVIII ad ed.)*: *Si mulier pugno vel equa ictu a te percussa eiecerit, Brutus ait Aquilia teneri quasi rupto <fetu>. And if you mulum plus iusto oneraverit and aliquid members ruperit, Aquiliae locum fore*.

In this case, in fact, the jurist Brutus says that, if a woman is beaten with a fist or a mare struck with a blow, expelling the fetus would represent, according to the *lex Aquilia*, a *ruptio* against the mother or the mare.

The solution granted appears to have been adopted in analogy to the action available on the basis of the Aquilia law, in the case a mule, loaded more than necessary, should have a limb broken, as witnessed by the exegesis of paragraph 23 of the fragment.[8]

The problem of interpretation arose from the circumstance that the *foetus*, in itself and for itself, was not included among the "goods" (slaves and cattle) considered for the purposes of the application of Chapter One of the Law in cases where the event of death occurred. Nevertheless, as Brutus pointed out, the phenomenon of *ruptio*[9] is, however, the result of an individual activity that determines harmful consequences although variable: foetal death in the case of the slave and the mare and instead a broken limb in the case of the mule. In addition, it should be considered that the phrase '*quasi rupto*' would require either a male noun or a neutral noun and is therefore not directly referable to the *mulier* or to the *equa* assuming the probable omission of the term *fetu*.

Fetu is taken into account as part of the female and therefore treated as if referring to a limb fracture.

8 P. Ziliotto, *L'imputazione del danno aquiliano tra* iniuria *e* damnum corpore datum, Padova, 2000, p. 57 *et seq*.; G. MacCormack, *Aquilian studies*, in *SDHI*, XLI, 1975, pp. 1-78; Id., *On the third chapter of the* lex Aquilia, in *The Irish Jurist*, V, 1970, pp. 164-178.

9 A. Bignardi, Frangere *e* rumpere *nel lessico normativo e nella* interpretatio prudentium, in Aa. Vv., *Nozione, formazione e interpretazione del diritto: dall'età romana alle esperienze moderne. Ricerche dedicate al Prof. F. Gallo*, I, Napoli, 1997, p. 54 *et seq.*

In this case, in order to guarantee a more equitable result, the protection provided by the third chapter is used for cases of damages also to inanimate things (*ceterae res*) while the foetus, as not being an autonomous individual or animal, at least until birth, is considered as a member of the mare and the slave.

The foetus is thus considered both a part of the *pecus* and an identifiable entity and therefore subject to *ruptum* as an identifiable 'thing'. At the time of the economic evaluation it will be possible, therefore, to measure the incidence that the loss of the *fetus* has had on the value of the *pecus*.

From these considerations, for which I feel like agreeing to the view given by an influential part of the doctrine,[10], we come to the conclusion of the response that, despite the failure in recognizing the full value of the slave or animal, allows to subject the damaging party to the action provided by the *lex Aquilia* and to condemn it to a penalty equal to the loss produced to the goods. In my opinion, this appears to be the closest interpretation of the text, «in which the blow (*pugnus vel ictus*) and the abortion (*si eiecerit*) of the female (*mulier vel equa*) struck (*a te percussa*) are respectively identified as a harmful fact (cause) and effect (damage)».[11] The phenomenon comes therefore in consideration like an element of the event that concerns the female.

In this regard, it is useful to focus the attention on the meaning of the verb *rumpere*, which is one of the verbs used in the third section of the *Lex Aquilia* to indicate a harmful behaviour.

The importance of this response lies also in the fact that from that moment on the verb *rumpere,* in the general sense of *corrumpere*, as confirmed by a response of Quinto Mucio[12] (1st century BC), was used as a general interpretative principle whereby

10 C.A. Cannata, *Sul testo della* Lex Aquilia *e la sua portata originaria*, in *Scritti scelti di diritto romano, II*, edited by L. Vacca, Torino, 2012, p. 173 *et seq*.; L. Desanti, *La Legge Aquilia. Tra* verba legis *e interpretazione giurisprudenziale*, Torino, 2015, p. 39.

11 Cannata, *Sul testo*, cit., p. 173.

12 D. 9.2.39 pr.: *Quintus Mucius scribit: equa cum in alieno pasceretur, in cogendo quod praegnas erat eiecit: quaerebatur, dominus eius possetne cum eo qui coegisset lege Aquilia agere, quia equam in iciendo ruperat. If you wish to consult other people, please contact us.* About this fragment: B. Albanese, *Studi sulla legge Aquilia*, in *AUPA*, XXI, 1950, Palermo, pp. 5-349; K. Visky, *La responsabilité dans le droit romain à la fin de la Republique*, in *RIDA*, III, 1949, pp. 437-484.

non-destructive damage could all be included in the third chapter as *corruptiones* and sanctioned on the basis of the damage produced.[13]

Moreover, following the reconstruction made by Lenel in his Palingenesi, it is possible to refer to another passage of the Digesto, always reported by Ulpiano, in which it is maintained that almost all the *veteres,* identified with the jurists of the Republican age, intended the verb *rumpere* in the sense of *corrumpere*:[14]

> D. 9.2.27.13: *Inquit lex "ruperit". Rupisse verbum fere omnes veteres sic intellexerunt "corruperit".*

From the Palingenesi we can see how this fragment is placed before the response given by Brutus, as demonstrated by the fact that Ulpian, after having clarified in advance in § 13 that the Aquilian *rumpere* was intended in the sense of *corrumpere*, maintains this consideration also in the following paragraphs. It follows that it was now peaceful for him to be considered as the real point of reference for the application of the third section of the *Lex Aquilia*.[15]

Moreover, the extensive reading of the sources of *rumpere* as *corrumpere* is testified in several fragments including a response provided by Celsus,[16] and reported by Ulpian, who equates the act of adulterating the wine with a damage punishable by the action of the Aquila Law.

What is also fundamental is the confirmation that comes from the *Insitutiones* of Gaius (jurist of the second century A.D.) who in step 3.217[17] shows us how the

13 A. Corbino, *Il danno qualificato e la* Lex Aquilia, Padova, 2008, 102.

14 S. Galeotti, *Ricerche sulla nozione di* damunm. *Il danno nel diritto romano tra semantica e interpretazione*, I, Napoli, 2015, p. 20.

15 F. Musumeci, *"*Quasi ruperit*", "*Quasi rupto*"*, in *Studi in onore di A. Metro*, IV, Milano, p. 358 *et seq.*

16 D. 9.2.27.15 (*Ulp. XVIII ad ed.*): *Cum eo plane, qui vinum spurcavit vel effudit vel acetum fecit vel alio modo vitiavit, agi posse Aquilia Celsus ait, quia etiam effusum et acetum factum corrupti appellatione continentur.* About this fragment: E. Fraenkel, Rupti appellatio, in *ZSS*, LXVII, 1950, pp. 612-614.

17 Gai. 3.217: *Capite tertio de omni cetero damno cauetur. itaque si quis seruum uel eam quadrupedem, quae pecudum numero est, uulnerauerit siue eam quadrupedem, quae pecudum numero non est, uelut canem, aut feram bestiam, uelut ursum, leonem, uulnerauerit uel occiderit, hoc capite actio constituitur. in ceteris quoque animalibus, item in omnibus*

extension of the verb *rumpere* has been received by the system over the years so as to give it as a general principle regarding the application of the third head of *Lex Aquilia*.

Therefore, the Ulpian commentary to the edict, that contains the fragment from which we started, is a source of closure of this evolutionary line, even if it does so by reporting a response of the previous centuries.

Let's see, therefore, how the extension of protection determines the possibility of quantifying the damage suffered for the loss of a good that, without the extension of the same, would not have been considered as such. The interpretative reading of the fragment derives from a response given by a jurist; this response is part of a custom whereby, through the publication of the solutions presented by the jurists, the «proposal for a method for the application of the *ius*, for the concrete determination of the *ita ius esto*, was made concrete, and corresponds to the idea that this *ius* no longer lies in the norms, but is implicit in any case and it is in the case that it must be found».[18]

It was therefore the interpretative activity carried out by the jurists (through their *response*) and the praetor, who transformed *Lex Aquilia*[19] from a legislative measure with punitive/sanctionary value into a measure with a pecuniary penalty aimed at economic reintegration and the satisfaction of the interests damaged by the behaviour of an individual.

All this considered, and I will conclude here, the brief analysis carried out indicates that the fragment in question represents an example of the use of the instrument of 'analogy' within the Roman legal system, aimed at guaranteeing protection to a situation not expressly provided for in itself. Therefore, the analogical instrument, as well as the *aequitas*, guarantee an extensive application of the *lex* to a situation that appears to have all the characteristics provided for by the *lex* itself.

rebus, quae anima carent, damnum iniuria datum hac parte uindicatur. if this is not the case, then it is the case that we can only appeal to ruptum aut fractum fuerit, actio hoc capite constituitur, if only ruptum in omnes istas causas sufficere; ruptum enim intellegitur, quod quoquo modo corruptum est; unde non solum usta aut rupta fracta, sed etiam scissa et collisa et effusa et quoquo modo utiata aut perempta atque deteriora facta hoc uerbo continentur. About this fragment: S. Solazzi, *Appunti di critica gaiana*, in *Studi Arangio*-Ruiz, III, Napoli, 1953, pp. 89-113; B. Beinart, *Once more on the origin of* lex Aquilia, in *Butterworths South African Law Review*, Butterworths, 1956, pp. 70-80.

18 C.A. Cannata, *Per una storia della scienza giuridica europea*, I, Torino, 1997, p. 212.

19 C.A. Cannata, *Genesi e vicende della colpa aquiliana. Lettura di* S. Schipani, *Responsabilità* ex lege Aquilia. *Criteri di imputazione e problema della* culpa, edited by L. Vacca, Torino, 1969, in *Labeo*, XVII, 1971, pp. 64-84.

OTTAVIA DORA LO SARDO*

THE ROLE OF SUPREME COURTS IN THE UNIFORM APPLICATION OF THE LAW

ABSTRACT. *This paper analyzes the ageless subject of the functions of supreme courts relative to the uniform application of the law, a constant concern for the legal community. It gives an overview of the importance of an equal and uniform application of the law. It also examines the role of courts and the ways in which, with specific or general criteria, their nomophylactic power is guaranteed. The relevant systems of France, Spain and Germany have been taken into consideration.*

CONTENT. 1. Introduction – 2. Uniform application of the law – 3. A renewed view of case law – 4. Different approaches to providing judicial uniformity – 5. Approaching uniform application of the law in civil law tradition in Europe – 5.1. France – 5.2. Spain – 5.3. Germany

* Law school graduate, Roma Tre University.

1. Introduction

Society is developing at a speed that has no equal in history. Nations allow limitations of their sovereignty,[1] regarding it necessary to ensure peace and justice among nations. Their powers, on the other hand, are also expanding, dissolving frontiers as never before. Dialogue and confrontation have led to the creation of supranational regulatory bodies, such as the European Union and the Court of Human Rights, with a multiplication of sources of law. The productive system has developed very rapidly, affecting the conduct and customs of all citizens. The third industrial revolution is profoundly changing our way of living, leading not only to a greater integration of peoples and to extensive migrations, but also to an exponential growth of data flows.[2] The legislator has not always been able to respond to the needs of citizens and to the new challenges. In many cases this has caused a loss of cohesion in the regulatory system.

Equal and uniform application of the law, decisional predictability – which only a Supreme Court endowed with supreme authority can provide – are needed now, more than ever before. *Nomophylachia*, either in civil law or in common law systems, seems to be the only tool we have today to achieve this goal, as the persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is one of the essential components of a state based on the rule of law.

2. Uniform application of the law

The uniform application of the law is essential to the implementation of the principle of equality before the law. In a state governed by the rule of law, all citizens justifiably expect to be treated the same and to be able to rely on previous decisions in comparable cases, so that they can predict the legal effects of their acts or omissions.

1 Article 11 of the Italian Constitution (one of the core principles of our democracy) states that: «*L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo*».

2 See J.S. Bergé, S. Grumbach and V. Zeno-Zencovich, *The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance*, in *European Journal of Comparative Law and Governance*, V, 2018, p. 144.

Nomophylachia enhances the public's confidence in the courts and the public's perception of fairness and justice. It can also reduce the need for judicial intervention in resolving disputes, since when parties are able to know in advance where they stand, they might often decide not to go to court in the first place.

Divergences in interpretation have to be accepted as an inherent trait of any judicial system which is based on a network of courts. Especially those where judges are "*bouche de la loi*" and are not obliged to follow the *stare decisis* principle.

However, under certain circumstances, conflicting decisions of courts, especially those of higher courts, can constitute a breach of the fair trial requirement enshrined in modern constitutions and in Article 6 of the ECHR. In this regard, the *Conseil d'Europe* states that in cases of inconsistent decisions there needs to be assessment of whether "profound and long-standing differences exist in the case law of the domestic courts, whether the domestic law provides machinery for overcoming those inconsistencies, whether that machinery has been applied and, if appropriate, to what effect."[3]

Greater clarity would help judges and litigants to identify rapidly the principles and guidelines that should be followed, thus concretely advancing legal certainty. Much as we might wish to exalt this unifying function, the Supreme Court is still however called upon to guarantee the full and complete protection of the correct application of the law in specific cases. One cannot and must not undermine the fundamental rights of those who resort to justice. Where there is opposition between those who have respected previous rulings of the Court and those who try to evolve the system, there can be no winner and no loser. Each particular case is different and can involve different principles. Only a Court of Cassation which is internally consistent will be able to strike the correct balance between opposing views. The instrument of prospective overruling could also be adopted. The representing lawyer might have a greater knowledge of the issues, having studied in greater depth the multiplicity of national and supranational sources concerning the subject; a case may be so unique or particular that it requires diverse legal protection; previous jurisprudence, even if consolidated, may be faulty.

3 CCJE Opinion N. 20 The role of courts with respect to the uniformity of the law, para. 9, at <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>.

3. A renewed view of case law

In the European Community, Common and Roman Law institutes tend to merge,[4] and a new common ground has been created, causing important repercussions on all European legal systems. Judicial decisions in systems known to be formally of civil law are increasingly becoming a *res iudicata*, not only between the litigants (as has always been the case), for they are becoming a genuine source of law – the so called "living law".[5]

Referring to previous decisions can be a very powerful instrument for judges, whether or not these decisions have the full power of precedents and are considered a source of law, as citizens feel a strong need for legal certainty, to be guaranteed through institutions and regulations that ensure universality and effectiveness. In this context the predictability of future decisions is one of the basic elements which, as Renato Rordorf[6] recalls, has also had[7] a very important economic function. Consistent jurisprudence allows people to weigh the risks of a possible appeal to the judge. The authoritativeness of the decisions therefore has a central role for the efficiency of justice, for the conduct of economic activities and is a basic pivot of the structure of the political and social system.

4 These two icebergs that could merge or collide, as Federico Carpi calls them, have been the focus of the XX seminar of the *Rivista Trimestrale di Diritto e Procedura Civile* on the matters of comparative law, common law and civil law. See F. Carpi, Introduction; A. Gambaro, *Common law e civil law: evoluzione e metodi di confronto*; V. Varano, *Civil law e common law: tentativi di riflessione su comparazione e cultura giuridica*; C. Consolo, *Il processo civile alla high court di Londra, un intarsio fra Medioevo e globalizzazione economica*; M. Lupoi, *Comunicazione e flussi giuridici*; M. Timoteo, *Un paese due sistemi - Il diritto cinese fra civil law e common law* and S. Chiarloni, *Riflessioni microcomparative su ideologie processuali e accertamento della verità*; speech by M. Rubino-Sammartano, L. Querzola, P. Biavati, G. Ricci, G. Alpa, M. Taruffo and M. Lupoi, in *Riv. trim. dir. e proc. civ.*, 2009, suppl. at n. 4

5 On "living law" and "predictive justice", as an opportunity to predict the outcome of judgements, for a uniform application of the law see D. Dalfino, *Creatività e creazionismo, prevedibilità e predittività*, in *Foro it.*, 2018, V, p. 385.

6 R. Rordorf, *Nomofilachia e precedente giudiziario: Il precedente nella giurisprudenza*, in *Foro italiano*, IX, 2017, p. 277.

7 For an incisive view on the supremacy of economy on justice see A.D. De Santis, *Contributo allo studio della funzione deterrente del processo civile*, Napoli, 2018, p. 89 *et seq*. Where the author underlines the peculiar incipit of the EU Justice Scoreboard: «Effective justice Systems support economic growth and defend fundamental rights. That is why Europe promotes and defends the rule of law». It seems clear by reading this statement that fundamental rights come after economic growth.

In common law countries precedents are binding *de jure.* When a higher court settles a legal issue all cases thereafter are bound to follow it. Precedents are thus considered to be a proper source of law. The literature on the role of *stare decisis,* going back to the nineteenth century, argues that the rule of precedents is the best way to provide the much-needed predictability of the rulings of Courts. Henry Campbell Black, citing James Kent, is very persuasive about why the *stare decisis* principle is necessary. In his words: «it would be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. [...] On the other hand it has also long been understood that precedents evolve since genuinely new issues are bound to arise».[8] Thus, in these legal systems a precedential decision has relevance. However, a consolidated trend of decision on a certain legal issue has generally been required in order for the judicial opinion to become relevant in civil law countries. The guarantee of the independence of judges, on the other hand, means, *inter alia*, that they are independent and are bound only to the Constitution and the law in their decision making, not by judicial decisions reached in similar cases.[9]

Article 111, paragraph 7, of the Italian Constitution does not allow the introduction of normatively prefigured filters to access the claim before the Court of Cassation and Article 101 states that «Justice is administered in the name of the people. Judges are subject only to the law». Therefore, a way to achieve uniformity of the law may be to design different procedural paths when the nomophylactic function is at stake.

8 H. Campbell Black, *The principle of stare decisis*, in *The American Law Register, 1886,* pp. 745-757.

9 Although lower courts are not formally bound to the decision of Supreme courts, they will usually follow their decision in similar matters. See V. Zagrebelsky, *Dalla varietà della giurisprudenza alla unità della giurisprudenza*, in *Cass. pen*., 9, 1988, p. 1576; G. Gorla, "*Precedente giudiziale*", in *Enc. Giur. Treccani*, vol. XXIII, Roma, 1990; U. Mattei, *Precedente giudiziario e* stare decisis, in *Dig. Disc. Priv. - Sez. civile*, vol. XIV, Torino, 1996; M. Taruffo, *Precedente e giurisprudenza*, in *Riv. trim. dir. proc. civ.*, 3, 2007, p. 712; A. Cadoppi, *Il valore del precedente nel diritto penale*, Torino, 2007; A. Cadoppi, *Giudice Penale e giudice civile di fronte al precedente*, in *Indice penale*, 1, 2014, p. 11; G. Costantino, *La prevedibilità della decisione tra uguaglianza e appartenenza*, in *Riv. Dir. Proc.*, 3, 2015, p. 646.

In contemporary literature many distinguished jurists[10] have asked a question that still echoes strongly: what is the role of the supreme courts? This is of course a rhetorical question, but one which sheds light on the critical nature of the current situation. However, the answer to a question that tries to penetrate to the very heart of the civil law system is necessarily complex. Courts of last resort are designed to address different needs, they are an "ambiguous" summit, as Michele Taruffo[11] wrote, since they must ultimately ensure the justice of a concrete case, an individual case, but at the same time they must articulate unequivocal and authoritative guidelines. The judges' gaze brings to mind the image of the two-faced Janus. On the one hand, they must have the ability, looking to the future, to create precedents and to dictate the jurisprudential solutions destined to operate in a multiplicity of future cases. On the other hand, since it is customary to distinguish between *ius litigatoris* and *ius costitutionis*, the Supreme court must address the individual case in order to be able to abstract the principle of law, in a continuous dialogue between present and future.

The judges themselves seem to believe that a new principle of *stare decisis* should be introduced in civil law systems as the certainty of the law, the equality of everyone before the law and the legitimate expectation in jurisprudence cannot be guaranteed by a plethora of decisions coming from a large number of Colleges, among which it is difficult to attempt perfect coordination.

In the words of Benjamin Cardozo: "it is when the colours do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them he will be fashioning it for others".[12]

10 For an overview on the role of precedents in Italy and other countries see L. Passanante, *Il precedente impossibile*, Torino, 2018.

11 M. Taruffo, *La giurisprudenza tra casistica e uniformità*, in *Riv. trim. dir. proc. civ.*, 1, 2014, p. 35.

12 B.N. Cardozo, *The Nature of the Judicial Process*, New Haven: Yale University Press 1921, pp. 20-21.

4. Different approaches to providing judicial uniformity

While civil law supreme courts hear up to 90%[13] of the petitions for review, common law supreme courts hear as little as 1% of the same type of cases.

In the first approach, particularly in the so-called cassation model,[14] the procedural regulation should ensure that each litigant has a high probability of a supreme court revision. In the common law approach the access tends to be restricted thanks to the presence of limitation, such as the discretional *certiorari* or the permission to appeal.[15]

In civil law systems, even though traditionally there is no formula as to how to identify the moment in which a case law can be considered settled, numerous courts of last instance now have the power to select certain cases with the primary intention of setting rules that should be applicable for the future.

Even though access to supreme courts is framed differently across Europe, due to differences in legal traditions and the organisation of judiciaries, formal and semi-formal mechanisms are being enforced to achieve consistent case law.

Four formal mechanisms can be found in most European civil law supreme court regulations to implement their nomophylactic powers:

1. Deciding an individual litigant's appeal on a point of law. It is in this field *par excellence* that courts are able to perform their unifying and often innovative action as regards the construction of the rule of law, whether substantive, procedural, or part of old or new legislation. It is essentially in this area that the case-law of the Court of Cassation is developed;

13 P. Bravo-Hurtado-A. Bustos, *Explaining Difference in the Quantity of Supreme Court Revisions: A Model for Judicial Uniformity*, 2016, at <https://ssrn.com/abstract=2886390>.

14 For a subdivision of supreme courts see M. Bobek, *Quantity or quality? Reassessing the role of supreme jurisdictions in central Europe*, in *The American Journal of Comparative Law*, 1, 2009, p. 33.

15 Once a relatively passive institution which heard all appeals that Congress authorized, now the American Supreme Court is a virtually autonomous decision-maker with respect to the nature and extent of its own workload. No longer is it true, as Chief Justice Marshall declared in a bygone era, that the Court has «no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given», or that the Court «must take jurisdiction if it should». M.M. Cordray-R. Cordray, *The philosophy of* certiorari: *Jurisprudential considerations in Supreme Court case selection*, in *Wash. ULQ*, 82, 2004, p. 389.

2. Special appeals brought by a public prosecutor, or another public body, with the aim of ensuring the uniform application of the law – these usually result in a declaratory judgement thus not regarding the litigants;
3. Interpretational statements, also known as uniformity decisions or legal decisions, that do not stem from any real trial. These statements do not have any direct impact on individual cases since they are decided *in abstracto*,[16] thanks to the court's, the minister's or other similar authorities' proposal;
4. Preliminary rulings adopted in pending cases on specific issues, usually upon the request of lower courts, such as jurisdictional questions.[17]

Semi-formal mechanisms, on the other hand, can include regularly scheduled meetings of judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court. Such meetings can have either a purely informal character or, by issuing certain guidelines, they might become "institutionalized". Judicial networks have a very important role as they have the potential of consolidating the uniformity of the law and developing judicial communities such as the European one.[18]

16 These statements are largely found in post-Communist judicial systems, such as Czech Republic or Hungary. In the CCJE's view – as stated in Opinion N. 20 (2017) – the uniformity of the case law and the development of law should be achieved through a proper filtering system of appeals. These, in the Court's opinion, should be preferred over making law *in abstracto* in the form of binding interpretative statements or general opinions, adopted in plenary sessions of a supreme court. Such instruments (unlike the instrument of preliminary rulings) are, in fact, adopted irrespective of any real-life or pending cases and without the parties and their lawyers being able to argue their positions. While admitting that such instruments can have a positive impact on the uniformity of case law and legal certainty, the CCJE is of the opinion that they raise concerns from the viewpoint of the proper role of judiciary in the system of separation of state powers. However, some authors don't agree with this assessment such as Z. Kühn, *The authoritarian legal culture at work: the passivity of parties and the interpretational statements of supreme courts*, in *Croatian yearbook of European law & policy*, 2, 2006, p. 19.

17 Article 41 of the Italian Civil Procedural regulates conflicts of jurisdiction, stating that litigants can resort to the *Corte di cassazione* to establish the rightful judge.

18 S. Benvenuti, *National Supreme Courts and the EU Legal Order: Building a European Judicial Community through Networking*, in *Perspectives on Federalism*, 1, 2014, p. 1.

5. Approaching uniform application of the law in civil law tradition in Europe

The European Community, now the European Union, was born under the banner of mutual interaction. It resulted in new dialogue between common and civil law systems, causing one to learn norms and principles from the other. The process of integration that was set in motion is today inevitable.

The prospect of the nomophylactic function is, in fact, permeated by international law stemming from the Court of Justice and the ECHR. As Roberto Conti states "the changing of the coordinates represented by the advent of supranational law – Euro-EU law, ECHR, international treaties – clearly indicates the change of perspective of the nomophylactic function, and ultimately the genetic mutation of the Court of Cassation, now "legally obliged" to guarantee, also, the uniform interpretation of the law as reinterpreted in the light of a supranational system."[19]

For this reason, it important to compare and study different approaches to the uniform application of the law throughout Europe.

5.1 France

In the other civil law countries closest to our legal tradition the problem of the excessive workload of the courts of last resort, contrary to what has happened in Italy, has long been addressed.

From a historical point of view, we should recall that access to the French *Cour de Cassation* was subordinate, until 1947, to the screening of a special "filter section."[20] *La Chambre des requêtes* examined all appeals for the immediate purpose of rebutting those deemed inadmissible or unfounded. Following a long debate on the usefulness of the preliminary examination of appeals, the *Chambre* became an ordinary civil Chamber. The opinion of those who thought it increased costs and elongated the trial – while

19 R. Conti, *Il rinvio pregiudiziale alla Corte UE: risorsa, problema e principio fondamentale di cooperazione al servizio di una nomofilachia europea*, *Report on'Le questioni ancora aperte nei rapporti tra le Corti Supreme Nazionali e le Corti di Strasburgo e di Lussemburgo – 23 e 29 ottobre 2014* –, at <http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/23_ottobre_relazione_Conti.pdf>.

20 As per Article 606 lett. b) of the Italian Penal Procedural Code or Article 360 n. 3) of the Civil Procedural Code.

acknowledging the merit of an obligatory passage that eliminated claims that would certainly be unsuccessful – prevailed.

The legal issue was, *de facto*, subjected to a double, and almost identical, scrutiny.[21]

Due to the increase in the number of pending charges before the *Cour*, the idea of selecting appeals resurfaced. In 1979, therefore, new internal organs were introduced in the *Cour*, called *formations restreintes*, modeled on the *Chambre des requêtes*. These filter mechanisms were then perfected, thanks to two legislative acts, the 1981 Reform and the 25 June 2001 Law.

Initially, each civil section of the Court was equipped with these organs. They had the exclusive function of examining, in advance, all appeals, in order to discard, following a simplified and non-contradictory procedure, those deemed irrelevant and *prima facie* inadmissible.

This deflationary instrument soon proved to be difficult to implement, neither it did not respond to the needs that had emerged. Instead of decreasing the workload of the *Cour de Cassation*, the *formations restreintes* increased the duration of trials, due first and foremost to the double examination to which appeals were subjected. Strong criticisms were also addressed to the lack of the right to be heard in court and the difficulty of identifying the real selection criteria, beyond the general ones found in the specific law. The greatest doubts, however, were sparked by the choice to make the *formations restreintes* simple «chambre(s) de rebuts». These, having only the power of rebuttal, had no power to analyze the legal issues, therefore, or to examine them in depth.

In response to these criticisms, Law of 6 August 1981 was enacted.

Article 131-6, paragraph 2 of the *Code de l'Organisation Judiciaire* eliminated the *formation restreinte* within each *Chambre*. They could be *ad hoc* instated when the president of the section or the first president considered an appeal manifestly inadmissible or unfounded, or, again, when the question raised seemed of easy solution given the constant orientation of the *Cour de cassation* in the matter.[22]

21 E. Silvestri, *L'accesso alle corti di ultima istanza: rilievi comparatistici*, in *Foro it.*, IV, 1986, col. 289.

22 Report n. 316 of the French Senate at <https://www.senat.fr/rap/1980-1981/i1980_1981_0316.pdf>: «qu'il appartiendra au premier président ou au président de la chambre concernée de renvoyer l'affaire devant une

Thus, a double track was created. On the one hand, the *formation*s *restreintes* continued to perform their function as "filter," rejecting appeals. On the other, an ordinary procedure was opened, in which parties had a right to a fair trial, so as to decide on the merit of the appeal. For less complex cases, those not raising particular legal issues, a "preferential" path was implemented.

The 1981 Reform gave positive results overall, lightening the Court's workload. This was achieved by reserving the decision of the most complex cases, or those of particular relevance, to sections in their ordinary composition. The majority of cases, the so-called routine cases, were, however, referred to the *formations restreintes*.

Since the 15th of June 2001, the *Cour of Cassation* has adopted a simplified procedure which allows it to declare appeals unacceptable, without giving any reasons, when these seem *prima facie* inadmissible or not based on any serious legal question. The adversary is granted through the particular requirement that parties produce their memoirs. The *rapporteur* will then draw up a single document containing the report and the refusal opinion that will be communicated to the parties. An only deed-based procedure has thus been implemented.[23]

Article 5 of the Civil Code prohibits judges from issuing *arrêts de règlement*.

It reads as follows: «il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumise». However, using case law –«jurisprudence» – to fill gaps in legislation is common practice in France. A well-known manual of law defines it as a «set of judicial decisions from which it is possible to extract general rules that allow the solution of similar disputes in the future to be foreseen. Each sentence has a limited scope in the specific case, but the repetition of similar decisions leads to the conclusion that the courts recognize the validity of the rule and that they will observe it in the future. It therefore becomes necessary to consider this rule when addressing legal issues».[24] It often happens that important norms and institutions stemming from the courts' decisions were, subsequently, issued by the

formation restreinte lorsque la solution du pourvoi lui paraît s'imposer».

23 *Le Corti Supreme in Europa: le regole per l'accesso, Ufficio del Massimario*, <http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Corti_Supreme_08.pdf>.

24 M. Planiol, *Traité Elémentaire de Droit Civil*, Pichon, 1908.

legislator. For example, administrative law is largely created by the *Conseil d'État*.

In France problems arise from the challenge of striking a balance between the principle of legitimate expectation and the principle of the uniform application of the law, and its polyform application.

Prospective overruling has therefore been implemented in France since 2004. This important mechanism came into being thanks to a sentence issued in July by the second *Chambre civil*, of the *Cour de cassation*. In line with the interpretation of Article 6, § 1 of the ECHR, the French Court stated in particular that: «que si c'est à tort que la cour d'appel a décidé que le demandeur n'avait pas à réitérer trimestriellement son intention de poursuivre l'action engagée, la censure de sa décision n'est pas encourue de ce chef, dès lors que l'application immédiate de cette règle de prescription dans l'instance en cours aboutirait à priver la victime d'un procès équitable, au sens de l'article 6.1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales».[25]

Case law and legal opinions[26] often recall Art. 2 of the *Code civil*[27] on the application of law in time, that also addresses the problem of the non-retroactive nature of legislative acts, when discussing the possible application of the prospective overruling in France.

It is believed that, in order to circumscribe the application of prospective overruling, it would be preferable to give the power of implementing it exclusively to the Court of Cassation, preferably *en banc*, never to the courts of merit.

5.2. Spain

In Spain, since 1881 – the year in which the Law on civil proceedings and the respective code was adopted with a Royal Decree of 3 February – the right to appeal to the Court of last instance presented no restrictions.

25 Cour de Cassation, Chambre civile 2, du 8 juillet 2004, bulletin 01-10.426, at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007048778>.

26 P. Morvan, *Le sacre du revirement prospectif sur l'autel de l'équitable*, Recueille Dalloz, 2007.

27 «La loi ne dispose que pour l'avenir elle n'a point d'effet rétroactif», literally translated and introduced in the Italian Civil Code at Art. 11 of the preliminary norms.

However, as in many other countries, this led to an abuse of power by the parties in order to delay the natural course of decisions and thus it created a severe burden of work for the Supreme Court and a significant increase in the length of trials.[28] And as the legal adage states "justice delayed is justice denied".

The intention of the Spanish Parliament in 2000 to reduce the time necessary to deliver justice through filter mechanisms is apparent in the new cassation procedures.

In order to deal with the incessant growth of pending appeals *Ley* 1 of 7 January 2000 (*Enjuiciamiento Civil*) reformed the process of appeal to the Supreme Court.

First of all, to strengthen the *funcion nomofilactica*, the provisional regime of cassation in the new Civil Procedure Law features two types of appeal: "cassation" and "the extraordinary appeal for procedural infringement".

With regard to the effects of an appeal to the Supreme Court, the system introduced in Spain in 1855[29] remains in place, with an *iudicium rescindens* and *iudicium rescissorum* when deemed fit.

What is thought to be really innovative, on the other hand, is the selection of cases where access to cassation is granted. The Superior Regional Court of Justice can review all proceedings for the protection of fundamental rights, those with a considerably high *summa gravaminis*[30] and any case featuring cassational interest.[31]

28 For and in-depth analysis of the Spanish Higher Court see A. Briguglio, *Storia e riforma della Cassazione civile Spagnola*, in *Riv. trim. dir. proc. civ*., 1, 1991, p. 117.

29 M. De Benito, *Civil cassation in Spain: past, present, and future*, Cham, 2017.

30 The law states that in order to access the cassation judgment certain prerequisites, that have become increasingly stringent over time, must exist. The value of the lawsuit, for example, must be higher than 600,000 euros (this value increased with the 2011 reform, a minimum of 150,000 euros was previously envisaged).

31 Art. 477 Codigo de Enjuiciamiento Civil: «Motivo del recurso de casación y resoluciones recurribles en casación. 1. El recurso de casación habra de fundarse, como motivo ùnico, en la infracción de normas aplicables para resolver las cuestiones objeto del proceso.
2. Serán recurribles en casación las sentencias dictadas en segunda instancia por las Audiencias Provinciales, en los siguientes casos:
1°. Cuando se dictaran para la tutela judicial civil de derechos fundamentales, excepto los que reconoce el artículo 24 de la Constitución.
2°. Siempre que la cuantía del proceso excediere de 600.000 euros.
3°. Cuando la cuantía del proceso no excediere de 600.000 euros o este se haya tramitado por razón de la materia, siempre que, en ambos casos, la resolución del recurso presente interés casacional.

Interés casacional occurs when (i) the lower court has diverged from a consolidated orientation of the Cassation, (ii) when the jurisprudence of the *Audiencias Provinciales* is contradictory or, finally, (iii) when a provision of substantive law has recently been applied. An appeal shall be deemed of cassational interest «when the judgment *a quo* contradicts the Supreme Court's case law or decides on points and issues about which contradictory case law from the Provincial Courts exists, or where it applies rules that have been in force for less than five years, as long as, in the latter case, no case law from the Supreme Court exists concerning previous rules of identical or similar content».

The balance between private and public interest seems to have thus reached an acceptable status. On the one hand, the *ius constitutionis*, the public interest in the uniformity of law, has increasingly become central, and a low or undetermined economic value is no longer incompatible with it. On the other hand, the *ius litigatoris,* the private interest, is fully recognised in cases of fundamental rights and those that are economically relevant.

Cassation *sentencias* for *errores in procedendo* are also issued in the interest of the law following an *infracción de ley procesual*. In such cases the *sentencia* will set the doctrine. The new jurisprudence will not produce any effects on the parties. It is only intended to maintain the unity of jurisprudence.

These fundamental decisions will then be published in the official State Bulletin. After their publication, the doctrine will "complete the legal system", obliging all judges and courts of the civil branch, excluding the Supreme Court, to follow it.

The preparatory work relating to the law (*Exposición de motivos*) is also particularly significant for understanding the *ratio* that moved the legislator to adopt

3. Se considerará que un recurso presenta interés casacional cuando la sentencia recurrida se oponga a doctrina jurisprudencial del Tribunal Supremo o resuelva puntos y cuestiones sobre los que exista jurisprudencia contradictoria de las Audiencias Provinciales o aplique normas que no lleven más de cinco años en vigor, siempre que, en este último caso, no existiese doctrina jurisprudencial del Tribunal Supremo relativa a normas anteriores de igual o similar contenido. Cuando se trate de recursos de casación de los que deba conocer un Tribunal Superior de Justicia, se entenderá que también existe interés casacional cuando la sentencia recurrida se oponga a doctrina jurisprudencial o no exista dicha doctrina del Tribunal Superior sobre normas de Derecho especial de la Comunidad Autónoma correspondiente».

the aforementioned Law 1 of 2000.

In § XIV we read that *en un Sistema juridico como el nuestro* in which precedent lacks binding force – that only the law and other sources of objective law have – it cannot, however, «lack and it must not lack a relevant interest to the singular efficacy of doctrine linked to precedents, that are not binding, but which have particular legal authority». The interest *casacional* is here explained as «the transcendent interest for the procedural parts that the resolution of an appeal can represent». The cassational interest is thus the main subject of this law and it is guaranteed «not only by means of the parameter of the high economic value, but with the requirement that the cases have been decided, on the one hand, violating the substantive law and, on the other hand, against the previous jurisprudential doctrine of the Supreme Court (or, if applicable, of the High Court of Justice)». It is also believed that there is an interest of cassation when the law of which the infringement is reported has not been applied for long enough to allow an authorized jurisprudential doctrine to have been formed on its application and interpretation.

«In this way, the necessity of an appeal is established with reasonable objectivity. This objectification of the interest of cassation, which provides greater legal certainty for the parties and their lawyers, seems preferable to the method of attributing to the court itself the choice of matters worthy of their attention». A more objective view on the nature of the cassational interest and thus of the uniformity of the law, as per the preparatory work, «eliminates the risk of mistrust and disagreement with court decisions».[32]

32 <https://www.boe.es/eli/es/l/2000/01/07/1/con>
«En un sistema jurídico como el nuestro, en el que el precedente carece de fuerza vinculante – sólo atribuida a la ley y a las demás fuentes del Derecho objetivo –, no carece ni debe carecer de un relevante interés para todos la singularísima eficacia ejemplar de la doctrina ligada al precedente, no autoritario, pero sí dotado de singular autoridad jurídica.
De ahí que el interés casacional, es decir, el interés trascendente a las partes procesales que puede presentar la resolución de un recurso de casación, se objetive en esta Ley, no sólo mediante un parámetro de cuantía elevada, sino con la exigencia de que los asuntos sustanciados en razón de la materia aparezcan resueltos con infracción de la ley sustantiva, desde luego, pero, además, contra doctrina jurisprudencial del Tribunal Supremo (o en su caso, de los Tribunales Superiores de Justicia) o sobre asuntos o cuestiones en los que exista jurisprudencia contradictoria de las Audiencias Provinciales. Se considera, asimismo, que concurre interés casacional cuando las normas cuya infracción

5.3 Germany

Germany is one of the original countries of the "civil law system." The primary source of law is national legislation. As courts only deal with individual cases, such a binding effect should remain only *inter partes*. However, the decisions of the highest courts (*e.g.*, Federal Courts or the Federal Constitutional Court) have *de facto* a binding legal effect.

Germany has a particular judicial structure with five higher courts: the Federal Court of Justice, *Bundesgerichtshof*, the Federal Administrative Court, *Bundesverwaltungsgericht*, the Federal Finance Court, *Bundesfinanzhof*, the Federal Labour Court, *Bundesarbeitsgericht*, and the Federal Social Court, *Bundessozialgericht*. The task of the Federal Courts is primarily to ensure the uniform application of law, to clarify fundamental points of law and to develop the law.

Although the binding effect of the judgments and rulings of the Federal Courts are technically confined to the individual case, lower courts follow their interpretation of the law with few exceptions.

The far-reaching effect of rulings of the Federal Court of Justice can also be determined by the fact that, particularly in the field of civil law, legal practice is often guided by these rulings. Banks and insurance companies, as well as landlords and divorce lawyers, respond to a "ruling from Karlsruhe", as happens in Italy with the "Milanese rulings".

There are however special arrangements, in Germany, which aim to secure a uniform application of the law. A chamber common to the Federal Courts guarantees a uniform application of the law within the different Federal Courts (Article 95 of the *Grundgesetz*). This is the joint chamber of the Federal Courts («Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes»). If a chamber of one of the Federal Courts plans to deviate from the current jurisprudence of a chamber of a different Federal Court, it

se denuncie no lleven en vigor más tiempo del razonablemente previsible para que sobre su aplicación e interpretación haya podido formarse una autorizada doctrina jurisprudencial, con la excepción de que sí exista tal doctrina sobre normas anteriores de igual o similar contenido.
De este modo, se establece con razonable objetividad la necesidad del recurso. Esta objetivación del 'interés casacional', que aporta más seguridad jurídica a los justiciables y a sus abogados, parece preferible al método consistente en atribuir al propio tribunal casacional la elección de los asuntos merecedores de su atención, como desde algunas instancias se ha propugnado. Entre otras cosas, la objetivación elimina los riesgos de desconfianza y desacuerdo con las decisiones del tribunal».

has to submit the case to the joint chamber of the Federal Courts.

In 2001 a substantial reform changed the admissibility of appeals. The *Zivilprozessreformgesetz,* implemented on the 1 January 2002, changed many of the articles that can be found in Book III of the Civil Procedural Code, the *Zivilprozessordnung* (ZPO).[33]

In general, the reform in question has provided that access to the Supreme Court (*Bundesgerichtshof*, BGH) is limited to cases that present a matter of fundamental law issues (*grundsätzliche Bedeutung*), or offer the Court an opportunity to insure the uniformity of jurisprudence or the "improvement" of the law.[34] The reform has therefore changed the discipline of the judicial cassation by limiting the use of the appeal and introducing, among other things, a preliminary verification by the appeal judge.

In regard to the eligibility of each ruling when the appeal is granted by the referring court, the respective Federal Court will not be able to refuse to examine the case, since in the words of Antonio Briguglio «what dominates the proceeding is the interest, even objective, in the proper functioning of the *Bundesgerichtshof* and in particular that the supreme body of the jurisdiction isn't unnecessarily engaged».[35]

The procedure in question, which takes place before the BGH, is known as *Revision*. It has as its subject the control of decisions taken in lower courts in terms of their compliance with the rule of law. The violation of a law (*Rechtsverletzung*) is therefore the necessary requirement to request the cassation of a provision.

A definition of this violation is established by § 546 ZPO according to which there is a violation of the law when a rule of law (*Rechtsnorm*) has not been applied or when it has not been correctly applied.[36]

33 See the Italian Senate's website, *Le impugnazioni dinanzi al giudice civile in GERMANIA*, in "Legislatura 17ª – Servizio studi – Dossier n. 171", at <https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/803980/index.html?stampa=si&part=dossier_dossier1-sezione_sezione11-h2_h23&parse=si&spart=si>.

34 R. Caponi, *La riforma dei mezzi di impugnazione*, in *Riv. trim. dir. proc. civ.*, 4, 2012, p. 1153.

35 A. Briguglio, *Il controllo sull'ammissibilità della impugnazione nel processo civile spagnolo e in quello tedesco (Documentazione per la riforma della Cassazione Civile*), in *Giust. civ.*, 2, 1982, p. 515.

36 V. Di Cerbo, *Le Corti Supreme degli altri. Il procedimento civile dinanzi al* Bundesgergichtshof *(cenni)*, *Relazione 12 aprile 2012*, at <http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20120412_RelazioneCerbo.pdf>.

The Revision is therefore admissible only in the light of the parameters in the second paragraph of the aforementioned § 543 ZPO, which states:

1. First, there must be a question of law (*Rechtssache*) of fundamental importance;

2. Secondly, the situation must be such that a decision by the BGH is necessary for the evolution of the law (*Fortbildung des Rechts*) or to guarantee the uniformity of the jurisprudence (*die Sicherung einer einheitlicher Rechtsprechung*).

The parameter in point 1 will subsist in those cases in which the question of law, on the one hand, must be clarified for the decision of the *sub iudice* case and, on the other, has a significant effect in an indeterminate number of future cases. The issue on which doubts arose must not have previously been clarified by the Supreme Court and must have a fundamental value for the uniform application of the law. Often, in fact, in the German system the so-called pilot cases are brought in front of the BGH.

In point 2 it is necessary to distinguish the first hypothesis from the second. The first implies that the decision of the BGH is essential to the evolution of the law. A concrete case could in fact constitute an opportunity to affirm a legal principle regarding the interpretation of laws or the integration of these rules (*Gesetze-slückenausfülen,* literally filling the gaps in the law). The second hypothesis exists in cases where the jurisprudence is divergent with respect to that of the Supreme Court. For example, when there is a recurring mistake in the interpretation of the law. It includes symptomatic errors in the application of the law (*Rechtsanwendungsfehler mit symptomatischer Bedeutung*) with a possible non-negligible impact on the interests of the community. For example, the incorrect application of the rules on the burden of proof can render an appeal for *revision* admissible if there are concrete indications that the wrong judgment could give rise to similar erroneous applications by the same judge or by other judges.

The assessment of the admissibility of each appeal thus has as a prerequisite the evaluation of public interest. The review is also considered admissible in the case of violation of procedural principles considered fundamental, such as the right to be heard (*das Recht auf rechtliches Gehör*), guaranteed by the Constitution, and finally the right to a fair and non-arbitrary process (the English due process).

The uniform application of law is also ensured on a horizontal level within the

Bundesgerichtshof, thanks to the rules contained in § 132 of the organisational law of the courts (*Gerichtsverfassungsgesetz* - GVG).[37]

The law requires that when one chamber believes that the jurisprudence on similar cases is faulty, and thus believes that it should be changed, the chamber must ask whether the other chambers still uphold the older interpretation. In such instances, the matter is referred to a joint chamber (*Großer Senat*) of judges – the president of the Court and one judge from each chamber – in order to solve the discrepancies of views and to ensure a unified decision. This procedure is called *Divergenzvorlage* (literally diverging submission). There is one joint chamber for criminal cases and one for civil cases.

Chambers can also request a decision of the joint chamber of judges if a uniform decision is needed in a question of fundamental importance for the development of legal principles or for securing a uniform jurisprudence. This procedure is called "*Rechtsfortbildungsvorlage*". The deciding chamber is then bound by the rulings of the *Großer Senat*. This special procedure of submission to the joint chamber is unique in having this binding effect. In all the other cases there will be a binding effect only to the extent that the chamber will have to submit the case to the joint chamber if it plans to deviate from the decisions of the joint chamber judges.

This exact process described above takes place in the BGH, but other Federal Courts also have similar rulings to guarantee a uniform application of the law.

37 *Gerichtsverfassungsgesetz* § 132: (1) A Grand Senate for Civil Matters and a Large Senate for Criminal Matters are formed at the Federal Court of Justice.
(3) A submission to the Grand Senate or the United Grand Senates is only permissible if the Senate, whose decision is to be departed from, has declared at the request of the recognizing Senate that it will maintain its legal position. If the Senate, the decision of which is to be deviated from, can no longer be addressed with the legal question due to a change in the business distribution plan, the Senate will take its place, which according to the Business Distribution Plan would be responsible for the case in which a different decision was made. The respective Senate decides on the question and the answer by resolution in the form required for judgments; Section 97 (2) sentence 1 of the Tax Consultancy Act and Section 74 (2) sentence 1 of the *Wirtschaftsprüferordnung* remain unaffected.
(4) The recognizing Senate can submit a question of fundamental importance to the Grand Senate for a decision if, in its opinion, this is necessary for the further training of the law or to ensure uniform case law. As found at <http://www.gesetze-im-internet.de/gvg/__132.html>.

SARA GALEOTTI[*]

«SOLUTIO PER ERROREM». THE SIGNIFICANCE OF THE SOLVENS' MISTAKE IN THE CONTEXT OF THE CONDICTIO INDEBITI[**]

ABSTRACT. *One mark of a mature legal system is that it is conscious of its own traditions: to fully understand the notion of* solutio indebiti *in the contemporary legal systems we need to understand the historical and the institutional background from which the* condictio indebiti *came. In this respect, the action to which that name was applied in Roman law is based on principles which afford scope for interesting analysis.*

In the Roman World, where one, by mistake, makes payment of what is not due, he may in certain circumstances recover it by an action. Whether money paid under an error in law can be recovered by a condictio indebiti *is a question which has given rise to much controversy. The constitution of Diocletian and Maximian seems to deny restitution where the money has been paid under an error in law: in C. 1.18.10 it is explicitly stated that* «cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est». *Referring to this constitution and other texts, many eminent jurists, such as Cujas, Donellus, and Voet, maintain that no action lies to recover money paid by mistake in point of law. Other authors, among whom we find Vinnius and D'Aguesseau, are of the opinion that restitution may be obtained in all cases of error, whether it be an error of fact or an error of law. They contend that in the whole title of the Digest which concerns the* condictio indebiti, *restitution is never confined solely to an error in fact, or denied to an error in law, but is constantly ascribed simply to error, whether the payment was made on account of what was never due, or of some claim which could not be enforced by reason of a perpetual exception.*

[*] Senior Research Fellow, Professor of History of Roman Private Law, Roma Tre University.

[**] This essay reproduces, with minor revisions, a brief exegetical Lecture delivered at Moscow School of Social and Economic Sciences on September 19, 2019. I would like to offer my sincere thanks to Professor Dmitry Dozhdev, for inviting me to attend the Round Table MSSES-Roma Tre, and to Professor Vincenzo Mannino, for the valuable advices I received while preparing my speech.

The aim of this paper is to investigate the Romanist roots of the solvens*' mistake importance for the purposes of restitution remedy in case of undue payment. I will therefore analyze the Roman jurisconsults' position and the interpretative tradition of the* ius commune*, which are the basis of all civil law systems.*
The second part of my essay will instead be focused on a basic examination of the solutio per errorem *in the Italian, English, German and French legal systems, so as to highlight the considerable similarities of the legal solutions adopted in those different systems.*

CONTENT. 1. The *indebiti solutio* in the ancient Roman law − 2. *Solvere per errorem* − 3. Considerations about the *error* in the Medieval Roman law − 4. Beyond the Romanist tradition: comparative profiles

1. The indebiti solutio *in the ancient Roman law*

The institution of undue payment, as is known, has its origins in Roman law, and its legal foundation is to be found in the need – felt today as then – to decide on a legal validation that leads over asset transfers.[1]

In the systematic order of the Gaius' *Institutiones*, the *solutio indebiti* follows the description of the constituent elements of the *mutui datio*, presented in Gai 3.90 as the sole source of the *obligatio re contracta*.[2] In fact, paragraph 91 states:[3]

> *Is quoque, qui non debitum accepit ab eo, qui per errorem solvit, re obligatur; nam proinde ei condici potest* SI PARET EVM DARE OPORTERE, *ac si mutuum accepisset. Unde quidam*[4] *putant pupillum aut mulierem, cui sine tutoris auctoritate non debitum per errorem datum est, non teneri condictione, non magis quam mutui datione. Sed haec species obligationis non videtur ex contractu consistere, quia is, qui solvendi animo dat, magis distrahere vult negotium quam contrahere*.[5]

1 For details, see M. Kaser, *Das römische Privatrecht*, I[2], München, 1971, pp. 586, 592 *et seq*., 596, 615; W. Kunkel-H. Honsell, *Römische Recht*, Berlin-Heidelberg-New York, 1987, p. 350 *et seq*.; B. Kupisch, *Arricchimento nel diritto romano, medioevale e moderno*, in *Dig. disc. priv.*, I, Torino, 1987, p. 423; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, 1996 (Cape Town-Wetton-Johannesburg, 1990), pp. 834-838, 848-851; C.A. Cannata, *«Cum alterius detrimento et iniuria fieri locupletiorem». L'arricchimento ingiustificato nel Diritto Romano*, in L. Vacca (ed.), *Arricchimento ingiustificato e ripetizione dell'indebito. VI Convegno Internazionale ARISTEC (Padova-Verona-Padova, 25-26-27 settembre 2003)*, Torino, 2005, pp. 13-52; J. du Plessis, *The «condictio quasi indebiti»*, in *Fundamina*, 16, 2010, p. 52 *et seq*.

2 See Zimmermann, *The Law of Obligations*, cit., pp. 153-165; C.A. Cannata, *Corso di Istituzioni di diritto romano*, II, 2, Torino, 2017, pp. 79-95; V. Mannino, *Introduzione alla storia del diritto privato dei Romani* 3, Torino, 2018, pp. 422-425.

3 To ensure that the texts cited in this essay are accessible also to those who do not have a working knowledge of Latin, I have added translations to all passages cited in the text and in the footnotes. For the passage from Gai 3.91 devoted to *solutio indebiti*, I have used the 1904 English translation of Edward Poste. For passages from the Digest and from the *Codex* of Justinian which mention the *indebitum*, I have used the 1932 English translation of Samuel P. Scott.

4 See J.C. van Oven, *La «forêt sauvage» de la condictio classique*, in *TR*, 22, 1954, p. 271 *et seq*.

5 The receiver of what was not owed from a person who pays in error is also under a real obligation, for he may be sued by *condictio* with the formula: 'If it be proved that he ought to convey' just as if he had received the property in pursuance of a loan. And, accordingly, some have held that a ward or female, if their guardian has not authorized them to receive a payment, are not liable to be sued for money paid in error any more than they are for money received as a loan. This, however, is a mistake, as the obligation in this case seems to be of a kind not arising

As the name suggests, the *solutio indebiti* mainly represents a case of fulfilment of the contract (*solutio*), that is the compensation of a credit through the payment of the amount due.[6] In Roman law, in fact, we can distinguish between the *solutio*, on one hand, and other ways of settling an obligation – which do not necessarily involve the satisfaction of the creditor – on the other. The verb *solvere*,[7] after all, appears in the sources also in a broader sense,[8] to indicate the dissolution of the obligatory bond in general, not the fulfilment (especially if carried out with payment) in particular.

The archaic Roman law recognized in fact mainly two ways to extinguish the obligation: the *nexi liberatio* and the *solutio per aes et libram*.[9] In the subsequent evolution of the *ius civile*, however, we notice a progressive overcoming of this formalism based on the idea that it was possible to dissolve the obligatory bond with a formality-free fulfilment, unless they were imposed by the very structure of the obligation which they wanted to cancel. This also happened in the context of the credit, presumably due to the effect of the *l.a. per condictionem*, introduced by a third century BC *lex Silia* to prosecute claims relating to *certa pecunia*, and extended shortly afterwards by a *lex Calpurnia* to the credits of *aliae certae res*. The *condictio* then becomes the mean through

from contract, as a payment in order to discharge a debt is intended to extinguish an obligation, not to establish one.

6 Cf. W.W. Buckland, *Main Institutions of Roman Private Law*, Cambridge, 1931, p. 306; E. Descheemaeker, *The Roman Division of Wrongs: A New Hypothesis*, in *Roman Legal Tradition*, 5, 2009, p. 10 *et seq*., 16; Cannata, *Corso di Istituzioni*, II, 2, cit., p. 97 *et seq*.

7 *L&S* (= Char.T. Lewis-Ch. Short, *A Latin Dictionary*, Oxford, 1879), s.v. *solvo*: «I. To loose an object bound, to release, set free, disengage, dissolve, take apart (…). B. Trop. 1. To free, release, loose, emancipate, set free (…) c. From obligations and debts». See also Zimmermann, *The Law of Obligations*, cit., p. 748 *et seq*., p. 754 *et seq*.; C.A. Cannata, *Corso di Istituzioni di diritto romano*, II, 1, Torino, 2003, pp. 273-302.

8 See D. 20.6.6.1 (Ulp. 73 *ad ed.*): *Qui paratus est solvere, merito pignus videtur liberasse: qui vero non solvere, sed satisfacere paratus est, in diversa causa est. Ergo satisfecisse prodest, quia sibi imputare debet creditor, qui satisfactionem admisit vice solutionis: at qui non admittit satisfactionem, sed solutionem desiderat, culpandus non est*; D. 50.16.176 (Ulp. 45 *ad Sab.*): *'Solutionis' verbo satisfactionem quoque omnem accipiendam placet. 'Solvere' dicimus eum, qui fecit quod facere promisit*; D. 46.3.52(Ulp. 14 *ad ed.*): *Satisfactio pro solutione est*; D. 46.3.54 (Paul. 56 *ad ed.*): *Solutionis verbum pertinet ad omnem liberationem quoquo modo factam magisque ad substantiam obligationis refertur, quam ad nummorum solutionem*. For a detailed overview, see A. Saccoccio, *«Aliud pro alio consentiente creditore in solutum dare»*, Milano, 2008, pp. 3-9.

9 See M. Kaser, *Das altrömische ius*, Göttingen, 1949, p. 240 *et seq*.; D. Liebs, *«Contrarius actus». Zur Entstehung der römischen Erlaßverträge*, in *Sympotica F. Wieacker*, Göttingen, 1970, p. 128 *et seq*.; Zimmermann, *The Law of Obligations*, cit., p. 755 *et seq*.

which the lender can act against the borrower who has not satisfied the obligation to repay the contract *tantundem eiusdem generis*.[10]

In the formulating system, the *condictio* maintains its abstract nature (i.e., the possibility of acting without indicating the source of the sought after credit)[11] and the jurisprudential interpretation specifies its field of application, establishing that it was based on two assumptions, one of positive and one of negative sign. The first consisted of the *datio*, meant as the transfer of the *res* property, that the claimant had made in favour of the defendant, not as a mere delivery. The second, on the other hand, assumed that there was no valid reason for the defendant to withhold the thing received.[12] The *condictio* could therefore be undertaken in any case of *solutio indebiti*, or rather of performing an undue service.

What happens if, as a matter of fact, the contract that one would like to fulfil does not exist, or if who pays (*solvens*) is not really indebted to the recipient of the payment (*accipiens*)?

2. Solvere per errorem

As Gaius suggests (3.91), like the one who *mutuum accepisset*, even those who receive a certain amount of money as payment of a non-existent debt are *obligari re*, since the mandatory situation is due to a sum that has been wrongly transferred (in such case the recipient is required to restore it).

The situation that lies ahead is the following:

1. transfers to A one hundred (*sestertii*), as a debt's payment.

2. acquires the hundred (*sestertii*) property because:

3. the *traditio*, in Roman law, is a causal transaction and

4. its cause is an acceptance *in lieu* [that the parts negotiated for the payment] (*causa solvendi*).

10 See G. Pugliese, *Il processo civile romano*, I. *Le legis actiones*, Roma, 1962, p. 346 *et seq*.; Zimmermann, *The Law of Obligations*, cit., p. 835 *et seq*.; Cannata, *«Cum alterius detrimento et iniuria fieri locupletiorem»*, cit., p. 14.

11 Zimmermann, *The Law of Obligations*, cit., pp. 835 and 852, but see S. Romeo, *L'appartenenza e l'alienazione in diritto romano. Tra giurisprudenza e prassi*, Milano, 2010, p. 334 *et seq*., for arguments against.

12 See Cannata, *«Cum alterius detrimento et iniuria fieri locupletiorem»*, cit., p. 15 *et seq*., 18 *et seq*.

5. The debt did not exist, and so B wasn't obliged to *dare oportere*.

At this point two potential alternatives can be expected:

6. The *solvens* was aware of the nonexistence of the debt, but he paid anyway.

7. The *solvens* was wrong, he just misguidedly thought there was a debt.[13]

Only in the second case, as it will be seen more clearly in the following section, whoever has performed the unjustified service may obtain the repayment of the unduly loaned amount, resorting to the *condictio indebiti*.

As can be learned from the reading of Gai 3.91, in order for the payment of the undue fee to function as the source of the obligation to repay, it must have taken place by mistake of the *solvens*, who must have made the payment convinced of being obliged. In truth, the *accipiens* knowledge has its relevance: if he had known there was no debt to be repaid and had taken advantage of the *solvens*' mistake, he would have committed a theft, and so he not only couldn't have acquired the amount of money transferred to him, but would also have been sued in an *actio poenalis in personam* (*actio furti*).[14] If the enriched person was aware that the payment was not due, therefore, when he accepted it, he could be held liable for the *condictio furtiva*. In the latter instance, ownership would not have passed and the enriched person would have been liable for damage caused to the impoverished person as a result of his loss. Furthermore, the enriched party was also liable for the value of fruits which he could have gathered but did not, which presumably also included interest on the money received. The enriched party was not allowed to take any expenses into account but in certain instances was allowed to detach improvements. If the performance was destroyed, the party was liable unless he could show that the thing would have suffered the same fate at the hands of the plaintiff.

The *mala fides* receiver was thus in a worse position than the receiver who only discovered the true state of affairs after receiving payment.[15]

13 See VAN OVEN, *La «forêt sauvage»*, cit., p. 275 *et seq*., nt. 21.

14 See KASER, *Das römische Privatrecht*, I[2], cit., p. 593; CANNATA, *«Cum alterius detrimento et iniuria fieri locupletiorem»*, cit., p. 19.

15 On this, see the analysis by CANNATA, *op. loc. ult. cit*.; M. MARRONE, *Problemi di responsabilità del debitore nel regime dell'indebito: dal diritto romano ai codici italiani*, in Vacca (ed.), *Arricchimento ingiustificato*, cit., pp. 234-236, and A. LOVATO-S. PULIATTI-L. SOLIDORO, *Diritto privato romano*, Torino, 2014, p. 585.

Given that the one who pays something persuaded to be in debt and the one who received the undue payment are both at fault, let us see the relevance of the *solvens*' mistake for the purpose of the reconveyance (*condictio indebiti*).

The debate around the prerequisite of the *solvens*' fault in order to be entitled for reimbursement has always been spirited since the *ius commune* period.[16] As it is, this is the most discussed topic of the Romanist branch of knowledge.[17] The most rigorous interpolationists just reject tout court that the *solvens* fault has relevance at all in the classical Roman law: this means that having made an undue payment would have been enough to justify the practice of the *conditio indebiti*.[18]

The sources, however, suggest for more moderate stances.

Gaius presents indeed the *indebiti solutio* with these words: *qui non debitum accepit ab eo, qui per errorem solvit, re obligatur*.

We can read in the Digest:

> D. 12.6.1.1 (Ulp. 26 *ad ed.*): *Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio*.[19]
>
> And,
>
> D. 12.6.50 (Pomp. 5 *ad Q. Muc.*): *Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repetere non potest*.[20]

According to these excerpts, the payment could be repeated just in case of the

16 See Zimmermann, *The Law of Obligations*, cit., pp. 849, 868 *et seq*.; H. Scott, *The Requirement of Excusable Mistake in the Context of the Condictio Indebiti: Scottish and South African Law Compared*, in *S. Afr. Law J.*, 124, 4, 2007, p. 830.

17 See Zimmermann, *The Law of Obligations*, cit., p. 849, more specifically nt. 101.

18 See S. Solazzi, *L'errore nella «condictio indebiti»*, in Id., *Scritti di diritto romano*, IV, Napoli, 1963, p. 99 *et seq*.; Id., *Ancora dell'errore nella «condictio indebiti»*, in Id., *Scritti*, IV, cit., p. 405 *et seq.* On the error requirement in classical law see also Kaser, *Das römische Privatrecht*, I2, cit., p. 596, nt. 36.

19 And, indeed, if anyone ignorantly pays what is not due, he can recover the same by means of this action; but if he paid it being aware that he did not owe it, an action for its recovery will not lie.

20 Where anyone knowingly pays what he does not owe with the intention of afterwards bringing suit to recover it, he has no right of action.

solvens' mistake, so that it would not be possible to give back what was intentionally paid. The reason is purely technical: the *traditio solutionis causa* has definitively attributed to the *accipiens* the ownership of the transferred amounts. The obligation to give back the undue payment arises, in turn, from a case that includes the *error solventis*. If there has been no mistake, the case at the source of the *re obligari* does not occur, and so there is no obligation whatsoever. Therefore, the quite common opinion among Romanists, according to which the cognizant *solvens* would have carried out a *traditio donationis causa*, losing the right to act with the *condictio* against the *accipiens*, is not correct.[21]

Let us now analyze the procedural profiles of the question in more details.

The obligation *ex debito soluto* was protected with a generic *condictio*. On the basis of the relative *formula*, the judge had to condemn the respondent, if it turned out that they were obliged to transfer (*dare oportere*) to someone who acted a *certa pecunia* or a *certa res*. But, as the *formula* did not state the source of the obligation, it was still the judge's task to verify what the claim of the plaintiff was to a *certum dare oportere*. In this framework worked the *prudentes*, who had to delineate the outlines of the duty of restitution, to decide on which cases it was possible to *condicere* and in which ones it was not admitted.[22] In all likelihood, even in classical law (contrary to what was argued in the past) the error of the *solvens* plays a central role, a negative – and not a positive – requirement for the restitution action. In order to *condicere*, in fact, the plaintiff would have the burden of proving on the procedural level only the circumstance of the payment and the presence of a valid *causa condicendi*, while his *inscientia* would have been just presumed. The defendant, on the contrary, should have refuted the content of this

21 See, for example, TH. MACKENZIE, *Studies in Roman Law with Comparative Views of the Laws of France, England, and Scotland* [5], Edinburgh, 1880, p. 255 and BUCKLAND, *Main Institutions*, cit., p. 310. Cf. D. 46.2.12 (Paul. 31 *ad ed.*): *Si quis delegaverit debitorem, qui doli mali exceptione tueri se posse sciebat, similis videbitur ei qui donat, quoniam remittere exceptionem videtur. Sed si per ignorantiam promiserit creditori, nulla quidem exceptione adversus creditorem uti poterit, quia ille suum recepit: sed is qui delegavit tenetur condictione vel incerti, si non pecunia soluta esset, vel certi, si soluta esset, et ideo, cum ipse praestiterit pecuniam, aget mandati iudicio*; D. 50.17.53 (Paul. 42 *ad ed.*): *Cuius per errorem dati repetitio est, eius consulto dati donatio est*. For a bibliographic review on this subject, see KASER, *Das römische Privatrecht*, I[2], cit., p. 596, nt. 36, and CANNATA, *Corso di Istituzioni*, II, 2, cit., p. 99 *et seq.*, for arguments against.

22 See A. SACCOCCIO, «*Si certum petetur*». *Dalla condictio dei veteres alle condictiones giustinianee*, Milano, 2002, p. 549 *et seq*.

assumption, showing that the plaintiff was aware of the non-existence of the debt.[23]

We may observe a change in the discipline with Justinian:

> D. 22.3.25 pr. (Paul. 3 *quaest.*): *et ideo eum, qui dicit indebitas solvisse, compelli ad probationes, quod per dolum accipientis vel aliquam iustam ignorantiae causam indebitum ab eo solutum, et nisi hoc ostenderit, nullam eum repetitionem habere*.[24]

From the passage it is clear how the error has become a fundamental requirement of the applicant's claim; it is, in fact, the plaintiff who must prove that his performance took place *per dolum accipientis vel aliquam iustam ignorantiae causam*. It is equally clear that the recognition of the *condictio indebiti* to the *solvens* appears to be subordinated to the requirement of the reasonableness of the error.[25]

The constitution of the emperors Diocletian and Maximian of 294 lays down a principle that will profoundly influence the medieval interpreters:

> C. 1.18.10: *Imperatores Diocletianus, Maximianus. Cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est*.[26]

The dichotomy *error iuris/error facti* dominated, in Justinian law, as a norm to identify the cases in which the undue payment cannot be excused, therefore there is no return action. Exemplary in this regard, Paulus' statement in D. 22.6.9 pr. (Paul. *l. sing. iuris et fac. ignor.*), in which the disciplines' differences between error of law[27] and factual

23 See Zimmermann, *The Law of Obligations*, cit., p. 850.

24 Therefore, he who alleges that he has paid money which was not due will be required to produce evidence that the said money was paid through the fraud of the party who received it, or on account of some just cause of ignorance, and unless he shows this he will have no right to recover it.

25 See P. Voci, *L'errore nel diritto romano*, Milano, 1937, p. 129; U. Zilletti, *La dottrina dell'errore nella storia del diritto romano*, Milano, 1960, p. 11 *et seq*., p. 483 *et seq*.

26 Where anyone, who is ignorant of the law, pays money which is not due, he cannot recover it; for you are well aware that only ignorance of fact confers the right to recover money which has been paid when it was not due.

27 On the *ignorantia iuris* theme, cf. F. Vassalli, *«Iuris et facti ignorantia»*, in Id., *Studi giuridici*, III, 1. *Studi di*

error are highlighted: *regula est iurisquidem ignorantiam cuique nocere, facti vero ignorantiam non nocere*.

> D. 22.6.9 pr. (Paul. *l. sing. juris et fac. ignor.*): *Regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. Videamus igitur, in quibus speciebus locum habere possit, ante praemisso quod minoribus viginti quinque annis ius ignorare permissum est. Quod et in feminis in quibusdam causis propter sexus infirmitatem dicitur: et ideo sicubi non est delictum, sed iuris ignorantia, non laeduntur. Hac ratione si minor viginti quinque annis filio familias crediderit, subvenitur ei, ut non videatur filio familias credidisse*.[28]

Although, in all likelihood, the elaboration belongs to the classical jurists, only in the Low Empire the principle *ignorantia iuris nocet* – then accepted in the Justinian Compilation – had maximum application, as a suitable instrument to guarantee the stability of juridical relations and certainty of law.[29] It was nonetheless subjected to exceptions, essentially in consideration of the limited capacity attributed to certain subjects: people under twenty-five years old, women (*propter sexsus infirmitatem*), militaries, countrymen.[30]

diritto romano (1906-1921), Milano, 1960, p. 425 *et seq*.; M. Scarlata Fazio, v. *Ignoranza della legge (dir. rom.)*, in *Enc. dir.*, 20, Milano, 1970, p. 1 *et seq*.; H. Kupiszewski, *«Ignorantia iuris nocet»*, in *«Sodalitas». Studi in onore di A. Guarino*, III, Napoli, 1984, p. 1357 *et seq*.; P. Cerami, *«Ignorantia iuris»*, in *Sem. compl. der. rom.*, 4, 1993, p. 57 *et seq*.

28 The ordinary rule is that ignorance of law injures anyone, but ignorance of fact does not. Therefore, let us examine to what instances this rule is applicable, for it may be stated, in the first place, that minors under twenty-five years of age are permitted to be ignorant of the law; and this also is held with respect to women in certain cases, on account of the weakness of the sex; hence, so long as no crime has been committed, but only ignorance of the law is involved, their rights are not prejudiced. For the same principle, if a minor under the age of twenty-five lends money to a son under his father's control, relief is granted him, just as if he had not lent the money to a son subject to paternal authority.

29 D. 22.6.2 (Ner. 5 *membr.*): *In omni parte error in iure non eodem loco quo facti ignorantia haberi debebit, cum ius finitum et possit esse et debeat, facti interpretatio plerumque etiam prudentissimos fallat*. Cf. Voci, *L'errore*, cit., pp. 226 *et seq*.; V. Scarano Ussani, *L'utilità e la certezza. Compiti e modelli del sapere giuridico in Salvio Giuliano*, Milano, 1987, p. 83 s. and nt. 108.

30 C.Th. 2.16.3; D. 2.5.2.1, D. 2.13.1.5, D. 25.4.1.15, D. 22.6.9 pr., D. 22.6.9.1; C. 1.18.1, C. 9.23.5, C. 6.9.8.

On the other hand, the assessment of the *error facti* was different. In the conception of classical jurists, the error of fact was the total or partial ignorance of a factual circumstance that had determined the conclusion of the bargain; as such, it therefore affected and characterized the desire to perform the act or the deal. In the specific case of *indebiti solutio*, the mistake of the *solvens* is what is defined as a significant error of the will (or presumed error). In fact, on the one hand, there was the agent's willingness to pay the due amount and, on the other, the unwillingness to perform an act of liberality. The classical jurists and the Justinian compilers assumed that, if the mistake that had led the *solvens* to pay had been an *error facti*, it could be allowed to reclaim the debts.[31] The Byzantines positively considered the *error iuris* inexcusable and, therefore, the payment made was unrepeatable due to an error of law. The position taken by the classical jurisconsults, conversely, is doubtful in this regard, due to the manipulation of the texts by the Justinian's commissioners.[32]

On the subject, I will briefly discuss only the thought of Labeo.

> D. 22.6.9.2 (Paul. *l. sing. juris et fac. ignor.*): *Sed facti ignorantia ita demum cuique non nocet, si non ei summa neglegentia obiciatur: quid enim si omnes in civitate sciant, quod ille solus ignorat? Et recte Labeo definit scientiam neque curiosissimi neque neglegentissimi hominis accipiendam, verum eius, qui cum eam rem ut, diligenter inquirendo notam habere possit.* 3. *Sed iuris ignorantiam non prodesse Labeo ita accipiendum existimat, si iuris consulti copiam haberet vel sua prudentia instructus sit, ut, cui facile sit scire, ei detrimento sit iuris ignorantia: quod raro accipiendum est*.[33]

31 See Voci, *L'errore*, cit., p. 130 *et seq*.

32 See Zilletti, *La dottrina*, cit., p. 216 *et seq*., p. 483 *et seq*.; Zimmermann, *The Law of Obligations*, cit., p. 850 *et seq*.

33 Ignorance of the fact, however, does not injure anyone unless he should be guilty of gross negligence; for example, what if everyone in the town knew what he alone does not? Labeo very properly says that neither the knowledge of the most inquisitive, or the most negligent man, should be understood to be meant, but that of him who can obtain it by diligent inquiry. 3. Labeo, however, thinks that ignorance of the law ought not to be considered excusable unless the party should not have access to a magistrate, or is not intelligent enough to easily ascertain that ignorance of the law is a detriment to him, which is very rarely the case.

Two centuries before Paulus tempered the principle *ignorantia iuris nocet* with the exceptions mentioned above, the Augustan jurist seems to go even further, stating that the *ignorantia iuris* should only harm those who can avail themselves of legal assistance (or if they are law expert themselves). In other words, Labeo would recognize the operation of the rule only in those cases where the law's mistake could have been reasonably avoided. The position of the jurist is not without implications concerning also the evaluation of the incidence of the error of fact: if, in fact, it is fair that the *solvens* does not receive an injustice from his *ignorantia iuris*, if it could not be avoided even with a conscientious behavior, just as reasonable is that the *condictio* is denied in those cases in which the *error facti* is attributable to his serious negligence.[34]

So, just to summarize, the payment had to have taken place *solvendi animo per errorem*, that is, under the impression that the performance was owing. Where the party's mistake was an *error iuris*, that is a mistake of law, the party could not, as a general rule, have reclaimed either. Thus, in principle, he could have recovered the performance only if he had performed as a result of an *error facti*, a factual mistake. Moreover, this was only the case if such *error facti* was a *iustus error*, that is a reasonable mistake. In certain cases of complicated legal questions and where the payer was a woman, soldier or ignorant rustic, an *error iuris* was no bar to the institution of the *condictio indebiti*; in short, an *error iuris* was accepted as a *iustus error* in specific cases.

The idea that the repeatability of what is paid can be conditioned by the *solvens*' behavior, in particular by the excusability of its mistake, will strongly influence the thinking of the seventeenth-century jurisprudence and still echoes today in the juridical administration of the *condictio indebiti* in South African law.[35]

34 See ZILLETTI, *La dottrina*, cit., p. 254 *et seq.*; KASER, *Das römische Privatrecht*, I², cit., p. 242; ZIMMERMANN, *The Law of Obligations*, cit., p. 604 *et seq.*; L.C. WINKEL, *Mistake of law: English and Roman comparisons*, in W.J. Swadling (ed.), *The Limits of Restitutionary Claims. A Comparative Analysis*, London, 1997, p. 244 *et seq.* and nt. 3, p. 247; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 829 and nt. 7.

35 See SCOTT, *The Requirement of Excusable Mistake*, cit., pp. 839-851; EAD., *Unjust Enrichment in South African Law. Rethinking Enrichment by Transfer*, Oxford-Portland, 2013, p. 4 *et seq.*

3. Considerations about the error in the Medieval Roman law

In the Middle Ages, Glossators and Commentators were above all interested in the *solutio* due to error of law. In the theoretical construction of Medieval authors, the *ignoratia iuris civilis* could be relied upon, if it prevented from suffering damage, while no emphasis was *in lucro captando*. In fact, as the assumption of the *condictio indebiti* was satisfied in the absence of a reason that legitimized the *accipiens* to withhold an enrichment unfairly achieved through an unwary *solvens*, it could not be judged *bonum et aequum* subordinating the remedy to the application of the principle *ignorantia iuris non excusat*.[36]

The *interpretatio* relating to the payment by error of law is rooted in the *Glossa* of Accursio, where a classification of the hypotheses of undue is proposed that, abiding by the *bonum et aequum*, should have clarified the limits of interference of the principle *ignorantia iuris non excusat* in the applicative sphere of the *condictio*. It should also be noted that the mistake is an essential precondition for the reimbursement (the consciousness of the *solvens* of paying what is not due is, in fact, equated to a donation in order to make the credit stable) and the only effective way to assess whether or not to grant the *condictio indebiti* is identifying the justification, natural or civil, of the payment. The principle of non-excusability of the mistake of law is in fact negligible in itself, it is rather used for the sole purpose of highlighting the natural obligation's capability for the attribution's solidity.[37] To affirm that the *solvens*, believing a civil obligation to be only a natural one, does not deserve repetition because such *error iuris* cannot be excused, is equivalent to say that the natural obligation is in itself suitable to justify the attribution. In essence, considering *bonum et aequum* that the *solvens* can repeat patrimonial attributions received from the *accipiens* without reason, there is no doubt that the *ignorantia iuris* is in itself unfit to justify and stabilize this payment.[38]

Such an approach, which strongly marks the so-called *mos italicus*, is however

36 See Zimmermann, *The Law of Obligations*, cit., p. 608; A. D'Angelo, *L'errore senza rimedio*, Milano, 2006, pp. 123-142.

37 See E. Cortese, v. *Errore (dir. interm.)*, in *Enc. dir.*, 15, Milano, 1966, pp. 236-246; Zimmermann, *The Law of Obligations*, cit., p. 868 *et seq.*, p. 873; D'Angelo, *L'errore*, cit., pp. 140-142.

38 See D'Angelo, *op. loc. ult. cit*.

criticized by the *Culti*, which reiterate the idea, setting out from C. 1.18.10 and based on the rigid *error iuris/error facti* opposition, that the error of law is never excusable: considering that the *solvens* voluntarily gives away his own money not only when he pays a debt, but also when he makes an undue payment; assuming, therefore, that some stability must be recognized to a spontaneous patrimonial attribution, although not properly justified, the concession of the restoring remedy must be evaluated as a special favor of equity, therefore denied in the case of error of law (because it is an inexcusable behavior). The erroneous assumption of the existence of a debt rises, then, from a mere 'supposed cause' to reason of the stability of the attribution and preclusive element of the *condictio* itself.[39]

The principle *ignorantia iuris non excusat* is reiterated with particular force by the Dutch jurist Johannes Voet, who embraces an even more extreme interpretation of D. 22.6. He states, in fact, that even in the case of *error facti*, the recognition of the *condictio* to the *solvens* must be subordinated to the excusability of his error. As for the *error iuris*, it would always be an inexcusable fault.[40]

In the *usus modernus pandectarum*, in which both stances are present, some authors begin to replace the term *ignorantia* with *error* and, because of the resulting contrast between *ignorantia iuris* and *ignorantia facti*, they definitively open the way to a new direction. After about five hundred years of doctrinal dispute, Augustin Leyser, with the distinction between *ignorantia vincibilis* and *ignorantia invincibilis*, makes the principle of excusability of error the main condition for determining whether the *condictio indebiti* should be granted or not to *solvens*.[41]

Starting from the nineteenth century, it is the German Historical School that absorbed these influences: for example, Savigny believes that, although in principle the *condictio indebiti* must always be granted in case of error, it cannot assist the *solvens*

39 See MACKENZIE, *Studies in Roman Law*, cit., p. 256; ZIMMERMANN, *The Law of Obligations*, cit., p. 869; D'ANGELO, *L'errore*, cit., pp. 142-151, 162 *et seq.*; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 830.

40 See MACKENZIE, *op. loc. ult. cit.*; ZIMMERMANN, *The Law of Obligations*, cit., p. 869 and nt. 210; D'ANGELO, *L'errore*, cit., pp. 154 *et seq.*; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 830.

41 ZIMMERMANN, *The Law of Obligations*, cit., p. 870; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 830 *et seq.*, nt. 23.

incase of an inexcusable one (*verschuldeten*). The reasons for this orientation must be sought in an equitable principle: it is right to recover what was paid for by mistake (*Begünstigung aus Billigkeit*), but it would be unfair to allow it to those who made a mistake for their negligence. Years later Vangerow will formulate the theory in even more general terms, affirming that repeatability can be granted only in the case of un excusable error, but without any distinction between factual error and error of law.[42]

Despite the general favor shown to this approach in the Germanic area, the *Bürgerliches Gesetzbuch* (BGB) compilers will however prefer a discipline closer to classical Roman law, abolishing the principle of excusability and the distinction between factual error and error of law.

4. Beyond the Romanist tradition: comparative profiles

Let's now see how this long interpretative procedure has affected the discipline of restorative remedies in some of the main contemporary law systems.

Traditionally the prerequisites for regaining an undue payment are identified in the characteristic, in its being unjustified and in the mistake of the *solvens*. In addition to these traits, French scholars also added an evaluation of the excusability of the error of those who proceeded to an unjustified fulfillment: it was believed, in fact, that every time the transfer of wealth was due to a serious negligence of the impoverished, it could not be considered without cause, and so the consequent impossibility of restorative remedies.[43]

The 1865 Italian Civil Code (c.c.) found in the mistake of the *solvens* (Art. 1145) a necessary requirement for the recognition of the reclaim action. The doctrine and the jurisprudence both agreed in believing that the proof of the error was essential to obtain the restitution of what was unduly paid. In the current Italian law, the undue payment discipline is articulated differently depending on whether it is an objective or subjective undue. In the first case, despite what was configured in the 1865 Code, there are only two prerequisites for reacquiring what was unduly paid: the making of a

42 See MACKENZIE, *Studies in Roman Law*, cit., p. 256 s.; D'ANGELO, *L'errore*, cit., p. 159 *et seq.*; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 831 *et seq.*

43 See. P. GALLO, *Introduzione al diritto comparato*, II. *Istituti giuridici* [3], Torino, 2018, p. 389.

payment and the lack of the corresponding obligation. The subjective condition of ignorance on the part of the *solvens* about the non-existence of the obligation has disappeared. Article 2033 c.c. in fact begins by simply stating that «those who made an undue payment have the right to get back what they unduly paid».[44]

The irrelevance of the *solvens* error pursuant to Art. 2033 of the Civil Code constitutes a significant trend reversal to the dominant opinion under the Napoleonic Code and under the 1865 Civil Code, according to which a payment made by a *solvens* aware of the non-existence of the debt was the same as a donation. The 1942 Civil Code seems to have embraced the idea that it is arbitrary to deduce there is a state of willingness from a mere intellectual state. Therefore, the *scientia indebiti* does not allow us to presume the *animus donandi*, and can undoubtedly coexist with the decision to assume, albeit temporarily and with the implicit clause to repeat the *solutio*, the position of the fulfilling debtor. If anything, it will be up to the *accipiens* to provide the proof that the payment was made in a spirit of generosity or in fulfillment of a natural obligation or on the basis of a contractual obligation. Howbeit, the system does not allow the mere intellectual ability of the *solvens* to constitute a valid justification for not fulfilling the debt: to be able to recover what unduly paid, the author of the payment just needs to prove the nonexistence of the debt, because the objective illicit is based only on the lack of foundation of the patrimonial shift as such.[45]

The psychological element, however, becomes relevant again in the subjective debts' topic pursuant to Article 2036 of the Civil Code, enforceable in the case that a person mistakenly pays someone else's debt.

In this case, in order for the *solvens* to be able to recover the amount paid, it is

44 See: M. Pescatore, *Filosofia e dottrine giuridiche*, I, Torino, 1881, p. 253 *et seq.*; A. Namias, *Contributo alla teoria della ripetizione dell'indebito*, in *Arch. giur.*, 45, 1890, p. 104 *et seq.*; G. Pacchioni, *I quasi contratti e l'azione di arricchimento ingiustificato*, Padova, 1935, p. 225 *et seq.*; L. Caliendo, *Dell'errore del «solvens» nella ripetizione dell'indebito*, in *Ann. Dir. Comp. St. Leg.*, 12, 2, 1935, p. 49; E. Moscati, v. *Indebito (pagamento e ripetizione dell')*, in *Enc. dir.*, 13, Milano, 1971, p. 86; U. Breccia, *La ripetizione dell'indebito*, Milano, 1974, p. 30 *et seq.*; P. Gallo, *Arricchimento senza causa e quasi contratti (i rimedi restitutori)*, in *Tratt. Sacco*, Torino, 1996, p. 121; P. Cisiano, *Questioni vecchie e nuove in tema di ripetizione di indebito oggettivo*, in *Giur. it.*, 2000, p. 54; F. Rocchio, *Errore e onere della prova nella ripetizione dell'indebito*, in *Riv. dir. civ.*, 6, 2010, p. 846 *et seq.*

45 See Rocchio, *Errore e onere della prova*, cit., pp. 848-852.

necessary that at the time the payment was made in an excusable error condition. It is clear why the law grants the action only if the payer is in error; the creditor, in fact, is really owed money, and thus has achieved what is due to him; only an excusable error (therefore not dependent on grave negligence) could justify the recovery of the amount paid; on the other hand, if the error is not excusable, it does not seem fair to penalize the creditor who, as things stand, had just received what is rightfully his; it is the false debtor, consequently, who will have to turn to the true debtor to be refunded.

In the outlined perspective, the responsibility of the *accipiens indebiti* creates the conditions suitable to exclude a recovery, as for example that the payment was made on the basis of a solid contractual obligation, in fulfillment of a natural obligation, or in a pure spirit of generosity. As we will see, the most recent developments show a clear tendency to lessen the error relevance in other legal systems too. From this point of view, therefore, it can be said that the discipline outlined by Art. 2033 of the Civil Code is at the forefront in Europe.[46]

Traditionally, in common law countries the rule governing the recovery of undue payments is very clear: the inexistence of the debt is not sufficient, the proof of the error of the *solvens* is also required.[47] In particular, at first, only a fundamental or basic error could give rise to the restoring remedy, as Baron Bramwell's famous *dictum* in *Aiken v. Short* (1856)[48] reminds us:

> «In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money».

A further limitation to the possibility of recovering consisted in the exclusion of the obligation to return if the error had been due to the negligence of the subject

46 See Gallo, *Introduzione al diritto comparato* II[3], cit., p. 390.

47 See Mackenzie, *Studies in Roman Law*, cit., p. 257; Gallo, *op. loc. ult. cit*.

48 See A. Tettenborn, *Law of Restitution in England and Ireland* [3], London-Sidney, 2002, p. 26 *et seq.*

who made the payment, as Baron Parke recalls, in the *Kelly v. Solari* (1841):[49]

> «[if the money] is paid under the impression of the truth or a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it».

However, starting from the jurisprudence of the 1970s we can notice a gradual reduction in the relevance of the *mistake*.[50]

The case *Barclay's Bank Ltd. v. W. J. Sims & Sons* (1979)[51] states the principle according to which

> «if a person pays money to another under a mistake of fact which causes him to make a payment, he is prima facie entitled to recover as money paid under a mistake of fact».

A 1993 decision by the English House of Lords (*Woolwich Equitable Building Society v. Inland Revenue Commissioners*) then established that the recovery of unduly paid taxes should not be subject to proof of the error.[52] In this perspective, if a company makes undue payments in order to avoid bad publicity, or to avoid the imposition of penalties connected with late payment, it is entitled to get back its money even if, at the time of payment, it was perfectly aware of the undue nature of the taxation. In this case, recovery cannot be excluded because it is easily understandable that whoever makes the undue payment of a tax is not in any case moved by a generous intent.

In the end it is clear that the error requirement tends to blend in England too, while solutions comparable to those established in our 1942 Civil Code are set. Also the

49 See P. Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures*, Wellington, 2002, p. 7 *et seq.*

50 See D'Angelo, *L'errore*, cit., p. 200 *et seq*.

51 See P. Birks, *An Introduction to the Law of Restitution*, Oxford, 1985, p. 150 *et seq.*

52 See A.S. Burrows-E. McKendrick-J. Edelman, *Cases and Materials on the Law of Restitution*, New York, 2005, p. 625 *et seq*.; Gallo, *Introduzione al diritto comparato* II[3], cit., p. 391.

traditional rule of the *mistake of law* (*ignorance of the law is no excuse*) now appears limited to a small circle of cases, which surprisingly coincide with those excluded from the restitution remedy in the civil law countries too.[53]

In Germany it is the legislation itself that asks for proof of the *solvens*' mistake in order for them to get back what was paid without cause (§ 814 BGB).[54] However, for a long time, the jurisprudence has attenuated the condition's relevance, essentially reversing the burden of giving proof: it is therefore not the plaintiff who has to prove he misguidedly paid, but it will be the defendant who will have to demonstrate how, at the time of payment, the *solvens* was aware of the absence of the obligation, thus he had voluntarily fulfilled, perhaps driven by a munificent intent or by any other factor suitable to justify the money withholding.[55]

Useful indications in the sense of a gradual decrease in the relevance of the mistake also derive from the 1992 new Dutch Code, which, for the purpose of recovering the undue payment, no longer refers to the proof of error (Art. 6:203).

As anticipated, before the 2016 reform the relevance of the error in French law was still considerable. The Napoleon Code seemed to have a strictly objective conception of the undue payment by not requiring proof of the error for the purpose of restitution, just stating that any undue payment had to be reversed (Art. 1235). Proof of the error was required only in matters of subjective undue (Art. 1377).

Immediately after the Code issuing, the doctrine and jurisprudence had, however, brushed up the so-called '*condition d'erreur*', in compliance with the *ius commune* – and ultimately Roman – tradition, according to which the conscious payment of a non-existent debt would have been equatable with a donation. In this perspective, despite what affirmed in the Code's section, error's proof became again an essential requirement for the purposes of restoring the undue debt. As expected, all this has had consequences: subordinating the restoring of the undue payment to the evidence of the

53 GALLO, *Introduzione al diritto comparato* II[3], cit., p. 391.

54 *Bürgerliches Gesetzbuch (BGB)* § 814 (*Kenntnis der Nichtschuld*): *Das zum Zwecke der Erfüllung einer Verbindlichkeit Geleistete kann nicht zurückgefordert werden, wenn der Leistende gewusst hat, dass er zur Leistung nicht verpflichtet war, oder wenn die Leistung einer sittlichen Pflicht oder einer auf den Anstand zu nehmenden Rücksicht entsprach*.

55 See D. GEROTA, *La théorie de l'enrichissement sans cause dans le Code civil allemand*, Paris, 1925, p. 175.

error means, in fact, that any attribution carried out with the awareness of its undue character can no longer be restored, regardless of the lack of cause or underlying justification.

Nevertheless, in spite of the dominant leaning, even in French law the role of the *solvens*' mistake ended up being deescalated: in case of nullity of the contract, for example, the contract is invalidated not because the act is not supported by the will of its author, but because it is objectively without reason. The action of invalidity is therefore completely detached from the proof of the error.[56]

Accepting the solicitations of the most recent doctrine, the Legislator intervened on the discipline of the debts in 2016, with a legislative reform that conceives the debt in strictly objective terms.

The setting given to the subject is now the following: any payment presupposes a debt, so what was unduly received must be returned. The Legislator does not mention the error but excludes the restoration in the case of spontaneous execution of a natural obligation (Art. 1302).

> «Tout paiement suppose une dette; ce qui a été reçu sans être dû est sujet à restitution.
> La restitution n'est pas admise à l'égard des obligations naturelles qui ont été volontairement acquittées».

It follows that anyone who has received an undue service by mistake, or even knowingly, is subject to restitution (Art. 1302-1):

> «Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû doit le restituer à celui de qui il l'a indûment reçu».

The phrasing of Art. 1302-3 is interesting, it seems to contain a reference to the duty of diligent behavior on the part of the *solvens*:

> «La restitution … peut être réduite si le paiement procède d'une faute».

56 See GALLO, *Introduzione al diritto comparato* II[3], cit., p. 392 *et seq.*

Even though it appears that the generally objective view of the undue established in Europe has led many authors to believe the Roman heritage of the institute completely outdated, there is a fact I would like to linger over before I finish: the significance again granted to the *error solventis* as a negative requirement for restorative remedies. If it is indeed true that whoever pays the undue debt can appeal for restitution without having to prove the existence of his mistake, the defendant will be able to resist only by demonstrating the existence of a *scientia solventis*.

In the final analysis, to quote Zimmermann's keen observation, on the procedural plane we are very close «to the position that had once prevailed in classical Roman law».[57]

57 ZIMMERMANN, *The Law of Obligations*, cit., p. 871.

DARIO IPPOLITO[*]

CHANTIERS BECCARIENS. LOI PÉNALE ET LIBERTÉ CIVILE CHEZ GENOVESI, FILANGIERI ET PAGANO[**]

ABSTRACT. *The article proposes a consideration on the constitutional centrality of criminal law and on the cultural impact of Beccaria's doctrine.* On Crimes and Punishments *marks a turning point in the philosophical debate of the Enlightenment. In the context of this debate are positioned the* Diceosina *of Antonio Genovesi, the* Scienza della legislazione *of Gaetano Filangieri and the* Considerazioni sul processo criminale *of Pagano. The analysis of these works allows shed light on both the relationship between rights and guarantees and the tensions between power and freedom.*

CONTENT. 1. Introduction − 2. Antonio Genovesi et l'«opusculum pene aureum» de Beccaria − 3. Le droit pénal comme système de garanties: Gaetano Filangieri et Mario Pagano − 4. Les voies du réformisme pénal: les Lumières au pluriel

[*] Associate Professor, Philosophy of Law, Roma Tre University.

[**] L'auteur souhaite remercier Philippe Audegean pour la révision linguistique de ce texte.

1. Introduction

Giovanni Tarello a fait remarquer que «le problème pénal n'a jamais été aussi débattu que dans la seconde moitié du XVIII[e] siècle».[1] Ce phénomène s'explique par le contexte idéologique où il prend forme: celui d'une vision profondément renouvelée de la *civitas terrena*. La philosophie des Lumières pose l'individu au centre de la sphère politique. La déontologie de l'obéissance qui pliait les sujets à s'acquitter de leurs devoirs envers leur souverain desserre son étau sur les esprits, de plus en plus gagnés à l'idée que le souverain a au contraire pour devoir de respecter et de défendre les droits de ses sujets. Dès lors, la rhétorique de la *potestas legibus* soluta s'efface au profit de l'idée qu'il faut régler et contrôler l'exercice du pouvoir. C'est dans cette perspective – *ex parte civium* – que s'inscrivent les théories de la souveraineté de la loi, de la division des pouvoirs et de la représentation politique à la faveur desquelles prend forme le modèle d'État prôné par les Lumières.

On comprend alors pourquoi la législation pénale devient l'objet d'un débat crucial. Le développement théorique d'un paradigme de gouvernement caractérisé par la subordination de l'autorité publique à la loi en vue de la protection des individus met au premier plan le problème de la configuration des crimes, de la détermination des peines et des règles de procédure pénale.[2]

Le système pénal apparaît comme le lieu principal de qualification politique de l'ordre civil: le contact entre souverain et sujet y est immédiat, le conflit entre autorité et immunité y est transparent, la tension entre force et droit s'y trouve exaspérée. Quelles interdictions légales peut-on justifier? Dans quel but et comment punir les transgresseurs? Comment s'assurer de la violation des normes juridiques et de la responsabilité personnelle d'une action criminelle? Les réponses à cette questions tracent la ligne de démarcation entre la liberté et l'oppression.

La centralité constitutionnelle du droit pénal est clairement explicitée par Montesquieu dans l'*Esprit des Loi*.[3] Avant lui, le jusnaturaliste allemand Christian

1 G. Tarello, *Storia della cultura giuridica moderna* [1976], Bologne, Il Mulino, 1997, p. 383.

2 Voir P. Costa, *Civitas. Storia della cittadinanza in Europa*, vol. I, *Dalla civiltà comunale al Settecento*, Rome-Bari, Laterza, 1999, pp. 433-440.

3 La littérature sur la pensée pénale de Montesquieu est très vaste. Je ne rappelle ici que les études les plus

Thomasius avait fermement montré la nécessité d'une réforme de la législation criminelle.[4] Force est pourtant de constater que le débat philosophique sur les fondements, les buts et les limites du droit de punir ne se développe pleinement qu'après la publication de l'ouvrage de Beccaria.[5] Cette observation banale, qui vaut pour tous les pays européens, est d'autant plus vraie dans le cas de l'Italie méridionale. Avant 1764, en dehors de quelques juristes isolés, la culture napolitaine ne manifeste pas vraiment d'attitude critique envers le régime pénal existant.[6] Dans les milieux réformateurs, d'autres thèmes sont à l'ordre du jour, comme l'agriculture, le commerce ou le crédit.[7] Les défauts de la législation criminelle ne retiennent pas l'attention des philosophes méridionaux et suscitent encore moins leurs dénonciations. Or, tout change avec la parution de *Dei delitti e delle pene*. L'hétérodoxie pénale de Beccaria retentit aussitôt dans les pages d'Antonio Genovesi, le penseur le plus influent des Lumières napolitaines.[8] Plus tard, elle inspire les réflexions de Gaetano Filangieri et de Mario

récentes: W. Carrithers, «La philosophie pénale de Montesquieu», *Revue Montesquieu*, 1997, 1, pp. 39-63 (disponible sur internet: <http://montesquieu.ens-lyon.fr/IMG/pdf/6-Carrithers_1_.pdf>); C. Larrere, «Droit de punir et qualification des crimes de Montesquieu à Beccaria», dans M. Porret (éd.), *Beccaria et la culture juridique des Lumières*, Genève, Droz, 1997, pp. 89-108; M.A. Cattaneo, *Il liberalismo penale di Montesquieu*, Naples, Edizioni Scientifiche Italiane, 2000; C. Spector, «Souveraineté et raison d'État. Du crime de lèse-majesté dans L'Esprit des lois», dans L. Delia et G. Radica (éd.), *Penser la peine à l'âge de Lumières*, Lumières, n° 20, 2012, pp. 55-72; D. Ippolito, *L'esprit des droits. Montesquieu et le pouvoir de punir,* trad. de Ph. Audegean, pref. de M. Rueff, Lyon, École Normale Supérieure Éditions, 2019.

4 Voir M.A. Cattaneo, *Diritto e pena nel pensiero di Christian Thomasius*, Milan, Giuffrè, 1976; I. Hunter, *The Secularisation of the Confessional State: the Political Thought of Christian Thomasius*, Cambridge, Cambridge University Press, 2007.

5 Voir surtout F. Venturi, «Il diritto di punire», dans *Utopia e riforma nell'Illuminismo* [1970], Turin, Einaudi, 1978, pp. 119-143; «Introduzione», dans C. Beccaria, *Dei delitti e delle pene. Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna nell'Europa del Settecento* [1965], Turin, Einaudi, 1994, pp. VI-XXXIX.

6 Une exception notable est offerte par le cas de Tommaso Briganti qui, dans sa *Pratica criminale delle corti regie, e baronali del Regno di Napoli* (Naples, Mazzola, 1755), développe une critique de divers éléments du procès pénal d'Ancien Régime. Voir G. Vallone, «Briganti, Tommaso», dans I. Birocchi, E. Cortese, A. Mattone, M.N. Miletti (éd.), *Dizionario biografico dei giuristi italiani (XII-XX secolo)*, Bologne, Il Mulino, 2013, vol. I, pp. 338-339.

7 Sur le mouvement réformateur méridional du second XVIIIe siècle, voir surtout F. Venturi (éd.), *Illuministi italiani*, t. V, *Riformatori napoletani*, Milan-Naples, Ricciardi, 1962; G. Galasso, *La filosofia in soccorso de' governi. La cultura napoletana del Settecento*, Naples, Guida, 1989.

8 Voir D. Ippolito, «Antonio Genovesi lettore di Beccaria», *Materiali per una storia della cultura giuridica*, 2007, XXXVII, 1, p. 3-20; I. Birocchi, «Genovesi, Antonio», dans Birocchi *et al.*, *Dizionario biografico dei giuristi*

Pagano, qui ont porté la culture juridique méridionale à l'avant-garde du mouvement réformateur européen.[9]

Il y a plus de vingt ans, Anna Maria Rao a décrit la réception et la circulation des idées de Beccaria dans le Royaume de Naples.[10] Je me propose ici de développer les résultats de son étude magistrale en essayant d'analyser et d'évaluer l'impact de l'ouvrage de Beccaria sur la pensée des trois plus grands représentants des Lumières napolitaines. Je partirai de l'idéologie pénale de Genovesi afin de montrer combien et comment elle se transforme après sa lecture de *Dei delitti*. J'aborderai ensuite les doctrines de Filangieri et de Pagano pour y discerner des éléments de continuité avec la pensée de Beccaria et mettre en évidence leur principale contribution au développement d'une théorie pénale marquée par son influence. Je m'arrêterai enfin sur certains aspects qui, au contraire, distinguent et opposent la philosophie de la peine de Genovesi, Filangieri et Pagano et celle de Beccaria.

1. Antonio Genovesi et l'«opusculum pene aureum» de Beccaria

Genovesi a cinquante ans lorsque paraissent les *Delitti*. Professeur d'économie à l'université de Naples, philosophe reconnu, il fait figure de maître à penser auprès de

italiani, ouvr. cité, vol. I, pp. 963-966.

9 Sur la pensée politique et juridique de Filangieri, voir I. Birocchi, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Turin, Giappichelli, 2002, pp. 510-537; V. Ferrone, *La Politique des Lumières. Constitutionnalisme, républicanisme, droits de l'homme: le cas Filangieri*, Paris, L'Harmattan, 2009 (éd. originale italienne, 2003); F. Berti, *La ragione prudente. Gaetano Filangieri e la religione delle riforme*, Florence, Centro Editoriale Toscano, 2003; «Modello britannico, modello americano e antidispotismo: Filangieri e il problema della costituzione», dans A. Trampus (éd.), *Diritti e costituzione. L'opera di Gaetano Filangieri e la sua fortuna europea*, Bologne, Il Mulino, 2005, pp. 19-60; G. Pecora, *Il pensiero politico di Gaetano Filangieri. Una analisi critica*, Soveria Mannelli, Rubbettino, 2007; D. Ippolito, «La *Scienza della legislazione*. Osservazioni critiche su una analisi critica», *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2010, xxix, pp. 821-839; A. Trampus, «Filangieri, Gaetano», dans I. Birocchi *et al.*, *Dizionario biografico dei giuristi italiani*, ouvr. cité, vol. I, pp. 860-863; D. Ippolito, «Prólogo», dans G. Filangieri, *La Ciencia de la Legislación*, sous la dir. de L. Prieto Sanchís, Madrid, BOE, 2019, pp. 21-56. Sur la vie et l'œuvre de Mario Pagano, voir F. Venturi, «Francesco Mario Pagano. Nota introduttiva», dans F. Venturi, *Illuministi italiani*, ouvr. cité, pp. 783-833; G. Solari, *Studi su F. M. Pagano*, Turin, Giappichelli, 1963; D. Ippolito, *Mario Pagano. Il pensiero giuspolitico di un illuminista*, Turin, Giappichelli, 2008; F. Berti, *L'uovo e la fenice. Mario Pagano e il problema della rivoluzione*, Padoue, Cedam, 2012.

10 Voir A.M. Rao, «*Delle virtù e de' premi*: la fortuna di Beccaria nel Regno di Napoli», dans l'ouvrage collectif *Cesare Beccaria tra Milano e l'Europa*, Rome-Bari, Laterza, 1990, pp. 534-569.

ses nombreux élèves.[11] Dans la seconde moitié des années 1760, il joue un rôle important dans la promotion du pamphlet de Beccaria et dans la diffusion en Italie méridionale d'une conscience nouvelle des enjeux de la question pénale.[12] Son adhésion à la perspective réformatrice du philosophe milanais ne saurait toutefois être assimilée à celle de la plupart des intellectuels des Lumières. Alors que ceux-ci reconnaissent d'emblée, dans le miroir lucide et scintillant des *Délits et des peines*, l'expression de leurs propres idéaux, la position initiale de Genovesi sur le droit pénal est fort éloignée de celle de Beccaria. Ce n'est qu'après avoir médité sur son livre que le philosophe napolitain se laisse convaincre par ses raisons et finit par élaborer une réflexion critique sur la législation criminelle de son temps.

J'utilise à dessein le verbe «méditer», parce que l'évolution de Genovesi n'a pas été immédiate. Penseur vigoureux, le patriarche des Lumières méridionales n'est pas foudroyé par la lecture de *Dei delitti e delle pene*. Nous avons la chance de connaître ses premières impressions de lecture grâce à une lettre qu'il écrit à l'abbé Antonio Cantelli le 30 avril 1765:

> «J'ai parcouru le discours sur les délits et les peines, mais je n'ai pu le lire entièrement. Pour ce que j'en ai vu, il me semble écrit par un homme intelligent, sincère, philanthrope, mais qui prétend promouvoir le bien par une voie que je ne considère pas comme la plus sûre. Les hommes […] sont enclins à se nuire réciproquement plus que tous les autres animaux. Étant donné cette nature, allez donc réduire la rigueur des peines et vivez, si vous le pouvez, parmi la tourbe».[13]

11 Voir surtout F. Venturi, *Settecento riformatore*, vol. I, *Da Muratori a Beccaria* [1969], Turin, Einaudi, 1998, pp. 523-664; M.L. Perna, «Genovesi, Antonio», *Dizionario biografico degli italiani*, Rome, Istituto dell'Enciclopedia italiana, vol. 53, 2000, *ad vocem* (disponible sur internet: <http://http://www.treccani.it/enciclopedia/ricerca/antonio-genovesi/>).

12 Nombreux sont les disciples de Genovesi qui écrivent à Beccaria pour lui exprimer leur admiration. Un témoignage exemplaire est celui du jeune prêtre Benedetto Rocco qui, dans une lettre du 27 septembre 1771, raconte à Beccaria qu'il a lu son livre deux ans auparavant, sur le conseil d'un «philosophe ami» qui n'était autre que Genovesi et qui lui aurait suggéré cette lecture en ces termes: «[…] lisez ces quelques pages, me dit-il, et jugez si l'Italie et notre temps ont quelque chose à envier à la Grèce ou à l'époque la plus heureuse de la philosophie et de la politique» (C. Beccaria, *Carteggio*, 2e partie: 1769-1794, *Edizione Nazionale delle opere di Cesare Beccaria*, vol. V, Milan, Mediobanca, 1996, p. 310).

13 Antonio Genovesi, lettre à Antonio Cantelli, 30 avril 1765, reproduite dans Venturi (éd.), *Illuministi*

Avec une bonne dose de pessimisme anthropologique, Genovesi prend ainsi ses distances avec l'appel lancé par Beccaria en faveur de l'adoucissement des sanctions pénales, qui est l'un des thèmes centraux de son livre. Dans une certaine mesure, il semble ajouter foi au dogme criminaliste selon lequel la prévention des crimes exige la sévérité des châtiments: dogme vigoureusement réaffirmé, contre Beccaria et Montesquieu, par les théoriciens de l'«éclat des supplices».[14] Bien que, dans la suite de cette lettre, Genovesi déclare ne pas croire que «l'excessive dureté soit très profitable»,[15] il se montre convaincu que la modération des peines entraîne la prolifération des délits.

Il exprime des considérations analogues dans un ouvrage presque contemporain, mais resté inédit: les *Dialoghi morali*, dont le manuscrit date de 1766.[16] Ces dialogues opposent deux personnages: le premier, Filalete, est un jeune homme désireux d'apprendre la vérité, tandis que le second, Dicearco, est un pédagogue et fin connaisseur des règles de la justice. L'ouvrage aborde les thèmes les plus débattus de la littérature jusnaturaliste (droits et devoirs des individus, propriété privée, mariage, contrats, successions…) et consacre plusieurs pages à des problèmes de droit pénal (justification du pouvoir de punir, détermination des actions punissables, mesure et efficacité des peines).[17] Dans le cadre de notre analyse, ce qui nous intéresse plus particulièrement est la réponse de Genovesi à la question: «Comment punir?». Cette question fait l'objet d'un échange très significatif du quatorzième dialogue. À Dicearco, qui range la loi du talion au nombre des lois de la nature et soutient qu'il faut donner «la vie pour la vie

italiani, ouvr. cité, pp. 310-311.

14 Voir par exemple P.-F. Muyart de Vouglans, *Réfutation des principes hasardés dans le Traité des délits et des peines*, Lausanne-Paris, Desaint, 1767; «Lettre sur le système de l'auteur de l'*Esprit des lois* touchant la modération des peines» [1785], *Revue Montesquieu*, 1997, 1, pp. 77-95. Sur l'idéologie pénale de Muyart de Vouglans, voir M. Porret, «Les "lois doivent tendre à la rigueur plutôt qu'à l'indulgence". Muyart de Vouglans versus Montesquieu», *Revue Montesquieu*, 1997, 1, pp. 65-76.

15 Antonio Genovesi, lettre à Antonio Cantelli, 30 avril 1765, *loc. cit.*, p. 311.

16 Voir A. Genovesi, *Dialoghi morali*, dans *Dialoghi e altri scritti intorno alle «Lezioni di commercio»*, Naples, Istituto italiano per gli Studi filosofici, 2008, pp. 73-317.

17 Voir *ibid.*, Dialogo III, pp. 89-90; Dialogo IV, p. 100; Dialogo VI, p. 118; Dialogo VII, pp. 124, 130, 134; Dialogo X, pp. 162-168; Dialogo XII, pp. 188-191; Dialogo XIV, pp. 204-205, 210-211; Dialogo XVII, p. 246; Dialogo XXIV, p. 309-317.

ainsi que pour d'autres offenses graves»,[18] Filalete objecte que l'application de ce principe conduit à une excessive cruauté et qu'il convient de punir en recourant à la prison et aux travaux forcés plutôt qu'au gibet. Mais Dicearco lui adresse une réplique mordante: «Voilà une politique qui remplit les États de délits et de scélératesses».[19] Selon lui – c'est-à-dire selon Genovesi –, la «rigueur des lois»[20] est seule capable de dissuader les criminels. Pour corroborer cette thèse sur le plan empirique, il rappelle l'exemple historique de l'empire des Incas (paradigme du bon gouvernement dans l'imaginaire politique du philosophe napolitain):[21]

> «Les Péruviens punissaient de mort presque tous les délits graves; le procès s'achevait en cinq jours et les forfaits mineurs étaient punis sur le champ, selon l'usage militaire, de coups de bâton […]. Cette méthode de punir […] dans la personne et de façon rapide fit que dans un empire de trois mille milles en longueur sur trois cents de large, il ne se commettait que deux ou trois meurtres par an […]».[22]

Peine capitale et châtiments corporels: telle est la méthode préconisée par Genovesi pour lutter contre le crime. À ses yeux, la prison et les travaux forcés ne sont pas suffisamment dissuasifs.

On ignore combien de temps s'écoule entre cette prise de position, implicitement hostile à Beccaria, et la rédaction finale du chapitre sur le droit pénal de *Della Diceosina o sia della filosofia del giusto e dell'onesto*, le dernier traité de droit naturel de Genovesi, qui paraît en 1767.[23] On peut seulement constater que, entre le dialogue qu'on vient de citer et ce dernier ouvrage, la vision de l'auteur se transforme du tout au tout. Genovesi perd sa confiance initiale dans la rigueur pénale et fait sienne la théorie

18 *Ibid.*, Dialogo XIV, p. 205.

19 *Ibid.*

20 *Ibid.*

21 Voir *ibid*, Dialogo XXI, pp. 293-294.

22 *Ibid.*, Dialogo XIV, p. 205.

23 A. GENOVESI, *Della Diceosina o sia della filosofia del giusto e dell'onesto* [1767, 1771, 1777], Venise, Centro di Studi sull'Illuminismo europeo «G. Stiffoni», 2008.

de la prévention générale exposée dans *Dei delitti e delle pene*.

La nouveauté de cette théorie – qui recueille un héritage de Montesquieu – consiste en une réfutation de la relation de cause à effet entre la dureté de la législation criminelle et la diminution des actions criminelles. En lisant les *Lettres Persanes* et l'*Esprit des lois*, Beccaria comprend que «les peines plus ou moins cruelles ne font pas que l'on obéisse plus aux lois» et que «dans les pays où les châtiments sont modérés, on les craint comme dans ceux où ils sont tyranniques et affreux».[24] D'où vient alors la force intimidatrice des sanctions pénales? À cette question, incontournable pour tout théoricien de la fonction préventive des peines, Beccaria donne une réponse très claire: elle vient de la certitude et de la promptitude des réactions pénales contre ceux qui transgressent la loi. Or, dans la *Diceosina*, Genovesi énonce cette thèse sans hésitation: «Ce n'est pas tant la sévérité de la peine que sa certitude et sa promptitude […] qui redressent l'imagination des hommes».[25] À l'instar de Beccaria (qui à son tour avait suivi Montesquieu), il remarque que la férocité punitive perd sa vigueur dissuasive lorsque le peuple s'habitue au spectacle des supplices.[26] Avec ces arguments utilitaristes – néanmoins renforcés par des arguments jusnaturalistes –, il se lance vigoureusement dans la bataille pour la réduction de la violence répressive du pouvoir étatique et se rallie ainsi aux partisans de la modération pénale: hormis dans des cas extrêmes, affirme-t-il, «la douceur sera toujours plus profitable que la trop grande sévérité».[27]

Comment se pose alors, dans ce revirement de perspective et ce nouveau contexte polémique, le problème de la peine capitale? Il ne faut en effet pas oublier que le plaidoyer de Beccaria en faveur de la douceur des peines culmine dans la contestation de la légitimité, de la nécessité et de l'utilité de la peine de mort.[28] Or, le Genovesi des *Dialoghi morali* avait exalté la fonction sécuritaire de l'échafaud, seul en mesure

24 Voir Montesquieu, *Lettres persanes* [1721], dans *Œuvres complètes*, Paris, Gallimard, 2001, vol. I, lettre lxxx, p. 252.

25 Genovesi, *Della Diceosina*, ouvr. cité, livre I, chap. 19, § xxiii, p. 288.

26 Voir *ibid.*, I, 19, xi, p. 276.

27 *Ibid*, I, 19, xx, p. 286.

28 Voir Francioni, «Beccaria filosofo utilitarista», dans *Cesare Beccaria tra Milano e l'Europa*, ouvr. cité, pp. 69-87.

d'atteindre le but recherché, c'est-à-dire la prévention générale. Mais plus tard, conquis par la doctrine réformatrice de la modération pénale, le philosophe napolitain découvre et souligne à son tour les avantages sociaux des peines alternatives à la mort:

> «Je conviens moi aussi – écrit-il dans la *Diceosina* en tissant un dialogue idéal avec Beccaria – qu'il y a des peines non capitales qui instillent plus de peur et peuvent être plus profitables au public que les peines capitales. Certaines peines des lois romaines, obligeant à travailler dans les mines, dans les ports, dans les fabriques publiques, à servir sur les galères, […] sont […] parfois plus lourdes que le gibet, plus utiles à la société et n'engendrent pas de férocité dans les âmes des citoyens. […] Elles agissent sur la raison et, avec le temps, rendent les gens sages».[29]

Contrairement à Beccaria, Genovesi ne remet toutefois pas en cause le pouvoir souverain de punir de mort. Selon sa vision de la société politique, le fondement du droit pénal n'est pas le contrat social, mais la justice naturelle; or, selon sa vision de la justice naturelle, le châtiment extrême est parfaitement légitime. En dépit de ce postulat jusnaturaliste, Genovesi se rapproche pourtant de l'utilitarisme de Beccaria en partageant certains de ses arguments contre la peine capitale: 1) elle intimide moins que d'autres punitions; 2) elle ne dédommage pas la société; 3) elle corrompt les esprits en donnant un exemple de cruauté.[30]

Ce retentissement des idées de Beccaria dans la *Diceosina* donne la mesure de la force de persuasion exercée par son discours iconoclaste. Lorsque, dès le début des années 1750, Genovesi avait lu et apprécié l'*Esprit des lois*, ses convictions sécuritaires étaient restées intactes. À l'évidence, son virage idéologique est donc le fruit des réflexions suscitées en lui par *Des délits et des peines*, qu'il en vient à célébrer, dans la seconde édition de *De iure et officis*, comme un «opusculum pene aureum».[31] En

29 Genovesi, *Della Diceosina*, ouvr. cité, I, 19, xx, pp. 285-286.

30 Voir Ph. Audegean, *La Philosophie de Beccaria. Savoir punir, savoir écrire, savoir produire*, Paris, Vrin, 2010, pp. 152-167; D. Ippolito, «Beccaria, la pena di morte e la tentazione dell'abolizionismo», dans *Diritti e potere*, ouvr. cité, pp. 77-102.

31 A. Genovesi, *De jure et officiis ad usum tyronum* [1764], Naples, Stamperia Simoniana, 1767, vol. I, p. 124 n.

véhiculant dans la *Diceosina* le réformisme législatif et judiciaire de Beccaria, Genovesi inaugure à Naples les Lumières du pénal. Ses élèves, Filangieri et Pagano, se sont chargés d'en montrer toute la fécondité.

2. Le droit pénal comme système de garanties: Gaetano Filangieri et Mario Pagano

Pagano et Filangieri sont nés respectivement en 1748 et 1753. Ils s'imposent dans la République des Lettres au cours des années 1780: le premier avec ses *Saggi politici*[32] et ses *Considerazioni sulla procedura criminale*,[33] qui paraissent alors qu'il est déjà titulaire de la chaire de droit pénal de l'université de Naples,[34] le second avec sa monumentale *Scienza della legislazione*,[35] dont le troisième livre, intitulé «Des lois criminelles», forme un véritable traité de droit pénal.[36] Théoriciens des droits de l'homme et de l'État constitutionnel, ils retiennent de Montesquieu et de Beccaria que la législation criminelle revêt une importance politique cruciale, puisqu'elle apparaît même comme un critère décisif des sociétés civiles. Leur réflexion juridique et politique se fonde en effet sur l'idée que le rapport de chacun avec l'autorité et avec les autres dépend du fonctionnement des institutions pénales: liste des incriminations, peines encourues, règles de procédure. Pour protéger à la fois l'intégrité personnelle et la liberté individuelle, il faut donc réformer le droit de punir en veillant à ce que les individus soient protégés aussi bien des actions criminelles privées que des prévarications des pouvoirs publics.[37]

32 F.M. Pagano, *De' saggi politici. Del civile corso delle nazioni o sia de' principi, progressi e decadenza delle società* [1783-1785], Naples, Fridericiana Editrice Universitaria, 2000. De cet ouvrage a paru une seconde édition «augmentée et corrigée»: *Saggi politici. De' principi, progressi e decadenza delle società* [1791-1792], Naples, Vivarium, 1993.

33 F.M. Pagano, *Considerazioni sul processo criminale* [1787], Venise, Centro di Studi sull'Illuminismo europeo «G. Stiffoni», 2009.

34 Voir D. Ippolito, «Pagano, Francesco Mario», dans Birocchi *et al.*, *Dizionario biografico dei giuristi italiani*, ouvr. cité, vol. II, p. 1484-1486. L'activité didactique de Pagano est connue par deux ouvrages posthumes: les *Principj del codice penale* (publiés à Milan en 1803 et, sur la base d'un autre manuscrit, à Naples en 1806) et la *Logica de' probabili applicata a' giudizj criminali* (publiée à Milan en 1806 et la même année à Naples, sur la base d'un autre manuscrit, sous le titre: *Logica de' probabili per servire di teoria alle pruove nei Giudizi criminali*).

35 G. Filangieri, *La scienza della legislazione* [1780-1791], Venise, Centro di Studi sull'Illuminismo europeo «G. Stiffoni», 2003-2004.

36 Voir *ibid.*, livre III («Delle leggi criminali» [1783]), 1 («Della procedura») et 2 («Dei delitti e delle pene»).

37 Cette double fonction de la loi pénale est clairement explicitée par Pagano dans les premiers chapitres de

Chez Filangieri et Pagano, l'élaboration d'un nouveau paradigme pénal s'inscrit dans l'horizon d'une limitation du pouvoir. Il s'accompagne d'une critique radicale d'un système pénal confessionnel dans ses incriminations, vexatoire dans ses accusations, arbitraire dans ses jugements et féroce dans ses châtiments. Dans ce nouvel horizon, le champ des incriminations légitimes est circonscrit par les principes métalégislatifs de matérialité, de nocivité et de subjectivité qui, en définissant le délit comme fait matériel tangible, préjudiciable aux droits d'autrui et imputable à la responsabilité d'une personne, établissent les conditions justifiant une interdiction pénale. Sur le plan des sanctions, les critères de légitimité du système pénal sont à leur tour identifiés dans les principes de nécessité, de proportionnalité et d'humanité de la peine, qui interdisent les châtiments cruels et imposent une modulation de la sévérité des punitions sur l'échelle de gravité des crimes.[38]

L'héritage de Beccaria est ainsi pleinement capitalisé: Filangieri et Pagano revendiquent la décriminalisation des comportements inoffensifs – qui n'étaient sanctionnés que parce qu'ils étaient considérés comme contraires à la morale courante ou à la doctrine de la foi – et réclament un adoucissement des modalités punitives de

ses *Considerazioni sulla procedura criminale:* «[…] où les délits sont impunis il règne toujours une licence effrénée. Alors le citoyen […] y peut être impunément privé de ses droits, il n'y jouit pas de sa liberté, il n'y a pour lui ni sûreté ni tranquillité» (F.M. Pagano, *Considérations sur la procédure criminelle*, traduit de l'italien par A. de Hillerin, Strasbourg, Imprimerie ordinaire du Roi, 1789, chap. v, p. 26). D'autre part, «si, pour rechercher et punir les crimes, les mains du juge sont trop libres; s'il peut […] agir sans borne; si la loi fournit au zèle aveugle ou à la méchanceté le moyen d'attenter, sous le voile de la justice, aux droits du citoyen […], il n'y a plus de sûreté pour la liberté et l'innocence» (*ibid.*, chap. ii, pp. 14-15).

38 Sur la doctrine pénale de Filangieri et Pagano, voir E. Palombi, *Mario Pagano alle origini della scienza penalistica del secolo xix*, Naples, Giannini, 1979; E. Dezza, *Accusa e inquisizione. Dal diritto comune ai codici contemporanei*, Milan, Giuffrè, 1990, pp. 168-223; M. Boscarelli, «Riflessioni sul pensiero penalistico di Gaetano Filangieri», dans L. d'Alessandro (éd.), *Gaetano Filangieri e l'illuminismo europeo*, Naples, Guida, 1991, pp. 247-253; M.A. Cattaneo, «Alcuni problemi nella dottrina della pena di Gaetano Filangieri», *ibid.*, pp. 261-288; K. Seelmann, «Gaetano Filangieri e la proporzionalità fra reato e pena. Imputazione e prevenzione nella filosofia penale dell'illuminismo», *Materiali per una storia della cultura giuridica*, 2001, xxxi, 1, pp. 3-25; F. Berti, «Il garantismo penale di Gaetano Filangieri», *Archivio storico del Sannio*, 2006, 2, pp. 147-201; D. Ippolito, «El garantismo penal de un ilustrado italiano: Mario Pagano y la lección de Beccaria», *Doxa. Cuadernos de Filosofía del Derecho*, 2007, 30, pp. 525-542; «Pensamiento juridico ilustrado y proceso penal: la teoría de las pruebas judiciales en Gaetano Filangieri y Mario Pagano», *Jueces para la democracia*, 2008, 1, pp. 61-75; F. Berti, «Droit de punir et construction d'une citoyenneté vertueuse dans la philosophie de la peine de Filangieri », dans Delia et Radica (éd.), *Penser la peine à l'âge de Lumières*, *loc. cit.*, pp. 73-86.

l'État dans le cadre d'une refondation intégrale du droit pénal basée sur le principe de légalité. Laïcisation, humanisation et codification: dans leurs programmes législatifs, Filangieri et Pagano suivent les lignes directrices de la réforme pénale prônée dans *Des délits et des peines*. Ils les suivent, mais les développent aussi, en y ajoutant la contribution originale de leurs analyses théoriques et de leurs propositions concrètes.

L'apport des deux philosophes napolitains à la doctrine juridique des Lumières est particulièrement important dans le domaine de la réflexion sur le procès pénal, auquel ils reconnaissent une fonction capitale dans l'ordre juridique:

> «La liberté civile – écrit Pagano – est maintenue par la législation criminelle, et par les jugements publics, qui sont l'objet principal et le plus intéressant de cette dernière. La procédure criminelle, en réglant la forme des jugements publics, devient donc la sauvegarde de la liberté, le rempart qui la défend contre la puissance, l'indice certain de la félicité nationale».[39]

Elle n'est telle, cependant, que dans la mesure où ses normes et ses institutions lui permettent d'atteindre son but, qui consiste à «soustraire – pour reprendre les termes de Filangieri –, autant qu'il est possible, l'innocent à l'effroi, le coupable à l'espoir, le juge à l'empire de sa volonté».[40] Pour Pagano et Filangieri, la tâche la plus urgente des juristes-philosophes consiste dans l'élaboration d'un projet systématique et détaillé de procédure pénale reposant sur les garanties individuelles:

> «Vainement – écrit Filangieri – on s'est élevé, d'un bout de l'Europe à l'autre, contre l'irrégularité de la procédure criminelle; ce murmure universel n'a pas encore fait naître une nouvelle méthode que l'on puisse substituer à l'ancienne. La philosophie a attaqué quelques-uns des abus les plus dangereux de ce système; mais elle n'a pas encore osé le combattre dans toutes ses parties; ainsi, presque tous ses efforts ont été inutiles. […] Renonçons donc à ces réclamations partielles; parcourons le système de la procédure

39 PAGANO, *Considérations sur la procédure criminelle*, ouvr. cité., «Introduction», pp. 4-5.

40 G. FILANGIERI, *La Science de la législation*, traduit de l'italien par J.-A. Gauvain Gallois, Paris, Dufart, 1799, III, 1, I, pp. 7-8.

> pénale dans toute son étendue. […] En montrant à l'homme honnête […] le fer qui est suspendu sur sa tête, offrons-lui aussi le bouclier impénétrable qui doit l'en garantir. Au détail des maux, joignons le tableau des remèdes».[41]

Ce jugement, qui souligne le caractère inabouti de la doctrine réformatrice des Lumières, est sans doute peu généreux, mais il n'est pas dépourvu de fondement. En effet, aussi bien Beccaria que Montesquieu avaient réfléchi sur le droit pénal matériel plus que sur la procédure. Alors que leurs propositions concernant la liste des incriminations et les peines encourues étaient claires, précises, concrètes, leurs thèses sur le jugement pénal étaient moins élaborées. Bien que, dans les *Delitti*, la critique de la procédure pénale d'Ancien Régime soit nette, bien que Beccaria énonce certains principes libéraux concernant la détention préventive, les pouvoirs du juge et les règles probatoires, ces quelques indications sont loin de composer cette «nouvelle méthode» procédurale dont parle Filangieri. Il ne suffit certainement pas d'appeler de ses vœux le procès «*informatif* […] employé par le despotisme asiatique […] dans les cas tranquilles et indifférents»[42] pour offrir un modèle de réforme judiciaire.

Le système de garanties agencé par Filangieri et Pagano s'inspire des deux principaux paradigmes historiques du procès accusatoire: la Rome républicaine et l'Angleterre contemporaine. Dans le sillage de Thomasius, ils exploitent dans toute sa potentialité polémique la grande dichotomie *inquisitio/accusatio*, en disqualifiant chaque composante de la procédure inquisitoire comme incompatible avec la liberté civile et en faisant l'éloge des divers éléments constitutifs du modèle accusatoire comme autant d'instruments de protection de l'innocence et de garantie de la vérité.

Ainsi, à la procédure pénale en vigueur, fondée sur la détention préventive inconditionnelle et illimitée, sur le secret de la procédure et sur la forme écrite de l'instruction probatoire, sur l'infériorité de l'accusé par rapport à l'accusateur, sur la confusion entre les fonctions de procureur et de juge, il opposent un paradigme de procès qui, antithétique dans ses traits fondamentaux, repose sur la présomption

41 *Ibid.*, pp. 5-6.

42 C. Beccaria (introd., trad. et notes Ph. Audegean, texte italien G. Francioni), *Des délits et des peines. Dei delitti e delle pene* [1764-1766], Lyon, ENS Éditions, 2009, § xvii, p. 203.

d'innocence et la liberté personnelle de l'accusé, sur la publicité et l'oralité dans la formation des preuves, sur la parité et le contradictoire entre les parties, sur l'impartialité du juge et la motivation de la sentence. Cet ensemble de garanties procédurales et institutionnelles concourent à renforcer le caractère cognitif de la juridiction pénale en minimisant la dimension discrétionnaire du pouvoir de punir.[43]

3. Les voies du réformisme pénal: les Lumières au pluriel

C'est précisément à propos de la limitation de l'arbitraire judiciaire qu'on peut relever une première différence significative entre la doctrine de Beccaria et celles de Filangieri et Pagano. Cette différence concerne l'un des aspects les plus controversés de la procédure pénale: comment établir la vérité des faits? Au-delà des ambiguïtés présentes dans les *Delitti* à propos des règles probatoires, Beccaria se dit convaincu que «pour s'assurer d'un fait», le «simple et ordinaire bon sens» d'un juré est suffisant.[44] Hostile à la *scientia juris* des magistrats, il se montre confiant dans l'«ignorance qui juge par sentiment»[45] et ouvert aux principes de la libre évaluation des preuves et de l'intime conviction. Or, selon Filangieri et Pagano, on ne peut au contraire éviter les dérives subjectivistes qu'en réglementant l'activité judicaire d'établissement des faits. Néanmoins, il faut certes en finir avec le système des preuves légales élaboré par la doctrine criminaliste, qui déterminait par avance la valeur spécifique de chaque élément probatoire. Si en effet la liberté de condamner sur la base du simple bon sens met l'innocence en danger, l'obligation de condamner sur la base de l'aveu du prévenu ou de deux témoignages concordants est une offense à la «*logica dei probabili*»,[46] qui enseigne à distinguer les connaissances empiriques des sciences mathématiques, l'induction de la déduction, la certitude morale de la vérité analytique.[47]

43 Voir Ferrajoli, *Diritto e ragione*, ouvr. cité, pp. 546-718.

44 Beccaria (introd., trad. et notes Ph. Audegean, texte italien G. Francioni), *Des délits et des peines. Dei delitti e delle pene*, ouvr. cité, § xiv, p. 185.

45 *Ibid.*

46 Voir *supra*, note 35.

47 Voir Filangieri, *La Science de la législation*, ouvr. cité, III, 1, xiii, pp. 183-189; F.M. Pagano, *Logica de' probabili per servire di teoria alle pruove nei Giudizi criminali*, dans *Giustizia criminale e libertà civile*, Rome, Editori Riuniti, 2000, chap. I, pp. 123-130.

En guise d'alternative à ces deux paradigmes insatisfaisants, Filangieri propose de «combiner la certitude morale du juge avec la règle prescrite par le législateur».[48] Le jugement doit ainsi découler de la combinaison de ces deux critères: s'ils sont tous deux présents, le prévenu sera condamné, s'ils sont tous deux absents, il sera acquitté, si seul l'un d'entre eux est présent, le juge prononcera un *non liquet*. L'auteur explique ainsi la raison d'être de cette proposition réformatrice: «La loi enchaînerait la volonté du juge, et la volonté du juge remédierait à l'imperfection de la loi. L'une et l'autre auraient assez de force par elles-mêmes pour protéger l'innocence; mais l'une et l'autre n'en auraient pas assez pour l'opprimer».[49] Lorsque, en 1799, Pagano devient président de la Commission législative de la République napolitaine, ce système probatoire projeté par Filangieri est adopté dans la «Loi sur l'abolition de la torture et sur les preuves dans le procès pénal».[50]

Un deuxième élément qui distingue les positions doctrinales des Lumières napolitaines et celles de Beccaria concerne la mesure des peines. La lourdeur de la peine doit certes être proportionnelle à la gravité du crime. Mais comment mesurer cette dernière? C'est sur cette question que les positions divergent. Selon Beccaria, la gravité des délits n'est déterminée que par le seul dommage causé à la société. Or, selon Filangieri et Pagano, il ne faut pas seulement tenir compte de la donnée objective du dommage, mais aussi de l'élément subjectif du crime, c'est-à-dire la volonté de son auteur. Si la modalité de la peine doit être déterminée par la qualité du délit, la quantité de la peine doit ainsi être déterminée par l'intention du criminel: aussi s'attachent-ils à distinguer divers degrés de faute et de dol.[51] Alors que Beccaria considérait la prise en compte de la *mens rea* dans la quantification de la peine comme contradictoire avec le principe de légalité, sauf à former, comme il l'écrit en argumentant par l'absurde, «un code particulier pour chaque citoyen»,[52] Filangieri préconise au contraire une loi pénale

48 Filangieri, *La Science de la législation*, ouvr. cité, III, 1, xiv, p. 191.

49 *Ibid.*, p. 198.

50 Voir M. Battaglini et A. Placanica (éd.), *Leggi, atti, proclami ed altri documenti della Repubblica Napoletana 1798-1799*, Cava de' Tirreni, Di Mauro, 2000, vol. 2, pp. 172-173.

51 Voir Filangieri, *La Science de la législation*, ouvr. cité, III, 2, xiii-xiv, p. 156-183; Pagano, *Principj del codice penale*, dans *Giustizia criminale e libertà civile*, ouvr. cité, chap. I-X, pp. 61-86.

52 Beccaria (introd., trad. et notes Ph. Audegean, texte italien G. Francioni), *Des délits et des peines. Dei delitti e delle pene*, ouvr. cité, § vii, p. 165.

établissant pour chaque type de délit une échelle de peines en fonction des différents niveaux de culpabilité («faute très petite», «faute moyenne», «faute très grande», «dol très petit», «dol moyen», «dol très grand»).[53] Cette conception, partagée par Pagano, admet dès lors une certaine marge de discrétion dans la juridiction pénale: la peine en vient en effet à être déterminée par la connotation judiciaire du crime dans sa singularité.

La troisième et dernière question que je souhaite aborder concerne la distance entre la doctrine de l'interprétation de Beccaria et celle de Genovesi.[54] Dans la *Diceosina* ainsi que dans les *Dialoghi morali*, le plaidoyer en faveur de la souveraineté de la loi et la certitude du droit s'accompagne d'une polémique contre l'autorité des *doctores iuris* et l'arbitraire des juges. Dans l'un et l'autre ouvrage, en outre, Beccaria est implicitement cité à propos du jugement pénal comme raisonnement syllogistique.[55] Toutefois, Genovesi refuse la conception beccarienne du jugement pénal comme application mécanique de la loi. Il sait en effet que la norme formant la majeure du syllogisme judiciaire ne peut être que le produit de l'interprétation de la loi:

> «Voilà – écrit-il dans la *Diceosina* – une question […] que j'estime importante: le juge doit-il interpréter la loi [ou] l'appliquer littéralement ? Je réponds qu'il est impossible qu'un juge n'interprète point une loi. Toute loi est générale et concerne une infinité de cas semblables. Or, il est très évident que deux cas du même genre, quoique apparemment semblables, peuvent cependant être différents en raison d'une multiplicité de circonstances».[56]

Pour appliquer correctement une loi, il faut donc l'interpréter. À l'affirmation de Beccaria selon laquelle «il n'est rien de plus dangereux que l'axiome commun selon lequel il faut consulter l'esprit des lois»,[57] le philosophe napolitain – sous la masque du pédagogue Dicearco – objecte que le juge doit «avoir en vue le but plus que les mots de

53 Voir Filangieri, *La Science de la législation*, ouvr. cité, III, 2, xiii, p. 162, xiv, p. 181.

54 Voir Ph. Audegean, «Codification et interprétation. Le § iv des *Délits et des peines* de Beccaria», *L'Irascible. Revue de l'Institut Rhône-Alpin de Sciences Criminelles*, 2011, 1, pp. 15-31.

55 Voir Genovesi, *Della Diceosina*, ouvr. cité, I, 20, iv, p. 303; *Dialoghi morali*, ouvr. cité, Dialogo vii, p. 123.

56 Genovesi, *Della Diceosina*, ouvr. cité, I, 20, xiv, p. 311.

57 Beccaria (introd., trad. et notes Ph. Audegean, texte italien G. Francioni), *Des délits et des peines. Dei delitti e delle pene*, ouvr. cité, § iv, p. 153.

la loi».[58] Se borner à la lettre d'un texte normatif peut en effet conduire à des conclusions absurdes. Pour éclaircir sa pensée, Genovesi fournit deux exemple: 1) interprété à la lettre, le précepte biblique du jour du Seigneur comme jour de repos absolu devrait impliquer l'interdiction de lutter pour protéger sa propre vie; mais, comme l'enseigne Jésus Christ, c'est le samedi qui est fait pour l'homme et non l'homme pour le samedi; 2) de même, la loi anglaise qui punit la bigamie ne devrait pas concerner les quadrigames; or, la défense du mariage monogamique exige que les juges punissent tous ceux qui, déjà officiellement mariés avec une femme, se marient à nouveau.[59] À la lumière de ces observations, Genovesi affirme la nécessité et la légitimité de l'interprétation des lois, aussi bien de l'«interprétation restrictive» que de l'«interprétation extensive».[60]

Les positions des philosophes napolitains divergent également de celles de Beccaria sur d'autres questions, comme celle de la peine de mort.[61] Si, dans le cadre de cet article, j'ai choisi de m'arrêter sur la théorie des preuves, la théorie de la mesure des peines et la théorie de l'interprétation, c'est simplement parce que la doctrine pénale des Lumières a souvent été identifiée avec les thèses exposées dans *Des délits et des peines*. Or, comme j'ai essayé de le montrer, les Lumières pénales doivent elles aussi être déclinées au pluriel.[62]

58 Genovesi, *Dialoghi morali*, ouvr. cité, Dialogo vii, p. 131.

59 Philippe Audegean me rappelle que Pietro Verri discute lui aussi, à propos de l'interprétation juridique, du cas de la loi anglaise sur la bigamie et de son application judiciaire. Contrairement à Genovesi, toutefois, il prône une stricte observation de la lettre de la loi de la part du juge (voir P. Verri, «Sulla interpretazione delle leggi» [1766], dans *Il Caffè 1764-1766*, G. Francioni et S. Romagnoli (éd.), Turin, Bollati Boringhieri, 1993, pp. 695-704).

60 Genovesi, *Dialoghi morali*, ouvr. cité, Dialogo vii, pp. 130-131. Que la punition du quadrigame soit le résultat d'une interprétation extensive de la loi contre la bigamie est en réalité très discutable: un quadrigame ne cesse pas d'être également un bigame.

61 Voir l'étude subtile d'A. Tuccillo, «Droit de punir et légitimation de la peine de mort dans la *Science de la législation* de Filangieri», dans L. Delia et F. Hoarau (éd.), *La peine de mort*, *Corpus. Revue de philosophie*, nº 62, 2012, pp. 231-243.

62 J'ai tenté de montrer que la doctrine pénale des Lumières ne saurait être aplatie sur les seules positions de Beccaria dans D. Ippolito, «La philosophie pénale des Lumières entre utilitarisme et rétributivisme», dans Delia et Radica (éd.), *Penser la peine à l'âge de Lumières*, loc. cit., pp. 21-34.

GIULIO BARTOLINI AND FRANCESCO FERRACCI*

INTERPRETERS IN CONFLICT ZONES: AN INTERNATIONAL LEGAL ASSESSMENT

ABSTRACT. *This paper analyses the role of interpreters operating in conflict scenarios, with a special emphasis placed on professional and legal issues relating to their involvement in military operations. Indeed, no specific attention has been devoted by legal scholars to such individuals and only a few attempts have been made to raise awareness on such issues. However, this paper aims at demonstrating how such interpreters can be fully accommodated within relevant existing legal provisions by examining their legal status in conflict and post-conflict situations. Furthermore, the possibility for interpreters to be summoned before international criminal courts and be obliged to give evidence on activities connected with the performance of their duties will also be discussed. This paper will finally focus on the situation in Afghanistan during the years of the conflict as a test-case for legal challenges raised for such individuals once foreign actors are withdrawn, also in order to advocate for special protection programmes to be provided by involved States in order to comply with their duties of care toward local personnel involved in such risky functions.*

CONTENT. 1. Introduction – 2. References to the activities of interpreters in international humanitarian law – 3. The legal status of interpreters as related to the conduct of hostilities – 4. The legal status of interpreters in case of capture – 5. The case of interpreters involved in post-conflict situations – 6. The possible obligation interpreters may incur to give evidence before international criminal courts – 7. Case Study: Afghanistan and USA – 7.1 Special Immigrant Visas Programs – 8. Conclusions

* Giulio Bartolini is Associate Professor of International Law, Department of Law, Roma Tre University, and author of paragraphs 2-6. Francesco Ferracci, Master thesis in conference interpreting (University of International Studies in Rome) is author of paragraph 7. The introduction and conclusions are co-authored.

1. Introduction

Armed conflicts raise multiple legal challenges and have been the object of extensive legal analysis, yet still some issues remain undermined and the voice of specific categories of victims in particular contexts is unheard. A prominent example is provided by the fate of interpreters and linguistic mediators contracted to work in conflict and post-conflict scenarios. Such personnel provide critical functions for very different categories of foreign actors such as (a) armed forces deployed in the area; (b) journalists operating in conflict areas to report on events and alert international public opinion to the critical situation existing in the area; (c) international organisations on the ground providing assistance to the civilian population, (d) non-governmental humanitarian organisations performing similar tasks.

However, the performance of such activities in high-risk environments and their links with foreign actors has exposed several of them to direct attacks and persecution also in the aftermath of a conflict, once foreign actors leave the concerned countries. Data emphasise a continuous trend of targeted violence against such individuals which, also from a quantitative point of view, can be equated to those involving media professionals involved in armed conflict situations.[1] For instance, according to data provided by Members of the U.S. Congress, more than 300 interpreters serving the U.S. Administration have been killed in Iraq during the period 2003-2008[2] and severe casualties have also been recorded in Afghanistan,[3] as increasingly emphasised by international media,[4] even if no official data exist on casualties, especially for interpreters

1 See, for instance, the data available through the website of the International Association of Conference Interpreters, which has created a working group on interpreters in conflict areas <https://aiic.net/node/2688/interpreting-in-conflict-zones/lang/1>.

2 See the 2008 letter of several Members of Congress to the U.S. Secretary of Defence, Robert M. Gates <http://cponefoundation.org/wp-content/themes/cponefoundation/images/Wyden_Letter_to_Gates_-_Mask_Ban_for_ Iraqi_interpreters_final_signed.36321323.pdf>.

3 On the events concerning Afghanistan see, for instance R. NORDLAND, *Taliban Say They Killed 4 Afghan Interpreters*, in *The New York Times*, May 15, 2010 and T. BIRTLEY, *Hunted by the Taliban: Afghan interpreters renew UK asylum plea*, in *Aljazeera*, February 12, 2019.

4 See M. DUNCAN and A. AEDY, *Frozen Out: The US Interpreters Abandoned on Europe's Border*, in *The Guardian*, 12 February 2018 at <https://www.theguardian.com/world/video/2018/feb/12/frozen-out-the-us-interpreters-abandoned-on-europes-border>.

who were killed after their assignments ended or after troop withdrawal. It is thus difficult to determine the exact number of interpreters who were killed, but the International Refugee Assistance Project (IRAP) estimated that in 2014 one Afghan interpreter was killed every 36 hours due to his American affiliation.[5] Nevertheless, the United States are not the only country that relied on local interpreters to conduct military operations in non-English speaking and foreign countries and accused of failing to provide adequate protection to them, as witnessed by the several letters of appeal that Red T, a non-profit organisation whose mission is to protect translators and interpreters in high-risk settings, sent to the relevant authorities, such as the Australian Prime Minister on behalf of a group of Iraqi interpreters who worked for the Australian Defence Force and left behind in their country[6] or to Chancellor Merkel for a group of Afghan interpreters who worked for the *Bundeswehr*,[7] but also to the Heads of State and Government of France, Italy or Canada.

Such issues are thus able to prompt a series of challenges.

First, from a professional perspective, several analyses have been devoted to such scenarios able to raise multiple challenges in terms of standards and ethics of the language profession. Working in conflict situations requires interpreters to confront their personal, political and professional beliefs and it should be borne in mind that not all interpreters working in such situations are professionals with a proper experience, a code of conduct and adequate professional skills and training which may be essential when conducting military operations.[8] Armed conflicts entail a set of moral and ethical challenges and interpreters are asked to take decisions that extend beyond the translation of a written text or the mediation between the military personnel and the local

5 See A. Horton, *Former interpreters for U.S. troops wait out the State Department – and the Taliban – as visas decline*, in *The Washington Post*, January 24, 2019.

6 See Interpreters in areas of conflict, *Open letter to P.M. Morrison*, February 28, 2020, aiic.net.

7 For more details about local interpreters working for German troops, see Interpreters in areas of conflict, *Open letter to Chancellor Angela Merkel*, July 10, 2019, aiic.net, and T.C. Walther, *Former Afghan Bundeswehr employees: Unsafe at home, insecure in Germany*, in *Deutsche Welle*, December 13, 2019.

8 For an exhaustive historical overview on interpreting in conflict zones throughout history, see L. Ruiz Rosendo and C. Persaud, "Interpreters and Interpreting in Conflict Zones and Scenarios: A Historical Perspective", in *Linguistica Antverpiensia, New Series – Themes in Translation Studies*, 2016, 15: 1-35.

population, as they often need to commit to the purpose of the conflict. This is particularly relevant for locally recruited interpreters who frequently come face to face with nationals whose human rights have been violated, witness poor public and humanitarian services and security for compatriots, face crime and death as if they were combatants and it thus can be difficult for them to stick to their commitment or to be clear about to which party they owe their allegiance.[9] Their personal moral dilemma should be taken into account: on the one hand, they are usually seen as siding with international troops as they often wear uniforms, carry weapons, participate in raids and combat foot patrols and, above all, they depend on their employment relationship for their livelihood. On the other hand, during the period of their assignment, they are asked to ignore their allegiance to their own local community, to which they would return once the conflict is over. This conflict scenario inevitably has an impact on their work, their role, their experience of the war and, of course, on the way other parties see them in terms of interaction with their compatriots and the other members of the community in which they operate. This implies that interpreters who belong to the minority group of the local community face issues of positionality, accountability, neutrality and ethics and are vulnerable to pressure from both sides: on the one hand, from the less powerful party, expecting the interpreter to empathize with them and act as their advocate; on the other hand, from the military troops, who may be concerned that the interpreter's impartiality is compromised by proximity to their compatriots and hence tend to monitor his/her behaviour and linguistic output.

The issue of neutrality of wartime interpreters has been widely debated among scholars, with a particular emphasis on the conflicts in the Middle East and on the Bosnian war. Considered a characteristic and a virtue of the interpreting profession, neutrality is always included in the ethical guidelines for interpreters, but we already discussed how difficult it could be for unqualified civilian interpreters to be impartial. The practice of translation in the Balkan wars during the 1990s is a clear example of

9 For an in-depth analysis on the role of interpreters and translators in conflict zones, please see L. RUIZ ROSENDO and M. BAREA MUÑOZ, "Towards a typology of interpreters in war-related scenarios in the Middle East", in *Translation Spaces* 6:2, 2017, pp. 182-208 and M. BAKER, "Interpreters and Translators in the War Zone", in *The Translator*, 2010, 16:2, pp. 197-222.

how such prerequisite can be contravened when interpreters are personally related to one of the parties in conflict.[10]

In addition to the moral and ethics issues interpreters have to deal with, it is worthwhile to consider the practical difficulties inevitably linked to their work in war zones: the environment in which they operate, the different dialects used by the various social groups of the same local community, the technical language of the army (acronyms, proper names, tactics, etc.), the lack of materials for preparation and, last but not least, the unforeseeable nature of their daily routine.

Moreover, they are required to act not only as linguistic but also as cultural mediators, facilitating the communication between two or more parties belonging to different cultures and, thanks to the knowledge of the cultural context, preventing errors from arising and avoiding unsatisfactory results for one or all of the parties involved in a dialogue due to ignorance of the local traditions. In such contexts, the correct interpretation of body language and of other non-verbal communications plays a key role.[11]

Thus, interpreting in a conflict can be a traumatic and stressful experience, particularly for unprepared and unqualified interpreters.

Second, legal issues could also be raised, as explored in this paper. Indeed, contrariwise to other vulnerable categories in armed conflicts, such as journalists,[12] no

10 Among the most relevant studies on the neutrality of conflict interpreters, see P. SNELLMAN, "Constraints on and dimensions of military interpreter neutrality", *Linguistica Antverpiensia, New Series: Themes in Translation Studies*, 2016, 15, pp. 60-281. For a detailed overview on the role of interpreters and the issue of their neutrality during the Yugoslav Wars, see M. DRAGOVIC-DROUET, "The Practice of Translation and Interpreting During the Conflicts in the Former Yugoslavia (1991-1999)", in M. SALAMA-CARR, *Translating and Interpreting Conflict*, 2007, Amsterdam: Rodopi, pp. 29-40.

11 For further information on the risks and challenges faced by interpreters in conflict zones, see M. TĂLPAȘ, "Words cut two ways: An overview of the situation of Afghan interpreters at the beginning of the 21st century", in *Linguistica Antverpiensia*, *New Series: Themes in Translation Studies*, 2016, 15, pp. 241-259, and M. Salama-Carr (ed.), *Translating and Interpreting Conflict*, 2007, Rodopi.

12 On this subject see, among others: L. GROSSMAN, All the News that's Worth the Risk: Improving Protection for Freelance Journalists in War Zones: *Boston College International and Comparative Law review*, 2017, p. 141; R. GEISS, *The Protection of Journalists in Armed Conflicts*, in *Germ. YB Int. Law*, 2008, p. 289 *et seq.*; H.P. GASSER, *The Journalist's Right to Information in Time of War and on Dangerous Missions*, in *Yearbook of International Humanitarian Law*, 2003, p. 366 *et seq.* See, moreover, reports of the *Institut de droit international* on «The International Status, Rights and Duties of Duly Accredited Journalists in Times of Armed Conflict» (*e.g.*, *Annuaire de l'Institut de droit international*, vol. 73, 2009, p. 451 *et seq.*).

specific attention has been devoted to this subject by scholars and, similarly, this topic cannot be qualified as a prominent one in current institutional or humanitarian debates regardless of attempts by transnational professional organisations to shed light on such neglected issues in light of the impressive data concerning losses among interpreters and linguistic mediators in recent armed conflicts.

For instance, in the framework of international organisations such as the Council of Europe[13] or the European Parliament,[14] only few attempts have been made to raise the attention of the International Community concerning these events. Such attempts aim to advocate for a better protection for individuals involved in interpreting activities in conflict scenarios, particularly with regard to their protection once foreign actors are withdrawn, taking into account the fundamental role of these individuals for international actors operating in such contexts and, in general terms, the possibility to link this issue to emerging and strictly-related legal concepts such as the duty of care.[15]

The lack of attention devoted to interpreters acting in conflict zones does not, however, mean that they are relegated to a kind of legal vacuum. This paper will in fact show that they can be fully accommodated within relevant existing legal provisions and notions, also singling out the possible problem areas their activities raise for IHL (see paras. 3-4) and, in post-conflict situations, for international law (see para. 5). Moreover, we will focus on the possible legal obligation for interpreters to give evidence before international criminal tribunals concerning information they may have acquired during their activities (see para. 6). Furthermore, this paper will use the situation in Afghanistan, examining the case study of Afghan civilian interpreters who worked for the United States during the conflict and the scarce protections offered to them, as a test-case for legal challenges raised for such individuals once foreign actors are withdrawn

13 Council of Europe, Parliamentary Assembly, Written Declaration No. 442, *We Should Protect Interpreters in Conflict Areas*, April 29, 2010, requesting Member States to provide better protection for interpreters during and following conflicts. The text has been signed by more than 40 Parliamentarians, some of whom have also proposed the adoption of a resolution on this subject by the Assembly.

14 L. FITCHETT, *Hearing on Interpreters in Conflict Zones in the European Parliament*, February 19, 2018. Accessed June 5, 2020. <http://aiic.net/p/8522>.

15 See in this regard A. de Guttry, M. Frulli, E. Greppi, C. Macchi (eds.), *The Duty of Care of International Organizations Towards Their Civilian Personnel. Legal Obligations and Implementation Challenges*, The Hague, 2018.

(see para. 7). In the conclusions we will discuss the possible need to undertake special initiatives to improve the currently provided safeguards.

2. References to the activities of interpreters in international humanitarian law

Firstly, it is important to mention that the provisions of IHL do recognise the usefulness of interpreters as persons required for the proper functioning of a number of legal safeguards, as provided by the references made to the presence of an interpreter, sometimes further qualified as "competent" or "qualified," found in the Third and Fourth 1949 Geneva Conventions.

Specifically, Arts. 96[16] and 105[17] of the Third GC outline the right of prisoners of war who are involved in disciplinary or criminal proceedings held by the Detaining Power to avail themselves of the services of an interpreter during the course of such proceedings. Similar provisions are to be found in the Fourth GC, Arts. 72[18] and 123,[19] regarding the protection of civilians detained by another State, in situations of military occupation or internment, who have criminal or disciplinary procedures brought against them. These provisions thus seek to ensure the right to a fair trial for persons protected by IHL. Furthermore, the crucial importance of this right has been recognised by the ICRC's study on customary IHL which, under *Rule* 100,[20] specifies the customary nature, applicable in both international and non-international armed conflicts, of the

16 Article 96 GC III: «… Before any disciplinary award is pronounced, the accused… shall be permitted… to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter».

17 Article 105 GC III: «The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter».

18 Article 72 GC IV: «… Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement».

19 Article 123 GC IV: «… Before any disciplinary punishment is awarded, the accused internee… shall be permitted… to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter».

20 See J. Henckaerts-L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, Oxford, 2005, p. 352, «Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees». Among these guarantees we can find the "Assistance of an interpreter" (*ibidem*, pp. 365-366), with references to human rights treaties.

duty to provide an interpreter to persons who may be involved in criminal or disciplinary procedures, and in doing so also refers to similar provisions which have developed over time within human rights treaties regarding proceedings against foreign nationals.[21]

It is also worth pointing out that such interpretation services, in view of their clear importance in ensuring the overriding right to defence, are given a special qualification. As specified by the Commentary to Article 105 of the Third GC and reiterated in the other provisions referred to: «The right of an accused prisoner of war to have the services of a competent interpreter "if he deems necessary" automatically results from the rights of defence if the language currently used in the detaining country is unfamiliar or unknown to the prisoner of war. In this connection, it should be noted that it is for the prisoner himself to judge whether he needs an interpreter. The word "competent" denotes an interpreter who not only knows the two necessary languages – that of the prisoner of war and that of the detaining country – but also is familiar with legal terminology and accustomed to acting as an interpreter during judicial proceedings. This interpreter must be supplied by the Detaining Power; if the prisoner of war prefers to have the services of one of his fellow-prisoners with the necessary qualifications, he may do so, provided that the person appointed also enjoys the confidence of the court».[22]

As noted in the Commentary, this right can only be said to be fulfilled if the person entrusted with providing the service has the necessary qualifications to do so. These qualifications also include familiarity with legal terminology and being accustomed to acting as an interpreter in legal proceedings. An interpreter so defined must be provided by the Detaining Power or, alternatively, a fellow prisoner may be chosen, for obvious reasons of confidence. However, even in the latter instance, the condition that the interpreter be "competent" must in any case be met, which confirms that the standard established by the Convention is particularly high.

21 On human rights provisions providing for the right to the assistance of an interpreter in criminal proceedings, see S. TRESCHEL, *Human Rights in Criminal Proceedings*, *Coll. Courses Ac. Eur. Law*, Oxford, 2005, pp. 327-339.

22 J. Pictet (ed.). *The Geneva Conventions of 12 August 1949: Commentary*, vol. III, Geneva, 1960, p. 487.

Finally, the provisions of the Geneva Conventions also envisage the use of interpreters to assist a Protecting Power. Also in this case Article 126[23] of the Third GC and Article 143[24] of the Fourth GC provide that members of delegations of the Protecting Power may avail themselves of interpreters in their monitoring activities, which may for example include visits to prisoners of war camps or internment facilities. In such cases, however, the use of interpreters is considered to be a last resort, as expressed in the Commentary.[25] The reason for the recommendation not to use interpreters is due to the need for there to be direct contact, without any mediation interposed between the members of the international delegation and the protected individuals, so as to avoid any fear on the part of the interviewees that the confidential nature of the information they provide might be breached. Therefore, although the Detaining Powers have the obligation to provide such interpreters, the Commentary is clear in indicating a preference for the use of members of the international delegation itself or individuals provided by the ICRC, also in order to prevent interpreters from being seen as potential informers of the Detaining Power.

Thus, by scrutinising these specific provisions, we have already been able to bring to light two aspects which are apparently central to the debate on the role of interpreters in armed conflicts. One is the need to ensure the technical reliability of the services provided by interpreters, in view of the requirement that the persons used should have qualified linguistic skills and, in particular, a knowledge of legal terminology. The other is the need embodied in these provisions to address the possibility that interpreters may act in an equivocal manner, such as to favour one of the parties to a conflict, and the further possibility that they may make use of their position as linguistic mediators for ulterior purposes, such as reporting any negative opinions expressed by prisoners and internees regarding the Detaining Power.

23 Article 126 GC III: «Representatives or delegates of the Protecting Powers… shall be able to interview the prisoners… without witnesses, either personally or through an interpreter».

24 Article 143 GC IV: «Representatives or delegates of the Protecting Powers shall have… access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter».

25 See Pictet (ed.). *The Geneva Conventions*, cit., p. 609.

Since these are the only provisions under IHL that directly refer to the services of interpreters in conflict situations, we must now seek to outline their legal status: (a) in the conduct of hostilities; and (b) with regard to their situation if captured.

3. The legal status of interpreters as related to the conduct of hostilities

Concerning the conduct of hostilities, the main point to be clarified is the legal status of persons acting as interpreters, both when they are acting on behalf of one of the parties to the conflict and when they are assisting agencies or individuals which are not parties to the conflict, such as international organisations, journalists or NGOs. In the first case, it needs to be established whether interpreters can be considered as combatants or civilians. In this context, it is also necessary to distinguish between international and non-international armed conflicts.

In international armed conflicts interpreters are usually excluded from the category of combatants, apart from the marginal case in which they are members of the armed forces of a State, the so-called military interpreters. This possibility is not a remote one, as several armed forces have been enrolling members specialised in this activity for centuries. For instance in 1803, in view of the planned invasion of England, Napoleon created the military corps of "Guides interprètes", *i.e.*, commissioned officers and soldiers responsible for translation services operating among the so-called "Army of England".[26] A similar military unit, *i.e.*, the Corps of Interpreters of the African Army, was established in 1830 to facilitate operations in Algeria, and included former Mamelouks of Napoleon's Imperial Guard.[27] Similarly contemporary armies rely on military interpreters for their activities. Equally, in non-international armed conflicts, in order to qualify certain members of non-State organised armed groups as distinct from the category of civilians and therefore as targets of attack on an ongoing basis it must be ascertained that the individual shall have a "continuous combat function".[28] It would however be hard to define the activity of interpreters as such, in view of their

26 J.R. Elting, *Swords around a Throne. Napoleon's grande armée*, New York, 1988, pp. 93-94.

27 C. Féraud, *Les interprètes de l'armée d'Afrique*, Alger, 1876.

28 ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009, pp. 27-36.

non-involvement in a proper combat function, as discussed below.

Therefore interpreters, even when acting on behalf of a party to the conflict, are usually considered civilians and thus protected against direct attacks. The only possibility may arise in cases in which an interpreter carries out activities which could be characterised as a "direct participation in hostilities", as he would lose his immunity from direct attack. Taking into account the ICRC guidelines on this subject, which identifies criteria to classify a number of activities under this heading,[29] it would seem difficult to characterise the role of interpreters, which involves direct contact between two parties for mediation and to enable linguistic communication, as direct participation in hostilities.

On the contrary, a different case could be made with regard to activities more closely related to tactical intelligence functions, such as the translation of encrypted or enciphered messages or military communications issued by the opposing side. In this latter case the activity involved is more specifically military in nature and is such as to confer a clear benefit to the Party availing itself of the translation services in view of subsequent tactical operations. As such, this activity would probably entail the loss of immunity for civilians engaging in it, although we are obviously outside the normal realm of activities undertaken by interpreters.

In relation to cases in which interpreters provide their services to other actors present in the area of conflict, such as representatives of international organisations, NGOs or media professionals, the correct way to qualify such persons would be as civilians and there would seem to be no way in which they might be deprived of their right to be protected from direct attack.

Obviously, when interpreters are present in the area of conflict, particularly in the exercise of their functions on behalf of a party to the conflict, there is a possibility that they will be the indirect victims of warfare. This may, for example, occur because of their proximity to legitimate military targets or of their direct participation in raids and other military operations; nonetheless these possible civilian casualties must obviously comply with the usual legal limit of proportionality.

29 For relevant criteria, *i.e.* threshold of harm, direct causation and belligerent nexus see *ibidem*, pp. 46-64.

4. The legal status of interpreters in case of capture

We now need to examine IHL provisions as they govern the case of interpreters captured during armed conflicts.

If we begin our examination with the case of international armed conflicts, the first instance to be considered is that of interpreters who were performing their activity on behalf of a State which was a party to hostilities when captured. In this case, interpreters would fall under a specific category envisaged by the Third GC, under Article 4.A. (4), as «persons who accompany the armed forces». This specific provision attributes the qualification of prisoner of war to individuals who, while being civilians in relation to the conduct of hostilities, may find themselves captured, particularly in the event of ground operations, because the supporting activity they have been providing caused them to operate in proximity to enemy lines. Since the early codifications of IHL, it has been considered possible to attribute the prisoner of war status to these contractors, under certain conditions, as their position when captured had given rise to difficulties during past conflicts.[30] Individuals serving as interpreters on behalf of State armed forces could be included within this special category, also because of the non-exhaustive nature of the list of activities referred to in this provision.[31] The only condition required in order to claim said special status would be for the individual to be acting with the authorisation of the armed force which he is providing a service to; this required link is also attested to by the delivery of a special identity card.[32]

Apart from this specific instance, interpreters would still be considered as belonging to the civilian population. Thus, once captured, interpreters shall be entitled to the guarantees enshrined in the Fourth GC, supplemented where appropriate by the provisions of the First Additional Protocol, as long as they can be qualified as "protected persons". Therefore, in order to benefit from the status of "protected person" one must

30 On this provision see: G. BARTOLINI, *Contractors as "Persons who Accompany the Armed Forces"*, in F. Francioni-N. Ronzitti (ed.), *War by Contract. Human Rights, Humanitarian Law, and Private Contractors*, Oxford, 2011, p. 219 *et seq.*; Pictet (ed.), *The Geneva Conventions*, cit., pp. 64-65.

31 Pictet (ed.), *The Geneva Conventions*, cit., p. 64.

32 See the model established in Annex IV.A of the Third GC. For national regulations dealing with this issue, see for instance U.S. Department of Defense, *Identity Cards Required by the Geneva Conventions*, Instruction Number 1000.1, January 30, 1974.

not be a citizen of the capturing State, as provided under Article 4 of the Fourth GC, which defines the scope of application *ratione personae* of the Treaty. This may have major consequences in the case of a State which is a party to a conflict making use of local interpreters, *i.e.* citizens of the State against which military operations are being conducted. In this case such individuals, once captured, would no longer fall under the protective provisions of the Fourth GC, but would at least benefit from the protections granted in Article 75 AP I.

In the case of non-international armed conflicts there is, of course, no notion of prisoner of war. However, even in such a case, if captured by one of the parties, interpreters acting on behalf of one of the parties to the conflict, *i.e.* the government armed forces or the organised non-state armed groups, or even on behalf of other persons operating in the area, such as journalists, governmental or non-governmental organisations, etc., shall benefit from the safeguards established in the relevant provisions relating to individuals who are not taking an active part in hostilities. These guarantees are set out in the common Article 3 of the 1949 GCs, in the Second Additional Protocol, where relevant, and in the many rules of customary law which have been developed on this matter.

5. The case of interpreters involved in post-conflict situations

Whereas the above analysis sought to outline the status of interpreters in the event of their involvement in armed conflicts, a further area of interest relates to the case in which interpreters may act in a post-conflict situation. This would usually involve international organisations, or ad hoc coalitions of States, operating in international missions entrusted with peace-keeping and reconstruction tasks. In such cases, other international law provisions can be of use to define the legal status of interpreters.

Particularly relevant could be the provisions provided by the status of force agreements (SOFA), *i.e.* treaties defining the legal status of personnel employed to assist an international mission. In these conventions, a number of provisions can be significant for interpreters, especially local ones, as they can be equated with a category which is commonly regulated in these instruments, namely «locally recruited personnel».

This, for example, is the case for the United Nations' Model SOFA.[33] In this document, after recalling in paragraph 22 that the United Nations «may recruit locally such personnel as it requires», a number of rules are set out, clarifying privileges to such staff, usually identified with a special identification document provided by the UN authorities. In particular, paragraph 28 of the UN Model SOFA extends to locally recruited staff a series of privileges included in section 18 letters a, b, c of the 1946 Convention on Privileges and Immunities of the United Nations.[34] Some of these privileges are explicitly re-affirmed in para. 46 of the SOFA, where it is established that members of the UN operation «including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity». This privilege remains valid beyond the end of the mission. Moreover, pursuant to para. 48, immunity from local jurisdiction is also extended to civil actions in regard to disputes concerning the performance of official duties. Similar provisions are also to be found in SOFAs covering other international operations outside the UN system.[35]

However, these provisions do not rule out possible prosecution being brought by States other than the one where the interpreter is operating. Depending on national laws, there may be a number of instances in which it is possible for personnel serving in these international contingents to be subject to a State's jurisdiction. One possibility would involve the application of the passive personality principle. A second possibility would be to base the prosecution on specific provisions extending the jurisdiction of a State, in particular in relation to military offences, to civilian personnel working for its own armed forces, independently of their nationality. For instance, this was the case

33 See UN General Assembly, *Model Status-of-Forces Agreement for Peace-Keeping Operations*, October 9, 1990, UN Doc. A/45/594.

34 In particular, section 18 of the 1946 Convention specifies that the jurisdiction of local courts shall not apply to any acts committed by such personnel in the performance of their official duties and that such personnel shall be granted exemptions from local taxation.

35 For references to similar privileges accorded to "locally recruited personnel" see for instance: paragraph 16 of the SOFA governing the IFOR/SFOR missions in Bosnia Herzegovina and Croatia; paragraph IX. 4 of the SOFA regulating the Multinational Protection Force deployed in Albania in 1997; and section 4, paragraph 14 of Annex A to the Military Technical Agreement established for the ISAF mission in Afghanistan.

concerning the aggression committed against another worker by Alaa "Alex" Mohammad Ali,[36] an interpreter with dual Iraqi and Canadian nationality operating with the United States contingent. As a result of the changes made by the U.S. Congress in 2007 to the Uniform Code of Military Justice, in order to subject contractors «serving with or accompanying an armed force in the field» to the jurisdiction of U.S. military courts, it was possible to bring a prosecution against this interpreter.

6. The possible obligation interpreters may incur to give evidence before international criminal courts

A further problem might arise for interpreters operating in conflict zones. It is clear that, in view of the sensitive nature of the work performed by interpreters, they may be witness to particularly significant events or statements, which might result in their receiving subpoenas from international criminal tribunals to give evidence on activities connected with the performance of their duties. It is known that some international criminal tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are endowed with the power to compel testimony from individuals considered to be useful for the investigation[37] by issuing subpoenas for the compulsory appearance of witnesses which, if not complied with, could entail criminal prosecution being brought against recalcitrant.

The possibility of being summoned to testify clearly raises problems of professional ethics for interpreters, who are usually required to act on a confidential basis, and the issue of balancing the requirement of justice with the need to guarantee the safety of interpreters present in conflict areas, which would be further jeopardised

36 For this case, which is of particular importance since it was the first case involving a civilian before a military tribunal following the recent amendments to United States law, see for example: U.S. Central Command, Press Release, April 16, 2008 <http://www.centcom.mil/press-releases/civilian-contractor-court-martial-pre-trial-begins>.

37 See the Rules of Procedure and Evidence of the ICTY (rule 54) and the ICTR (rule 98). On the lack of subpoena powers for the International Criminal Court see G. SLUITER, *Appearance of Witness and Unavailability of Subpoena Powers for the Court*, in R. Bellelli (ed.), *International Criminal Justice. Law and Practice from the Rome Statute and Its Review*, Burlington, 2010, p. 459 *et seq.*

if the parties to the conflict considered these persons as potentially inconvenient witnesses to the offences being committed. Precisely in order to address the various issues involved, International Tribunals have in their practice developed a series of special privileges for certain professional categories, which may be exempted from the obligation to give evidence in view of the overriding importance of the functions they perform, compared with the need to obtain information which may be of use in the cases tried. In this context, it may be useful to refer to the practice of the ICTY, as this is the tribunal that has tackled the issue most extensively. Although the Tribunal has mainly dealt with other instances of international presence on the ground, such as ICRC delegates[38] and journalists, it is also possible to derive guidance from its rulings in defining the position of interpreters regarding these cases.

A first hypothesis to be considered would be that of interpreters directly involved in international trials and working in International Tribunals. In this context, a significant ruling was made by the ICTY in the *Delalic* case, in which the defence had advanced a request for a subpoena to be issued to an interpreter working at the Tribunal in relation to some divergences emphasised by the defence during an interrogation.[39] In this case, the Trial Chamber rejected the request to compel the interpreter to testify. In particular, the Tribunal emphasised both the position of impartiality and the duty of confidentiality of interpreters and the necessity «to insulate the interpreter or other functionaries of the International Tribunal from constant apprehension of the possibility of being personally involved in the arena of the conflict, on either side, in respect of matters arising from the discharge of their duties».[40] This wording appears to be

38 See: S. JEANNET, *Recognition of the ICRC's Long-Standing Rule of Confidentiality: An Important Decision by the International Criminal Tribunal for the Former Yugoslavia*, in *International Review of the Red Cross*, 2000, p. 403 *et seq.*; J. MCDOWELL, *The International Committee of the Red Cross as a Witness before International Criminal Tribunals*, in *Chinese Journal of International Law*, 2002, p. 158 *et seq.*

39 On challenges with regard to translation services at international criminal tribunals see: K. DOUGHTY, *Language and International Criminal Justice in Africa: Interpretation at the ICTR*, in *International Journal of Transitional Justice*, 2017, 239 *et seq.*; E. ELIAS-BURSAC, *Translating Evidence and Interpreting Testimony at a War Crimes Tribunal: Working in a Tug-of-War*, Plagrave, 2015.

40 See ICTY, Trial Chamber, *Prosecutor v. Delalic and Others, Decision on the Motion Ex Parte concerning the Issue of a Subpoena to an Interpreter*, July 8, 1997, paragraphs 18-20.

particularly significant, since it underlines the need to avoid exposing interpreters to undue pressure in the performance of their official duties, in view of the importance of ensuring that they can properly undertake the tasks assigned to them.

However, the *Delalic* case relates explicitly to the work of an interpreter who was a member of staff of the ICTY; the situation might be construed differently in the case of interpreters working in a conflict area who are employed not by similar International Institutions but by other organisations or individuals, such as journalists. The latter case is particularly significant, since the legal principles developed by the ICTY concerning the possibility of compelling journalists to give evidence were discussed as part of the *Randal*[41] case, the events of which primarily involved a local interpreter hired by this journalist. Randal, who at the time was a correspondent for the Washington Post, had interviewed Radoslav Brdjanin, a member of the Republika Srpska administration, through a local interpreter, since the journalist did not speak Serbo-Croatian. The published interview quoted Brdjanin as using expressions denoting feelings of open hostility towards Bosnian Muslims.[42] In 2001, during the proceedings held against Brdjanin, the Prosecutor sought to have the article admitted as evidence but the defence invoked its right to cross-examine the journalist to assess the truthfulness of the text. The Tribunal responded to the request by asking Randal to confirm the accuracy of the sentences attributed to Brdjanin and to this end issued a subpoena against him.

Randal, however, challenged this procedure, alleging that journalists were exonerated from the obligation to give evidence and invoking his inability to provide any value judgement on the accuracy of the statements attributed to the defendant as he had had to rely on the services of a local interpreter. The Trial Chamber refused to recognise the privilege invoked, whereas the Appeals Chamber partly accepted the journalist's position. Even if it did not recognise an unconditional exemption for

41 See ICTY, Appeals Chamber, *Brdjanin and Talic, Decision on Interlocutory Appeal*, 11 December 2002. On these issues see M.A. FAIRLIE, *Evidentiary Privilege of Journalists Reporting in Areas of Armed Conflict*, in *American Journal of International Law*, 2004, p. 805 *et seq.*

42 See J.C. RANDAL, *Preserving the Fruits of Ethnic Cleansing: Bosnian Serbs, Expulsion Victims See Process as Beyond Reversal*, in *The Washington Post*, February 11, 1993.

journalists from the requirement to give evidence, the Appeals Chamber outlined a number of abstract judicial criteria to be used in deciding whether journalists working in war zones should be compelled to give evidence.[43] The Appeals Chamber ruled that the criteria had not been met in this case, particularly in view of the fact that his testimony would not have been of «direct and important value to determining a core issue in the case»,[44] in view of his inability to provide useful information on the accuracy of the translation.

This case, therefore, can provide some points for discussion with regard to the role of interpreters in conflict areas. In particular the central reason underpinning the defence's request to hear the witness was to determine the accuracy of the translation provided to Randal, since the main object of discussion was not so much the definition of the circumstances under which the interview was conducted, but the content of the final text produced, which was inescapably channelled through the activity carried out by the interpreter. It would obviously have been interesting if the interpreter, as the only person involved and able to give an account of what really happened, had been obliged to testify in the case in question, for instance in order to assess his language skills. At the same time, however, the examination might have failed to provide an accurate result, since the person's language skills could have changed after more than ten years from the events.

Secondly, the interpreter, if called upon to testify, could also have made similar claims to the journalist, invoking the privilege to be exempted from the obligation to give evidence. The position of the interpreter in claiming such exemption would have been made stronger by being able to invoke the instrumental nature of the interpreter's activity in relation to the role of a journalist in a conflict area. If journalism merits protection, albeit balanced with other requirements, then activities which are connected

43 In particular, taking into account the fundamental role performed by journalists, the Appeals Chamber ruled that two criteria have to be met before one can order a journalist to give evidence: «First the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence cannot be obtained elsewhere» (ICTY, *Brdjanin and Talic*, cit., par. 50).

44 *Ibidem*, paragraph 54.

with it, in this case a translation service, should also be encompassed within the same sphere, so as to cause an extension of privilege from testimony to cover interpreters used. One could add other interests to be taken into account, such as the need to guarantee the personal safety of interpreters in conflict areas; particularly if members of the local population, such interpreters might be more easily exposed to threats and actions against their safety if the international criminal tribunals developed a tendency to require them to provide evidence on events with which they had been connected because of their activity.

The uncertainty surrounding these issues is confirmed by the *Rules of Procedure and Evidence* of the International Criminal Court. In this case Rule No. 73 (2), concerns communications made «in the context of a class of professional or other confidential relationship» which shall be considered privileged in nature and thus not subject to the obligations of testimony or disclosure. Rule 73 (2) outlines a set of criteria designed to define whether said privilege may be considered to apply to these kinds of professional relations, emphasising in particular the confidential nature of the relationship;[45] it also provides, in paragraph 3,[46] some examples of these possible situations, even though they are characterised as non-exclusive and, more importantly, subject to the satisfaction of the aforementioned requirements. A specific mention is made of activities carried out by delegates of the ICRC, as well as the professional relationship between: patients and physicians; psychiatrists or psychologists; counsel and defendants and the activities of

45 According to Rule 73 (2): «… communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure… if a Chamber decides in respect of that class that: (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules».

46 See Rule 73 (3): «In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion». For privileges accorded to the ICRC staff see paragraphs 4-6. On this latter subject see S. Jeannet, *Testimony of ICRC Delegates before the International Criminal Court*, in *International Review of the Red Cross*, 2000, p. 993 *et seq*.

religious clergy, whereas no agreement was reached on the issue of journalists present in a conflict area, leaving the problem to be settled on a case by case basis.[47]

However, neither during the negotiations nor at any later stage does any specific attention appear to have been dedicated to the case of interpreters involved in such situations, even if, for instance, they are usually obliged to perform their activities on a confidential basis. In our opinion, this is a matter that requires thorough analysis, particularly in view of the instrumental function of interpreters' services concerning activities carried out by a number of categories of people who are recognised as having such a privilege, such as ICRC delegates. On this point, it is probably correct to consider that interpreters, particularly when they are providing official services related to the activity carried out by categories of professions covered by such a privilege, should also see this benefit extended to them, in view of the instrumental incorporation of the functions performed by linguistic mediators within the sphere of interest of the activity for which this benefit is recognised.

7. Case Study: Afghanistan and USA[48]

After discussing the position of conflict interpreters, their legal status and the relevant legal principles and obligations, special emphasis is now placed on a test-case, namely the situation in Afghanistan and on Afghan civilian interpreters who worked for the United States. The bulk of these interpreters are not professionals contracted by the local administration but by private companies pursuing their own political and economic agendas and that do not offer them regular work contracts or any kind of protection.

It is worth noting that the U.S. military has come to rely more and more on private contractors to provide linguistic services to function effectively in non-English speaking regions, especially in the Middle East and Central Asia where U.S. troops were actively engaged. Contractors are often seen as providing operational benefits to the

47 See on this subject R.S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, New York, 2001, p. 360.

48 I owe this insight to F. FERRACCI, *Gli interpreti in zone di conflitto: il caso dei civili afgani al servizio degli Stati Uniti*, MA Degree final thesis, 2017, Università degli Studi Internazionali di Roma.

Department of Defense (DOD), which can also have great economic advantages since local nationals can be hired when a specific need arises and be discharged when their services are no longer needed. Contractors are also hired to perform non-combat activities and to provide critical support capabilities in specialized fields that DOD may not possess, *e.g.*, transportation, engineering services, construction and, of course, linguistics.

According to a report of the Office of the Assistant Secretary of Defense for Sustainment, the principal logistics official within the senior management of the DOD, in 2009-2010 and 2012-2013 the number of contractors exceeded 100,000 units. From 2014 there was a gradual decrease of the number of contractors due to the official conclusion of the main military operations in the country: the second quarter of 2020 registered 27,641 contractors actively engaged in Afghanistan, of which 5,853 were local nationals and 1,774 worked as interpreters and translators representing 6.4% of the total.[49]

The type of services interpreters were required to provide include performing oral interpretation, providing interpretation support at military traffic control points, assisting security personnel in screening the local population at military checkpoints. Private contractors provided three different categories of interpreters: *Category 1* included local nationals with security screening but no clearance and a salary between 10 and 45 dollars per day; *Category 2* was for US citizens with a salary between 70,000 and 140,000 dollars per year; *Category 3* included a restricted number of US citizens working as interpreters with top secret clearance.

It should be borne in mind that, aside from braving the usual dangers associated with war such as roadside bombs, ambushes, or sniper fire, local nationals are high-priority targets for the Taliban too and this contributes to increase the – unknown – number of local interpreters who died because of their work. Indeed, American contractors are under no obligation to publicly report the deaths of their employees and they often notify only family members. This means that the great majority of the local

49 See Office of the Assistant Secretary of Defense for Logistics & Materiel Readiness, *Contractor Support of U.S. Operation in the USCENTCOM Area of Responsibility, 2nd quarter FY2020*, April 2020. Available at <https://www.acq.osd.mil/log/PS/.CENTCOM_reports.html/5A_April_2020.pdf>.

nationals hired on site die uncounted. There are no official records neither of the number of local nationals hired as interpreters or translators nor of the number of deaths.

Afghan interpreters find themselves in an extremely dangerous situation. On the one hand, the U.S. army considers them as potential threats because of the assumptions that all members of a local ethnic group would share the aspirations of their leaders or could (voluntary or under duress) be leaking information. In fact, civilian interpreters may become the target of violent pressure from insurgent groups (death threats, kidnappings or reasons of personal revenge) and therefore may be persuaded to betray the military unit they work for. In a nutshell, Afghan interpreters can be tainted by the mere fact that they speak Dari or Pashto, that is the very skill for which they are recruited in the first place. On the other hand, the Taliban see them as infidels to put to death. Once the occupying forces and humanitarian organizations on the field have left, the interpreters are vulnerable and without protection because of their collaboration with their former employers or with the enemy. Civilian linguists contracted by U.S. military troops were, and continue to be, denounced as traitors by insurgent groups and singled out for kidnapping and slaughter in retaliation for their collaboration. This is also due to the order issued in 2009 by the *mullah* Omar, the Taliban's supreme leader at the time, to capture and kill any Afghan supporting the coalition forces: «Our policy is that, whoever protects and supports foreigners as translators, they are national traitors for us and the people of Afghanistan. Like the foreign soldiers and other foreign occupiers, they too will be put to death».[50]

Threats against them are delivered in a variety of ways: some interpreters are terrorized over the phone, others receive anonymous "night letters" warning them and their families of their impending fate. The following text is an extract of a letter received by an Afghan interpreter, published by Al Jazeera: «We know you have been working with the U.S. special forces, and you must stop working and helping these infidels. You must know we have spared and have forgiven those ones who did surrender and obeyed us. So like others, you must also obey and surrender yourself to us. But if you reject

50 See B. ANDERSON, *The Afghan interpreters (Full-Lenght)*. Vice News, 2014. Available at <https://www.vice.com/en_us/article/qbewvb/afghan-interpreters-full-length-122>.

and do not obey our directions and rules, your death will be eligible to us according to Islamic Sharia, and we will never let you live in peace in any part of Afghanistan».[51]

These threats are often carried out quickly and with utter brutality, *e.g.*, shootings, explosive devices placed in their vehicles. For these reasons, Afghan interpreters often wear face masks during their assignments with the U.S. troops in the effort to hide their identities, often to no avail. More frequently, they even choose not to reveal their collaboration with the coalition forces to their relatives. Any contact with them is forbidden, since relatives are often targeted, taken hostages and tortured to disclose the position of the traitor, and interpreters are thus forced to leave their homes and hide in an always different secret location.

Despite threats and intimidation, the protections offered by the United States during and after the conflict are scarce: the names of the interpreters are often added to the *Blacklist*, a U.S. database of troublemakers and terrorists who have committed crimes. Therefore, they cannot get a visa and can easily fall into the hands of criminals.

7.1 Special Immigrant Visas Programs

In 2006 the United States established a series of legal dispositions to provide a pathway to safety for Afghan and Iraqi nationals who met certain requirements and who were employed in Afghanistan or Iraq to enter the United States and become lawful permanent residents, authorizing the issuance of Special Immigrant Visas (SIVs). There are three SIV programs: (i) Special Immigrant Visas for Iraqis Who Were Employed by/on Behalf of the U.S. Government; (ii) Special Immigrant Visas for Afghans Who Were Employed by/on Behalf of the U.S. Government; (iii) Special Immigrant Visas for Iraqi and Afghan Translators/Interpreters.

The SIV programs for Afghans and Iraqis employed by/on behalf of the U.S. government requires applicants to have been employed for a minimum of two years, between October 2001 and December 2020, and they must also have experienced or be experiencing an ongoing serious threat as a consequence of their employment. The

51 See Fault Lines, *Afghan interpreter: 'Taliban don't wait to kill you'*, in *Al Jazeera*, April 16, 2016. Available at <http://www.aljazeera.com/indepth/features/2016/04/afghan-interpreter-taliban-don-wait-kill160403131005408.html>.

SIV program for Iraqi and Afghan translators/interpreters authorizes the issuance of up to 50 Special Immigrant Visas annually for nationals who have worked for a period of at least 12 months and have obtained a favorable written recommendation from a General or from the Chief of Mission from the embassy they worked for.

However, due to security review slowdowns and President Donald Trump's travel ban, hundreds of thousands of interpreters are left behind in dangerous and even deadly situations. In fact, according to the official records made available by the U.S. Department of State – Bureau of Consular Affairs, only 1,606 visas were issued to Afghan and Iraqi translators/interpreters under the third program in the period 2007-2020.[52]

It is worth noting that most of the visa applications are denied for unknown reasons and the applicant is often added to the so-called Blacklist, a database where the U.S. put fingerprints, iris scans and personal details of troublemakers, terrorists and of Taliban people who have committed crimes. The vast majority of such interpreters have been put on that list, which means when they try to apply for a visa or when they try to get a job or a flight out of Afghanistan, they are marked and their visa is denied, leaving them trapped in their country with no hope, safety and future.

For these reasons on 8 March 2019 some senior members of the U.S. Congress addressed an official letter to the Department of State, the Department of Homeland Security, the Department of Defense and the Federal Bureau of Investigation to express their concern and ask for further information about the slow processing of visas for Iraqi and Afghan allies, stating that under the second program «1,649 Afghan SIVs were issued in 2018, a 60% decrease from the 4,120 visas issued in 2017» and that «the Iraqi program has a backlog of more than 100,000 people due to slowdowns in the Direct Access Program, where only 48 individuals were admitted in a 10-month period in Fiscal Year 2018».[53]

One possible way out of the impasse was reached on 20 December 2019, when

52 See U.S. DEPARTMENT OF STATE, *Special Immigrant Visas Statistics, Iraqi or Afghan Translators (SI)*, available at <https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SINumbers_12312019.pdf>.

53 See CONGRESS OF THE UNITED STATES, March 8, 2019, <https://blumenauer.house.gov/sites/blumenauer.house.gov/files/Afghan%20SIV%20Processing%20Letter.pdf>.

President Trump signed the National Defense Authorization Act for Fiscal Year 2020, providing additional 4,000 more visas to the Afghan Special Immigrant Visa Program, increasing the total number of visas available for Afghan interpreters who worked with the U.S. military from 18,500 to 22,500.[54] However, under this program, only 12,000 Afghan interpreters have been granted visas since 2008, while other 9,000 are still having their application considered. Therefore, following a lawsuit filed by a refugee advocacy group of the International Refugee Assistance Project (IRAP),[55] the White House submitted a new plan to clear the backlog of interpreters waiting for visas and fix the long delays in the Program.[56]

8. Conclusions

This analysis has enabled us to identify a series of provisions which tend to define the legal status of interpreters operating in conflict or post-conflict areas. An analysis of the existing provisions, however, needs to be accompanied by an examination of the concrete reality, which shows that there is a situation of precariousness, particularly regarding the requirements of protection. In view of this context, it seems necessary to consider the possibility of outlining further legal instruments for the protection of interpreters.

In this respect, some suggestions can be made based on the protection currently accorded by IHL to journalists in conflict areas. Currently, there is considerable debate concerning the ways in which the protection of such journalists can be strengthened, to the extent that it has been suggested that a separate legal status and also a specific protective emblem be established for these persons, through a specific international

54 See American Immigration Lawyers Association, *P.L. 116-92: National Defense Authorization Act (NDAA) for Fiscal Year 2020*, AILA Doc. No. 19121731, December 20, 2019 <https://www.aila.org/infonet/s1790-national-defense-authorization-act-ndaa>.

55 For more details, see J.P. Lawrence, *US plan to fix visa delays for interpreters who helped troops deemed 'offensive'*, in *Stars and Stripes*, March 12, 2020 <https://www.stripes.com/news/us-plan-to-fix-visa-delays-for-interpreters-who-helped-troops-deemed-offensive-1.622149>.

56 See J.P. Lawrence, *US submits new plan to fix visa delays for interpreters who helped troops*, in *Stars and Stripes*, May 23, 2020 <https://www.stripes.com/news/us-submits-new-plan-to-fix-visa-delays-for-interpreters-who-helped-troops-1.630974>.

treaty.[57] One way of proceeding would be to promote the inclusion of interpreters operating in conflict areas within these new treaties, which do not currently clearly include them in their intended scope.[58] Aside from the fact that there are major doubts as to the real feasibility of such proposals, even the extension *ratione personae* of the scope of application of these hypothetical instruments would only provide protection to some categories of interpreters, namely those providing their services to journalists, and would leave out the very broad category of interpreters providing the same service and in the same war area for other individuals or for international institutions.

A second proposal is linked with duties of care to be imposed on entities taking advantages of such personnel. It is self-evident how such personnel – if and when they abandon their own countries – might be entitled to benefit from the guarantees enshrined in the 1951 Geneva Convention on refugees, as well as in complementary instruments, such the subsidiary protection system provided by the EU legislation on asylum, which is extended to victims of generalised violence during armed conflicts, and national legislations adopting such approaches. Obviously, the possibility of benefitting from such protection is first subject to legal requirements of proof of the persecution or violence that the individual may be exposed to in the national State, as normally recognised by the UNHCR's guidelines on asylum-seekers with regard to interpreters cooperating with foreign entities, particularly armed forces.[59] However, this

57 Apart from previous drafts of conventions proposed within the UN system in the 1970s (see C. ZANGHÌ, *The Protection of Journalists in Armed Conflicts*, in P.A. Fernández Sánchez (ed.), *The New Challenges of Humanitarian Law in Armed Conflict: in Honour of Professor Juan Antonio Carrillo-Salcedo*, Leiden, 2005, pp. 146-150; H.P. GASSER, *The Journalist's Right*, pp. 370-371), a draft text has been proposed by the NGO "Press Emblem Campaign" <www.pressemblem.ch/4983.html>. For a discussion of this initiative, see the report of Y. DINSTEIN in *Annuaire de l'Institut de droit international*, vol. 73, 2009, pp. 465-467.

58 For example, the preamble of the abovementioned proposed convention reads: «the term "journalist" in this Convention covers all civilians who work as reporters, correspondents, photographers, cameramen, graphic artists, and their assistants in the fields of the print media, radio, film, television and the electronic media (Internet), who carry out their activities on a regular basis, full time or part time, whatever their nationality, gender and religion». For a discussion on the opportuneness of including associated personnel or logistical staff support (including interpreters) in the definition of "journalist" see by DINSTEIN, *ibidem*, pp. 461, 471-472.

59 For risks faced by interpreters and their families see: UNCHR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May 2012, pp. 16-17, <https://www.refworld.org/pdfid/4fc77d522.pdf>; UNCHR, *Eligibility Guidelines for Assessing the International Protection Needs*

possibility is related to the person's capacity to physically reach a third State and in this regard a claim could be made to identify a positive duty for such entities, particularly States, to facilitate this possibility through privileged channels of access to their territory and special visa programmes in order to comply with their human rights obligations related to the right to life.

On such basis it could be recognised how, in recent conflict scenarios, such as Iraq and Afghanistan, in order to protect local personnel acting as interpreters, the hiring States themselves have transferred such contractors to their territories in order to attribute refugee status to them. For instance, apart from the U.S. case analysed above, once Denmark left Iraq, it decided to transfer and attribute international protection to more than 200 local Iraqi interpreters and their families, taking into account previous acts of violence by armed groups against such individuals due to their collaboration with foreign troops.[60] Similarly, Australia launched in 2013 a special federal programme finally permitting 900 interpreters from Afghanistan and Iraq to benefit of visas. However, also in this case, shortcomings have been recorded in the management process, also due to lack of transparency.[61] Same can be said for France, which has granted less than 250 visas to Afghan interpreters recruited between 2002 and 2014, according to the Association of the French Army's Afghan Interpreters.[62]

As a consequence, it is clear that in order to assure greater protection for interpreters in conflict areas, it is necessary first and foremost to bring pressure in order to see the legal guarantees which already exist reaffirmed and advocate for some innovative solutions. This could be achieved through the appropriate dissemination of

of Asylum-Seekers from Afghanistan, 30 August 2018, pp. 39, 43, <https://www.refworld.org/pdfid/ 5b8900109.pdf>.

60 See Reuters, *Denmark Airlifts 200 Iraqis Translators and Relatives*, July 20, 2007, <www.reuters.com/article/idUSL2031209220070720>.

61 See ABC, *Veterans fighting for protection visas for Afghan interpreters*, 10 September 2018, <https://www.abc.net.au/news/2018-09-10/veterans-fight-peter-dutton-over-visas-for-afghan-interpreters/10221716>; The Guardian, *Australia urged to give visas to Iraqi translators who worked for ADF*, 11 December 2019, <https://www.theguardian.com/australia-news/2019/dec/12/australia-urged-to-give-visas-to-iraqi-translators-who-worked-for-adf>.

62 For further details about the situation of Afghan interpreters employed by the French government, see Q. Müller, *Les interprètes afghans de l'armée française attendent toujours un geste*, in *L'Express*, March 3, 2020; O. Tallès, *Lâché par la France, un ex-interprète afghan de l'armée échappe à la mort*, in *La Croix*, December 9, 2019 and B. Makooi, *Afghan employees for French army left to fend for themselves*, in *InfoMigrants*, September 20, 2019.

these normative standards and by building up adequate awareness in theatres of operations and in relevant fora. In this respect, proposals such as those presented to the Council of Europe should be supporte d in order to bring attention to the need to ensure protection for individuals who, as neutral parties in conflict situations, perform indispensable functions of common interest for local communities and, in a broader sense, for the International Community.

GIACINTO PARISI[*]

NEW SCENARIOS FOR THE ITALIAN CLASS ACTION

ABSTRACT. *The present paper aims at reviewing the main innovations brought upon by the new regulation of the Italian class action, disciplined by Law no. 31 of 12 April 2019, also in relation to the problematic issues which had arisen in the precedent regulatory context.*

CONTENT. 1. Foreword – 2. The issues of the "old" class action – 3. The "new" class action: a) the field of application – 4. b) the legal standing – 5. c) subscriptions – 6. d) costs and financial incentives

[*] Ph.D. in Procedural Civil Law, Roma Tre University.

1. Foreword

Law no. 31 of 12 April 2019 introduced in the Italian system an organic regulation of the class action, which is now disciplined by Articles 840 *bis* - 840 *quinquiesdecies* of the Italian civil procedural code (c.p.c.).[1]

Since it is stated that the Law will enter into force nineteen months after its publication in the Italian Official Gazette,[2] the new provisions will become effective on 19 November 2020 and will be applied only to the unlawful conducts perpetrated after such date.

As it is commonly well-known, class action was already present in Italy: it was introduced in 2007 (but it then entered into force only in 2009) by Article 140 *bis* of Legislative Decree 206/2005 (so called Consumer Code) and was initially set to be applied only to specific torts committed within the business to consumer transaction and it presented some immediate issues, whose review seems relevant in order to analyse some choices which were made in the new regulation of 2019.[3]

1 The literature regarding this particular matter, also in relation to the new regulation of 2019, is extremely broad. Among the first papers, please see: AA.VV., *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, edited by B. Sassani, Pisa, 2019; AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 321 *et seq.*; AA.VV., *La Class action riformata*, edited by A. Carratta, *Giur. it.*, 2019, p. 2297 *et seq.*; D. Amadei, *Nuova azione di classe e procedimenti collettivi nel codice di procedura civile (l. 12 aprile 2019, n. 31)*, *Nuove leggi civ. comm.*, 2019, p. 1049 *et seq.*; C. Consolo, *La terza edizione della azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad una amplissima disciplina*, *Corr. giur.*, 2019, p. 737 *et seq.*; P. Farina, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, *Riv. esecuzione forzata*, 2019, p. 654 *et seq.*; M. Franzoni, *Azione di classe, profili sostanziali*, *Danno e resp.*, 2019, p. 309 *et seq.*; A. Giussani, *La riforma dell'azione di classe*, *Riv. dir. proc.*, 2019, p. 1572 *et seq.*; P.G. Monateri, *La riforma italiana della class action tra norme speciali processuali e ricostruzione della tutela civilistica*, *Danno e resp.*, 2019, p. 312 *et seq.*; R. Pardolesi, *La classe in azione. Finalmente*, *ibidem*, p. 301 *et seq.*; G. Ponzanelli, *La nuova class action*, *ibidem*, p. 306 *et seq.*; G. Scarselli, *La nuova azione di classe di cui alla legge 12 aprile 2019 n. 31*, *Judicium*, 7.6.2019.

2 The law was originally supposed to enter into force twelve months after the publication in the Italian Official Gazette (according to Article 7, § 1 of Law no. 31/2019) but such period of time was deferred for other seven months pursuing Article 8, § 5 of Decree no. 162 of 30 December 2019, which was later converted into law by Law no. 8 of 28 February 2020, in order to allow the Ministry to prepare the technical infrastructure necessary for the functioning of some of the mechanisms introduced by the new provisions.

3 The main monographs on the issue are C. Consolo, B. Zuffi, *L'azione di classe ex art. 140-bis cod. cons. Lineamenti processuali*, Padova, 2012; A.D. De Santis, *La tutela giurisdizionale collettiva: contributo allo studio della legittimazione ad agire e delle tecniche inibitorie e risarcitorie*, Napoli, 2013; R. Donzelli, *L'azione di classe a tutela dei consumatori*, Napoli, 2011; C. D'Orta, *La class action tra proclami e deterrence. Uno studio di diritto interno e*

2. The issues of the "old" class action

The reform of class action is based on the idea that Article 140 *bis* of the Consumer Code has not reached the targets that were set out, and in particular has failed to provide a proper compensation in favour of the aggrieved subjects and to create a deterring effect on the businesses, given the short number of class action law suits which have been brought over the relevant years and the fact that such collective trials have proven to be extremely time-consuming.[4]

The main complaints that have been made in relation to the class action provided by Article 140 *bis* concerned the main features of said regulation, starting from its field of application, and in particular the fact that it was intended to be applied only to some specific torts.[5]

A further issue was that the legal standing was granted only upon the individual aggrieved subjects and that entities and associations could be involved in the proceedings only by means of a specific power of attorney released by the aggrieved consumer member of the class.[6]

Another downside has been identified in how the parties could subscribe to the class, as it was believed that the complex mechanism that was outlined represented a concrete obstacle to a widespread participation, in particular given its poor flexibility and the fact that, in any case, it was limited to the introductive phase of the suit.[7]

comparato, Torino, 2014; T. Febbrajo, *L'azione di classe a tutela dei consumatori. Profili sostanziali*, Napoli, 2012; E. Ferrante, *L'azione di classe nel diritto italiano: profili sostanziali*, Assago, 2012.

4 G. Pailli, C. Poncibò, *The Transformation of Consumer Law Enforcement: an Italian Perspective*, *Comparative Law review*, 8, 2018, p. 21 *et seq*.

5 C. Consolo, B. Zuffi, *L'azione di classe ex art. 140-bis cod. cons. Lineamenti processuali*, 2012, p. 5.

6 E. Ferrante, *L'azione di classe nel diritto italiano. Profili sostanziali*, 2012, p. 89 *et seq*.

7 It is of particular interest the case of the banks' commissions that was analysed by the Court of Turin (15 June 2012), which, after decreeing the non-admissibility of the suit (with a decision which was later reformed by the Court of Appeal), admitted the action as long as the signature of the subscriber was declared authentic by a third party. Such formality has definitely influenced the collection of subscriptions, which was limited to only 104 members although the class was potentially composed of hundreds of damaged clients. The first-instance decision, which was later confirmed by the Court of Appeal, has been recently annulled by the Court of Cassation (judgement no. 12997 of 15 May 2019), which underlined the absolute informality of the proceedings as a whole and the subsequent need for the reduction of the burdens on the subscriber: it is then evident that the Court of Turin, when asking for the signatures to be declared authentic pursuing D.P.R. n. 445 of 2000, has imposed a formality over such process which

Lastly, a further disincentive from joining the class action was identified in the high costs involved, starting from the ones requested for the publication of the decision over the admissibility of the action, which were to be paid by the plaintiff in order to avoid the declaration of the inadmissibility of the suit, also given the lack of financial incentives for the ones who filed the suit.[8]

Bearing all the above in mind, it is now possible to review the innovations which are present in the new 2019 regulation.

3. The "new" class action: a) the field of application

The field of application of the "new" class action is regulated by Article 840 *bis*, § 3, c.p.c., which states that the action can be brought against businesses or entities providing publish services or services of public interest: on the other hand, any individual (thus not only consumers) can bring the action in relation to any unlawful conduct.

It has already been suggested by the first scholars who have reviewed the new regulation that it is appropriate to provide an interpretation of the term "businesses" in a wider sense, so that such is not limited by the definition set forth in Article 2082 of the Italian Civil Code (c.c.), but also entails the category of «professionals», which is also present in the Consumer Code.[9]

As already mentioned, according to the new regulation the class action is intended to protect homogeneous individual rights, without any limits or restrictions, as it is also confirmed by the fact that any member of the class can bring the action. The members of the class can then be individuals, institutions, subjects of any kind and

is not dictated by law and which actually goes against the interest of highest informality which is a very relevant feature of the whole proceedings.

8 C. D'Orta, *La class action tra proclami e deterrence. Uno studio di diritto interno e comparato*, 2014, p. 196 *et seq*.

9 R. Donzelli, *L'ambito d'applicazione e la legittimazione ad agire*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 339 *et seq*. Supporting the contrary theory, A. Carratta, *I nuovi procedimenti collettivi: considerazioni a prima lettura*, in AA.VV., *La Class action riformata*, edited by the same Author, *Giur. it.*, 2019, p. 2298. For an intermediate interpretation, please see A. Giussani, *La riforma dell'azione di classe*, 2019, p. 1574.

thus also shareholders' companies.[10]

The individual rights that can be actioned can have been breached by specific conducts, but also by behaviours perpetrated over time. The only condition is that such wrongdoings need to be committed within the professional activity of the individual or must be related to the public services provided by the entity: such requirement present in the Law is not particularly clear and, at a first glance, seems to be aimed at further clarifying that the unlawful conducts need to be ascribed to the sued legal.

The unlawful conduct can be related to a contract or can be qualified as a tort[11] and does not need any further requirements: this confirms that the privileged position that consumers had within class actions in the previous regulation has completely been erased.[12]

There is also no restriction imposed on the individual value of the single breached right: this means that there will be not only small claims, but also controversies having a medium or a high value.

In any case, and beside the specific nature of the individual right, it is necessary, as stated by Article 840 *bis*, § 1, c.p.c., that the claims have a homogenous nature.

The homogeneity is a requirement that the Tribunal needs to assess in order to declare the suit admissible, pursing Article 840 *ter*, § 4, letter b) c.p.c. and needs to be detailed both in the decision over the admissibility and in the judgment which declares the liability of the defendant, pursuing Articles 840 *ter* and 840 *sexies*, letter c) c.p.c.

However, there is still no clear definition of the term «homogeneity», which was already present in Article 140 *bis* of the Consumer Code, and thus one of the main issues already present in the old regulation is still existent in the new one.[13]

10 R. Donzelli, *L'ambito d'applicazione e la legittimazione ad agire*, 2019, p. 339 *et seq*.

11 P. Farina, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, 2019, p. 656.

12 B. Sassani, *Presentazione*, in AA.VV., *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, edited by the same Author, Pisa, 2019, IX.

13 Lastly, see on this matter Court of Cassation, judgment no. 14886 of 31 May 2019, according to which the homogeneity requirement is present when the different claims have common features that justify a serial assessment and a joint trial: thus, it is to be excluded, from a logical standpoint rather than judicial, the compatibility of such instrument with all those situations that require a specific assessment based on personal situations or that entail evaluations over the specific reverberation of the unlawful conducts over the emotional or relational sphere of

A further interesting aspect is that it was previously not clear whether, pursuing Article 140 *bis* of the Consumer Code, the final settlement of damages was supposed to be the same (and thus, homogenous) for all the plaintiffs (case-law believed not[14]). The "new" class action sets forth two different phases: the second one is intended to assess the specific issues of each plaintiff, in order to accommodate classes which have different members and can also be divided into sub-classes.[15]

4. b) the legal standing

The subjects who are granted with legal standing, pursuing Article 840 *bis*, § 1, c.p.c. are the members of the class and no-profit associations or organizations, whose aims, set in the internal bylaws, entail the protection of homogenous individual rights and which are listed in a specific document which is to be periodically reviewed by the Ministry of Justice.

Therefore there is a concurrent legal standing, which is granted, on the one hand, to entities, as it already happens in other European countries and, on the other hand, to the single individuals, as it happens in the American model: it is an innovative solution, which has the clear goal to outline more than one path so to further enhance the presentation of class action law suits, which are then not any more limited to the power of attorney bestowed by the single aggrieved subject, as it happened in the class action regulated by Article 140 *bis* of the Consumer Code.

Article 196 *ter* of the implementing provisions of the Italian Civil Procedural Code authorises the Ministry of Justice, jointly with the Ministry of Economics, to indicate with a decree the requirements necessary to be inserted in the list indicated by Article 840 *bis*: in particular, it is stated that said requirements will have to be drafted in order to ensure that the entities have features that make them suitable to protect the

the single aggrieved party.

14 Among all, see Court of Cassation, judgment no. 14886 of 31 May 2019. In the jurisprudence, see R. Donzelli, *L'azione di classe a tutela dei consumatori*, 2011, p. 257, who, after underlining that all homogenous individual rights have a common part and a different one, states that the common part needs to cover the factual and juridical issues which are necessary for establishing the liability of the defendant, whereas the different part can regard the extension of the liability and the quantification of the compensation amount.

15 P. Farina, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, 2019, p. 664.

individual rights, have adequate means and are meant to operate continuously over time; it is also requested to verify the origins of the funds which are used.[16]

It is worth underlining that Article 196 *ter* generically mentions organizations, whereas Article 140 *bis* specifically addressed associations and committees: such change seems to be due to the recent introduction of Legislative Decree no. 117/2017, which reformed the no profit sector and disciplined several types of no-profit entities. However, on the basis of the principles listed in Article 196 *ter* c.p.c. it is questionable whether committees, which are entities that are created with a specific protection aim, can be considered as having the legal standing to bring class action suits, as they seem to lack in the continuity criterion which is listed in the provision.

Such new regulation presents two critical issues. Firstly, it is to be considered that it would have been better not to forego the previous lists and registers of entities representing collective interests and to integrate them with the new list which will be presented by the Ministry of Justice: once assessed whether the present associations met the needed requirements, they could have been authorised to bring class action suits.

Secondly, it is not clear whether the legal standing of the associations present in the list set forth in Article 840 *bis* will be assessed by an administrative authority or if it is up to the Tribunal, which, when pronouncing on the admissibility of the action, pursuing Article 840 *ter*, § 4, letter c), is also called to assess whether the entity is capable to represent the homogenous individual rights protected by Article 840 *bis*. However, it seems preferable to think that such evaluation by the Tribunal is referred to collective

16 Such provision raises, however, serious doubts over its compatibility with the Italian Constitution, given that: a) the conditions to access trial, in this case in its collective dimension, protected by Article 2 of the Constitution, are not dictated by law, thus violating Articles 24, § 1 and 111, § 1 of the Italian Constitution; b) the introduction of a preliminary administrative selection over the collective subjects who are entitled to act seems problematic, considering that, on the one hand, within the same trial it is in any case possible for the single individuals to present their suit and, on the other hand, the judge is any case required to evaluate the capability of the plaintiff to properly take care of the homogenous individual rights. This potentially creates an issue in terms of an unreasonable different treatment between similar situations, given that it cannot be excluded that the entities which do not belong to the specific lists may bring their action as voluntary processual representatives of the member of the class pursuing Article 77 of the Italian procedural code (R. Donzelli, *L'ambito d'applicazione e la legittimazione ad agire*,2019, p. 339 *et seq*.; for other issues on this subject, please see C. Consolo, *La terza edizione della azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad una amplissima disciplina*, 2019, p. 738.

class actions and not to the suit brought by an association, which will be evaluated on its inner coherence with the allegedly breached homogenous right rather than on its capacity to bring class action suits, which will be considered to have already been evaluated on an administrative basis.

5. c) subscriptions

The subjective efficacy of the judgment which grants the request present in the collective suit is one of the most relevant aspects of any regulation on class actions. The new class action, following the path set forth in Article 140 *bis*, adopts an opt-in mechanism, which is focused on the subscription by the aggrieved subjects.[17]

Article 840 *bis*, § 4, specifies that the class action suit does not prevent individuals from bringing individuals suits, although the final judgment issued in relation to the collective proceedings can be employed in the liquidation procedure only by the individuals who were members of the suit and did not withdraw their subscription before the liquidation decree became final in their regards (Art. 840 *undecies*, last paragraph).

The main difference between the new and the old class action concerns the deadline for the subscriptions, which can be filed not only after the issuing of the judgment over the admissibility of the suit (Art. 840, § 1), but also after the release of the judgment which grants the formulated request (Art. 840 *sexies*, §1, letter e).[18] The intent is clearly to further sponsor the subscription to class actions and to make it possible also when the outcome has been (almost) achieved, or even after the request has been granted, in order to overcome one of the main issues of the old regulation.

On the other hand, there might be some perplexities on the reason why the law provides for a system of early subscription and sets forth two defined time-slots to file

17 R. Donzelli, *L'ambito d'applicazione e la legittimazione ad agire*, p. 339 *et seq*.; A.D. De Santis, *L'azione di classe a dieci anni dalla sua entrata in vigore*, *Foro it*., 2019, p. 2180. Furthermore, it is to be considered that the Court of Milan, with judgment no. 10773 of 25 October 2018, *Corr. giur.*, 2019, p. 1107, has acknowledged the compatibility with the Italian law system of the mechanism of the *opt-out*, which is present in the United States' regulation.

18 A.D. De Santis, *L'adesione*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 356 *et seq*.

one's application.

In fact, pursuing Article 840 *sexies*, § 1, letter a), the judgement only concerns the suits presented by the plaintiff and not also by the subscribers, whereas Article 840 *sexies*, § 1, letter e) specifies that with such judgment the tribunal can order the integration of documents that are deemed necessary for the initial members. Such analysis of the new regulation allows to observe that the opening of the first time-slot for the filing of subscriptions does not meet the interests of the potential members of the class actions, who might find more convenient to wait for the judgment, and thus cause a delay of the class action suit between sixty and one hundred and fifty days.[19]

In reality, early subscriptions serve a specific purpose. First off, they allow one to be introduced into the class in a moment of time that is closer to the unlawful act; the time necessary for the conclusion of the suit could in fact be considered a disincentive from joining the action.[20]

This is particularly poignant, for example, in relation to minor damages, which require the preservation of documents related to balance sheets or to contracts in order to provide evidence in relation to the homogenous right which has allegedly been breached: the passing of too much time from the perpetration of the unlawful act, besides potentially leading the plaintiff to forget the damage he/she suffered, can make the retrieval of said documents particularly difficult or can cause issues in the reconstruction of the events, leading the aggrieved party to be tempted to decide not to bring the action.

Furthermore, it is to be considered that the collective action has no interruptive effect on the statute of limitation referred to the individual rights of the members of the class: thus, the judgment which with the collective request is granted might also be published after the statute of limitation period has elapsed, with the risk that the individual rights of the potential members might not be enforceable by then.[21]

On the other hand, given that subscribing to the suit has the same effect as

19 A. Carratta, *I nuovi procedimenti collettivi: considerazioni a prima lettura*, 2019, p. 2299.

20 De Santis, *L'adesione*, 2019, p. 356 *et seq*.

21 M. Bove, *L'aderente*, in AA.VV., *La Class action riformata*, edited by A. Carratta, *Giur. it.*, 2019, p. 2307 *et seq*.

bringing a suit in first person (as per Art. 840 *septies*, § 6), the collective plaintiff will then be interested in gathering the subscriptions also before the judgment, in order to avoid the risk to lose potential members or to be gathering subscriptions for rights whose statutes of limitation has already elapsed.

The new regulation also presents some new features in relation to the liquidation phase of the damage suffered by the individual subscribers.[22]

In fact, pursuing the regulation of the Consumer Code, it was up to the tribunal, when issuing the conviction judgment, also to settle damages – on an equitable basis – suffered by the members or to adopt an homogenous criterion in order to proceed with the settlement: in the latter case, the very same tribunal settles damages, upon request of the party and in case there is no agreement on the amount.

Article 840 *octies* c.p.c. now sets forth an innovative proceeding, according to which, after the judgment which assesses the unlawfulness of the conduct of the defendant, the tribunal can issue a decree containing the settlement of claims for each subscriber, following a mechanism that reminds the one set forth in the Italian bankruptcy law (recently repealed).[23]

After the issuing of the liquidation decree, there can be two different scenarios.[24] If the defendant intends to pay spontaneously, he is due to deposit the money on a bank account in the proceedings' name, and he is then precluded from giving the money directly to the single creditors: only after the general representative prepares a distribution plan, the sums are awarded to the single subscribers (Article 840 *duodecies*).

On the contrary, if the defendant does not comply, also the enforcement procedure is regulated in the collective terms set forth in Article 840 *terdecies*, which innovates in such regard the regulation present in the Consumer Code, according to which the enforcement was regulated by the ordinary rules on the foreclosure requested

22 Among which, please, A. Giussani, *La fase di determinazione del quantum nella nuova azione di classe*, in AA.VV., *La Class action riformata*, edited by A. Carratta, *Giur. it.*, 2019, p. 2316 *et seq*.

23 P. Farina, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, p. 665; D. Amadei, *L'esecuzione spontanea e coattiva degli obblighi del decreto di liquidazione di somme agli aderenti*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 375 *et seq*.

24 Among which, please see F. Cossignani, *Adempimento spontaneo ed esecuzione collettiva*, in AA.VV., *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, edited by B. Sassani, Pisa, 2019, p. 179 *et seq*.

by more than one creditor (Art. 493, § 1, c.p.c.).

According to the new Article 840 *terdecies* c.p.c., the collective enforcement of the decree of the tribunal is enhanced by the common representative of the subscribers, who takes all the necessary measures in the interest of the members of the class, including also the ones related to the potential opposition proceedings. The legal standing in such proceedings is then to be attributed to the common representative:[25] the intent is to avoid that the individual claims of the participants (often small sums) would start enforcement proceedings concerning different goods and that could be difficult to coordinate, with a consequent damage for the debtor.

6. d) costs and financial incentives

One of the main criticisms brought against the class action regulated by Article 140 *bis* of the Consumer Code concerned the high costs requested to file the suit and the lack of appropriate incentives in relation to said costs and the related risks. In particular, Article 140 *bis*, § 9, of the Consumer Code states that with the judgment that declares the admissibility of the suit, the tribunal sets the deadlines and the manners in which the action is made public, in order to facilitate the prompt subscription by the individuals belonging to the class, specifying that said publicity is a condition without which the action cannot be taken forward.

When applying such provision, courts usually request that the publication of the decision is printed on newspapers, imposing on the plaintiff a significant cost.[26] On the other hand, Article 140 *bis* did not have any provision regulating the costs of the proceedings and in particular the ones related to the appointment of technical consultants and to the collection of evidence undertaken by the collective plaintiff: the only provision on this regard concerned the clearance of the expenditure attributed to the subject who lost the suit, as in such case it is provided that the legal fees can be increased up to three times the original amount (Art. 4, § 10, Ministerial Decree 10

25 D. Amadei, *L'esecuzione spontanea e coattiva degli obblighi del decreto di liquidazione di somme agli aderenti*, 2019, p. 375 *et seq*.

26 On this please see the judgments published on the website of the Ministry of Economic Development at the following link: <https://urly.it/33gk1>.

March 2014, no. 55).

The new class action takes into account such criticism and dictates new provisions aiming at reducing the costs of the plaintiff and inserting incentives for the payment of the legal fees of the counsels assisting the class.

In relation to the costs of the legal action it is immediately specified that the ones related to the publicity of the suit are to be individuated exclusively in the publication of the suit (840 *ter*, § 2), of the judgment over the admissibility of the suit (840 *ter*, § 4) and of the final judgment (Art. 840 *quinquies*, last paragraph) on a specific webpage provided by Article 840 *ter*, § 2.

This new provision has been positively evaluated, given the doubtful communicative functionality of the publication of judgments in newspapers: thus, its elimination can allow the collective plaintiff to use the relevant financial resources for other more effective communication means.[27]

The presence of a specific webpage which can be accessed by any potential collective plaintiff and where the main deeds related to each class action (suit, admissibility decision and final judgment) can be retrieved, jointly with the proposed transactions (Art. 840 *quaterdecies*), seems relevant also to meet the transparency requirements and to allow potential subscribers and actual members to control the management of the class action.

Furthermore, the new regulation also provides that it is up to the defendant to pay the fees and the expenses of the technical consultants appointed by the judge.[28]

The incentives for proposing a class action suit are set forth in Article 840 *novies*, which specifically regulates the expenses of the proceedings. Such provision states that with the final judgment the tribunal orders the defendant to pay a fee to the common representative, calculated on the basis of the number of subscribers, with the application of a decreasing percentage (from 9% until 0,5%), calculated on the basis of the total amount.

Article 840 *novies*, § 6, also states that the tribunal, with the decree that grants

27 A.D. De Santis, *Le spese e le sanzioni*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 364 *et seq*.

28 De Santis, *Le spese e le sanzioni*, 2019, p. 364 *et seq*.

the subscription requests, orders the defendant to pay the legal counsel of the original plaintiff, and also of the plaintiffs that later started joint actions, a rewarding fee which follow the same rules dictated for the remuneration of the common representative.

As it is a rewarding fee, it seems correct to think that the counsels are also to be reimbursed of the ordinary expenses they suffered, which are generally established in favour of the part succeeding in the case, pursuing Article 91 c.p.c., which provides for the increase of the amount up to three times, as set forth in Article 4, Ministerial Decree no. 55/2014.[29]

The concrete quantification of the fees to be awarded to the counsels and to the common representative depends on two parameters: the number of subscribers and the total amount due to all the members in order to calculate the percentage. The second element varies on the basis of the nature and the type of unlawful act, and thus on the choice operated at the beginning by the plaintiff, whereas the number of subscribers depends on the success of the suit and the consequent communication initiatives in order to increase said number. Such settlement of expenses then implies the activism of at least one of the potential interested parties, who usually can be identified in the common representative of the class or in the legal counsel, although there are some issues in relation to the compatibility of such proactivity with the relevant deontological rules.[30]

In particular, one issue might be whether the counsel can legitimately pursue actions, *e.g.*, looking for the aggrieved party who would be willing to act as the common representative of the class, committing himself to pay for the expenses and the costs of the common representative (also the one related to the technical reports or to the unsuccessful outcome of the suit), bringing and managing the suit, urging subscription and thus publicizing the suit.[31]

From a different angle, it can be then observed that the granting of incentives only to the counsels and not also to the collective plaintiff does not seem well

29 For an analysis of the incentives in favour of the common representative, please see D. Amadei, *L'esecuzione spontanea e coattiva degli obblighi del decreto di liquidazione di somme agli aderenti*, 2019, p. 375 *et seq*.

30 For a critical opinion, please see De Santis, *Le spese e le sanzioni*, 2019, p. 364 *et seq*.

31 In fact, such activities could in principle violate Article 37 of the Lawyers' Deontological Code, which prohibits the acquisition of clients.

coordinated with the decision to grant legal standing also to representative associations. If in presence of an individual plaintiff, the counsel of the class is destined to act as the main actor of the suit, the situation is obviously different when the plaintiff is an organization, which does not receive any benefits although it faces costs and risks related to the suit. For example, the appointment of the common representative of the subscribers is left to the discretion of the tribunal, and there is no provision that allows the representative organization which acts as a plaintiff to provide a contribution, as it might have been appropriate, in order to give an incentive to the party starting the suit and not to a third individual.

GIORGIO PINO*

FORMS AND METHODS OF CONSTITUTIONAL INTERPRETATION – ITALIAN STYLE**

ABSTRACT. *This essay will highlight some issues that feature prominently in the Italian debate on constitutional interpretation. To be sure, "constitutional interpretation" is not just a single issue, but rather a cluster of different and tightly interwoven issues, such as: the choice of interpretive canons that best fit the Constitution, the nature of constitutional norms, the relation between constitutional interpretation and statutory interpretation – just to mention a few. I will try to untangle at least some of these issues, and to relate them to the underlying conceptions of the Constitution at work in contemporary Italian legal culture, as well as to similar debates in other countries.*

CONTENT. 1. Constitutional Interpretation in Contemporary Italian Legal Culture – 2. The Nature of Constitutional Norms – 2.1. Constitutional Norms vs. Constitutional Programs – 2.2. Constitutional Rules, Principles, and Values – 3. Constitutional Interpretation and Conceptions of the Constitution – 3.1. The Defensive Constitution – 3.2. The Foundational Constitution – 3.2.2. The Values-Based Model – 4. Taking Stock

* Full Professor of Philosophy of Law, Roma Tre University.

** A slightly different version of this essay will appear in V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini (eds.), *Dialogues on Italian Constitutional Justice*, Routledge 2020.

1. Constitutional Interpretation in Contemporary Italian Legal Culture

Constitutional interpretation has received an extensive and extremely sophisticated treatment by Italian scholars. To be sure, legal interpretation *in general* has always been a point of thorough and intense scholarly debate in contemporary Italian legal culture.[1] But constitutional interpretation has attracted additional interest in its own right, in virtue of the fact that it is widely perceived as a *sui generis* kind of legal interpretation, different in character from 'ordinary' (*i.e.*, statutory) interpretation.[2] Moreover, constitutional interpretation has gradually become an extremely pervasive issue. Indeed, at least in the last three decades the Italian legal culture has firmly embraced the idea that constitutional principles may be relevant for any kind of legal question, and may exert their normative force on any branch of the law. The Constitution, as a consequence, steadily appears in the legal reasoning of Italian jurists – constitutional interpretation is business as usual for Italian jurists, judges and academics alike.[3] Moreover, the Italian Constitutional Court, while originally designed by the Constitution to play the role of just a "negative legislator", has gradually evolved also, and prominently, into an "interpretive agency". In other words the Italian Constitutional Court, in addition to issuing declarations of unconstitutionality, pure and simple, consistently produces also "interpretive decisions", which avoid a declaration of unconstitutionality insofar as it is possible to interpret the "suspect" statute in a "constitutionally compatible way".[4]

1 To name just two Italian classics, E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)*, Milan, Giuffrè, 1949 (a torch-bearer of the hermeneutic approach to legal interpretation); G. Tarello, *L'interpretazione della legge*, Milan, Giuffrè, 1980 (an outstanding example of analytical and legal realistic jurisprudence). More recent and comprehensive primers to legal interpretation are P. Chiassoni, *Tecnica dell'interpretazione giuridica*, Bologna, Il Mulino, 2007, and R. Guastini, *Interpretare e argomentare*, Milan, Giuffrè, 2011.

2 See L. Paladin, *Le fonti del diritto italiano*, Bologna, Il Mulino, 1996, p. 110 (the Constitution «paves the way for a new theory of interpretation»).

3 Hereinafter, I will use "Constitution" (with a capital C) in order to refer to a particular constitution (such as, and most frequently, the Italian one), and "constitution" (with a lowercase c) in order to refer to the constitution as an abstract object.

4 According to a long-standing doctrine of the ItCC, ordinary judges should not even refer a question of constitutionality, if the suspect statute can be interpreted in a way that is compatible with the Constitution (see *e.g.*, Judgment 356/1996). See V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*

This essay will highlight some issues that feature prominently in the Italian debate on constitutional interpretation. To be sure, "constitutional interpretation" is not just a single issue, but rather a cluster of different and tightly interwoven issues, such as: the choice of interpretive canons that best fit the Constitution, the nature of constitutional norms, the relation between constitutional interpretation and statutory interpretation – just to mention a few. I will try to untangle at least some of these issues, and to relate them to the underlying conceptions of the Constitution at work in contemporary Italian legal culture, as well as to similar debates in other countries.

2. The Nature of Constitutional Norms

A preliminary issue that needs to be addressed concerns the very the nature of constitutional norms. Are constitutional norms properly *legal* norms, or should they be considered more akin to policy directives or political programs?[5]

2.1. Constitutional Norms vs. Constitutional Programs

This issue has been heatedly debated in the Italian legal culture especially during the hiatus between the entry into force of the Republican Constitution (1948), and the first ruling of the Italian Constitutional Court (1956). Back then some scholars, as well as the Supreme Court (*Corte di Cassazione*), maintained that substantial parts of the Constitution should be understood as "programs" or "policies" rather than as full-blown, mandatory legal norms. These would include the "Bill of Rights" part of the Constitution (Articles 1 to 54) almost in its entirety, and possibly also some articles of the "Frame of Government" part. Under this view, arguably shared even by the Framers themselves, the Constitution is to be regarded more as a *political* document, rather than a properly *legal* one. It does not really qualify as *law*, but rather as a sort of political

in Global Context, Oxford, Oxford University Press, 2016, pp. 82-91.

5 I use "policy" here in roughly the sense stipulated by R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1978, p. 22 («I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community»); see also M. Atienza, J. Ruiz Manero, *A Theory of Legal Sentences*, Dordrecht, Springer, 1998, p. 5, p. 11. For a more general view on this topic, see L. Weis, *Constitutional Directive Principles*, *Oxford Journal of Legal Studies*, 37, 2017, p. 916.

statement. As such, it is not apt for judicial application – its function, instead, is to serve as a point of reference in the political debate and the legislative process.[6]

Now, the idea that the Constitution (or ample portions thereof: hereafter I will leave this qualification aside) is better conceived just in terms of a set of policy directives has clear implications on constitutional interpretation. For one thing, under this view the legislature becomes the sole "master of the constitution": implementing the Constitution is up *only* to the legislature. It is only through legislation that constitutional policies become legal norms (*interpositio legislatoris*).[7] Courts, on the other hand, in their ordinary adjudicative functions, will not be able to resort directly to the Constitution – the Constitution, as such, is not justiciable.

Interestingly, the merely programmatic character of the constitution, and particularly of the provisions on fundamental rights and liberties – an idea somewhat anticipated by Hans Kelsen[8] – is now vindicated by "political constitutionalists," whose fundamental claim is that rights are better left to political debate and to the determinations of a democratically elected legislator rather than to courts. And, to this effect, they recommend also that the constitution be stripped of its properly legal

6 C. Mezzanotte, *La Corte costituzionale: esperienze e prospettive*, AA.VV. *Attualità e attuazione della Costituzione*, Bari, Laterza, 1979. For a discussion of the theory of the "programmatic" character of the Constitution, see L. Paladin, *Le fonti del diritto italiano*, n. 2, p. 135; M. Luciani, *Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana*, G. Brunelli, G. Cazzetta (eds.), *Dalla Costituzione "inattuata" alla Costituzione "inattuale"? Potere costituente e riforme costituzionali nell'Italia repubblicana*, Milan, Giuffrè, 2013, pp. 40-49.

7 Some scholars distinguish between "implementation" and "application" of the constitution – the former understood as a matter of legislation and administrative regulations, the latter as a judicial task (M. Luciani, *Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana*, n. 6). The intended practical import of this distinction is that some constitutional norms are apt to (judicial) application, whereas other such norms are subject only to (legislative) implementation. In the interest of space, I will not expand on this point here, but I do think that this distinction is precarious at best. In the following, then, I will use "implementation" and "application" as synonymous.

8 H. Kelsen, *The Nature and Development of Constitutional Adjudication*, 1929, L. Vinx (eds.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge, Cambridge University Press, 2015, p. 60. For a recent restatement of this very idea, G. Webber, *Legal Reasoning and Bills of Rights*, *LSE Law, Society and Economy Working Papers*, 1, 2011, p. 1 at 10: «Legislation […] gives the various rights and freedoms affirmed in a bill of rights legal life. […] Legislation does no more and no less than take the abstracted and reified affirmations of rights in a bill of rights and render them apt and cognisable in law by specifying their scope and content».

character and confined only to the "political" realm.[9]

The opposite view is that the constitution is not just a political manifesto but a properly legal document – a proper source of law.[10] As such, the constitution is directly amenable to legal interpretation (as opposed to being confined to political debate), and constitutional norms are to be considered legal norms on all counts. The implementation, or application, of the constitution is not only a matter of sheer political choices to be adopted by the legislature, but also a matter of legal interpretation and legal reasoning performed by courts, with only scarce exceptions.[11]

To be sure, in Italian legal culture the policy/mandatory norms alternative has now lost most of its appeal. As soon as the Italian Constitutional Court became fully operative, it claimed the power of enforcing – or at least of using in its legal reasoning – any kind of constitutional provision; as a consequence, Italian scholars became suddenly aware that the Constitution could and should be regarded as a proper source of law. Put differently, in Italy the legal culture has undergone a massive and, as much as one can foresee, irreversible paradigm shift from a political constitutionalist to a legal-constitutionalist stance.[12] Even those who insist that courts should play a more limited role in the administration of rights – and conversely that the legislature should play a more central role therein – do not question the full-blown legal character of the Constitution and the importance of judicial review of legislation.

9 See J. WALDRON, *A Right-Based Critique of Constitutional Rights*, in 13 *Oxford Journal of Legal Studies* 18 (1993); J. WALDRON, *Law and Disagreement*, Oxford, Oxford University Press, ch. 12; R. BELLAMY, *Political Constitutionalism*, Cambridge, Cambridge University Press, 2007; G. WEBBER, *The Negotiable Constitution*, Cambridge, Cambridge University Press, 2009, ch. 5.

10 See S. GARDBAUM, *The Place of Constitutional Law in the Legal System*, M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012 (contrasting "political," "legal," and "total" constitutionalism).

11 The usual example is Art. 4: «The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective».

12 Among the very few dissenting voices, A. PINTORE, *I diritti della democrazia*, Bari, Laterza, 2003.

2.2. Constitutional Rules, Principles, and Values

If constitutional norms are proper, mandatory legal norms and not just policy directions for future legislation, one may still ask what kind of norms they are. Here the relevant distinction is between rules, principles, and values.[13]

Of course, nobody would actually claim that the Constitution consists *only* of rules, or *only* of principles, or *only* of values. Rather, the point here is about the comparative importance of these different kinds of norms in the architecture of the constitution.[14]

In legal scholarship, "rules", "principles" and "values" are not always clearly defined, nor always used in a consistent manner.[15] For present purposes, we may rely on the following provisional definitions. Rules are norms that are relatively *precise* and *determinate* in both their scope of application and their normative consequences. Principles are norms that are relatively *generic* and *indeterminate* in both their scope of application and their normative consequences. Moreover, principles embody, or give direct legal expression to, some moral or political ideal;[16] accordingly, a principle is a norm that conveys a peculiar dimension of "importance".[17] Values are moral or political

13 On this distinction, as referred to constitutional norms, see R. Alexy, *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2010, ch. 3; O. Chessa, *Libertà fondamentali e teoria costituzionale*, Milan, Giuffrè, 2002, pp. 357-393; G. Zagrebelsky, *Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View*, *I-CON*, 1, 2003, p. 621.

14 In quite a similar vein, I think, but with different terminology, Jeffrey Goldsworthy distinguishes between a "positivist" and a "normativist" conception of the constitution, as two extremes of a spectrum that includes various intermediate possibilities. According to the former, the constitution consists of "a set of discrete written provisions" (*i.e.*, rules), while according to the latter the constitution is «a normative structure whose provisions are, either explicitly or implicitly, based on deeper principles, and ultimately on abstract norms of political morality»; see J. Goldsworthy, *Constitutional Interpretation*, M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, sec. 1. This choice of words, however, is rather unfortunate since "positivism" and "normativism" normally refer to two well-known traditions in legal philosophy, which are not even remotely related to specific viewpoints on the nature of constitutions.

15 G. Pino, *Teoria analitica del diritto I. La norma giuridica*, Pisa, ETS, 2016, ch. 4.

16 S. Perry, *Two Models of Legal Principles*, *Iowa Law Review*, 82, 1997, p. 787 at 788 («the explicit content of principles is value-oriented, whereas that of rules is action-oriented»). See also N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon, 1978, p. 234; M. Jori, *I principi nel diritto italiano*, M. Jori, *Saggi di metagiurisprudenza*, Milan, Giuffrè, 1985, pp. 301-302.

17 S. Bartole, *Costituzione (Dottrine generali e diritto costituzionale)*, *Digesto delle Discipline Pubblicistiche*,

goods, conceived at an extremely high level of abstraction – equality, liberty, dignity, and democracy, are good cases in point.

Now, how is the rules-principles-values distinction relevant for constitutional interpretation? For one thing, when we talk about constitutional *norms,* we are assuming that some kind of interpretive job has already taken place: a norm is always the *result*, rather than the starting point, of legal interpretation. Before interpretation, there is no norm; there is just a text. The norm is the meaning (the semantic content) that is extracted from a source of law through interpretation. Accordingly, the possibility itself of framing constitutional norms in terms of rules, principles, or values is the outcome of a preliminary interpretive choice. Of course, the wording of the constitutional text provides some guidance to this effect. Accordingly, a sharply drafted provision will be easily interpreted as stating a rule, whereas a provision drafted in abstract, morally laden language will be easily interpreted as stating a principle (the case of values is different, as we shall see shortly). But the interesting point, here, is that *in principle* nothing prevents an interpreter from deriving a rule from a provision that is drafted in abstract, morally laden terms. And of course it is also possible to derive a principle from, or to read a value behind, a sharply formulated provision. Such interpretive choices ultimately depend on the background conception of the constitution adopted by the interpreter.

But there is more, of course. The "pre-interpretive" choice of framing constitutional norms in terms of rules, principles, or values, in turn, affects the next moves in the constitutional interpretation game – there are things that can be done (only, or preferably) with rules, things that can be done (only, or preferably) with principles, and things that can be done (only, or preferably) with values. Let's see.

If constitutional norms are framed in terms of *rules*,[18] they will be expected to

IV, 1989, p. 288 at 318; R. Guastini, *Teoria e ideologia dell'interpretazione costituzionale*, LI *Giurisprudenza costituzionale*, 1, 2006, p. 743.

18 Examples of a rule-oriented approach to the Constitution in Italian scholarship include: A. Pace, *Metodi interpretativi e costituzionalismo*, *Quaderni costituzionali*, XXI, 2001, p. 35; A. Pace, *Interpretazione costituzionale e interpretazione per valori*, G. Azzariti (ed.), *Interpretazione costituzionale*, Turin, Giappichelli, 2007; M. Dogliani, *Il «posto» del diritto costituzionale*, *Giurisprudenza costituzionale*, 1993, p. 525; R. Guastini, *Diritto mite, diritto incerto*, *Materiali per una storia della cultura giuridica*, XXVI, 1996, p. 513; L. Ferrajoli, *Costituzionalismo principialista e costituzionalismo garantista*, *Giurisprudenza costituzionale*, 2010, p. 2809; V. Angiolini, *Costituente e*

provide clear-cut requirements applicable in an "all-or-nothing" fashion, and thus they will provide clear indications of what is constitutionally permissible and what is constitutionally forbidden. Rules, when they are applicable, are supposed to apply without exception. A rule-based constitution, thus, will provide interpreters with precise indications as to what is constitutionally permissible and what is constitutionally forbidden. Courts will enjoy little discretion in applying the constitution.

Interpreting and applying a principle-based constitution,[19] on the other hand, is an entirely different matter. As we have already seen, *principles* are characterized by a certain degree of genericity, indeterminacy, and importance. As such, principles cannot determine directly the outcome of a case. The application of principles requires a previous "specification" – a process that translates the original principle into a more manageable rule, or set of rules. Moreover, principles tend to conflict with one another: many principles may be relevant in a given case, pulling in different directions. And such conflicts are usually solved through a "balancing" exercise – an assessment of the respective importance of the principles at stake in the case in question. It is easy to see, then, that the interpretation and application of a principle-based constitution is bound to become a discretionary exercise – far more discretionary than the interpretation of a rule-based constitution. Specification and balancing are necessary steps for the judicial application of a principle-based constitution, and – precisely because of the indeterminacy and genericity of principles – there are many different ways of either specifying a given principle or of balancing competing principles against each other. From an abstract principle, or from two or more colliding principles, many different and alternative rules may be derived by way of specification or balancing. So, a principle-oriented understanding of the constitution brings to the fore the need for courts to engage in a highly discretionary interpretive exercise, as opposed to the alleged "automatic" precision

costituito nell'Italia repubblicana, Padua, Cedam, 1995.

19 Examples of a principle-oriented approach to the Constitution in Italian scholarship include: G. Zagrebelsky, *Il diritto mite*, Turin, Einaudi, 1992; G. Zagrebelsky, *Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View*, 13, 2003, p. 621; G.U. Rescigno, *Interpretazione costituzionale e positivismo giuridico*, in 1 *Diritto pubblico,* 2005, p. 19; C. Pinelli, *Il dibattito sull'interpretazione costituzionale tra teoria e giurisprudenza*, *Scritti in memoria di Livio Paladin*, Naples, Jovene, 2004, p. 1665.

that is supposed to characterize the application of rules.[20]

Finally, constitutional *values* – a rather under-analysed concept in both legal theory and general legal discourse. Indeed, the distinction between principles and values is far from clear. Scholars and courts use these two terms more or less interchangeably, to refer to some exceedingly abstract normative standard imbued with moral or political significance.[21] Still, recourse to "values" gives a peculiar twist to constitutional interpretation (as we shall see shortly). While rules and principles certainly fit in the customary picture of the legal norm (in the sense that they are both *legal* and *norms*), the status of values is far less certain. On the one hand, a value is not normally thought of as a proper *norm*, but rather as the *foundation* of norms. On the other hand, the *legal* status of values is rather peculiar when compared to the legal status of an ordinary legal norm. Normally, values are not directly written into the text of the constitution,[22]

20 For this reason, some scholars maintain that it is the job of the legislator – and not of the judge – to transform abstract constitutional principles into judicially manageable rules: S. Fois, *«Ragionevolezza» e «valori»: interrogazioni progressive verso le concezioni sulla forma di Stato e sul diritto*, *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale. Riferimenti comparatistici*, Milan, Giuffrè, 1994, p. 103, p. 109; A. Pace, *Metodi interpretativi e costituzionalismo*, n. 18, pp. 57-58; R. Guastini, *Ponderazione. Un'analisi dei conflitti tra principi costituzionali*, *Ragion pratica,* 151, 2006, p. 159; G. Scaccia, *Valori e diritto giurisprudenziale*, in 1 *Diritto e società*, 2011, p. 135; L. Ferrajoli, *La democrazia attraverso i diritti*, Bari, Laterza, 2013, pp. 133-137.
Similar concerns are also visible in constitutional scholarship in other countries: see M. Nimmer, *The Right to Speak from* Times *to* Time. *First Amendment Theory Applied to Libel and Misapplied to Privacy*, *California L.R.*, 56, 1968, p. 935 at 947 («[balancing] may be criticized as a form of judicial lawmaking, and as such a usurpation of the legislative function»); B. Neuborne, *Notes for a Theory of Constrained Balancing in First Amendment Cases*, *Case Western L.R.,* 38, 1988, p. 576 at 578 («judicial balancing […] licenses a judge to engage in overtly subjective decision-making that replicates and occasionally displaces identical thought-processes already carried out by a politically responsible official»); P. de Lora, *Tras el rastro de la ponderación*, *Revista Española de Derecho Constitucional,* 2000, pp. 359-367 («Esa tarea de los tribunales no dista mucho de la legislación»); A. Stone Sweet, *Governing with Judges*, Oxford, Oxford University Press, 2000, p. 98 («A balancing jurisprudence not only gives the court great discretion, but it will inevitably cast the court into a more legislative style of deliberation and decision-making than would a jurisprudence of absolute rights»).

21 Examples of a value-oriented approach to the Constitution in Italian scholarship include: A. Baldassarre, *L'interpretazione della costituzione*, A. Palazzo (eds.), *L'interpretazione della legge alle soglie del XXI secolo*, Naples, Edizioni Scientifiche Italiane, 2001, p. 215; M. Cartabia, *Principi inviolabili e integrazione europea*, Milan, Giuffrè, 1995; A. Barbera, *La Costituzione della Repubblica italiana*, Milan, Giuffrè, 2016. For a stark criticism of value-talk in constitutional interpretation, however, see L. Paladin, *Le fonti del diritto italiano*, n. 2, p. 143, and G. Zagrebelsky, *La legge e la sua giustizia*, Bologna, Il Mulino, 2008, pp. 206-208.

22 A. Baldassarre, *L'interpretazione della costituzione*, A. Palazzo (eds.), *L'interpretazione della legge alle soglie*

and the individuation of values normally takes the interpreter far away from the text. Values are supposed to be inferred from the "spirit" of some constitutional provision, or even from the whole constitution. The written provisions of the documentary constitution may work as epiphanies of the constitutional *relevance* of a certain value, but the value itself will rest on some "objective," non-legal ground. More precisely, values are thought to be grounded in some objective moral system (or in some kind of natural law),[23] or in society,[24] or in a combination of both morality and society.[25]

Hence, the identification of values hardly qualifies as an exercise in legal interpretation – it is not constrained by the text of the constitution, and it is conceived as a kind of objective cognition of some moral reality.

del XXI secolo, 2001, p. 215. Among the scarce exceptions, one may point to Art. 13 of the Italian Constitution («Personal liberty is inviolable»), and Art. 1 of the German *Grundgesetz* («Human dignity shall be inviolable»).

23 An approach of this sort is conspicuous in German constitutional jurisprudence, whereby the German Basic Law is understood to incorporate an "objective order of values". See R. Herzog, *The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights*, in 13 *Human Rights L.J.*, 13, 1992, p. 90 at 91; D. Kommers, *German Constitutionalism: A Prolegomenon*, *Emory L.J.*, 40, 1991, p. 837 at 851; D. Kommers, *Germany: Balancing Rights and Duties*, J. Goldsworthy (ed.), *Interpreting Constitutions. A Comparative Study*, Oxford, Oxford University Press, 2006, p. 203; M. Hailbronner, *Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism*, *I-CON*, 12, 2014, p. 626; J. Bomhoff, *Balancing Constitutional Rights*, Cambridge, Cambridge University Press, 2013, p. 103 *et seq.* According to B. Schlink, *The Dynamics of Constitutional Adjudication*, *Cardozo L.R.*, 17, 1996, p. 1231, however, the «Bundesverfassungsgericht's value orientation is a myth» (at 1234). See also A. Chaskalon, *From Wickedness to Equality: The Moral Transformation of South African Law*, *I-CON*, 1, 2003, p. 590 at 608 («The Constitution now contains an objective normative value system»). For the use of value-arguments in American constitutional interpretation, see R. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, *Harvard L.R.*, 100, 1987, p. 1189 at 1204-1209; P. Bobbitt, *Constitutional Law and Interpretation*, D. Patterson (eds.), *A Companion to Philosophy of Law and Legal Theory*, Oxford, Blackwell, 1996. For a comparison between the German and the American approach to values in constitutional interpretation, see M. Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, *I-CON* , 2, 2004, p. 633 at 650-651, 661.

24 A. Baldassarre, *L'interpretazione della costituzione*, A. Palazzo (eds.), *L'interpretazione della legge alle soglie del XXI secolo*, 2001, p. 226; A. Barak, *Purposive Interpretation in Law*, Princeton, Princeton University Press, 2005, pp. 381-382; G.J. Jacobsohn, *Constitutional Values and Principles*, M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 777.

25 G. Fassò, *Il giudice e l'adeguamento del diritto alla realtà storico-sociale e procedura civile*, *Rivista trimestrale di diritto e procedura civile,* XXVI, 1972, p. 897.

3. Constitutional Interpretation and Conceptions of the Constitution

The three approaches to the constitution (as rule-based, principle-based, and value-based) introduced in the preceding section embody different *conceptions* of the constitution – *i.e.*, different conceptions of the nature and function of the constitution in the legal and political system. It is in the light of a given background conception of the constitution that it makes sense to frame the normative content of constitution in terms of rules, or principles, or values.

In this regard, one can usefully distinguish between a "defensive" and a "foundational" conception of the constitution – or, somewhat more accurately, between a cluster of "defensive" conceptions and a cluster of "foundational" conceptions of the constitution.[26]

3.1. The Defensive Constitution

According to a "defensive" conception of the constitution, the constitution should be primarily, or even exclusively, regarded as a protective device against governmental intrusion into certain rights.[27]

Under this approach, the constitution is limited in scope – it covers only a well-defined area of the social and political life of the relevant polity, and legislation is legitimate as long as it remains outside the area protected by the constitution. In other words, the legislature normally moves in a "constitution-free" area, and the content of a great deal of legislation is constitutionally irrelevant; the legislature must stop only in

26 See G. Tarello, *L'interpretazione della legge*, n. 1, pp. 335-337. In slightly different terms, see V. Onida, *L'attuazione della Costituzione tra magistratura e Corte costituzionale*, *Scritti in onore di Costantino Mortati*, Milan, Giuffrè, 1977, p. 501, and M. Dogliani, *Il «posto» del diritto costituzionale*, n. 18 (contrasting "defensive" and "expansive" conceptions of the constitution).

27 This approach is usually associated to the mainstream American understanding of the constitution: see L. Weinrib, *The Postwar Paradigm and American Exceptionalism*, S. Choudhry (eds.), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2007; M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, Cambridge, Cambridge University Press, 2013, chs. 5 and 6; J. Bomhoff, *Balancing Constitutional Rights*, n. 23, ch. 5. The poster child of this attitude is of course the rule-like rendering of the First Amendment in the jurisprudence of the Supreme Court: see F. Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, G. Nolte (ed.), *European and US Constitutionalism*, Cambridge, Cambridge University Press, 2005.

front of the gates of the constitutional fortress, guarded by the Constitutional Court. As a consequence, the constitution should work primarily as a checklist of "negative" validity conditions for legislation. Legislation may have any content whatsoever, as long as it does not clearly encroach upon the area protected by the constitution.

A defensive constitution, then, is premised exactly upon the possibility of clearly distinguishing between what is protected by the constitution and what is constitutionally irrelevant – between the freedom of the legislature and the competence of the Constitutional Court. And this condition can be satisfied only if the constitution is designed as a set of (precise) *rules*.

All this has some interesting implications for constitutional interpretation. Under a defensive, rule-oriented conception of the constitution, constitutional interpretation should be performed with a good amount of self-restraint, with a view to preserving legal certainty and the distinction of competences between legislator and courts. To that end, textualism and originalism become the favourite canons of constitutional interpretation.[28] More generally, under this approach there is no meaningful difference between constitutional interpretation, on the one hand, and statutory interpretation, on the other. Constitutional interpretation resorts to the same interpretive canons that are in place in ordinary, statutory interpretation[29] – the constitution is just a statute that happens to be hierarchically superior to other statutes.

Finally, the defensive conception has implications for the role of courts *vis-à-vis* the constitution. Under this conception, the constitution is not supposed to be

28 M. Dogliani, *Il «posto» del diritto costituzionale* n. 18; A. Pace, *Metodi interpretativi e costituzionalismo*, n. 18; M. Luciani, *Interpretazione costituzionale e testo della costituzione. Osservazioni liminari*, G. Azzariti (ed.), *Interpretazione costituzionale*, Turin, Giappichelli, 2007, p. 48, and *Interpretazione conforme a costituzione*, *Enciclopedia del diritto*, Annali IX, 391 (2016), 441; M. Esposito, *In penetralibus pontificum repositum erat: brevi considerazioni sulla parabola discendente del diritto scritto*, *Giurisprudenza costituzionale*, 2004, p. 2995. More generally, on the link between originalism and a perception of the constitution "as a statute", see M. Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, n. 25, pp. 656-657.

29 R. Guastini, *Interpretare e argomentare*, n. 1, pp. 343-351; A. Pace, *Interpretazione costituzionale e interpretazione per valori*, n. 18, p. 95; M. Luciani, *Interpretazione conforme a costituzione*, n. 28, p. 441 (nevertheless acknowledging that the difference between constitutional and statutory interpretation may in fact be "in degree", rather than in kind); M. Troper, *Constitutional Interpretation*, *Israel L.R.*, 39, 2006, p. 35; P. Bobbitt, *Constitutional Law and Interpretation*, n. 25, p. 127.

applied directly by ordinary courts in their ordinary adjudicative functions; rather, ordinary courts should limit themselves to "alerting" the Constitutional Court when they happen to stumble upon a constitutionally suspect statute. The Constitutional Court, in turn, should operate only as a "negative legislator" – its job is not to develop or implement the constitution but only to quash those statutes that are in clear contrast with the constitution.[30]

3.2. The Foundational Constitution

Under a "foundational" conception of the constitution, the constitution is seen as the foundation of the entire legal order: each and every norm of the legal system is valid only insofar as it is produced in accordance with the constitution, and is compatible with the constitution. Under this conception, the constitution is supposed to work *not only* as a set of negative limits but *also* – and most importantly – as a set of principles and values that call for implementation at both the legislative and the judicial level. Constitutional principles and values project their normative force upon the entire legal system. According to this conception, the function of the constitution is not only to *limit* governmental activities, but also to *direct* the actions of public authorities (including legislatures) towards certain constitutionally mandated objectives. Under a "foundational" conception, the constitution – far from being just a kind of statute – is a law of a peculiar kind, in virtue of its content and functions.[31]

As a consequence, the normative content of the constitution cannot be reduced to a set of fixed, stable, precise rules – the kind of norms we would expect to find in a statute. Rather, the constitution – the real content of the constitution, the most important part of the constitution – is seen either as a set of principles or as set of values. A foundational conception of the constitution, thus, may present itself either in a

30 The idea of the Constitutional Court as an essentially "negative legislator" was famously defended by H. Kelsen, *The Nature and Development of Constitutional Adjudication*, n. 8, and H. Kelsen, *General Theory of Law and State*, Cambridge, Harvard University Press, 1945, p. 268.

31 G. Zagrebelsky, *La legge e la sua giustizia*, 2008, p. 267; P. Hogg, *Canada: From Privy Council to Supreme Court*, J. Goldsworthy (ed.), *Interpreting Constitutions. A Comparative Study*, Oxford, Oxford University Press, 2006, p. 55, p. 77 (after the entry into force of the Canadian Charter of Rights and Freedoms, «the concept of the Constitution as a statute is well and truly over»).

principle-based or in a value-based fashion.

A few interesting implications follow from this. First, under a foundational approach the constitution is not a separate field of the law, but rather it irradiates the entire legal order. Every area of the law is subject to the influence of constitutional principles and values. The entire legal system has to be rendered fully compatible with the constitution, with no "black holes" or "constitution-free" areas.[32] The constitution, thus, becomes relevant for any kind of legal, political, and social dispute – it is a "total" constitution.[33]

Secondly, under a foundational approach the responsibility to implement constitutional principles and values falls on every legal and political actor. Constitutional principles will be implemented – through specification and balancing – not only by legislatures but also by courts, no matter how much judicial discretion is involved in such operations.

Thirdly, under a foundational approach constitutional interpretation is perceived as different in character from ordinary, statutory interpretation. As a consequence, it resorts to interpretive methodologies that are specifically appropriate for the constitution.[34] For instance, the peculiar normative content of the constitution

32 This is sometimes referred to as the "constitutionalization" of the (entire) legal system. As far as I know, this term, now widely used, has been first introduced in this sense by G. Tarello, *L'interpretazione della legge*, n. 1, p. 337. Subsequently, see A. Gambaro, R. Pardolesi, *L'influenza dei valori costituzionali sul diritto civile*, A. Pizzorusso, V. Varano (eds.), *L'influenza dei valori costituzionali sui sistemi giuridici contemporanei*, Milan, Giuffrè, 1985, I, p. 5, p. 12; L. Favoreau, *Le droit constitutionnel, droit de la Constitution et constitution du droit*, in 1 *Revue française de droit constitutionnel*, 1, 1990, p. 71; L. Favoreau, *La constitutionnalisation du droit*, J.-B. Auby (eds.), *L'unité du droit. Mélanges en hommage à Roland Drago*, Paris, Economica, 1996, p. 25; L. Favoreau, *La constitutionnalisation de l'ordre juridique: considerations générales*, *Revue belge de droit constitutionnel*, 1998, p. 233; R. Guastini, *La "costituzionalizzazione" dell'ordinamento italiano*, *Ragion pratica*, 11, 1998, p. 185; A. Stone Sweet, *Governing with Judges*, n. 20, 2000, pp. 114-125 (analysing this phenomenon in Italy, France, Germany, and Spain).

33 R. Bin, *Cosa è la Costituzione?*, *Quaderni costituzionali*, XXVII, 2007, p. 11. See also M. Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, in 7 *German L.J.*, 7, 2006, p. 341; S. Gardbaum, *The Place of Constitutional Law in the Legal System*, n. 10; M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, n. 27, p. 60 («in Germany, almost any legitimate individual or collective interest is grounded on a constitutional value and accorded constitutional status»).

34 The idea that constitutional interpretation is a peculiar kind of interpretation, which is not reducible to the ordinary techniques of statutory interpretation, is probably the majoritarian view in current Italian constitutional scholarship; see C. Pinelli, *Il dibattito sull'interpretazione costituzionale tra teoria e giurisprudenza*, n. 19, p. 1666. In

– principles, values – is not amenable to a merely literal interpretation (hence the rejection of textualism), and requires to be frequently adjusted to the ever-changing factual and social circumstances (hence the rejection of originalism). Principles and values ask for a "generous", purposive interpretation (hence the rejection of strict constructionism). Moreover, given that the normative content of the foundational constitution is constituted by moral and political principles and values (such as liberty, equality, dignity…), the interpretation and application of the constitution will inevitably require some kind of "moral reading". Constitutional interpretation, that is, will necessarily be contaminated by moral arguments.[35]

The upshot of all this is quite straightforward: the foundational model acknowledges a wide range of interpretive discretion for the judiciary. Both constitutional and statutory interpretation become "activist" and "dynamic" enterprises, as opposed to the "restrained" and "static" approaches required by a defensive, rule-based model of the constitution.[36] Courts will routinely use constitutional principles and values, either by directly applying them to a case, or by using them "indirectly," as aid in determining the meaning of a statute. The Constitutional Court, in turn, will tend to perform judicial review mainly on an interpretive level, as it were. The Constitutional Court, that is, rather than quash a constitutionally suspect statute, will mostly strive to interpret it in a "constitutionally compatible way". [37]

Put differently, a "foundational" conception of the constitution recasts the role

the international debate, see for instance A. Barak, *Hermeneutics and Constitutional Interpretation*, *Cardozo L.R.*, 14, 1993, p. 767 at 772; W. Waluchow, *Constitutional Interpretation*, A. Marmor (ed.), *The Routledge Companion to Philosophy of Law*, Abingdon, Routledge, 2012, pp. 418-419.

35 B. Celano, *I diritti nello Stato costituzionale*, Bologna, Il Mulino, 2013; G. Pino, *Positivism, Legal Validity, and the Separation of Law and Morals*, *Ratio Juris*, 27, 2014, p 190. The phrase "moral reading" has been famously coined by R. Dworkin, *Freedom's Law*. *The Moral Reading of the American Constitution*, Cambridge, Harvard University Press, 1996.

36 R. Guastini, *Teoria e ideologia dell'interpretazione costituzionale*, n. 17 (contrasting "activist" vs "restrained", and "dynamic" vs "static" approaches to constitutional interpretation). In a similar vein, see also P. Chiassoni, *Tecnica dell'interpretazione giuridica*, n. 1, pp. 159-161 (contrasting "traditionalist" and "modernist" approaches to constitutional interpretation).

37 G. Zagrebelsky, *La legge e la sua giustizia*, 2008, pp. 261-262 (judicial review as performed by the Italian Constitutional Court is more concerned with issuing "constitutionally compatible" statutory interpretations rather than judgements on the constitutional validity of statutes).

of both the Constitutional Court and ordinary courts in some important ways:

1) The Constitutional Court will not just be a "negative" legislator, but also a "positive" one: the Court will claim the power not only to quash statutes, but also to manipulate them in order to make them coherent with the constitution.[38]

2) The Constitutional Court will not only be engaged in a "validity check" on statutes, but will also play the role of an "interpretive agency."[39]

3) Due to the important and activist role played by ordinary courts in taking care of potentially unconstitutional legislation, the system of judicial review will tend to become a "mixed" one – both centralized and partially decentralized.[40]

So far, I have pointed to some features that can be found in all versions of a foundational conception of the constitution. To be sure, within the foundational conception it is possible to find important variations, which depend on whether the normative core of the constitution is framed in terms of principles or of values. To these variations I now turn.

3.2.1. The Principle-Based Model

As already noted, principles are norms that are characterized by a substantial degree of indeterminacy and importance. Constitutional principles, thus, do not have a precise scope of application. They display their normative force by generating more determinate rules or other – less determinate – principles. Now, if the normative content of the foundational constitution is framed in terms of principles, the general

38 On this kind of judgments, see V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, n. 4, pp. 86-88. See also D. Rousseau, *The Constitutional Judge: Master or Slave of the Constitution?*, *Cardozo L.R.*, 14, 1992, p. 775 at 778, on "constructive interpretations" rendered by the French Constitutional Council, whose role tends to become akin to a "colegislator" (783).

39 For similar trends in other European countries, see A. Stone Sweet, *Governing with Judges*, n. 20, 2000, pp. 71-73.

40 See V. Onida, *L'attuazione della Costituzione tra magistratura e Corte costituzionale*, n. 26, 514; S. Cassese, *La giustizia costituzionale in Italia: lo stato presente*, *Rivista trimestrale di diritto pubblico*, 2012, p. 603 at 606. For some general remarks on this trend, visible also in other European countries, see V. Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, *I-CON*, 2, 2004, p. 461.

picture drawn in the preceding section may be enriched in the following way.

First, a principle-based constitution is pervasive – any kind of legal, social and even political issue may be "subsumed" under some constitutional principle. And in this sense, the constitution is indeed a "total" constitution. But this does not imply that the constitution also provides *complete and precise answers*;[41] in fact, it is in the very nature of legal principles that they do not directly provide precise answers, exactly in virtue of their indeterminacy and genericity. A principle points in a direction: it "governs" – *i.e.*, it is relevant for – a given subject-matter, without "regulating" it in a precisely detailed way. A principle-based constitution, thus, is not a blueprint but a compass – it allows for many "possible constitutional worlds."[42]

Secondly, in a principle-based constitution there is no fixed intra-constitutional hierarchy.[43] The several constitutional principles are generally on a par. To be sure, it is possible that some constitutional principle *presumptively* weighs more than some other principle. But even in these cases, principles do not escape the balancing game – indeed, a presumptively weightier principle may in some cases be less important than another competing principle. Consequently, a principle-based constitution makes room for the possibility – indeed, the inevitability – of intra-constitutional conflicts.[44] A related point is this: as a matter of course, it is consistent with the foundational model that constitutional principles are balanced and/or specified by both the legislature and the courts. But there's

41 See D. Grimm, *The Function of Constitutions and Guidelines for Constitutional Reform*, 1972, D. Grimm, *Consitutionalism*, Oxford, Oxford University Press, 2016, p. 133; V. Ferreres Commella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, *Texas L.R.*, 82, 2004, p. 1705 at 1736. For a contrary opinion, see R. Guastini, *Applying Constitutional Principles*, *Analisi e diritto*, 2016, p. 241 at 243 («since principles have no definite boundaries of application, the more constitutional provisions are treated as principles the more the constitution looks as "gapless" or "complete", in the sense that the constitution looks able to regulate any possible subject-matter whatsoever»).

42 J.J. Moreso, *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, Springer, 1998, ch. 4.

43 G. Zagrebelsky, *Il diritto mite*, 1992, p. 11, and G. Zagrebelsky, *La legge e la sua giustizia*, 2008, p. 284; R. Bin, *Diritti e argomenti*, Milan, Giuffrè, 1992, pp. 32-35; G. Pino, *Diritti e interpretazione*, Bologna, Il Mulino, 2010, ch. 6.

44 G. Zagrebelsky, *Il diritto mite*, 1992, pp. 11, 16, 170-173; R. Bin, *Cosa è la Costituzione?*, n. 33; G. Pino, *Diritti e interpretazione*, 2010, ch. 6. More generally on this point see R. Dworkin, *Taking Rights Seriously*, 1978, p. 22; R. Alexy, *A Theory of Constitutional Rights*, 2010, ch. 3; L. Tribe, M. Dorf, *On Reading the Constitution*, Cambridge, Harvard University Press, 1991, pp. 24-25.

a wrinkle. When balancing/specification is carried out by the legislature, the result is a new piece of legislation. By contrast, when balancing/specification is carried out by a court – even by an ordinary court – the result is a new rule or principle that has constitutional "relevance", because it is supposed to derive directly from the constitution. The paradox, then, is that the implementation of the constitution performed by the legislature produces *legislation*, whereas the implementation of the constitution performed by courts produces *more constitutional norms*, albeit "unwritten" ones.[45]

Thirdly, as we have seen a principle-based constitution makes for a high degree of judicial discretion (supra, § 2.2). Supporters of this conception tend to countenance this with the development of rational – or at least controllable – ways to interpret and apply constitutional principles.[46] To that end, it is usually suggested that judicial balancing of conflicting principles should be consistent in time, *i.e.*, that the Constitutional Court should respect its own precedents;[47] that "definitional" or "categorical" balancing should be preferred to "ad hoc" balancing; or that balancing should be performed not in a whimsical fashion, but in a procedural way with multiple steps, tests, or phases – thus transforming balancing into the ostensibly more structured "proportionality" analysis.[48]

Lastly, under a principle-oriented model constitutional interpretation is not different *in kind vis-à-vis* statutory interpretation. Rather the difference between constitutional and statutory interpretation is regarded as a difference *in degree*. This

45 See S. Bartole, *Costituzione (Dottrine generali e diritto costituzionale)*, n. 17, p. 320; R. Guastini, *Applying Constitutional Principles*, n. 43, p. 248 («the judicial derivation of rules from constitutional principles develops and enlarges constitutional law»); A. Marmor, *Interpretation and Legal Theory*, Oxford, Hart Publishing, 2005, p. 142 («the main way in which constitutions change is by judicial interpretation»).

46 L. Paladin, *Le fonti del diritto italiano*, n. 2, pp. 146-150; S. Bartole, *L'elaborazione del parametro e del protocollo delle argomentazioni*, *Corte costituzionale e principio di eguaglianza*, Padua, Cedam, 2001, p. 35; R. Bin, *Diritti e argomenti*, n. 43, p. 5, p. 140.

47 L. Paladin, *Le fonti del diritto italiano*, n. 2, pp. 146-150; G. Zagrebelsky, *Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View*, 2003, pp. 647-649, and G. Zagrebelsky, *La legge e la sua giustizia*, n. 2008, pp. 289-295.

48 This attitude is epitomized by Robert Alexy's "arithmetic" theory of balancing: R. Alexy, *A Theory of Constitutional Rights*, 2010, ch. 3 (see esp. the "Postscript"), and R. Alexy *Constitutional Rights, Balancing and Rationality*, *Ratio Juri,* 16, 2003, p. 131. See also J.J. Moreso, *Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism*, in 25 *Ratio Juris*, 25, 2012, p. 31.

means that the same interpretive techniques are in place in both constitutional and statutory interpretation; however, in the case of constitutional interpretation, some such techniques (most notably, literal interpretation) are less used, while others are used more frequently, more visibly, and with a more intense exercise of value-judgements.[49] This, it should be noted, does not necessarily mean that the interpretive canons of statutory interpretation should also apply to constitutional interpretation (as the "defensive" conception, or the model of rules, would have it); rather, and more interestingly, under a principle-based model a sort of circulation of interpretive techniques takes place between constitutional and statutory interpretation. The quite "generous" interpretive techniques that are usually in place in constitutional interpretation – balancing, holistic interpretation, use of moral arguments, purposive interpretation, evolutive interpretation – will frequently be used also in statutory interpretation.

3.2.2. The Values-Based Model

A different variation of the foundational conception of the constitution is value-based – it claims that the most important part of the constitution is represented by the host of moral and political *values* that it incorporates.

A value-based model of the constitution inevitably loosens the constraining role of the text. In fact, rare exceptions notwithstanding, values are not explicitly written down in the constitution – they can only be read between the lines of the constitutional text. So, according to a value-oriented approach, the text of the constitution matters only in so far as it reveals the relevant underlying values. Constitutional interpretation unearths the underlying axiological texture implicit in the body of canonically stated constitutional norms, with the aid of philosophical speculation, social observation, and

49 G. Zagrebelsky, *Appunti in tema di interpretazione e di interpreti della Costituzione*, *Giurisprudenza costituzionale*, 1970, p. 904; E. Diciotti, *Come interpretare la Costituzione?*, in *Ragion pratica*, 4, 1995, p. 203; G.U. Rescigno, *Interpretazione costituzionale e positivismo giuridico*, n. 19; G. Pino, *Diritti e interpretazione*, Bologna, Il Mulino, 2010, pp. 116-117. See also O. Pfersmann, *Le sophisme onomastique: changer au lieu de connaître. A propos de l'interprétation de la constitution*, F. Mélin-Soucramanien (eds.), *L'interprétation constitutionnelle*, Paris, Dalloz, 2005. This, in turn, squares well with the fact that the difference between rules and principles is itself a difference in degree and not in kind: see G. Pino, *Teoria analitica del diritto I. La norma giuridica*, 2016, ch. 4.

intuition.[50]

Moreover, supporters of this view tend to assume a cognitivistic and irenic approach to constitutional values. Constitutional values, that is, are supposed to enjoy some kind of objectivity (be it a moral objectivity, or a "social" objectivity, or both), and they coexist in perfect harmony.[51] This produces some interesting consequences for constitutional interpretation.

First, under a value-based approach, conflicts among constitutional values are merely superficial appearances – on a deeper level, constitutional values constitute a harmonic whole. Thus, constitutional balancing is represented as an equilibrium-seeking enterprise – as a matter of discovering an objective equilibrium among the relevant values, rather than as a matter of choice and mutual sacrifice between the values involved. Balancing, and constitutional interpretation generally, are supposed to bring to light a sort of immanent harmonic ordering of constitutional values.[52] The magic word, here, is "reasonableness". Reasonableness becomes the guiding light of constitutional interpretation, enabling the interpreter to find the exact equilibrium between (apparently) conflicting constitutional values.

Second, in addition to projecting a cognitivist allure on balancing and constitutional interpretation generally, a value-oriented approach paves the way for a hierarchical ordering of constitutional values, whereby the value of human dignity ranks first, then life, health and liberty, then economic values, and so on.[53] Several constitutional values can coexist in a harmonious way because they are not all on the same axiological level: according to this model, some constitutional values rank as

50 See A. Baldassarre, *L'interpretazione della costituzione*, n. 21, p. 227.

51 A. Baldassarre, *Interpretazione e argomentazione nel diritto costituzionale*, *Costituzionalismo*, 2, 2007, pp. 6-7; R. Nania, P. Saitta, *Interpretazione costituzionale*, S. Cassese (ed.), *Dizionario di diritto pubblico*, vol. IV, Milan, Giuffré, 2006, p. 3215. This is particularly apparent in the value-talk of German constitutional jurisprudence: see for instance R. Herzog, *The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights*, n. 23, p. 9 (and generally the literature referred to at n. 23 above).

52 See P. Häberle, *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz*, München, C.F. Beck, 1962; D. Kommers, *German Constitutionalism: A Prolegomenon*, n. 23, p. 851.

53 D. Kommers, *German Constitutionalism: A Prolegomenon*, n. 23, 860; E.-W. Böckenförde, *Critique of the Value-based Grounding of Law*, (1990), E.-W. Böckenförde, *Constitutional and Political Theory*, Oxford, Oxford University Press, 2017, p. 224.

"supreme" values and enjoy axiological priority over the other, "ordinary" constitutional values – the former entering the balancing game with a presumptively heavier weigh than the latter, and are immune from constitutional amendment.[54]

Third, the weight of a value cannot be appreciated in isolation; rather, it depends on the relation between that value and all the other constitutionally relevant values, rights etc. Constitutional interpretation, then, becomes a holistic enterprise. On the other hand, since values are extremely abstract entities, they will react in different ways when faced with different factual circumstances; as a consequence, the interpretation and application of constitutional values becomes a case-by-case judgement.[55]

In sum, under a value-based model, constitutional interpretation is an intuitive enterprise, sensitive to social mores, and case-oriented. Its fundamental methodological principle is "reasonableness". Constitutional interpretation is only minimally constrained by the text of the constitution (the wording of the constitution may be easily trumped by the appeal to some fundamental value, as long as it is "reasonable" to do so), and it is fully entitled to "discover" new unwritten constitutional rights, insofar as they derive from the underlying axiological structure of the constitution.[56] Moreover, constitutional interpretation is presented as a "cognitive" enterprise, inasmuch as it is meant to bring to light morally or socially immanent values. In this scenario, of course, the constitution requires forms and styles of interpretation that are completely different from the ordinary techniques of statutory interpretation: the difference between constitutional interpretation and statutory interpretation is really a difference in kind, and not just in degree.[57]

54 See M. Cartabia, *Principi inviolabili e integrazione europea*, n. 21. This idea has now wide currency in Italian constitutional scholarship, and has been adopted also by the ItCC in a series of important decisions: see V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, n. 4, 62, pp. 98-99. On the idea of an intra-constitutional hierarchy of values (or principles) see D. Kommers, *German Constitutionalism: A Prolegomenon*, n. 23, p. 852, p. 860; Y. Roznai, *Unconstitutional Constitutional Amendments*, Oxford, Oxford University Press, 2017, esp. ch 2.

55 A. Baldassarre, *L'interpretazione della costituzione*, n. 21, p. 225.

56 R. Nania, P. Saitta, *Interpretazione costituzionale*, n. 51, p. 3217.

57 A. Baldassarre, *Interpretazione e argomentazione nel diritto costituzionale*, A. Palazzo (eds.),

4. Taking Stock

The Italian Constitution fully belongs to the so called "postwar paradigm," or "rights constitutionalism".[58] Indeed, it has been a forerunner of this paradigm, at the very least for chronological reasons.

Constitutions that fit this paradigm all have some broad features in common: they are written and fully legal in character, they include a long and detailed Bill of Rights, they are protected by a system of judicial review, and they are difficult to amend. Moreover, these constitutions are supposed to last, they embody a broad project of social transformation in the aftermath of some traumatic event (a war, a civil war, a dictatorship, a revolution, etc), and they are inspired by the overarching value of social and political pluralism.[59]

These features of contemporary constitutions rule out the descriptive plausibility of both political constitutionalism and of a mere "defensive" conception of the constitution. In fact, contemporary constitutions are undisputably legal in character (which rules out political constitutionalism), and have a clear foundational function. Moreover, it is quite implausible that the normative content of a "postwar paradigm" constitution be framed essentially in terms of rules: the pluralistic character, the aspiration to last long, and the transformative spirit of this kind of constitutions require that constitutional provisions be drafted in generic, indeterminate, flexible terms. Of course, a political-constitutionalist or a "defensive" conception of the constitution may still be defended as projects of legal and political reforms that move away from the existing post-war model. I will not argue here on this. I will just note, without even trying to argue in favour of this position, that under the prevailing conditions of many contemporary societies,

L'interpretazione della legge alle soglie del XXI secolo, 2001, p. 225; F. Modugno, *Interpretazione per valori e interpretazione costituzionale*, G. Azzariti (ed.), *Interpretazione costituzionale*, Turin, Giappichelli, 2007, p. 56.

58 For these expressions, see L. Weinrib, *The Postwar Paradigm and American Exceptionalism*, n. 27; L. Prieto Sanchís, *El constitucionalismo de los derechos*, *Revista Española de Derecho Constitucional*, 2004, p. 47; G. Anderson, *Constitutional Rights after Globalization*, Oxford, Hart Publishing, 2005, ch 1; G. Pino, *Il costituzionalismo dei diritti*, Bologna, Il Mulino, 2017. See also A. Somek, *The Cosmopolitan Constitution*, Oxford, Oxford University Press, 2014 (on "constitutionalism 2.0").

59 On the essential pluralistic character of contemporary, "postwar" constitutions, see G. Zagrebelsky, *Il diritto mite*, 1992; E. Diciotti, *Come interpretare la Costituzione?*, n. 49; R. Bin, *Cosa è la Costituzione?*, n. 33.

the foundational model seems, on balance, more likely to sustain a just society than its alternatives.[60] The favourable attitude expressed in the text does not ignore, of course, that the foundational model may lead to exaggerations and aberrations in the exercise of judicial discretion, with costs in terms of legal certainty and democratic legitimacy. Nothing can prevent even a model that is fairly good in its abstract formulation to go astray in its actual applications. Moreover, the comparative merits and demerits of each model cannot be assessed in purely abstract terms – they are contingent on the general institutional context.

Be that as it may, and assuming that a foundational model appears to be both descriptively accurate and normatively desirable, one may still ask if such a model is to be preferred in the principle-based variant or rather in the values-based one. In my opinion, there are sound reasons to prefer a principle-based approach to the Constitution and to constitutional interpretation. These reasons essentially boil down to the following:

– A principle-based approach does not result in an implausibly "cognitivistic" picture of constitutional interpretation (one in which the normative content of the constitution is just discovered out of an immanent order of values). Quite to the contrary, it acknowledges the ineliminable margin of choice that is required by constitutional interpretation; and this choice, in turn, brings with it the need for accountability – first of all under the guise of a duty to give a complete and persuasive justification for the interpretive decision.

– A principle-based approach does not tie the meaning of constitutional rights to social values, which would make fundamental rights prey to majoritarian attitudes (thus betraying its pluralistic aspirations).[61]

– A principle-based approach makes for an evolving interpretation of the constitution, ensuring that the constitution does not become rapidly outdated.

– A principle-based approach acknowledges the space of democratic decisions,

60 See C. Sunstein, A. Vermeule, *Interpretation and Institutions*, *Mich. L.R.*., 101, 2003, p. 885; G. Itzcovich, *On the Legal Enforcement of Values. The Importance of the Institutional Context*, A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford, Oxford University Press, 2017.

61 Against the "social consensus" argument in constitutional interpretation, see A. Marmor, *Interpretation and Legal Theory*, 2005, pp. 151 *et seq.*; G. Pino, *Diritti e interpretazione*, Bologna, Il Mulino, 2010, pp. 135-139.

since it does not assume that the constitution contains the precise regulation of any social and legal matter. Rather, this model actually requires that in many instances the responsibility of balancing and specifying the relevant constitutional principles fall exactly on the legislature.[62] Even more importantly, in such a model no single authority – not the democratically elected legislature, not ordinary judges, not even the Constitutional Court – has the last word on the interpretation/implementation of the constitution. The normative content of the constitution, in this model, is supposed to be shaped in the ongoing interaction (be it in the guise of dialogue or of conflict) among several institutional actors.[63]

If these admittedly sketchy arguments are sound, then the theory of constitutional norms as principles seems better suited to the idea of a contemporary, pluralistic constitution, such as the Italian one.

62 R. Alexy, *A Theory of Constitutional Rights*, 2010, ch. 3.

63 On this feature of contemporary constitutionalism, see G. Zagrebelsky, *Il diritto mite*, 1992, p. 213; B. Celano, *I diritti nello Stato costituzionale*, n. 35, pp. 161-162; M. Fioravanti, *Legge e costituzione: il problema storico della garanzia dei diritti*, in 43 *Quaderni fiorentini per la storia del pensiero giuridico*, 43, 2014, pp. 1077 at 1092-1093; M. Cartabia, *Diritto amministrativo e diritti fondamentali*, L. Torchia (ed.), *Attraversare i confini del diritto*, Bologna, Il Mulino, 2016, p. 187; G. Pino, *Il costituzionalismo dei diritti*, 2017, pp. 46-49.

CHIARA GRECO*

THE ITALIAN CONSTITUTIONAL COURT HAS CHANGED ITS MIND (AND IS NOT AFRAID TO SAY SO)

How a 'transnational' dialogue between Courts can benefit the protection of criminal convicts Notes to judgment 32/2020 of the Italian Constitutional Court

ABSTRACT. *In judgment 32/2020 the Italian Constitutional Court has proclaimed, for the first time, the prohibition of* ex post facto *law applicable to the norms governing the execution of criminal sanctions, and especially to the norms concerning the so called 'alternative measures to detention'. The present paper offers an overview of the Italian legal framework and previous case law regarding the prohibition of* ex post facto *law and alternative measures. It also analyzes the innovative conclusions expressed by judgment 32/2020. Finally, it stresses the most remarkable aspect of the judgment, which is the use that the Constitutional Court makes of the U.S. Supreme Court's case law to re-interpret Article 25 (2) of the Italian Constitution.*

CONTENT. 1. Introduction − 2. The relevant legal framework and case law − 3. The Court's decision − 4. Conclusive remarks

* PhD student, Law and Social Change: The Challenges of Transnational Regulation, Department of Law, Roma Tre University.

1. Introduction

There are some principles, in the criminal law field, that are so obvious for modern jurists that there seems to be no actual need to discuss them anymore. One of them is the prohibition of *ex post facto* law,[1] meaning that no one should be punished for a conduct that did not constitute a criminal offence when it was committed, or punished with a penalty that is harsher than the one originally provided by the law.

Some consequences of this uncontested principle, however, despite how intuitive and logical they might seem, sometimes struggle to make their way into judicial decisions, mainly due to 'formalistic' reasons.

Among the corollaries of the prohibition of *ex post facto* law stands (*recte*, should stand) the prohibition of retro-actively applying a norm that modifies, *in malam partem*, the effective nature of a criminal sanction, regardless of the 'substantial' or 'procedural' appearance of such a norm.

Behind this application of the prohibition of *ex post facto* law lies the idea that there is a radical and substantial difference between serving a sentence in prison and serving a sentence outside prison. Therefore, if the legislator modifies the sanction – even if by virtue of a formally 'procedural' norm – passing from a sentence to be served outside prison to a sentence to be served inside prison, such a modification should only apply to the crimes that are committed after the entry into force of the new provision.

Virtually no one would argue against the proposition that "*between 'outside' and 'inside*' [jail] *the difference is radical: qualitative rather than quantitative*." Yet, it took almost thirty years for the Italian Constitutional Court to say it out loud, in its judgment n. 32/2020, finally dismantling what appeared to be a previously rock-solid case law stating otherwise.

Indeed, the Italian Court of Cassation had been prompting for decades the idea that the prohibition of *ex post facto* law does not apply either to procedural norms or to those norms that concern the execution of sentences; the time regime of such norms, instead, is governed by the '*tempus regit actum*' principle, meaning they are (*recte*, were)

1 Albeit this expression is traditionally used in common law systems, for the sake of simplicity in this paper it will be used as an equivalent to the 'continental' prohibition of retro-active application of criminal law.

immediately applicable to anyone as soon as they enter into force, no matter the moment in which the crime was committed.[2]

The perverse effect of the above-mentioned principle can be perceived in all its seriousness if one just considers that "hidden" among the norms that concern the execution of sentences there are the provisions that envisage the measures alternative to detention – *i.e.*, norms that effectively 'transform' a sentence to be served in jail into one that is, totally or partially, served outside of the jail.

Applying the *tempus regit actum* principle to such norms entails that the legislator is given *carte blanche* to change the substantial impact that a criminal sanction has upon personal freedom, even after the crime has been committed (and even after the judgment has already become final).

Luckily enough, the last attempt of the Italian legislator to retro-actively change the effective nature of criminal sanctions has been met with concern within the academic[3] and legal community,[4] a concern that eventually culminated in the historic decision[5] of the Italian Constitutional Court hereby addressed.

2. The relevant legal framework and case law

Before addressing the innovative approach that underpins the judgment, a few remarks concerning the Italian legal framework are needed.

First, Article 25, paragraph 2 of the Italian Constitution contains the prohibition of *ex post facto* law: no one shall be punished for a conduct that, at the time in which it was committed, did not constitute a criminal offence according to the law.

Second, the Italian law on the penitentiary system (L. 374/1975, hereinafter

2 A famous judgment issued by the Italian Court of Cassation and upholding the formalistic approach is Cass., Sez. Un., 17 July 2006, n. 24561.

3 See, among others, T. Padovani, *La spazzacorrotti. Riforma delle illusioni e illusioni della riforma*, *Arch. pen. online*, 2018, fasc. 3; N. Pisani, *Il disegno di legge 'spazzacorrotti': solo ombre*, *Cass. pen.*, 2018, fasc. 11, p. 3589 *et seq.*; V. Manes, *L'estensione dell'art. 4-bis ord. pen. ai delitti contro la p.a.: profili di illegittimità costituzionale*, *Dir. pen. cont.*, n. 2/2019.

4 L. Baron, *'Spazzacorrotti', art. 4-bis ord. pen. e regime intertemporale, Dir. Pen. Cont.*, fasc. 5/2019, p. 154.

5 V. Manes-N. Mazzacuva, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 Febbraio 2020, n. 32*, *Sistema Penale*, 2020.

"o.p.") sets out a wide range of measures 'alternative to detention', which a special Surveillance Tribunal can grant, upon request, to individuals who have been convicted of a criminal offence and whose judgment has become final, in order for them to serve their sentence partially or totally outside jail.

Examples of such measures are day release, home detention, probation or liberty on parole.[6] Their grant is generally subject to a positive appreciation, by the Tribunal, that the individual will not commit any further offence; the function of such measures is to ensure that the criminal sanction leads to the effective rehabilitation of the convict, a goal that – where possible – is better achieved outside jail.

Depending upon the length of the sentence imposed upon the individual, such measures can either be applied immediately after the judgment has become final, or after the convict has served a certain amount of his/her sentence in jail.

For example, if the final judgment is no longer than four years of imprisonment, probation (*affidamento in prova*) can be granted immediately after the judgment becomes final (provided that some 'subjective' requisites are met). To avoid going to prison unnecessarily before filing the request (*e.g.*, for probation), Article 656 of the Italian code of criminal procedure (hereinafter c.p.p.) states that when the sentence is no longer than four years, the Public Prosecutor shall suspend the execution order and inform the convict that he/she can ask for alternative measures within 30 days.[7]

It will be then up to the Surveillance Tribunal to decide whether to grant the measure or not, based on a 'prognostic' evaluation of the convict's future behavior.

If such an evaluation is positive, the Tribunal will grant the alternative measure immediately after the conviction, and therefore the individual will serve his/her judgment entirely outside jail, despite having been sentenced to imprisonment.

Having made this clear, it is self-evident that lowering or raising the 'bar' for

6 Those terms represent non-literal translations of the Italian alternative measures' *nomen iuris*. Here 'day release' stands for '*semilibertà*', 'home detention' stands for '*detenzione domiciliare*', 'probation' stands for '*affidamento in prova*', 'liberty on parole' stands for '*liberazione condizionale*'.

7 The *ratio* of this mechanism lies in the 'crime-fostering' effect of short prison sentences; as such, it is more compatible with the rehabilitative function of criminal law that those who are eligible for alternative measures do not go to prison and are given the possibility of filing their request while being at liberty.

accessing such alternative measures has an enormous impact upon the effective nature of the sentence to be served, and therefore upon personal liberty.

Indeed, an individual knows in advance that if he/she is sentenced to no more than four years of imprisonment, he/she has a realistic possibility of serving his/her entire sentence outside jail.

If instead, after the crime has been committed and perhaps the trial is already at its final stage, the legislator passes a new law that prevents that individual from accessing the alternative measures, his/her legitimate expectations of serving the sanction outside prison will be frustrated.

Such laws, in fact, were traditionally considered not to fall within the scope of application of the prohibition of *ex post facto* law, thus being applicable to everyone as soon as they entered into force.

How is it so? In other terms, how is it possible that a norm significantly impacting upon personal liberty is immediately applicable as soon as it enters into force, regardless of when the crime was committed? Shouldn't the prohibition of *ex post facto* law prevent such an outcome?

The reason is entirely formalistic, and extremely difficult to uphold if one looks behind the veil to grasp the substance of the said norms.

For decades, the Italian jurisprudence has claimed that the prohibition of *ex post facto* law, as embedded in Article 25(2) of the Constitution, was not applicable to the norms governing the execution of sentences; such norms, according to the above-mentioned case law, are procedural in nature, and therefore subject to the *tempus regit actum* principle, as they neither introduce new criminal offences nor increase the abstract sanctions provided by the law.[8]

In fact, if one accepts to look at the phenomenon from a formal perspective, alternative measures do not modify the abstract sanction that each crime carries with it according to the law. They are 'simply' measures that can be applied after the conviction has become final, during the execution stage, provided that certain requirements are met, in order to facilitate the convict's return to society.

8 L. Baron, *'Spazzacorrotti', art. 4-bis ord. pen. e regime intertemporale, Dir. Pen. Cont.*, fasc. 5/2019, p. 155.

Of course, this line of reasoning stands no chance of being upheld if one abandons the formalistic perspective and decides to look at the substance of the phenomenon, which is exactly what the Constitutional Court has decided to do.[9]

One might well wonder why such a *révirement*.

During the past decades, the Italian legislator has frequently amended the law on the penitentiary system to decrease – or annul – the possibility for certain types of convicts of being granted alternative measures.

Since 1992, indeed, Article 4-bis of the o.p. states that those who have been convicted for a list of serious offences – mainly mafia organizations and terrorism related offences – cannot access alternative measures unless they cooperate with the authorities.[10] Consequently, once their conviction has become final – if they did not cooperate – they will necessarily have to go to prison and serve the entirety of the sentence 'behind bars'. This is also due to the fact that, when it comes to 'Article 4-bis o.p. crimes', the execution order can never be suspended.

Albeit both scholars and practitioners have expressed their concerns about the legitimacy of such mechanism (that, according to some, could even implicate 'blackmailing' the defendant), the legislator has kept increasing the number of crimes that fit within the scope of Article 4-bis o.p., and therefore the number of cases in which convicts are not eligible for alternative measures.[11]

9 It is noteworthy to mention that Italian scholars had for a very long time expressed their concerns on the formalistic approach; see F. Bricola, *Legalità e crisi: l'art. 25, commi 2° e 3°, della Costituzione rivisitato alla fine degli anni '70, Scritti di diritto penale,* vol. I, tomo II, Milano, 1997, pp. 1273 *et seq*.; M. Gambardella, *Il grande assente nella nuova "legge spazzacorrotti": il microsistema delle fattispecie di corruzione*, *Cass. Pen*. Fasc 1/2019, p. 52; Manes-Mazzacuva, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'ese-cuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32*, *Sistema Penale*, 2020.

10 Cooperation with the judiciary in mafia-type cases has given birth to the so called '*pentiti'* phenomenon. Alternative measures, however, can still be granted if cooperation is neither possible nor useful, and provided that there are no connections anymore between the convict and organized crime. It is up to the Surveillance Tribunal to verify whether such conditions are met.

11 More recently, however, such a system has been stigmatized by the European Court of Human Rights, in the famous judgment Viola v. Italy, App. n. 77633/16; subsequently, the Italian Constitutional Court, in its judgment n. 253/2019, has partly declared Art. 4-bis o.p. incompatible with the Italian Constitution, as it forbids a case-by-case evaluation of the convict's dangerousness and of the persistence of his/her connection with the criminal organization.

The last instance of such a trend was Law n. 3/2019, known as the '*wipe away the corrupt*' law; its Article 6 includes in the list of Article 4-bis o.p. all the main offences related to corruption.[12]

Therefore, everyone who is convicted of those crimes is currently unable to access alternative measures unless he or she cooperates with the authorities. As a consequence, the execution order cannot be suspended and the convict will immediately go to prison after the judgment has become final.

Since Article 4-bis o.p. has always been considered to be procedural in nature, as is every norm related to alternative measures, its amendments do (*recte*, did) not fall within the scope of the prohibition of *ex post facto* law. Consequently, the 'ban' on alternative measures for those who have been convicted of corruption was immediately applicable to everyone undergoing trial or convicted for such crimes, regardless of the moment in which the crime was committed and unless they decided to cooperate with the authorities.[13]

Thus, individuals who had decided to plead guilty or to waive some procedural rights,[14] knowing that if their sentence was shorter than four years of imprisonment they would most certainly never go to prison, were put in front of the alternative: either they decided to cooperate, or they would have to serve the entirety of the sentence behind bars.

Either way, their execution order could not be suspended, thus making it necessary for them to go to prison as soon as the judgment became final; only afterwards, and provided that they proved their cooperation (or its impossibility), they could ask for alternative measures.

12 V. Manes, *L'estensione dell'art. 4-bis ord. pen. ai delitti contro la p.a.: profili di illegittimità costituzionale*, *Dir. pen. cont.*, n. 2/2019, p. 107; D. Pulitanò, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 237.

13 Pulitanò, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 239 *et seq.*

14 The Italian c.p.p. allows the defendant to plead guilty (*patteggiamento*) or ask for a 'summary' proceeding (*rito abbreviato*) in exchange for a reduction of his/her sentence (up to one third); as such, many defendants decide to undertake this 'special' proceedings, that provide the defendant with less guarantees, in order to obtain a more favorable sentence. This frequently happens when the defendant knows that, because of the reduction, he or she will be eligible for the immediate application of alternative measures.

Needless to say, this alternative did not exist at the moment in which they committed the crime, as the legislator subsequently amended the law.[15]

The energy and pride with which the Government proudly publicized such an amendment sparked a huge academic debate; *re melius reperpensa*, it was not actually a 'debate', as almost every scholar stood firmly against the retro-active application of the new 'ban' on alternative measures for corrupts.

Such an outrage has reached criminal judges, who indeed showed 'unease' when asked to retroactively apply the new Article 4-bis o.p.;[16] their unease then turned into open doubts about the constitutional legitimacy of the amendment, thus provoking the intervention of the Constitutional Court.[17]

3. The Court's decision

As expected, it was not the first time that the Constitutional Court was called to scrutinize the legitimacy of the retroactive application of the amendments to Article 4-bis o.p., in light of the prohibition of *ex post facto* law. Indeed, adding new offences to the 'black-list' of crimes for which no alternative measure can be granted (unless the defendant cooperates) seems to be a *leitmotiv* of the past years' criminal policy, and almost every time this has happened in the past the Constitutional Court was asked to verify the legitimacy of such amendments.

However, never in the past had the Constitutional Court applied Article 25(2) Cost., prohibiting the retro-active application of criminal law, to the norms regulating

15 Manes-Mazzacuva, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32*, *Sistema Penale*, 2020, para. 3.

16 L. Masera, *Le prime decisioni di merito in ordine alla disciplina intertemporale applicabile alle norme in materia di esecuzione della pena nella cd. legge spazzacorrotti*, *Dir. pen. Cont.*, marzo 2019; G.L. Gatta, *Estensione del regime ostativo* ex *art. 4*-bis *ord. penit. ai delitti contro la p.a.: la Cassazione apre una breccia nell'orientamento consolidato, favorevole all'applicazione retroattiva Dir. pen. Cont.*, marzo 2019; Baron, *'Spazzacorrotti', art. 4-bis ord. pen. e regime intertemporale, Dir. Pen. Cont.*, fasc. 5/2019; Pulitanò, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 242; Manes-Mazzacuva, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 Febbraio 2020, n. 32*, *Sistema Penale*, 2020, para. 5.

17 In the Italian system, every judge can ask the Constitutional Court to assess the constitutional legitimacy of a given norm; if the Court decides that the norm contravenes with some Constitutional principles, it will declare the norm un-constitutional, thus retroactively eliminating it from the system.

the execution of sentences and alternative measures.

Every time Article 4-bis o.p. or its retroactive application have been partly declared un-constitutional (and, indeed, there are many cases), they always contravened Arts. 3 and 27 of the Constitution; those norms, however, do not concern the principle of legality or the prohibition of *ex post facto* laws, but prescribe that criminal laws need to be founded upon reasonable justifications and have to ensure the rehabilitation of the convict.[18]

In judgment 32/2020 instead, the Court has radically changed its approach and – almost ignoring the criticism that the referring judges raised by invoking the rehabilitation principle – has finally proclaimed the application of the prohibition of *ex post facto* law to (some of) the norms concerning the execution of sentences.

As stated in the judgment, indeed, nothing forbids the Court from reconsidering its previous case law when multiple and concurring reasons cast doubts on the current approach's compatibility with the constitutional principles.[19]

The path that the Court undertakes to reach such an innovative conclusion is mainly founded upon three arguments.

First, the judgment recalls the evolution of the European Court of Human Rights' (ECtHR) jurisprudence on the scope of application of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[20]

Second, the Court reconsiders and reinterprets the *rationes* underlining the prohibition of *ex post facto* law.

Third, it finally abandons the formalistic perspective to embrace a substantial point of view, and admits that the norms concerning alternative measures have (or better, in some cases have) such a substantial impact upon personal liberty that they need to fall within the scope of application of Article 25(2) Cost.

As per the evolution in the ECtHR's jurisprudence, the Court notices that at the beginning the Strasbourg Court had embraced the same formalistic approach followed by the Italian judges; in 2013, however, the same ECtHR reconsidered its

18 Pulitanò, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 240.

19 § 3.6.

20 The ECHR as interpreted by the Strasbourg Court is binding upon the Italian legislature, as per Art. 117 of the Constitution.

approach in the famous judgment Del Rio Prada v. Spain.[21]

In particular, the ECtHR stated that when the measures taken by the legislature «result in the redefinition or modification of the scope of the "penalty" imposed by the trial court [...] the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 § 1 in fine of the Convention. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed».[22]

The Constitutional Court then recalls how the (innovative) conclusions of the ECtHR are coherent with other States' legislation and jurisprudence. Indeed, according to the U.S. Supreme Court, the prohibition of *ex post facto* law also applies to the amendments of those norms regulating the execution of sentences that have the practical effect of prolonging the convict's detention, thereby modifying the *quantum* of the sanction. The same solution is also enshrined in Article 112-2 of the French penal code.[23]

Taking into account the abovementioned evolution and the approach embraced by other States, the Court considers it necessary to "re-assess the scope of application of the prohibition of *ex post facto* law with respect to the discipline of the execution of sentences".[24]

In doing so, the Court takes a step back to analyze what *rationes* stand behind the prohibition of the retroactive application of new incriminations or harsher sanctions, as embedded in Article 25(2) Cost.

The reason appears to be twofold.

First, as clearly stated by the Constitutional Court in the famous judgment n. 364/1988, the prohibition of *ex post facto* law guarantees the 'reasonable foreseeability'

21 § 4.2.3. ECtHR Del Rio Prada v. Spain, App. n. 42750/09.

22 ECtHR Del Rio Prada v. Spain, App. n. 42750/09 para. 89.

23 § 4.2.4.

24 § 4.3.

of the legal consequences that an individual faces when he or she contravenes the law. As such, the prohibition protects freedom of action and enables conscious defense strategies.[25]

However, the main innovative aspect of the judgment hereby discussed relies in the path that the Court follows to isolate the second *ratio* underlining the prohibition of *ex post facto* law. Indeed, the Court abandons its previous jurisprudence to look overseas, at the U.S. Supreme Court's case-law (hereinafter U.S. S.C.).

Since the 18th century, in fact, the U.S. S.C. has affirmed that the prohibition of *ex post facto* law serves to protect the individual against possible abuses perpetrated by the legislative power, which has always been tempted to aggravate – *ex post* – the sanctions to be applied for crimes that have already been committed. The Constitutional Court goes even further, and recalls a U.S. S.C. judgment (Calder v. Bull) in which the prohibition is traced back to the fact that the English Parliament had, in the past, frequently aggravated, *ex post facto*, the penalties for those who were considered 'enemies' or 'traitors' of the country. «But those laws were, in reality, judgments masked by law: nothing more, indeed, than the exercise of judicial power by a Parliament moved by spirit of revenge towards its enemies».[26]

Therefore, the prohibition of *ex post facto* law does not simply ensure the reasonable foreseeability of criminal consequences, but more importantly stands at the heart of the 'rule of law' concept.

After having recalled the *rationes* underpinning Article 25 (2) Cost., the Court proceeds to verify whether the prohibition of retroactive application needs to be extended also to those norms that modify the execution of sanctions.[27]

In the Court's opinion it is clear that when the amendment entails – from a practical perspective – the application of a sanction that is 'other' (an '*aliud')* if compared to the one that was foreseeable when the crime was committed, then the prohibition of *ex post facto* law is fully applicable.

25 § 4.3.1.

26 Here the Constitutional Court paraphrases a passage of Calder vs Bull, 3 U.S. 386/1768, p. 389, available at <https://supreme.justia.com/cases/federal/us/3/386/>.

27 § 4.3.2.

In particular, this happens when, at the moment in which the offence was committed, the individual could reasonably expect a sanction to be served outside jail, yet the legislator subsequently transforms it into a sentence that needs to be served inside jail (and even if this occurs without formally modifying the *nomen iuris* of the sanction).

Indeed, «between 'outside' and 'inside' the difference is radical: qualitative rather than quantitative».[28] In such cases, the sanction that the individual will effectively serve is an '*aliud*' if compared to the one that was foreseeable at the moment of the crime.

In the Court's opinion, measures such as liberty on parole, probation or home detention are not simply 'executive aspects' of imprisonment; rather they are truly alternative sanctions, as they impact on the quality and quantity of the penalty and they modify the degree of deprivation of personal liberty.

The same conclusion is also true when it comes to the above-mentioned mechanism of the suspension of the execution order;[29] albeit being disciplined in the code of criminal procedure (Art. 656), this mechanism has a huge impact upon personal liberty. In fact, when the legislator forbids such a suspension, it means that the convict will necessarily begin to serve its sentence in prison; this entails that, in turn, at least part of the sanction will be 'effectively' imprisonment, whereas at the moment of the commission of the crime the individual could expect to benefit from the suspension and therefore to serve the entirety of its sentence outside jail (provided that the alternative measure was granted, of course).

This suffices to recognize that Article 656 c.p.p. effectively transforms the sanction and its impact upon personal liberty, thus falling within the scope of application of the prohibition of *ex post facto* law.

In addition, the Court also considers the retroactive application of the amendments hereby addressed as infringing upon the right to an effective defense as embedded in Article 24 Cost., since the individual is 'surprised' with the application of a different sanction that he or she could have not foreseen when developing his/her

28 § 4.3.3.

29 § 4.4.4.

defense strategy.

Conequently, the amendments to Article 4-bis o.p., *i.e.*, the 'ban' on alternative measures for those who have been convicted of corruption and did not cooperate with the authorities, will only be applicable to the crimes committed after Law n. 3/2019 has entered into force.[30]

4. Conclusive remarks

The conclusion that the Court embraces, *i.e.*, that between 'outside' and 'inside' jail there is a radical difference and that such a difference necessarily brings with it the prohibition of *ex post facto* law, represents 'a positive earthquake' for the Italian criminal law system and is to be totally endorsed.

However, special attention is not to be given solely to the conclusion in itself, as this paper starts by implying that such a conclusion is logic, intuitive and should have been embraced years ago.

The most valuable part of the judgment hereby addressed is the way in which the Court arrives to that conclusion. Albeit the solution hereby embraced had long been envisaged by the Italian doctrine and legal community, indeed, none of them could have 'reasonably foreseen' the original way in which the Court has reached it.

First of all, the Court abandons the traditional dichotomy between substantial and procedural criminal norms, the ones falling within the scope of application of Article 25(2) Cost., the other ones following the '*tempus regit actum*' principle.[31] What seems to matter, in the Court's reasoning, is not the formal qualification of a given norm, its package, but substantially the fact that it modifies the nature of the sanction

30 For the sake of clarity it is necessary to add that the Court distinguishes between different kinds of alternative measures and between alternative measures and the so called 'penitentiary benefits'; in the Court's opinion, indeed, the prohibition of *ex post facto* law is only applicable to the alternative measures that truly modify the nature of the sanction, such as home detention, probation, day-release and liberty on parole. Contrariwise, the *tempus regit actum* principle shall continue to apply to the other alternative measures – such as the possibility of working outside jail – and to the penitentiary benefits, such as the so called '*permessi premio*'. See Manes-Mazzacuva, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32*, *Sistema Penale*, 2020, para. 12 *et seq*.

31 As clarified by the Court, the mere fact that a norm is to be found within the code of criminal procedure is not sufficient so as to exclude it from the scope of application of the prohibition of *ex post facto* law.

and has an effective impact upon personal liberty. Provided that such conditions are met, the amendment to that norm entails the application of a sanction which is 'other' from the one originally foreseeable, hence the application of the prohibition of *ex post facto* law.[32]

Judgment n. 32/2020, therefore, leaves the Italian judiciary with a new 'test' to be applied when amendments to the laws concerning the execution of sentences come into play.

Secondly, and perhaps more importantly, the Court has decided to avoid 'the easy path' towards the abovementioned conclusion. Indeed, it would have been perfectly sufficient to simply recall the ECtHR jurisprudence, in particular judgment Del Rio Prada v. Spain, to reach the same solution.[33] In fact, Italy is bound by the ECHR and by the interpretation that the Strasbourg Court gives of its provisions. Recalling the evolution in the conventional case-law would have been enough to justify the application of the prohibition of *ex post facto* law to the norms hereby involved.

The Constitutional Court, instead, goes well beyond. The judgment proceeds to reconsider one of the most fundamental norms of the Italian Constitution (Art. 25 para. 2), possibly the most important one when it comes to criminal law, by using, as an interpretative tool, the U.S. S.C.'s jurisprudence.

When faced with the urge to fill a 'gap' in the protection of criminal defendants from the arbitrary application of criminal law, the Court does not seem afraid to (implicitly) admit that its previous case law is not apt to fill such a gap, and to resort to the principles proclaimed by other Supreme Courts.[34]

This technique is not just a matter of style or some sort of temporary trend, but shows an attitude of sincere modesty (which is very much different from deference)

32 Such a conclusion had long been anticipated by Italian scholars; see F. VIGANÒ, *Il nullum crimen conteso: legalità costituzionale vs. legalità convenzionale?, Dir. pen. cont*, aprile 2017; PULITANÒ, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019.

33 As noted, it would have been enough – and easier – to invoke Art. 117 Cost., which obliges the legislator to abide by (*inter alia*) the ECHR; contrariwise, the Constitutional Court has decided to reinterpret Art. 25 Cost. See MANES-MAZZACUVA, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32*, *Sistema Penale*, 2020, para. 6.

34 G. ZAGREBELSKY, *Corti costituzionali e diritti universali*, *Riv. trim. dir. pubbl.*, 2006, p. 297 *et seq*.

towards other countries' experiences. By resorting to the Supreme Court's case law, the Constitutional Court seems to uphold the view that Constitutional norms – especially when they concern fundamental rights – 'aspire to universality', and thus their interpretation is not merely the interpretation of 'ordinary laws' that needs to abide by the contingent political will.[35]

This dialogue[36] between Constitutional and Supreme Courts is to be welcomed, insomuch as it goes to the benefit of the principle of legality and ensures criminal defendants a stronger protection of their legitimate expectations in the overall fairness of the system.

Judgment 32/2020 is therefore to be read as another step towards the acknowledgment that no matter how serious the crime, how heinous the 'enemy', how strongly the public opinion supports the Government, the principle of legality still stands above it all.

35 ZAGREBELSKY, *Corti costituzionali e diritti universali*, *Riv. trim. dir. pubbl.*, 2006, p. 301.

36 Some authors have spoken of a '*ius commune* of fundamental rights'; see MANES-MAZZACUVA, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32*, *Sistema Penale*, 2020.

FEDERICA FEDORCZYK[*]

AFTER THE FIFTH ANTI-MONEY LAUNDERING DIRECTIVE: HOW EU MEMBERS STATES ARE EXPECTED TO IMPLEMENT AML/FT REGULATIONS

ABSTRACT. *The present paper aims at examining the major innovations introduced by the Fifth Anti-Money Laundering Directive, adopted by the European Parliament on 19 April 2018. Money laundering represents one of the most serious criminal phenomena and it is a major factor of contamination for the global economy, as it alters both the features of competition and the correct distribution of resources. In this context, the globalization of financial activity and the development of new technologies paved the way for a more sophisticated form of organized crime, which can now operate mainly by using anonymous instruments or hiding the identities of its members behind a front company. Therefore, appropriate measures have been established to contrast these illegal activities: indeed, now more than ever an effective international cooperation is required, based on mutual judicial assistance and common rules.*

CONTENT. 1. Introduction: notions, legal framework and EU harmonization – 2. The major innovations in the Fifth Anti-Money Laundering Directive – 3. Conclusions: brief notes on the transposition of the Fifth Directive in Italy and future perspectives

[*] Law School Graduate, Roma Tre University.

1.Introduction: notions, legal framework and EU harmonization

The overview of the international prevention and contrast regime on laundering shows a complex framework, the result of the regulatory need to answer with proper reactions to the ever-growing evolution of money laundering techniques.[1]

From a macroeconomic perspective, the International Monetary Fund pointed out a wide range of potential consequences of money laundering such as, for example, an increasing mistrust relating to financial institutions, which creates, as a result, a systemic risk for the stability of the financial sector and for monetary development. These phenomena grow in tandem with the ongoing globalization of the economy, which conceals serious and consistent risks even though up to now it has been without doubt essential in order to achieve a positive development in the worldwide economy.[2]

Although strictly related, "financial abuse", "financial crime" and "money laundering" outline different concepts.[3] While the notion of money laundering is more

1 According to the Third FATF Recommendations (see *FAFT International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, France, 2012-2019) «countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences». According to the definition given in the 1988 United Nations Convention against illicit traffic in drugs and psychotropic substances (1988), money laundering is committed in presence of one of the following conducts: «a) the conversion or transfer of property derived from criminal activity for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity in evading the legal consequences of his action; b) the concealment or disguise of the true nature, source, location, disposition, movement or rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an active participation in such activity; c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an active participation in such activity».

2 «On one hand, it represents an unprecedented opportunity for economic growth and the improvement of the standards of living. It facilitates the diversification of risks and enhances the performance of economies, stimulating a more efficient allocation of resources. On the other hand, if not adequately governed, globalization presents the risk of destabilizing imbalances, growing, distributive iniquities among countries and inside individual countries» as stated by C. Santini, *Globalisation and Offshore Dimension – Building Integrity, Confidence and Cooperation*, Report submitted to the *Nineteenth International Symposium on Economic Crime*, Cambridge, 12.09.2001 in *Journal of Money Laundering Control*, Volume V, no. 4, London, 2002.

3 IMF, *Financial System Abuse, Financial Crime and Money Laundering, Background Paper*, February 12, 2001.

consolidated (a second-degree criminal offence based on a predicate offence[4]), the distinction between the first two is still uncertain. From a non-technical perspective, every breaking of the law can be qualified as an abuse, even if it is not regulated as a felony in the legal framework. Instead, in its internationally accepted legal meaning, the notion of financial abuse includes in some cases illegal financial activities potentially damaging for the financial system and in other cases activities exploding taxation's regulation for illegal purpose. Moreover, there is no common definition of financial crime: in a broad sense, it groups together all non-violent crimes (committed intentionality or culpably) that entail financial losses, but it could include also only those crimes committed with the aim of having an economic benefit. However, the term "financial crimes" could be also used whenever a financial institution is involved in the crime: for instance, the financial institution may be the victim of embezzlement or credit card frauds, or, on the other hand, it may sell fraudulent financial products or it may be used to keep or transfer the proceed of crimes (as it happens indeed with money laundering).

Notably, money laundering is becoming increasingly more complex, owing to the number and variety of the possible transactions in the modern economy. Furthermore, it involves not only traditional financial institutions located in different jurisdictions, but also financial intermediaries that are usually not connected with the banking sector, such as check cashing services, brokers or insurers.

One of the principal problems is that money laundering defies the rules governing monetary phenomena but at the same time it makes use not only of cash, but also of other kinds of financial instruments. In this context, globalization became a vehicle for economic crime: the speed and lower costs of electronic financial transactions, along with the removal of the barriers to the freedom of capital flows, facilitated criminal activities. Internet enables intermediaries to reach an unlimited number of users in short time and at very low cost. Moreover, jurisdictions characterized

4 A predicate offence is the underlying criminal activity which generated the laundered proceeds. An example of a predicate offence can be arms sales, which lead to profits which may then be laundered. The list of predicate offences can vary from country to country, because each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any elements of those offences that make them serious ones.

by a weak regulation of financial system allow the proliferation of distorting economic activities, with a consequent damage of essential market requirements such as transparency, functionality, efficiency and security.[5] Frequently, laundering takes advantage of the diversity of national regulations, which provide different kinds of controls and sanctions, possibly causing the so-called regulatory arbitrage.[6]

In order to contrast these illegal phenomena, a common institutional grid has been built. Its purpose is the prevention and the fight against financial crime and money laundering, both on the investigative and legal fronts.[7] Initiatives in this field have developed on both national and international level, ranging from criminal and administrative law to Community standardisation (from the first Directive of 1991 to the last one of 20 May 2018) and giving a key role to the cooperation between countries and their institutions. Prevention and prosecution have been identified as the main targets: the former can be achieved with specific administrative and financial tools which may detect suspicious conduct; the latter with the unique criminalization of money laundering and its predicate offences.[8]

Nowadays, the main actors involved in this context are the FATF (Financial

5 Market's imperfections and shortcomings provide the main theoretical justification for the intervention of the State in the economic system: a market that doesn't utilize correctly its resources should be helped by the State, which then has to employ economic institutional prerogatives with regulation functions. On this topic, G.J. Stigler, *The Economics of Information*, *Journal of Political Economy*, 69, 1961, pp. 213-225 and J.E. Stieglitz, *Markets, Market Failures and Development*, *The American Economic Review* Vol. 79, No. 2, Papers and Proceedings of the Hundred and First Annual Meeting of the American Economic Association, 1989, pp. 197-203.

6 Regulatory arbitrage has been defined as *those financial transactions designed specifically to reduce costs or capture profit opportunities created by different regulations or laws*. – Frank Partnoy, Financial Derivatives and the Costs of Regulatory Arbitrage, 22 J. CORP. L., 22, 1997, p. 211 at 227.

7 On the development of international regulations, see AA.VV. (edited by M. Condemi-F. De Pasquale), *Lineamenti della disciplina internazionale di prevenzione e contrasto del riciclaggio e del finanziamento del terrorismo*, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, Roma, febbraio 2008.

8 «Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalize money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to the one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences» – see FATF Recommendation no.3, FATF (2012-2019), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France.

Action Task Force),[9] the IMF (International Monetary Fund) and the European Community, which operates mainly through its Directives. Additionally, the United Nations with International Agreements, the Council of Europe, and the Egmont Group,[10] through the activity of the FIUs (Financial Intelligence Units)[11].

At international level, the FATF has significantly contributed to build an anti-money laundering model, providing Recommendations to create a body of guidelines and effective tools to contrast financial crimes.[12] Even though the Recommendations are not binding, FATF countries could spontaneously incorporate them into their domestic regulations, because they set out measures conceived as a series of simple standards of universal application.[13] All the Recommendations relate to the identification of customers, the recording of transactions, the conservation of any related documents and the establishment of suitable internal procedures to detect any anomalous or unusual operation.

Such measures have been reproduced by the European Union Directives, which

9 In July 1989, the Paris summit of the Heads of State and Government of the Group of Seven (United States, Japan, Germany, France, Great Britain, Italy and Canada), as part of a series of measures to contrast drug trafficking, decided to set up the Financial Action Task Force (FATF), also known as GAFI (*Group d'Action Financière Internationale*). At first, the FATF comprised experts from the administration of G7 countries, however it was joined from the beginning by representatives of eight additional countries interested in contrasting drugs and money laundering (Australia, Austria, Belgium, Luxembourg, the Netherlands, Spain, Sweden and Switzerland) and the Commission of the European Communities. Its membership was subsequently extended to include countries of the OECD area, as well as the Gulf Cooperation Council. Nowadays, FATF counts 38 members.

10 The awareness of the transnational dimension of the "dirty" money circuits has given rise to a variety of international initiatives to contrast the laundering of illegal capital and these initiatives could be referred to two types of intervention. The first one relates to forms of cooperation that entail the adoption of binding agreements of international law (for instance, *The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* – Strasbourg, 8.XI.1990), while the second is linked to the initiatives of super national organizations specialized in the fight against money laundering (such as the Egmont Group, which is an informal international organization that groups together all the Financial Intelligence Units (FIUs).

11 Nearly all national legislations impose on credit and financial institutions (and on those who carry out activities that entail a money laundering risk) the obligation to report suspicious transactions to a central organization that is entrusted to receive, analyse and investigate the information disclosed in the reports. These organisations are the Financial Intelligence Units (FIUs).

12 The FAFT Recommendations have been revised over the years.

13 FAFT identified general principles that would allow Member State flexibility, because different countries have different legal systems and different regulations.

constantly amend its provisions in order to adequate and update the tools against money laundering and terrorist financing.[14] The first anti-money laundering Directive was adopted in 1990 in order to prevent the misuse of the financial system for the purpose of money laundering. It provides that obliged subjects[15] should apply customer due diligence (CDD) when entering into a business relationship: they should identify and verify the identities of clients, monitor and report suspicious transactions.

The Third Directive (2005/60/CE) emphasized customer due diligence procedures and record keeping based on the new "risk-based approach".[16] Furthermore, in order to effectively contrast money laundering and terrorism financing, each Member State shall establish a Financial Intelligence Unit (FIUs).

They have a key position between the private sector and competent authorities, because they monitor the work of economic operators to detect transactions suspected of links to money laundering and terrorist financing. In other words, a FIU is the central national authority competent for receiving any disclosures concerning illicit flows of capital, with the aim of avoiding fragmentation and making more effective the investigation and the prosecution of any financial crime.[17] Indeed, the purpose of the FIUs is to collect and analyse the information which they receive with the aim of

14 The Fourth Directive replaced previous Directives 1991/308/CE, 2001/97/CE, 2005/60/CE, while the Fifth Directive emended the Fourth Directive (849/2015/CE).

15 The obliged entities are those who are subjected to the Directive's provisions: credit institutions, financial institutions (which includes money service businesses), the following natural or legal persons when carrying out their professional activities: auditors, external accountants and tax advisors, notaries and other independent legal professionals that act on behalf of and for their clients in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their clients, trust or company service providers.

16 According to the risk-based approach, the extent and the impact of due diligence shall be calibrated according to the risk of money laundering (ML) and financing of terrorism (TF) associated with the individual client. The nature and extent of any assessment of ML/TF risks should be appropriate to the type of business, nature of clients and size of operations. This is usually performed as part of the overall client and engagement acceptance processes. The accountants should document these assessments and keep them up to date. In addition, they should have appropriate mechanisms to provide risk assessment information to competent authorities and supervisors. ML/TF risks can be organised into three categories: (a) country/geographic risk, (b) client risk and (c) transaction/service and associated delivery channel risk. See *Guidance For A Risk-Based Approach For The Accounting Profession*, FATF Report, 2019, p. 22.

17 See E. Cassese-P. Costanzo, *La terza Direttiva comunitaria in materia di antiriciclaggio e antiterrorismo*, *Giornale di diritto amministrativo*, 2006, no. 1, p. 5.

establishing links between suspicious transactions and underlying criminal activity in order to prevent and contrast money laundering and terrorist financing. Moreover, FIUs should disclose the results of their analysis and any other relevant information to the national competent authorities and to other FIUs, in order to ensure a full cooperation.

By 2015 the EU adopted a modernised regulatory framework (the Fourth Anti-Money Laundering Directive) inspired by the 2012 Recommendations of the FATF.[18] The need for another Directive came from the fact that the Third Directive was interpreted and applied differently by State Members, with serious risk of unfair competition for the market. Therefore, in order to avoid fragmentation, the Fourth Directive provided specific measures of cooperation and elaboration of common guidelines and best practices, emphasizing the key role of FIUs and their information flows. In this context, for instance, FIUs could not deny providing information to other FIUs, in order to guarantee an effective collaboration beyond the national borders. Moreover, great improvements have been made also in the field of transparency and disclosure, given that all the information about the effective ownership of corporate assets shall be stored in a Central Archive and shall be made available to the national competent authorities and intermediaries responsible of due diligence. Those subjects then need to: 1) identify and verify the identity of their customers and of their beneficial owners and to monitor the transactions of and the business relationship with the customers; 2) report suspicions of money laundering or terrorist financing to the public authorities (usually, the FIUs); 3) take supporting measures, such as ensuring the proper training of personnel and the establishment of appropriate internal preventive policies and procedures.[19]

2. The major innovations in the Fifth Anti-Money Laundering Directive

The Fifth Anti-Money Laundering Directive, which amends the Fourth Anti-Money Laundering Directive, was published in the Official Journal of the European Union on 19 June 2018. The amendments to the Fourth Directive aim at ensuring

18 As it results from MEMO/12/246.

19 European Commission report on the application of the Third Anti-Money Laundering Directive - 11 April 2012.

more transparency, helping competent authorities to effectively detect criminal and terrorist financing flows. As it results from the *Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC* (Strasbourg, 5.7.2016) the amendments should: «(a) ensure more legal certainty for obliged entities as regards the enhanced customer due diligence measures which need to be applied in relation to high-risk third countries; (b) improve the detection of suspicious virtual currency transactions; (c) reduce the misuse of anonymous prepaid instruments; (d) improve FIUs' access to, and exchange of, information held by obliged entities; (e) ensure swift access to relevant information on the identity of holders of bank and payment accounts to prevent and detect transactions linked to money laundering and terrorist financing; (f) enhance transparency of beneficial ownership of corporate and legal arrangements».

The modern digital market implies the need to redefine the areas of traceability of financial flows that can, due to their opacity, hide laundering phenomena.[20] In this context, after the terrorist attacks of 2015-2016 and the publication of the Panama Papers,[21] the field of application of the Directive was extended in order to cover new phenomena not previously considered. The emergency imposed tight transposition deadlines, with the prescription for Member States to transpose the Directive by 10

20 As indicated in the second recital of Directive 2018/843/CEE, «recent terrorist attacks have brought to light emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations. Certain modern technology services are becoming increasingly popular as alternative financial systems, whereas they remain outside the scope of Union law or benefit from exemptions from legal requirements, which might no longer be justified. In order to keep pace with evolving trends, further measures should be taken to ensure the increased transparency of financial transactions, of corporate and other legal entities, as well as of trusts and legal arrangements having a structure or functions similar to trusts ('similar legal arrangements'), with a view to improving the existing preventive framework and to more effectively countering terrorist financing. It is important to note that the measures taken should be proportionate to the risks».

21 In August 2015, a digitised file with more than eleven million documents from the archives of the Panamanian law firm *Mossack-Fonseca* about secret information on 214,000 offshore companies used as cover for illegal activities was delivered to the newspaper *German Süddeutsche Zeitung* and the *International Consortium of Investigative Journalists (ICIJ)*. See N. Mainieri, *Quinta direttiva europea antiriciclaggio: il decreto di recepimento 125/2019 entra in vigore*, in *Rivista di diritto bancario*, Novembre 2019, p. 2 *et seq*.

January 2020. The new rules cover four main areas: virtual currencies,[22] register of beneficial owners, enhanced due diligence and FIUs' role.

The Directive considers the anonymity of virtual currencies particularly risky because they can easily be used by terrorist groups and other national criminal organisations. Therefore, the new rules apply to all entities providing services related to the holding, storing and transferring of virtual currencies, as well as to persons providing services comparable to those provided by auditors, external accountants and tax advisors (already subject to the Fourth Anti-Money Laundering Directive). These new actors – which include: a) all the providers engaged in exchange services between virtual currencies and fiat currencies; b) the custodian wallet providers;[23] c) persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to €10,000 or more; d) persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, where the value of the transaction or a series of linked transactions amounts to € 10,000 or more – will now have to identify their customers and report any suspicious activity to the FIUs. In response to the increasing use of virtual assets for money laundering and terrorist financing, also the FATF updated its *Guidance for a risk-based approach to virtual asset service providers* in June 2019, in order to reach a more level playing field across the virtual asset ecosystem.

Likewise, in order to contrast the illegal use of other anonymous financial instruments, the Fifth Directive further reduces anonymous prepaid cards' limits and maximum amounts under which obliged entities are allowed not to apply customer due diligence measures provided by Directive 2015/849/CE. Therefore, Member States will now have the possibility to allow the anonymous use of electronic money products only

22 The expression "virtual currencies" means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.

23 Custodian wallet provider means an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies.

in two situations: when customers use their prepaid instruments directly in the shop for a transaction of maximum €150.00 and when customers carry out an online transaction with a prepaid card below €50.00. In all other circumstances, costumer identification will be compulsory. In addition, Member States may decide not to accept on their territory payments carried out with anonymous prepaid cards.

The second area of innovations concerns the register of beneficial owners.[24] There was the need to improve transparency on the real owners of trusts and companies, by establishing a centralised automated mechanism (such as central registries or central electronic data retrieval systems) in every Member State, in order to get access to information on the identity of bank holders and their beneficial owners. In this regard, Member States are currently required to ensure that corporate and other legal entities incorporated within their territory obtain and hold accurate and current information on their beneficial ownership.[25] While the Fourth Directive allowed access to the information contained in the Registers to each natural and legal person who was able to demonstrate a legitimate interest, with the Fifth Directive the beneficial ownership Registers for legal entities is totally public and can be accessed by following the established procedure. Therefore, access is no longer limited to persons who can demonstrate legitimate interests. In addition, similar disclosure requirements also apply to Trusts: indeed, the access to the data of the beneficial owner of trusts will be granted without restrictions to competent authorities and FIUs, while it will be subordinated to the existence of a legitimate interest for individuals. The national Registers on beneficial ownership information will be interconnected to promote cooperation and exchange of information between Member States, who should constantly verify beneficial ownership's information collected to help improve the reliability of these registers.

Another major area of amendment regards due diligence for high-risk countries,

24 Beneficial ownership refers to anyone who enjoys the benefits of ownership a company and control it, without being on the record as being the owner. Usually, a beneficial owner is an individual which owns or controls more than 25% of company's share or voting rights, or otherwise who exercise control over the company or its management. Where such an interest is held through a trust, the trustee or anyone who controls the trust will be registered as the beneficial owner.

25 As stated in the 25th recital of the Directive 2018/843/CE.

where the anti-money laundering regulations present significant weaknesses.[26] When dealing with these countries in business relationships or transactions, Member States shall require obliged entities to apply «the following enhanced customer due diligence measures:

(a) obtaining additional information on the customer and on the beneficial owner(s);

(b) obtaining additional information on the intended nature of the business relationship;

(c) obtaining information on the source of funds and source of wealth of the customer and of the beneficial owner(s);

(d) obtaining information on the reasons for the intended or performed transactions;

(e) obtaining the approval of senior management for establishing or continuing the business relationship;

(f) conducting enhanced monitoring of the business relationship by increasing the number and timing of controls applied and selecting patterns of transactions that need further examination».[27]

Furthermore, Member States should require that obliged entities apply

26 Under the Fourth and Fifth Anti-Money Laundering Directives, the Commission is mandated to carry out an autonomous assessment and identify the high-risk third countries. The list has been established on the basis of an analysis of 54 countries, which meet at least one of the following criteria: a) they have systemic impact on the integrity of the EU financial system; b) they are reviewed by the International Monetary Fund as international offshore financial centres; c) they have economic relevance and strong economic ties with the EU. For each country, the Commission assessed the level of existing threat, the legal framework and the controls put in place to prevent money laundering and terrorist financing risks and their effective implementation. At this regard, the list of the Commission includes those countries with low transparency on beneficial ownership information, no appropriate and dissuasive sanctions or which do not cooperate nor exchange information. The Commission concluded that 23 countries have strategic deficiencies in their anti-money laundering/counter terrorist financing regimes. The 23 jurisdictions are: Afghanistan, American Samoa, The Bahamas, Botswana, Democratic People's Republic of Korea, Ethiopia, Ghana, Guam, Iran, Iraq, Libya, Nigeria, Pakistan, Panama, Puerto Rico, Samoa, Saudi Arabia, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, US Virgin Islands, Yemen.

27 Amending Article 18 of the Directive 2018/843/CE. In addition, Member States may require obliged entities to ensure, where applicable, that the first payment be carried out through an account in the customer's name with a credit institution subject to customer due diligence standards that are not less robust than the one of the Directive.

additional mitigating measures, complementary to the enhanced customer due diligence measures, in accordance with a risk-based approach.[28] In this regard, the assessment of the individual clients' degree of risk is of outmost relevance and should be carried out considering several elements, such as the clients' conduct and the type of transaction, in order to assign them a specific risk class.

The new Directive also aims at enhancing the role of FIUs, by allowing them to collect all the information available and to exchange them rapidly. Member States authorities and obliged entities should provide Financial Investigation Units unconditional access to all the data in their possession. In this regard, Member States should endeavour to ensure a more efficient and coordinated approach to deal with financial investigations related to terrorism and money laundering. In the exercise of their tasks, FIUs should have access to information and be able to exchange it without impediments, through appropriate cooperation with law enforcement authorities. Information should flow directly and without delays in all cases of suspected criminality and in cases involving the financing of terrorism. Therefore, it is essential to further enhance the effectiveness and efficiency of FIUs, by clarifying their powers of and the cooperation between them.[29] In the Fourth Directive, the power for FIUs to obtain additional information from obliged entities could be activated only by a prior suspicious transaction report sent from the obliged entities. Instead, in the Fifth Directive this power might be triggered also by the FIU's own analysis or by information and report provided by another FIU.[30] In addition, information of a prudential nature relating to credit and financial institutions should be exchanged between competent authorities supervising credit and financial institutions and prudential supervisors should not be obstructed by legal uncertainty, which might arise as a result of the

28 As stated in the 12th recital of the Directive 2018/843/CE. At this regard, those measures shall consist of one or more of the following: «(a) the application of additional elements of enhanced due diligence; (b) the introduction of enhanced relevant reporting mechanisms or systematic reporting of financial transactions; (c) the limitation of business relationships or transactions with natural persons or legal entities from the third countries identified as high risk countries».

29 As stated in the 16th recital of the Directive 2018/843/CE.

30 Clearly, this does not include indiscriminate requests for information, but only information requests based on sufficiently defined conditions.

absence of explicit provisions in this field.[31]

3. Conclusion: brief notes on the transposition of the Fifth Directive in Italy and future perspectives

It must be remembered that the transposition of the Fourth Directive had already led to an amendment of *D.lgs.*[32] 231/2007, through *D.lgs.* n. 90/2017, which entered into force on 4 July 2017. However, in September 2019, the European Parliament adopted a Resolution on the implementation of anti-money laundering legislation in Europe, highlighting a framework of shortcomings in the application of the relevant provisions. Therefore, the European Commission was called upon to ensure a more transparent process of transposition, with clear and concrete standards.

On 26 October 2019, with *D.lgs.* 125/2019, Italy officially transposed the Fifth Directive. The main purpose of the Decree was to ensure the traceability of suspected financial flows, to strengthen customer due diligence, to enhance national and international cooperation and to introduce stricter sanctions for violating anti-money laundering provisions. With this important step, the Italian legislator adopted a wide reading of the indications contained in the Fifth Directive, not limited to the effective transposition of its provisions, but also addressing and defining better the Fourth Directive's provisions. In this respect, the response of Italian anti-money laundering legislation to the constant evolution of such criminal phenomena has always been particularly positive. In its follow-up Report AML/CFT of March 2019 the FATF, after the re-rating process of last February, has assigned to our country a flattering evaluation. Indeed, according to the FATF, Italy continues to make substantial progress in the field of contrasting illicit financial flows.[33] Italy has received the maximum evaluation – "largely compliant" – on twenty out of the Forty FAFT Recommendations,[34] including

31 As stated in the 19th recital of the Directive 2018/843/CE.

32 Law Decree.

33 FATF, Anti-money laundering and counter-terrorist financing measures – "Italy-Follow-up Report& Technical Compliance Re-Rating", March 2019.

34 The FATF Forty Recommendations have been recognised by the International Monetary Fund and the World Bank as the international standards for combating money laundering and the financing of terrorism.

some of great significance, such as the implementation of risk-based approach applied by financial intermediaries and professionals, the coordination and cooperation between authorities, the regulation on the reporting of suspicious transactions and the FIU's regulations.

As shown above, the evolution of the legislation has led to the identification of relevant cases based on objective parameters, limiting the discretion and the initiative of the obliged entities. An example could be found in the system of suspicious reporting, where at first the choice to make a suspicious report was left to the discretion of the financial intermediary, whereas now it is mandatory in presence of the conditions prescribed by the law. Even though a wider range of relevant cases and of subjects obliged to actively respect the anti-money laundering regulation certainly has positive consequences in terms of prevention, this does not imply any reduction in the number of rules and legislation related to the phenomenon. Indeed, European institutions, national institutions, supervisory authorities, FIUs and obliged entities adopt rules and good practices which form all together a regulatory framework that it is not always coherent.

Therefore, a possible solution, at least from the point of view of a correct compliance, could be the introduction of a new European Anti-Money Laundering Supervisory Authority, following the example of the banking and insurance sectors. From an even more forward-looking perspective, it would be necessary to adopt law enforcement measures at global level in order to contrast anyone who breaks the rules of transparency, whether they are criminal organisations or tax evaders. However, this would only happen with the agreement of all the organizations involved in the fight against ML/FT and without their overlapping.

ILARIA CAPOSSELA*

THE EUROPEAN ARREST WARRANT IN THE POST-BREXIT ERA

ABSTRACT. *The present paper aims at analyzing the effects of the European Arrest Warrant (EAW) after the Brexit. In this context, it is necessary to examine the EAW in the European framework and its adoption by the United Kingdom. Over time, the EAW became more used in practice. However, the principles on which the EAW is based, namely that of mutual trust built on the respect of fundamental rights enshrined in the Charter of Fundamental Rights, the free movement of people and the jurisdiction of the European Court of Justice, were put at stake by several countries. The future itself of the EAW is at an impasse due to the withdrawal of the UK from the EU. Thus, the paper tries to assess the possible scenario after the transition period and the future cooperation between the EU and the UK in the field of police and judicial cooperation in criminal matters.*

CONTENT. 1. Introduction − 2. The Extradition Act of 2003 and the Brexit transitional period − 3. The future of the EAW after the transitional period: the different alternatives − 3.1. Maintaining the 2003 Extradition Act? − 3.2. The option of a 'surrender agreement' − 3.3. The return to the 1957 Council of Europe Convention on Extradition − 3.4. A unilateral measure: the Extradition (Provisional Arrest) Bill − 3.5. The direction of the negotiations between the Parties: the Draft text of the Agreement on the New Partnership with the United Kingdom of 18 March 2020 − 4. Some conclusive remarks

* Law School Graduate, Roma Tre University.

1. Introduction

The European Arrest Warrant (EAW) is a cross-border judicial surrender procedure used to prosecute or execute a custodial sentence or detention order provided by the Council Framework Decision of 2002,[1] to replace the former extradition procedures and to simplify and strengthen the cooperation within the European Union.[2] The procedure is based on the principle of mutual recognition of judicial decisions between Member States, expressly recognized by Article 82 TFUE.[3]

As illustrated in the table below, EAW's data for 2015, 2016 and 2017 shows that, as time goes by, the procedure has been used more in practice.[4]

	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
Issued	6,889	10,883	14,910	15,827	13,891	9,784	10,665	13,142	14,984	16,144	16,636	17,491
Executed EAWs	1,223	2,221	3,078	4,431	4,293	3,153	3,652	3,467	5,535	5,304	5,812	6,317

According to Article 50, paragraph 1, of the Treaty of the European Union[5] and to the referendum's result of 23 June 2016 on the UK's membership in the EU, the

1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584> (hereinafter 'the 2002 Framework Decision'), Article 1, paragraph 1.

2 European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>.

3 The principle of mutual recognition entails that a Member State can arrest and transfer a person to another Member State on the basis of a request from a judicial authority, valid in the entire territory of the EU, which does not depend on the executive power. The EAW must only respect fundamental rights and fundamental legal principles enshrined in Article 6 of the Treaty on European Union; R. Galullo, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizioni*, *Il Sole 24ore*, 29 February 2020; European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>, last access 12 March 2020; The 2002 Framework Decision, Article 1, paragraph 2; UN Consolidated version of the Treaty on the Functioning of the European Union, 9 May 2008, <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=uriserv:OJ.C_.2008.115.01.0001.01.ITA&toc=OJ:C:2008:115:TOC#C_2008115IT.01004701>, Article 82.

4 European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>, last access 12 March 2020.

5 EU, Consolidated Version of the Treaty on European Union, 26 October 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>, Article 50, paragraph 1 that states: «[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements».

Withdrawal Agreement between the United Kingdom and the European Union provides the withdrawal of the UK from the EU (so-called 'Brexit').[6] The fate of the European Arrest Warrant after the withdrawal of the United Kingdom from the European Union is unknown.

To the purpose of analyzing the alternatives of this regulation, the paper firstly introduces the framework provided by the Withdrawal during the transitional period.

Then, it focuses on the core of the discussion: the Brexit event requests to pose questions concerning the EAW's future. Thus, the options could entail sources already existent or the creation of new agreements. In particular, the Article compares the pros and cons of maintaining the 2003 Extradition Act, adopting a 'surrender agreement', returning to the 1957 Council of Europe Convention on Extradition, endorsing a unilateral measure, or ratifying a new agreement. The latter seems to be the road being undertaken thanks to the Draft text of the Agreement on the New Partnership with the United Kingdom of 18 March 2020.

2. The Extradition Act of 2003 and the Brexit transitional period

In the UK, the Extradition Act of 2003[7] provides two systems of arrest in extradition cases based on the territory that issued the request. Part 1 of the Act is the implementing legislation of the EAW under Council Framework Decision 2002/58/JHA. In this section, the territories are referred as 'category 1 territories'. Whereas part 2 of the Act provides for extradition to those territories, defined as 'category 2 territories', designated under Section 69 of the Act wherewith the UK has formal extradition arrangements.[8] The statistics of the National Crime Agency show that, before 1 January 2004, date of entry into force of the EAW, the UK extradited less than 60 persons every year. From 2004, the extraditions requests to the United

6 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 31 January 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0131(01)>.

7 Extradition Act 2003, 20 November 2003, <http://www.legislation.gov.uk/ukpga/2003/41>.

8 C. Coleman, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, p. 2.

Kingdom shifted from 1,865 in 2004 to 12,613 in 2015, while the requests from the UK to other Member States increased from 96 to 228 in 2015.[9]

A transition period of 11 months (until 31 December 2020) keeps the UK bound to the European Union law.[10] In accordance with Article 62, paragraph 1, letter b, of the Withdrawal Agreement, the 2002 Framework Decision shall apply when the requested person was arrested before the end of the transition period for the purposes of the execution of a European Arrest Warrant.[11] Article 185 provides that each Member State may refuse to surrender its nationals to the UK pursuant to an EAW, in addition to the grounds for non-execution of an EAW referred to in Framework Decision 2002/584/JHA. Within one month from the receipt of the Union's statement, the UK can declare that its executing judicial authorities refuse to surrender its nationals to that Member State.[12] Moreover, some countries' Constitutions deny the extradition outside the EU.[13]

3. The future of the EAW after the transitional period: the different alternatives

From the end of the transition period, the UK will be a non-Schengen third country and will not allow the free movement of persons. The future of the European Arrest Warrant is one of the most problematic issues of the UK's withdrawal from the EU.[14]

In the case *Minister for Justice and Equality v. O'Connor*,[15] the Irish Supreme

9 The National Crime Agency is the Supplementary Information Request at the National Entry Bureau of the United Kingdom. Its role is to act as a legal gateway between authorities requesting an arrest and those carrying out an arrest. National Crime Agency, *Historical European Arrest Warrants statistics: Calendar and Financial year totals 2004- May 2016*, 12 June 2018.

10 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

11 *Ibidem*, Article 62(1)(b).

12 *Ibidem*, Article 185(3).

13 R. Galullo, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizioni*, *Il Sole 24ore*, 29 February 2020; E-justice.europa.eu, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>.

14 De Berti Jacchia, *Mandato di Arresto Europeo ed Estradizione Post-Brexit*, 1 August 2018 <www.dejalexonbrexit.eu/mandato-di-arresto-europeo-ed-estradizione-post-brexit/>.

15 IESC, 30 March 2017, *The Minister for Justice and Equality v. O'Connor,* <http://www.bailii.org/ie/cases/IESC/2017/S21.html>. The UK issued an EAW against Thomas Joseph O'Connor for an offence of conspiracy to cheat the public revenue. Based on this EAW's request by the UK, Mr. O'Connor was arrested in

Court had to review the European Arrest Warrant request issued by the UK against Mr. O'Connor for an offence of conspiracy to cheat the public revenue. Mr. O'Connor appealed to the Supreme Court referring to the Brexit's consequences on the execution of an EAW of a sentence that will extend beyond the withdrawal of the UK from the EU. Indeed, the legal framework that will rule most of his time in prison is unknown. Unless a bilateral agreement between the EU and the UK is reached, Mr. O'Connor would not be entitled to the same rights during a part of his imprisonment as he would enjoy at the moment of his surrender. The Irish government, submitting that the Court should decide on the basis on the applicable law and not on the possible legislative changes, failed to seek adequate protections for Mr. O'Connor, as the future of the EAW's is of real concern.[16]

In accordance with Article 267 of the TFEU, the Amsterdam District Court referred to the European Court of Justice for a preliminary ruling, investigating the maintenance of EU citizenship and the linked rights of British citizens living in the EU. A ruling of the CJEU in the case of Mr. O'Connor will be relevant to determine the requirements of a future agreement and the fundamental rights applicable to UK extraditions after Brexit. The EU will accept a judicial cooperation agreement with the UK if the latter complies with EU law. The main difficulties for any future partnership will be the same raised in *Minister of Justice and Equality v. Mr. O'Connor*, namely the loss of jurisdiction of the CJEU and the lack of equivalent fundamental rights protections after Brexit.[17]

Several options have been hypothesized to overcome these problems.

Ireland and the Irish High Court granted the surrender on 27 July 2017. Then, Mr. O'Connor appealed to the Supreme Court.

16 C. Sáenz Pérez, *Minister for Justice v. O'Connor: A decisive moment for the future of the EAW in the UK, European Papers, Vol. 3, 2018, No 2,* pp. 1017-1026 at 1019-1020.

17 *Ibidem*, at 1021-1025.

4. Maintaining the 2003 Extradition Act?

As Mr. Michel Barnier[18] affirmed at the 2018 European Union Agency for fundamental Rights in Vienna, the EAW is built on the principle of mutual trust formed mainly by the respect of fundamental rights enshrined in the jurisdiction of the European Court of Justice,[19] the Charter of Fundamental Rights and the free movement of people. Due to the UK's unwillingness to accept these features, the country could not maintain the 2003 Extradition Act and could not take part in the EAW.[20]

Concerns have been raised due to the gaps in the data collections from 2014 as the figures for EAW requests have included warrants without a UK connection,[21] and due to the significant costs of an EAW approximated by the UK Government to £20,000, including the detention before the extradition, costs to the police, the Crown Prosecution Service and court and legal aid costs. The Government affirmed that, whether the UK did not participate anymore in EAWs, it would turn back to the 1957 Council of Europe Convention on Extradition.[22]

On the other hand, the EAW system, as enshrined in the 2003 Extradition Act, is fundamental in the cooperation system. The National Crime Agency listed the EAW in the top three priorities of the negotiations on UK withdrawal from the EU. Moreover, the Crown Prosecution Service considers the EAW as vital. Lastly, Helen Ball, the Metropolitan Police Service's Senior National Coordinator for Counter-Terrorism

18 Chief negotiator for the 'Task force for the preparation and conduct of the Negotiations with the UK under Article 50 TEU', <https://ec.europa.eu/info/sites/info/files/organisation_charts/organisation-chart-tf50_en.pdf>.

19 De Berti Jacchia, *Mandato di Arresto Europeo ed Estradizione Post-Brexit*, *Dejalexonbrexit*, 1 August 2018; ECJ 5 February 1963, Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61962CJ0026>; ECJ 15 July 1964, Case 6/64, *Flaminio Costa v. ENEL,* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006>; C. Mac Partholán, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants, The Journal of Criminal Law, 1-18,* 26 December 2019, pp. 2-4.

20 C. MacPartholán, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, pp. 2-4.

21 *Ibidem*, pp. 9-10.

22 HM Government*, Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, Cm 8671, July 2013, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf>, p. 95.

Policing, rated EAW at 'about an 8' on a scale of 1 to 10 of relevance in her field.[23]

5. The option of a surrender agreement

There has already been a 'surrender agreement' between the EU and non-EU countries but in the Schengen zone, namely with Norway and Iceland. The first agreed arrangements were in 2006, but only came into force in November 2019.[24] It mirrors for the most parts the EAW and it has an indirect but influential role for the European Court of Justice. However, Article 7 of the Agreement in exam provides an exemption for the extradition based on nationality.[25] The Home Affairs Select Committee affirmed that it must be kept in mind the length of time that it took to negotiate the agreement and the difficulties in an eventual replacement agreement of this kind.[26]

Article 36 of this Agreement establishes a dispute settlement clause that does not refer to the European Court of Justice, but to a dispute settlement mechanism that includes representatives of the governments of the Member States of the European Union, Iceland and Norway. Similar dispute resolution mechanisms have been proposed by the House of Lords' paper on the future of the EAW, whereas it considers the possibility of incorporating arbitration as a mechanism to settle disputes over the interpretation and application of any future agreement on the EAW.[27] On one hand, it could avoid being subjected to the jurisdiction of the European Court of Justice. On

23 C. MacPartholán, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, p. 16.

24 The Agreement of 28 June 2006 between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway entered into force on 1 November 2019, OJ L 292, 21 October 2006, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22006A1021%2801%29> (hereinafter 'the 2006 Agreement').

25 J. Dawson, *Brexit Next Steps: The European Arrest Warrant, House of Commons Library,* 20 February 2020.

26 The 2006 Agreement, Article 7 'Nationality exception': «1. Execution may not be refused on the ground that the person claimed is a national of the executing State. 2. Norway and Iceland, on the one hand, and the European Union, on behalf of any of its Member States, on the other hand, may make a declaration to the effect that nationals will not be surrendered or that surrender will be authorised only under certain specified conditions. 3. Where an arrest warrant has been issued by a State having made a declaration as referred to in paragraph 2, or by a State for which such a declaration has been made, any other State may, in the execution of the arrest warrant, apply reciprocity».

27 House of Lords, European Union Committee, *Brexit: Judicial Oversight of the European Arrest Warrant, 6th Report of Session 2017-19*, 27 July 2017, <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/16/16.pdf>, paragraphs 5, 27, 31, and 41.

the other hand, most of the expert witnesses consulted by the Home Affairs Committee of the House of Commons underlined that implementing a non-judicial mechanism would be difficult in a field that interferes with the individual's rights and freedoms. The best alternative for the UK would be, thus, the creation of a judicial body with competences to interpret and settle disputes. In any case, the UK Government might compromise in dispute settlement. Theresa May, the former prime Minister, declared that she was ready to make concessions about the acceptance of European Court of Justice's case-law and jurisdiction in order to ensure a UK-EU security deal referring to judicial and police cooperation in criminal matters. However, nowadays this opinion is not followed anymore.[28]

6. The return to the 1957 Council of Europe Convention on Extradition

In the absence of a compromise, the choice would fall on the 1957 Council of Europe Convention on Extradition. In fact, the 1957 Convention permits the accession of non-EU States as it happened with Israel, South Africa and South Korea, and the UK could become a non-EU Contracting Party. In accordance with Article 28, paragraph 3, of the 1957 Convention on Extradition,[29] the UK could make a Proposal of Cooperation based on the EAW and an agreement with the other Contracting Parties. Moreover, Article 9 of the 1977 European Convention on the Suppression of Terrorism states that the Contracting States can conclude bilateral or multilateral agreements to apply the provisions and principles of the Convention in exam.[30]

However, the application of the 1957 Convention on Extradition would lead to delays, huge costs, and potential political interferences.[31]

28 C. Sáenz Pérez, *Minister for Justice v. O'Connor: A Decisive Moment for the Future of the EAW in the UK, European Papers, Vol. 3, 2018, No 2,* pp. 1017-1026, at 1024-1025.

29 European Convention on Extradition, 13 December 1957, <https://rm.coe.int/1680064587>, Article 28(3): «Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention».

30 C. MacPartholán, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, pp. 17-18.

31 House of Lords, European Union Committee, *Brexit, the Proposed UK-EU Security Treaty*,18th Report of

There are some relevant differences between the European Arrest Warrant and the 1957 Convention regarding time limits, the authority issuing the requests and the reasons of denial of a request.[32]

Firstly, Article 17 of the EAW provides time limits while the 1957 Convention does not.[33]

Secondly, while Article 12, paragraph 1, of the 1957 Convention establishes that «the request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties», the EAW is a transaction between judicial channels.[34]

Thirdly, the Framework Decision on the EAW does not provide any exception clause allowing a State to refuse surrendering their own nationals and there is no exception for political, military or revenue offences. Instead, Article 6 of the 1957 Convention provides the possibility to refuse an extradition request for their own nationals.[35]

Furthermore, in order to protect both States' citizens, the Framework Decision provides that crimes and penalties are determined by each States' national laws. In fact, the EAW can be executed for a wide variety of crimes as it does not attempt to

Session 2017-19, 11 July 2018, <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/164/164.pdf>.

32 R. Galullo, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizioni*, *il sole 24 ore*, 29 February 2020; European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa. eu/content_european_arrest_warrant-90-en.do>.

33 The 2002 Framework Decision, Article 17; The first paragraph of Article 17 establishes that the EAW shall be executed 'as a matter of urgency'. Paragraph 2 affirms that «in cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given». The Article carries on affirming that «[i]n other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person». When the time limited cannot be respected, it must be followed by the executing judicial authority's reason for the delay and consequently the time limits may be extended by a further 30 days. Whether Member States cannot observe the abovementioned time limits, it shall inform Eurojust, providing the reasons for the delay. Repeated delays of Member States in the execution of European Arrest Warrants, shall be referred by the other MS to the Council in order to evaluating the implementation of the Framework Decision at the national level.

34 European Convention on Extradition, 13 December 1957, <https://rm.coe.int/1680064587>, Article 12.

35 C. MacPartholán, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, at 6 and 17.

harmonise the criminal acts of each Member States and the warrant's offence does not have to correspond to that under the legislation of the other Member States.[36]

If the 1957 Convention will be applied, both the UK and the other Member States would need to update the national legislation because most of the States repealed the 1957 Convention.[37]

7. A unilateral measure: the Extradition (Provisional Arrest) Bill

The Extradition (Provisional Arrest) Bill is an act that empowers authorities to arrest, without a warrant, for the purpose of extraditing people for serious offences.[38] The 2003 Extradition Act provides that the UK police can immediately arrest someone on the basis of a warrant correctly issued by 'category 1 territories' and certified by the National Crime Agency. On the other hand, the UK police must seek a warrant from a judge before arresting someone from 'category 2 territories'. Applying to a judge for an arrest warrant takes hours and jeopardizes the aim of detaining the individual who might escape or offend again. In light of this, the bill is aimed at creating a power of arrest without warrant in relation to predetermined category 2 territories. When such countries provide a valid extradition request, a designated authority in the UK, namely the National Crime Agency, might issue a certificate. Such certificate would allow a constable, customs officer, or a service police officer to arrest the individual specified without the need to apply to a court. The bill requires the certificate to be given to the arrested individual as soon as practicable and provides that these subjects must be brought before a judge within 24 hours of the time of their arrest. The judge could adjourn proceedings to allow more evidence to be produced. The total period of adjournments cannot be more than 72 hours.[39]

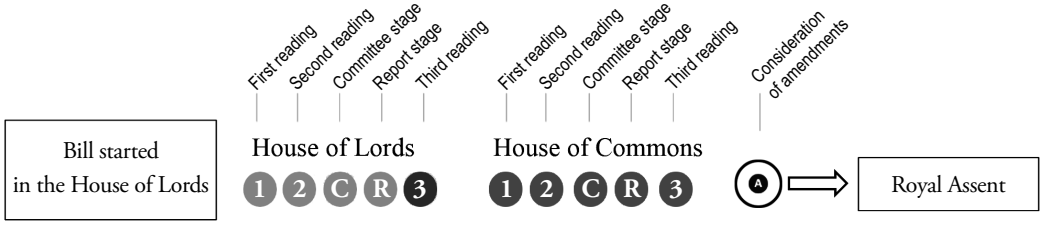
36 *Ibidem*, pp. 3-4.

37 R. Galullo, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizioni*, 29 February 2020; E-justice.europa.eu, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>.

38 Extradition (Provisional Arrest) Bill [HL] 2019-21, Government bill, Home Office, <https://services.parliament.uk/bills/2019-21/extraditionprovisionalarrest.html>.

39 C. Coleman, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, pp. 1-5.

PROGRESS OF THE BILL[40]



The latest step was the Report Stage of the House of Lords on 23 March 2020, while the next one shall be the third reading in the House of Lords.

In case the UK will no longer have access to the European Arrest Warrant after leaving the EU, the Bill might be amended to apply to EU Member States,[41] or to certain countries specified by the Bill, re-designating category 1 territories as category 2 territories.[42] In a 'loss of the EAW' scenario', also the European Union Committee within the House of Lords discussed about this modification and affirmed the need to create interim arrangements, even if only unilateral ones. However, keeping in mind that extradition is a reciprocal arrangement, the Committee stated that amending the 2003 Act would not be sufficient.[43] In October 2019, the Guardian newspaper reports that Richard Martin, the deputy assistant commissioner of the National Police Chiefs Council, affirmed that the loss of the EAW is one of the police's main concerns. Moreover, Rebecca Niblock, a criminal litigation partner at Kingsley Napley LLP specialising in extradition, expressed concerns about the bill. In particular, she affirmed

40 Image of the UK parliament website: Home Office, Government Bill, Extradition (Provisional Arrest) Bill [HL] 2019-21, <https://services.parliament.uk/bills/2019-21/extraditionprovisionalarrest.html>.

41 Prime Minister's Office, *The Queen's Speech 2019*, 19 December 2019, p. 82.

42 C. Coleman, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, p. 2.

43 House of Lords, European Union Committee, *Brexit: Judicial Oversight of the European Arrest Warrant, 6th Report of Session 2017-19*, 27 July 2017, <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/16/16.pdf>, paragraph 65; C. Coleman, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, pp. 6-7.

that promoting the Bill as the solution to the problem of arrests from non-EU countries avoids dwelling on the consequences of the loss of the EAW with Brexit.[44]

8. The direction of the negotiations between the Parties: the Draft text of the Agreement on the New Partnership with the United Kingdom of 18 March 2020

Cooperation in criminal matters is required to mirror the UK and UE common interests, the geographical proximity and the challenges to face. Cooperation would be met with an agreement between the UK and EU. The EU's draft negotiating mandate recalled that the arrangements for judicial cooperation will need to bear in mind that the UK will be a non-Schengen third country. Therefore, the UK will not enjoy the same rights of Member States.[45] Nonetheless, an ambitious cooperation would need commitments that concern the fundamental rights of individuals.[46]

Likewise, the UK Government stated that a pragmatic agreement on law enforcement and judicial cooperation is in the parties' mutual interest. Nonetheless, it affirmed that the EU must not restrict the autonomy and must respect the sovereignty of both parties and the autonomy of the legal orders. It cannot therefore include «any regulatory alignment, any jurisdiction for the CJEU over the UK's laws, or any supranational control in any area».[47] Moreover, UK will not formally commit to apply the European Convention on Human Rights. If this position is maintained, it will have practical consequences on the cooperation that will remain possible on the basis of

44 R. Niblock, *Changes Proposed by the Extradition (Provisional Arrest) Bill*, *The Law Society Gazette*, 6 November 2019; C. Coleman, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, p. 7.

45 General Secretariat of the Council of the European Union, *Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland*, 5870/20 ADD 1 REV 3, UK 3, 25 February 2020, paragraph 117; EU Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland*, Brussels, COM (2020) 35 final, 3 February 2020, paragraphs 112-113.

46 EU Commission, *Negotiations with the UK: Michel Barnier, the European Commission's Chief Negotiator, sets out points of convergence and divergence following the first round of negotiations*, 5 March 2020, <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_402>, p. 3.

47 Prime Minister Boris Johnson, *UK/EU relations: written statement – HCWS86*, 3 February 2020, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-02-03/HCWS86/>.

international agreements but won't be ambitious.[48] Moreover, any agreement should automatically terminate whether the UK censures the European Convention on Human Rights or the Human Rights Act of 1998, the national act that implements the ECHR.[49]

Part Three, Title I, Chapter Seven of the Draft text of the Agreement on the UE New Partnership with the United Kingdom establishes an extradition system based on a mechanism of surrender pursuant to an arrest of warrant.[50] Article 3 of the Draft text affirms that «Nothing in this Title shall have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in the European Convention on Human Rights, or, in case of the Union and its Member States, in the Charter of Fundamental Rights». Moreover, Article 136, Part Three, Title I of the Draft specifically lays down that the cooperation of law enforcement and judicial cooperation in criminal matters depends on the UK application of the European Convention on Human Rights, Protocols 1, 6 and 13 thereto, and its implementing Act under the domestic law. Whether the UK repealed the latter sources, this Title shall be disapplied.[51]

Article 110 rules the relation to other legal instruments establishing that from the entry into force of the Draft, Chapter 7 will replace the corresponding provisions of the 1957 Convention on Extradition and its additional Protocol, and the European Convention on the Suppression of Terrorism of 27 January 1977, applicable in the field of extradition in relations between the United Kingdom, on the one hand, and Member States, on the other hand (without prejudice to their application in relations between

48 EU Commission, *Negotiations with the UK: Michel Barnier, the European Commission's Chief Negotiator, sets out points of convergence and divergence following the first round of negotiations*, 5 March 2020, <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_402>, p. 3.

49 General Secretariat of the Council of the European Union, *Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland*, 5870/20 ADD 1 REV 3, UK 3, 25 February 2020, paragraph 118; EU Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland*, Brussels, COM(2020) 35 final, 3 February 2020, paragraphs 112-113.

50 EU Commission, Task Force for Relations with the United Kingdom, *Draft text of the Agreement on the New Partnership with the United Kingdom,* 18 March 2020, <https://ec.europa.eu/info/publications/draft-text-agreement-new-partnership-united-kingdom_it>, Article 76.

51 *Ibidem*, Article 3 and Article 136.

States and third States).[52]

After the entry into force of this agreement and no later than five years, the Parties shall jointly review the implementation of Chapter 7.[53]

The Draft contains the same provisions concerning the refusal of the execution of an EAW of the 2002 Framework Decision (such as amnesty, respect to the principle of *ne bis in idem*, the offences are not attributable to the person due to his/her age). In addition, the Draft seems to have a specific consideration to human rights. Contrarily, the Framework Decision does not contain an explicit ground for refusal based on the infringement or risk of infringement of human rights. While some Member States implemented this ground of refusal in the national legislation, others had not. Then, in these countries, judicial authorities do not neglect their mutual recognition obligations by taking fundamental rights concerns into consideration.[54]

Instead, different judgments took human rights into consideration questioning whether the principle of mutual recognition is limited if there is an infringement of the fundamental rights they should respect on the basis of Article 1, paragraph 3, of the Framework Decision.

Firstly, the European Court of Human Rights (ECtHR) in extradition proceedings, such as *Soering v. United Kingdom*, applied the principle that extradition shall be refused where there is a breach of the ECHR.[55]

Secondly, the European Court of Justice, in the joint cases *Pál Aranyosi and Robert Căldăraru,*[56] ruled that the executing judicial authority must obtain supplementary

52 *Ibidem*, Article 110.

53 *Ibidem*, Article 135.

54 M. DEL MONTE, *Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur: Baroness Ludford MEP), European Parliamentary Research Service,* 2014, pp. 15-16.

55 ECtHR, 7 July 1989, 14038/88, *Soering v. The United Kingdom*, <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57619%22]}>, paragraph 91.

56 ECJ 3 March 2016, Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, (Requests for a preliminary ruling from the Higher Regional Court, Bremen, Germany), <http://curia.europa.eu/juris/celex. jsf?celex=62015CC0404&lang1=it&type=TXT&ancre=>, paragraphs 128 at 134, 167, 183.

information when there is evidence of deficiencies of detention conditions in the requesting Member State. If the authority cannot establish the existence of a risk of inhuman or degrading treatment in a reasonable time, it should decide whether to conclude the surrender procedure.[57] This decision established a process of consolidation of the limits on the execution of the EAW, recognizing the prevalence of the protection of fundamental rights over the principles of mutual recognition.[58]

As a matter of fact, this fulfillment has been implemented in national courts that gave prevalence to the protection of fundamental rights. In the High Court case of *Strzepa v. Poland*,[59] Mr. Justice Ouseley in the judgment of appeal affirmed that extradition to Poland in 2018 for low-level offences committed years before would be a disproportionate interference with the appellant's right to private and family life enshrined in Article 8 of the European Convention on Human Rights and therefore considered as a violation of Article 14 of the Extradition Act of 2003.[60]

Furthermore, in the *Minister for Justice and Equality v. Celmer* case,[61] the Irish High Court did not allow the surrendering of the accused, Arthur Celmer, to Poland. The ruling was due to the deep concern on the situation of the rule of law in Poland that represents a «clear risk of a serious breach of the values referred to in Article 2 TEU».[62]

57 C. MacPartholán, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, pp. 7-8.

58 G. De Amicis, *Il principio del reciproco riconoscimento e la sua attuazione nel diritto interno*, M.R. Marchetti, E. Selvaggi, *La nuova cooperazione giudiziaria penale*, Cedam, 2019, p. 239 *et seq*.

59 EWHC, 18 July 2018, *Strzepa v. District Court Koszalin, Poland*, <https://advance-lexis-com.biblio-proxy.uniroma3.it/document/?pdmfid=1516831&crid=51343465-19de-408a-992e-50cc77292dfb&pddocfullpath=%2Fshared%2Fdocument%2Fcases-uk%2Furn%3AcontentItem%3A5W34-V1R1-FC1F-M0SJ-00000-00&pdcontentcomponentid=184140&pdteaserkey=sr1&pditab=allpods&ecomp=pp79k&earg=sr1&prid=dc27af73-595a-4c07-b078-37db8533f8fb>, paragraphs 24 and 30.

60 Extradition Act 2003, 20 November 2003, <http://www.legislation.gov.uk/ukpga/2003/41>, Article 14: 'Passage of time': «A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have – (a) committed the extradition offence (where he is accused of its commission), or (b) become unlawfully at large (where he is alleged to have been convicted of it)».

61 IEHC, 3 December 2018, *The Minister for Justice and Equality v. Celmer*, <http://www.europeanrights.eu/public/sentenze/Irlanda-High_Court-12marzo2018-High_Court.pdf>, paragraphs 46, 77, 97.

62 EU Commission, *Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland,* 20 December 2017.

In the area of the European criminal law built on mutual trust, all citizens should benefit from the same level of protection and not from different ones based on each national legislation. The Council and the European Parliament negotiated an explicit human rights ground for refusal concerning the European Investigation Order (EIO). Instead, even though the Court of Justice in the joint cases *Pál Aranyosi and Robert Căldăraru* hermeneutically filled the legislative gap,[63] such an expressed insertion similar to the EIO is not provided for the EAW. This inclusion would increase consistency between national legislations and coherence of the EU criminal justice.[64]

The Draft text of the Agreement on the UE New Partnership with the United Kingdom seems to have a specific consideration to human rights as it includes refusal «when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons». [65]

The text of the Draft Agreement seems to mirror the Council Framework Decision 2002/584/JHA and could be a great solution to retain the cooperation in the criminal matters.

9. Some conclusive remarks

In the event that the UK will lose access to the EAW, an agreement between the European Union and the United Kingdom would be necessary for both Parties for different reasons.

Firstly, on one hand, the UK is not willing to accept the jurisdiction of the European Court of Justice. In this case, it would be impossible to retain the EAW since

63 V. Sachetti, *La nozione di autorità giudiziaria nel mandato d'arresto europeo, tra mutuo riconoscimento e tutela dei diritti fondamentali, I post di AISDUE, I (2019), Sezione 'Note e commenti' n.10, 2 October 2019,* pp. 115-116.

64 M. del Monte, *Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur: Baroness Ludford MEP), European Parliamentary Research Service,* 2014, pp. 15-16.

65 *Ibidem*, Article 80, paragraph 1, letter i.

the latter is based on the mutual recognition between Member States formed, *inter alia*, by the binding jurisdiction of the CJEU. Moreover, the UK Government highlighted the significant costs of each EAW that lead to change the system. On the other hand, the requests of the EAW from the UK and to the UK increased in a considerable manner and various point of views highlighted the importance of this instrument. The former Prime Minister Theresa May affirmed that without an agreement and in the absence of the EAW, the UK will be 'a honeypot for all of Europe's criminals on the run from justice'.[66]

Secondly, it is difficult to realize a 'surrender agreement' in a short time, based on the Norway and Ireland's experiences that took 13 years until the entrance into force of the agreement.

Moreover, going back to the 1957 Council of Europe Convention on Extradition would cause a regression and would lead to delays, higher costs, and political interferences, although accessing to the 1957 Council of Europe Convention would allow the UK to become a non-EU Contracting Party and then to negotiate agreements with the other Contracting Parties.

Lastly, applying the Extradition (Provisional Arrest) Bill to Member States would imply adopting unilateral measures, which would be incompatible with the bilateral extradition's context.

Therefore, Chapter 7 of the UE Draft text of the Agreement on the New Partnership with the United Kingdom seems to be the more feasible alternative as it reflects the Council Framework Decision of 2002.

66 T. Shipman, *May warns Tory rebels will make Britain a honeypot for criminals*, *The Times*, 26 October 2014.

GIULIA ROMANO[*]

ARMED DRONES: A HUMANITARIAN WEAPON? TARGETED KILLINGS BY U.S. DRONES AND THE ROLE OF ITALY

ABSTRACT. *This paper aims at illustrating how the arming of drones – in particular by the United States – changed the dynamics of international armed conflicts but also of other contexts, thereby bringing a sense of urgency to the international debate on the lawfulness of targeted killings. Attention will be drawn to the current international trend whereby the responsibility of third States that facilitate U.S. drone operations is being brought into scrutiny, before showing how this trend opens the door to Italy being held liable for the drone operations conducted from the military base in Sigonella.*

CONTENT. 1. The arming of drones in the international context, with specific reference to the United States − 2. The international debate on targeted killings by means of drones − 3. Transparency, control, accountability − 4. The responsibility of Third States: Italy and the military base in Sigonella − 5. Concluding remarks

[*] Former Trainee at the Italian Supreme Court.

1. The arming of drones in the international context, with specific reference to the United States

As part of the "Global war on Terrorism" launched by the United States (U.S.) in the wake of 9/11, the use of Unmanned Aerial Vehicles (UAVs), also known as drones, has gained an ever-increasing strategic relevance in surveillance and combat operations.[1] Drones are aircrafts without a human pilot on board that can be controlled by an operator on the ground or follow prearranged flight plans along specific GPS coordinates.

Initially, drones have been – and continue to be – used for security and intelligence activities by various government agencies. However, over time, States have been using this technology in military operations, mainly in the context of armed conflicts, but not limited to them.

Indeed, drones have been armed and used to commit targeted killings as part of armed conflicts, international police and counter-terrorism operations, in particular by the U.S.[2] The expression "Targeted killings" refers to the deliberate use of lethal force by a subject of international law (not necessarily a State) against another subject that has been pre-identified as a target.

While it is true that the United States are the country with the greatest number of armed drones, numerous other States possess such weapons or plan to acquire them. The reason is that the characteristics of this technology make it very appealing for use in military and international police operations.[3] Due to unprecedented capacities in terms of autonomy, range and persistence, drones are capable of operating on the battlefield better than humans and, most of all, in their stead. Operations are, in fact, entirely managed from military bases miles away from the site of the attack, in another

1 For example, according to Jane's Markets Forecast, the 10 countries that spend the most on drones were expected to spend a total of $ 8 billion on combat drones in 2019, <www.theguardian.com/news/2019/nov/18/killer-drones-how-many-uav-predator-reaper>.

2 C. Meloni, *Sulla (il)legittimità degli omicidi mirati mediante i droni e i possibili ricorsi alle corti*, in *Droni Militari: Proliferazione o controllo?*, *Research Report*, Istituto di Ricerche Istituzionali IRIAD, Roma, volume 4, 2017.

3 For further developments, see F. Flamini, *La corsa agli armamenti. L'uso della forza e i droni armati. Il rapporto Italia-NATO*, *IRIAD Review*, volume 6, 2018.

country. There are other advantages as well: drones are lighter and more agile than traditional combat aircrafts and can fly over an area for long periods of time in search of a suspected terrorist, for example. Their built-in camera allows operators to identify their target before striking it and allows for a more accurate understanding of the situation on the ground, at least in theory. By removing the need for a human to directly engage in the act of killing, it is therefore easy to understand how this technology completely changes the dynamics of targeted killings. Due to their numerous advantages, above all precisely the absence of risk for the military personnel involved and the efficiency of those attacks, some proponents of the use of drones in counterterrorism operations have even gone as far as to call them "humanitarian weapons".[4]

2. The international debate on targeted killings by means of drones

Despite the above considerations, the use of armed drones – in particular by the U.S. – in order to commit targeted killings is at the center of a heated global debate, which spans political, moral and legal dimensions. The last one is the most relevant to this essay.

The concept of targeted killing is not new in the field of criminal law; it predates the use of drones. Nevertheless, the use of armed drones has significantly decreased the human and economic cost of such operations, therefore facilitating their multiplication. The impact of drones on the concept of targeted killings can therefore be said to be more quantitative than qualitative and made it more urgent to debate the legitimacy of targeted killings, as they have long been the object of international case law and doctrine that have sought to delineate, as precisely as possible, strict margins of legitimacy for those operations.

From the legal point of view, the use made by the U.S. of armed drones in counterterrorism operations poses several problems. In fact, these operations are attacks based on an extreme personalization of the enemy, due to the fact that they are conducted on the basis of kill lists personally approved by the President of the United

4 See G. Chamayou, *A Theory of the Drone*, New York, The New Press, 2015, pp. 135-139.

States. Targeted killings are conducted in heterogeneous contexts (Afghanistan, Pakistan, Syria, Yemen, Somalia, Iraq, Libya) that range from fully fledged armed conflicts to situations of grave internal instability as well as situations that fall outside armed conflicts such as international police or counterterrorism operations.

The militarization of terrorist activity has seen American doctrine qualify terrorist attacks as "acts of war", allowing the legality of counterterrorism operations to be assessed in light of international humanitarian law (IHL) rules (which allow for greater freedom in the use of force). However, this qualification has been, and continues to be, widely criticized from a doctrinal perspective, almost unanimously. Yet, if IHL does not apply, then in operations where the U.S. drone conducts a drone strike in another country outside the context of armed conflict, its legality must be assessed against criminal law and international human rights law.[5] What is legal in wartime may not be so in peacetime. Moreover, an important element to note is that counterterrorism operations involving drone strikes are often conducted by intelligence services, particularly the CIA, which is not part of the military. This makes a crucial difference as such bodies are not recognized as combatants by IHL. In any case, targeted killings by means of armed drones, if they were already hardly compatible with the law of armed conflicts (under certain conditions), are also highly questionable from the point of view of Human Rights law.[6]

Outside the context of armed conflicts, the criteria for a targeted killing to be lawful are set by Human Rights law, which poses stringent conditions for States to use lethal force in a deliberate and premeditated way: the operation needs to have a punitive goal, its objective needs to be the protection of human lives and it needs to be used as last resort.

On the other hand, in the case of armed conflicts, such targeted killings nonetheless raise doubts as regards their legitimacy. Indeed, it is necessary to assess

5 C. Meloni, *Sulla (il)legittimità degli omicidi mirati mediante i droni e i possibili ricorsi alle corti*, in *Droni Militari: Proliferazione o controllo?*, 2017.

6 Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killing, HC 574, HL Paper 141*, 10 May 2016; J. Dehn, *Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations*, *Harv. Int'l L.J.*, 84, 2013.

whether they respect the principles of distinction, military necessity and proportion. Above all, as strongly stated by the European Court of Human Rights, the protection of Human Rights (*in primis* the right to life) does not cease in wartime. Breaches of the abovementioned principles of international law and large-scale violations of Human Rights can even make targeted killings qualify as war crimes or crimes against humanity, provided that the conditions are met. This sheds some light on the reasons why an almost unanimous international doctrine considers targeted killings through the use of armed drones as unlawful, *tout court*, under IHL, international human rights law and international criminal law.[7] This thesis has been further confirmed by the UN Human Rights Committee.

One could affirm that the problem is less about armed drones than about targeted killings and, incidentally, shooting a missile with a drone would be equivalent, from the legal point of view, to shooting it from any other type of aircraft,[8] at least in theory. However, targeted killings by the means of armed drones present peculiarities susceptible to generate greater general concern.[9] First of all, drones can generate a so-called "PlayStation Mentality" (detachment from remotely controlled actions) as well as an "all or nothing" logic because, when using a drone, one can only shoot – and kill – the target; one cannot capture it. Above all, one of the greatest problems with such operations is that «the idea of hyper-precision air strikes that only kill terrorist militants and enemy fighters is an illusion».[10]

Indeed, numerous civilians have been killed in supposedly targeted drone strikes

7 For further developments, see P. HAMILL, *Is it murder? The ethics and legality of drone strikes*, *Learned Friends Conference*, 16 September 2015; M. RAMSDEN, *Assessing U.S. Targeted Killings Under An International Human Rights Law Framework, Groningen Journal of International Law*, 1/1, 2013; F. ROSEN, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility, Journal of Conflict & Security Law*, Oxford University Press, 2013.

8 P. ALSTON, *Addendum-Study on targeted killings*, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, United Nations Human Rights Council, 28 maggio 2010, UN Doc. A/HRC/14/ 24/Add.6, paragraph 79 («[…] a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles»).

9 For further developments, see M. DE GROOF, *Death from the Sky: International Legal and Practical Issues on the Use of Armed Drones*, in A. ZAVRŠNIK, *Drones and Unmanned Aerial Systems*, Springer International Publishing, 2016, pp. 131-156.

10 C. WOODS, *Director at Airwars*, UK, <http://www.youtube.com/watch?v=MYWwFnaFVOM>.

to the point where some consider that they were not just *collateral damage* but *the overwhelming proportion of drone strike victims*.[11] As demonstrated by the hundreds of civilian victims in recent years, targeted killings executed by armed drones are more vulnerable to errors. From the data made publicly available by the White House, it appears that, on average, one civilian is killed every seven drone strikes committed by the CIA. Among those civilian victims, there is also an Italian: Giovanni Lo Porto was killed by a U.S. drone in an attack on the Afghanistan-Pakistan border, as part of a counterterrorism operation.[12]

Lo Porto was an Italian humanitarian worker for *Welt Hunger Hilfe*, a German NGO with activities in Pakistan. In 2012, a few weeks after his arrival in Pakistan, he was kidnapped by a jihadist cell and was held captive for almost three years. During this long period, the Italian authorities on the field tried to obtain his liberation. But just while they were reassuring his family, he was killed in a lethal strike by a U.S. drone targeting Al-Qaeda officials. This event came to light only in April 2015 during a press conference where the then-President of the United States, Barack Obama, officially recognized the responsibility of the U.S. The Lo Porto family managed to obtain an unofficial meeting with the U.S. diplomatic representatives, where they were handed the report of an internal investigation conducted by an *ad hoc* team. This report confirmed and validated the operation excluding any failure to comply with the Rules of Engagement and other norms regulating drone operations.

3. Transparency, control, accountability

This contribution will not delve further into the legitimacy of the practice of targeted killings by means of drones. Nevertheless, there appears to be a clear need to assess the (un)lawfulness of such operations, at least on a case by case basis, and to be able to determine who can potentially be held liable for them. What is lacking, though,

11 For further developments, see S. Akbar, "*Drones: Beyond the myths of precision and legality" in ECCHR, Litigating drone strikes: Challenging the Global Network of Remote Killing*, ECCHR report, Berlin, May 2017.

12 ECCHR, *US drone strikes: The killing of Giovanni Lo Porto in Pakistan*, ECCHR Case Report, May 2018; C. Cucco-D. Mauri, *Omicidi mirati a mezzo drone: brevi riflessioni a margine del caso "Lo Porto" tra diritto penale e diritto internazionale*, *Diritto penale contemporaneo*, 5/2018.

is the formal acknowledgement of such unlawfulness by a judicial authority. Despite various attempts by researchers, lawyers and activists – in particular the Berlin-based European Center for Constitutional and Human Rights (ECCHR) – these cases have not seen the scrutiny of national courts. Indeed, the numerous legal and practical difficulties in ensuring the effective enforcement of international and criminal law in those cases leaves, in fact, many irreconcilable doubts, and, so far, the matter has remained confined to doctrinal debate only. In several States, it has emerged clearly how the civilian victims of drone strikes are completely deprived from any recourse, both at the civil and criminal levels[13] and, in this context of "denial of justice," international doctrine continues to maintain the necessity for domestic courts to exercise their jurisdiction over such operations.

Unsuccessful attempts have been made to prosecute targeted killings in the U.S.[14] and Israel. The sole exception is the High Court of Peshawar, Pakistan,[15] which condemned the targeted killings by drones in tribal areas as crimes by the United States and as violations of Pakistan's sovereignty, therefore considering those actions as breaches of international law and its principles on the use of force. Following this decision, the Court ordered the State of Pakistan to immediately take measures to safeguard the right to life of Pakistani citizens and every person situated in that area. Other unsuccessful attempts have also been made before the Italian and German courts. In addition, an appeal before the European Court of Human Rights (ECHR) did not bear fruit either. Indeed, the U.S. are not party to the Convention and the ECHR case law is very restrictive as regards the extraterritorial application of the Charter.

An analysis of these unsuccessful attempts reveals several obstacles in bringing targeted killing cases before national courts. First of all, the details of international police and counterterrorism operations are often considered state secrets, which limits the

13 For further developments, see N. Colacino, *Impiego di droni armati nella lotta al terrorismo e accesso alla giustizia da parte delle vittime*, *Rivista di diritto dei media*, 2/2018, Media Laws.

14 See for example R. Rosen, "*Drones and the US Courts", Journal of the National Security Forum*, 37/5, 2011.

15 Peshawar High Court, 11 April 2013, Writ Petition n. 1551-P/2012, <www.peshawarhighcourt.gov.pk/image_bank/Mr_Justice_Dost_Muhammad_Khan/wp1551-12.pdf>.

possibilities to ascertain the facts and build the case. A second major challenge relates to determining the competent jurisdiction. It is almost impossible to conduct prosecutions in countries other than the ones where the attacks take place. However, as previously mentioned, those countries often suffer from grave instability and are therefore hardly able to carry out justice effectively. Moreover, in Italy as well as in other countries, the general criterion that determines jurisdiction is territoriality, even though it is moderated by other specific criteria, such as the so-called "passive subject criterion", which was used in the Lo Porto case. Nevertheless, according to the Italian legislation, a crime committed against an Italian citizen in a third country falls within the jurisdiction of Italy only if very strict conditions are met. To sum up, barring the application of universal jurisdiction (which in limited situations provides courts with jurisdiction over crimes regardless of where they were committed, by whom, and against whom), the chance of activating the national criminal justice apparatus in cases of drone strikes in third countries remains tenuous.

In addition to the issues of transparency and jurisdiction, further difficulties are encountered when it comes to ascertain the individual liability of the numerous subjects that participate in such operations: we are talking about a type of technology that requires the theoretical and practical participation of many individuals, from the top commander who authorizes the operation to the people responsible for collecting data on the target (and confirming that it can be attacked), the officer giving the specific order to engage, the operator who materially pilots the drone and pushes the "fire" button, etc. In the case of the drone strike that killed Giovanni Lo Porto, for example, it was only possible to precisely identify one responsible individual: the head of the CIA, responsible for authorizing drone operations. The Prosecutor's Office of Rome, after two years of investigation, decided to drop the homicide charges, simply acknowledging that a military operation had been conducted by the U.S. in the context of an armed conflict and that the death of Giovanni Lo Porto was obviously due to a mistake. Therefore, the prosecutor concluded that no liability, even *in abstracto*, could arise from the death of Giovanni Lo Porto.

4. The responsibility of Third States: Italy and the military base in Sigonella

Considering the great difficulty of ensuring judicial control over the responsibility of individual participants to drone operations, international doctrine has been exploring, as an alternative, the possible liability of third States that assist, through various means, the U.S. in committing targeted killings.[16] The United Kingdom, Germany, the Netherlands, Denmark and Italy are reportedly involved in the U.S. drone program.[17]

In 2016, three Yemeni citizens, whose partners had been killed by a U.S. drone bombing, lodged a complaint in the Administrative Tribunal of Cologne, Germany. This legal action aimed to hold the German government partially liable due to its participation in the lethal strikes program conducted in Yemen by means of drones taking off from the Ramstein base. The Tribunal considered the case as admissible and acknowledged the role played by the Ramstein base in the U.S. targeted killings program. At the same time, it excluded that the German government had any obligation to prevent the use of the base for drone operations. The plaintiffs then filed an appeal before the Superior Administrative Tribunal of Münster, currently still pending.

The Italian State would be well-advised to follow the developments of the German case, being indirectly – or perhaps even directly – concerned by the legal problem at hand, due to the Italian-American military base in Sigonella, Sicily. This base occupies a strategic position at the heart of the Mediterranean Sea, on the Eastern part of Sicily, within reach of the North African and Near Eastern regions. While the presence of drones in Sigonella can be retraced to 2013,[18] in February 2016, the Wall Street Journal[19] spread the news about an agreement – without further specification –

16 For further developments, see C. Meloni, *State and Individual Responsibility for Targeted Killings by Drones*, in F. Santoni de Sio and E. Di Nucci (eds.), *Drones and Responsibility: Legal, Philosophical and Socio-technical Perspectives on the Use of Remotely Controlled Weapons*, 2016, pp. 47-64; G.-J.A. Knoops, *Drones at Trial. State and Individual (Criminal) Liabilities for Drone Attacks*, *International Criminal Law Review*, 14, 2014, pp. 42-81.

17 ECCHR *case report on US airbase Sigonella*, <www.ecchr.eu/fileadmin/Fallbeschreibungen/Drones_US_Italy_Sigonella_Case_Report_en.pdf>.

18 F. Tosato, *Impiego di velivoli 'Global Hawk' presso la base militare di Sigonella, Osservatorio di Politica Internazionale*, May 2013.

19 The article is available at <www.wsj.com/articles/italy-quietly-agrees-to-armed-u-s-drone-missions-over-libya-1456163730>.

between Rome and Washington about the arming of U.S. drones in the Sigonella base. Nevertheless, since then, the terms of the agreement have not been published[20] and the growing use of this technology is not met by equal attention from neither the political sphere nor public opinion.

For this reason, in March 2017, the ECCHR filed three requests on the basis of the 2016 Freedom of Information Act, in order to access information on the legal framework regulating the stationing and use of U.S. drones in Sigonella. The public administration denied the request on grounds of state secrets as well as national and security interests. The ECCHR then filed a complaint to the *Tribunale Amministrativo Regionale* (TAR) in Rome. However, the judge found the complaint to be inadmissible because the U.S. Government had not been notified while it had a counter-interest in the request. In March 2018, the ECCHR appealed this decision before the *Consiglio di Stato*, which is Italy's highest administrative jurisdiction, and argued against the TAR's interpretation concerning the need to notify the counterpart in FOIA litigations. Another of the ECCHR's central arguments is that the State cannot prescind from transparency for such crucial decisions that influence the government's policy on fundamental rights (including the right to life and the limits of lawful recourse to lethal force). At the time of writing, this procedure is still pending.

A potential disclosure of the agreement would provide interesting elements for a legal analysis of the Sigonella drones case. Given that the formal involvement of the Ramstein base in the execution of targeted killing missions was recognized, it is not completely unrealistic to think that, in the near future, the question of the responsibility of the Italian State would be brought before domestic jurisdictions, in particular administrative courts.

Indeed, Sigonella is a so-called joint-combined base, meaning that it is managed by NATO, Italy and the USA. According to the 2006 Technical Arrangement regulating its functioning, the base is under Italian command, leaving however the U.S. Commander fully in charge of military control over U.S. personnel, equipment and

20 Some exponents of the Italian Government – including the then-Minister of Foreign Affairs Gentiloni, the then-Minister of Defence Pinotti and the then-Prime Minister Renzi – have declared that Italy had indeed authorized punctual operations involving armed drones to purely defensive ends.

operations. Notwithstanding this, the U.S. Commander has the obligation to notify the Italian Commander of "all significant U.S. activities", which would reasonably include international operations involving armed drones. On his side, the Italian Commander must notify the U.S. Commander if the planned activities breach applicable Italian law. This could potentially constitute a basis to hold the Italian State liable for the U.S. drone strikes carried out from Sigonella in Libya and North Africa.[21]

5. Concluding remarks

In front of the "state secrets" argument used to deny requests for information, one question comes to mind: *quis custodiet ipsos custodes*? Notwithstanding various opinions as to the legitimacy of the killings, the idea that they cannot be completely exempt from any consideration of legality seems shared. It cannot be possible for drone strikes to avoid scrutiny *a priori* (due to the lack of transparency in their authorization) but also *a posteriori* (due to jurisdictional issues). In the specific case of Italy, where operations involving armed drones are still being conducted from Sigonella, a potential solution might lie in the use of the territoriality criterion. Indeed, since the conduct originates from the Sicilian military base, it would fall under the jurisdiction of the Italian courts. Alternatively, the Italian concept of territorial jurisdiction could be re-evaluated in the light of the so-called "universal jurisdiction". On that note, as shown by the doctrine, Italian criminal law has long been expanding its jurisdictional reach to the point where some authors, *de jure condendo*, no longer talk about the criterion of "tempered territoriality" but of "tempered universality".

In this fast-changing legal landscape, observing the evolutions of case law will be crucial, with particular attention to the Freedom of Information Act request for the Sigonella operations. Moreover, cases before the European Court of Human Rights also have the potential for breakthroughs in the field. Indeed, there currently are pending cases relating to the possibility of investigating "extraterritorial" violations of the rights

21 D. Mauri, *Quali responsabilità italiane per le operazioni dei droni armati a Sigonella?* in C. Meloni, *Armed drones in Italy and Europe: problems and perspectives*, *Diritto Penale contemporaneo,* 2017, <archiviodpc.dirittopenaleuomo.org/d/6399-droni-armati-in-italia-e-in-europa-problemi-e-prospettive>.

guaranteed by the Convention (*i.e.*, violations committed by non-signatory States). Should the Court soften its – traditionally very conservative – stance on the extraterritorial application of the Convention, this would allow it to decide upon the legality of targeted killings by means of armed drones. In this regard, a plausible doctrine states that at least the negative obligations to protect Human Rights should apply regardless of whether a State has control over a territory or an individual, and the obligation to refrain from taking lives arbitrarily would fall into that category. There are thus strong arguments in favor of extending the extraterritorial application of the Convention to drone operations.[22]

In the case where the drone operations in Sigonella fell under the jurisdiction of Italian courts, there would still be important questions in need of further in-depth research. First of all, given the peculiar nature of the military base, the judge would need to consider the distinction between military and "regular" criminal law, as well as the functional immunity of Italian and U.S. military officers. In this respect as well, case law is of fundamental importance. In particular, the Italian Constitutional Court stated the following:

> «The Italian judge's obligation to refuse jurisdiction in the case of requests for civil damages for crimes against humanity committed iure imperii by a foreign State on Italian territory, when there are provided no other forms of judicial reparation for such violations of fundamental rights, is […] contrary to the fundamental principle of judicial protection of fundamental rights, as outlined in articles 2 and 24 of the Italian Constitution. […]
>
> The total sacrifice of one of the supreme principles of the Italian legal order, which include, without a doubt, the right to access to a judge who protects inviolable rights stemming from the joint reading of articles 2 and 24 of the Constitution of the Italian Republic, on the basis of the immunity granted to a foreign State on Italian soil, cannot be justified nor tolerated when it comes to protecting the illegitimate exertion of

22 M. Pertile, *Droni armati e diritto internazionale,* in C. Meloni*, Armed drones in italy and europe: problems and perspectives*, *Diritto Penale contemporaneo,* 2017.

> that State's power, particularly when this exertion results in acts considered as war crimes and crimes against humanity, which breach individuals' inviolable rights».[23]

Would the classic instruments of Italian criminal law be appropriate to assess the criminal liability of the operations described in this article? In particular, this could bring new developments regarding key concepts such as the *dolo eventuale* (as recently interpreted in the *Tyssenkrupp* judgement) applied to the collateral victims, the concept of "error" (particularly the *error in persona*) or even guilt by association and joint participation in the commission of an offence, given the involvement of numerous individuals in conducting even one drone strike. Another prominent issue would be the liability of subordinates and the legal effects of executing a legitimate order.

Eventually, as shown at the European Union level, where the Council was asked to adopt a position, one might wonder whether the current legal landscape is not missing an important piece to properly address armed drones, as is true every time where the law has not yet caught up with the emergence of a new technology.

This would call for the elaboration of a common legal framework on the matter, bearing in mind that only the transparency of public authorities allows for judicial oversight; only judicial oversight guarantees accountability; and only by guaranteeing accountability the protection of the Rule of Law is ensured.

23 Corte Costituzionale, 22 October 2014, n. 238, <www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238>.

MARTA CAREDDA* **AND GIULIO NAPOLITANO****

THE JUDGMENT OF THE GERMAN FEDERAL CONSTITUTIONAL COURT ON THE PUBLIC SECTOR PURCHASE PROGRAMME (PSPP) OF THE EUROPEAN CENTRAL BANK (ECB): HAS THE COURT GONE TOO FAR?

On 5 May 2020, the Second Senate of the German Federal Constitutional Court (*Bundesverfassungsgericht*) delivered the long-awaited judgment in the case raised by several constitutional complaints directed against the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB).

The PSPP is part of the Expanded Asset Purchase Programme (EAPP), a framework programme of the Eurosystem for the purchase of assets on financial markets. The EAPP is meant to increase money supply, support consumption and investment spending in the euro area and ultimately contribute to achieving an inflation target of below, but close to, 2%. The ECB launched the PSPP with its decision of 4 March 2015, which was later amended by five subsequent decisions. Under the PSPP, the Eurosystem central banks – subject to the framework set out in detail in the ECB decisions – purchase government bonds or other marketable debt securities issued by central governments of euro area Member States, by 'recognised agencies' and international organisations or by multilateral development banks located in the euro area. The PSPP accounts for the largest share of the EAPP's total volume. As of 8 November 2019, the total value of the securities purchased under the EAPP by the

* Post-doctoral Research Fellow in Constitutional Law, Roma Tre University.

** Full Professor, Administrative Law and Comparative Administrative Law, Roma Tre University.

Eurosystem amounted to EUR 2,557,800 million, including purchases under the PSPP in the amount of EUR 2,088,100 million.

The complainants argued that the PSPP violates the prohibition of monetary financing (Art. 123 TFEU) and the principle of conferral (Art. 5(1) TEU in conjunction with Art. 119, Art. 127 *et seq*. TFEU). As a consequence of that, the democratic principle stated in the German Basic Law was violated.

To solve the case, the Federal Constitutional Court referred a request for a preliminary ruling to the CJEU, under Article 267 TFUE. In particular, the questions submitted to the CJEU concerned the prohibition of monetary financing of Member State budgets, the monetary policy mandate of the ECB, and a potential encroachment upon the Members States' competences and sovereignty in budget matters.

In the judgment delivered on 11 December 2018 (*Weiss and Others*, C-493/17), the CJEU maintained that the PSPP neither exceeded the ECB's mandate nor violated the prohibition on monetary financing, so confirming the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, as amended by Decision (EU) 2017/100. Following the CJEU ruling, the Federal Constitutional Court held an oral hearing in Karlsruhe on 30 and 31 July 2019.

Despite the green light given by the CJEU, however, the Federal Constitutional Court found that, in light of Article 119 and Article 127 *et seq*. TFEU as well as Article 17 *et seq*. of the European System of Central Banks (ESCB) Statute, the ECB Governing Council's Decision of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 must be in principle qualified as *ultra vires* acts.

The Court acknowledged that the interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls under the CJEU's jurisdiction, which in Article 19(1) second sentence TEU is called upon to ensure that the law is observed when interpreting and applying the Treaties. However, the Court held that the mandate conferred on the CJEU in Article 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded.

This is exactly what happened in this case.

In its judgment of 11 December 2018, the CJEU held that the Decision of the ECB Governing Council on the PSPP and its subsequent amendments were still within the ambit of the ECB's competences. The Federal Constitutional Court's judgment is that this view manifestly fails to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU) – which applies to the division of competences between the European Union and the Member States – and is untenable from a methodological perspective given that it completely disregards the actual economic policy effects of the programme.

However, in the Federal Constitutional Court's opinion, the CJEU's alleged approach to disregard the actual economic policy effects of the PSPP in its assessment of the programme's proportionality, and to refrain from conducting an overall assessment and appraisal in this regard, does not satisfy the requirements of a comprehensible review as to whether the ESCB and the ECB observe the limits of their monetary policy mandate. This standard of review is by no means conducive to restricting the scope of the competences conferred upon the ECB, which are limited to monetary policy. Rather, it allows the ECB to gradually expand its competences on its own authority; at the very least, it largely or completely exempts such action on the part of the ECB from judicial review. In order to safeguard the principle of democracy and upholding the legal bases of the European Union, it is imperative that the division of competences be respected.

In light of the aforementioned considerations, the Federal Constitutional Court found that it is not bound by the CJEU's decision. As a consequence, it must conduct its own review to determine whether the Eurosystem's decisions on the adoption and implementation of the PSPP remain within the competences conferred upon it under EU primary law. As these decisions were made on the basis of insufficient proportionality considerations, they exceeded the ECB's competences. In the Court's opinion, a programme for the purchase of government bonds, such as the PSPP that has significant economic policy effects, requires that the programme's monetary policy objective and economic policy effects be identified, weighed and balanced against one another. By unconditionally pursuing the PSPP's monetary policy objective – to achieve inflation rates below, but close to, 2% – while ignoring its economic policy effects, the

ECB manifestly disregards the principle of proportionality. In the decisions at issue, the ECB failed to conduct the necessary balancing of the monetary policy objective against the economic policy effects arising from the programme. Therefore, the decisions at issue violate Article 5(1) second sentence and Article 5(4) TEU and, in consequence, in principle exceeded the monetary policy mandate of the ECB.

It would have been incumbent upon the ECB to weigh the considerable economic policy effects and balance them, based on proportionality considerations, against the expected positive contributions to achieving the monetary policy objective the ECB itself has set. It is not ascertainable that any such balancing was conducted, neither when the programme was first launched nor at any point during its implementation. Unless the ECB provides documentation demonstrating that such balancing took place, and in what form, it is not possible to carry out an effective judicial review as to whether the ECB stayed within its mandate.

To the extent that the CJEU concludes in its judgment of 11 December 2018 that the PSPP does not violate Article 123(1) TFEU, the manner in which it applies the "safeguards" developed in its Gauweiler judgment raises considerable concerns because it neither subjects these "safeguards" to closer scrutiny nor does it test them against counter indications.

Nevertheless, the Federal Constitutional Court accepted the abstract possibility that the ECB observed the "safeguards" set out by the CJEU. As a consequence, a manifest violation of Article 123(1) TFEU is not ascertainable yet. As a matter of fact, the determination whether a programme like the PSPP manifestly circumvents the prohibition in Article 123(1) TFEU is not contingent on a single criterion; rather, it requires an overall assessment and appraisal of the relevant circumstances. This explains why judgment delivered by the Court is not the end of the story.

Based on their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Constitutional Court argued that the Federal Government and the German *Bundestag* have a duty to take action. In particular, in the event of a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union, the German constitutional organs must, within the scope of their competences and the means at their disposal, actively take steps seeking to ensure adherence to the European

integration agenda (*Integrationsprogramm*) and respect for its limits, work towards the rescission of acts not covered by the integration agenda and – as long as these acts continue to have effect – take suitable action to limit the German domestic impact of such acts to the greatest extent possible.

In addition, based on their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are required to take steps seeking to ensure that the ECB conducts a proportionality assessment. This applies accordingly with regard to the reinvestments under the PSPP that began on 1 January 2019 and the restart of the programme as of 1 November 2019. In this respect, the Federal Government and the *Bundestag* also have a duty to continue monitoring the decisions of the Eurosystem on the purchases of government bonds under the PSPP and use the means at their disposal to ensure that the ESCB stays within its mandate.

Finally, following the transitional period of no more than three months assigned to the ECB, the *Bundesbank* may no longer participate in the implementation and execution of the ECB decisions at issue, unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the PSPP are not disproportionate to the economic and fiscal policy effects resulting from the programme. For the same reason, the *Bundesbank* must ensure that the bonds already purchased and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the Eurosystem.

The judgment of the Court raised considerable concern among all European institutions.

On 5 May, the same day of the publication of the German Federal Constitutional Court's judgment, by means of a press release, the ECB stated that the Institution "takes note" of that judgment regarding the PSPP and that the Governing Council remains fully committed to doing everything necessary within its mandate to ensure that inflation rises to levels consistent with its medium-term aim and that the monetary policy action taken in pursuit of the objective of maintaining price stability is transmitted to all parts of the economy and to all jurisdictions of the euro area. The ECB also pointed out that the Court of Justice of the European Union ruled in December 2018 that the ECB is acting within its price stability mandate

On 8 May, the Court of Justice of the European Union issued a press release.

Although pointing out that it does not usually comment on a judgment of a national court, the CJEU restates that its preliminary rulings are binding on national courts, as well as on all national institutions and bodies. In order to ensure the uniform application of EU law, the CJEU alone – which was created for that purpose by the Member States – is entitled to rule on the validity of acts adopted by EU institutions. Divergences between national courts as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. That is the only way of ensuring the "equality of Member States in the Union they created". The Court concludes pointing out that the Institution will refrain from communicating further on the matter.

On 10 May the President of the EU Commission, Ursula von der Leyen, in a press release, highlighted three points: (a) «that the Union's monetary policy is a matter of exclusive competence»; (b) «that EU law has primacy over national law and that rulings of the European Court of Justice are binding on all national courts»; (c) that «the final word on EU law is always spoken in Luxembourg. Nowhere else». Significantly, the President added a conclusive remark that sounds as a clear warning message: «We are now analysing the ruling of the German Constitutional Court in detail. And we will look into possible next steps, which may include the option of infringement proceedings. The European Union is a community of values and of law, which must be upheld and defended at all times. This is what keeps us together. This is what we stand for».

Even if unprecedented in its direct attack against the European Court of Justice, the decision of the Court can be seen as the last stage of a judicial path that began a long time ago. As a matter of fact, the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) started its assessment on the legitimacy of EU Treaties and acts that strengthened the integration between Member States since the Nineties, ruling on the compatibility amongst EU Law, international treaties signed by the Member States and national constitutional principles. Just to remind, it ruled with reference to the Treaty of Maastricht (BVerfG 89, 155, 12 October 1993) and to the Treaty of Lisbon (BVerfG 123, 267, 30 June 2009). Afterwards, it ruled on several different matters, such as: the financial aid to Greece (BVerfG 129, 124, 7 September

2011), the Parliament involvement in the ESM preparation process (BVerfG 2BvE 4/11, 19 June 2012), the ESM participation (2 BvR 1390/12, 18 March 2014), the legitimacy of the Central Bank's OMT Program (2 BvR 2728/13, 21 June 2016).

Some critical remarks made upon precedent cases can be applied to this recent case. Differently from all other Member States' approach, the German Federal Constitutional Court actually rules on matters that are beyond the German legal system, through decisions that end up assuming a political rather than a judicial value. In this way, the Court claims to have, even if only indirectly, the power to ascertain the lawfulness of the EU institutions acts.

However, this case is significantly different from the previous ones, because for the first time the BVerfG sets a three-month term within which the German Constitutional Authorities must try to remedy the proportionality defects in the ECB decisions and those "mistakes" contained in the CJEU judgment, highlighted by the German decision. The Karlsruhe Court had already dealt with the ECB's first programme (the OMT, which remained on paper) and censored the overlap of economic policy and monetary policy. In the case of the OMT, however, the initial assessment of unconstitutionality was then translated into a substantial green light for the programme, following the preliminary opinion of the CJEU and the clarifications offered by the ECB. Therefore, while the German Court could have been expected to reiterate once again the need for a rigorous assessment of compliance with the limits of the ECB's mandate, the German Court was not expected to be so aggressive and to go so far as to expressly censure the CJEU's actions by reprimanding it for its shallow control of the ECB's decisions, to the point of declaring the CJEU's judgment to be *ultra vires* and thus *'tamquam non esset'*. No matter if the assessment made by the CJEU was persuasive or not. The point is that the German Court assumes to be entitled to "teach" the CJEU how to apply the proportionality test.

This time, in conclusion, the Court really seems to have gone too far.

Legal comparison supports this impression. Let's take the case of Italy. Since the very first steps of the European integration process, the Italian legal system proved to be very sensitive to the protection of its constitutional identity (since *Costa v. Enel* on). However, in Italy, the so called counter-limits "(*Contro-limiti*)" activation towards the implementation of EU law was focused on the protection of human fundamental

rights. In the famous "*Taricco saga*", the CJEU argued that Italian criminal law rules providing for time limitations for the prosecution of certain criminal offenses due to their conflict with EU rules and interests. The Italian Constitutional Court, however, in that case denied the primacy of EU Law in order to safeguard the fundamental right to crimes prosecution limitation time (in Italy it is a right, not a procedural rule) as well as the right to know the criminal consequences of its own actions before committing illegal acts, safeguarded by Article 25 of the Italian Constitution (Italian Constitutional Court, order n. 24/2017; more recently, judgement n. 115/2018). On the contrary, the German Constitutional Court seems to be concerned more with institutional architecture features, especially when mechanisms of financial solidarity are at stake. Even if the judgement of 5 May does not concern the more recent decisions of the ECB, it is well evident the attempt to influence future measures to face the economic crisis due to the Covid-19 pandemic.

Another argument supports the idea that the Court went too far. The Federal Constitutional Court always highlighted the need to protect the democratic principle (Arts. 38, 20 of the Basic Law, *Grundgesetz*). Accordingly, should the German Parliament not be involved in the most relevant and controversial EU decisions, any EU action potentially ultra vires could result into a violation of the citizens' right to vote. In this case, however, even more than in previous judgments, the feeling is that the BVerfG judgment of 5 May 2020 is not addressed to "the inside", but to "the outside". The most important purpose seems to grant Germany a dominant position in the European space in relation when fundamental decisions on financial and economy matters are at stake. When the EU has to face challenges that should be tackled by all Member States together, the Federal Constitutional Court reminds us that Germany can prevent the process to go forward, even when all other Member States (and in principle also the German government) consider such a process to be strongly desirable and even proportionate, by claiming that EU institutions' decisions are *ultra vires*. The position adopted by the German Constitutional Court could even represent a challenge to the constitutional provisions of other Member States: for instance, «Italy agrees, *on conditions of equality with other States*, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations» (Art. 11 of the Italian Constitution).

Exactly because the German Constitutional Court went too far, in its press release, the CJEU highlighted the need to uniformly apply EU law in order to grant «the equality of Member States in the Union they create» and the European Commission made reference to the eventuality of an infringement procedure against Germany. Coherently, the ECB should not provide any formal reply to the Federal Constitutional Court. Any additional effort to explain and disclose the economic and strategic assessments at the basis of its decisions should be welcomed. But it should be clear that the ECB is only accountable before the European Parliament and citizens.

STEFANIA GIALDRONI*

CONFERENCE: THE ROMAN ARMY AND THE DAWN OF EUROPE

(Roma Tre University, 9-11 May 2019)

In May 2019, Prof. Luca Loschiavo organized, at Roma Tre University's Law Department, in collaboration with the association "Ravenna Capitale d'Occidente", the international and interdisciplinary conference: "The Roman army and the dawn of Europe. Conceptual models and social experimentation: Languages, institutions, law (4th-8th centuries)". The conference took place between the Department of Law and the Department of Humanistic Studies.

The importance of the army in Roman political and social history is a well-known and widely studied matter. Just as well known is the role played by the army as a vehicle for the "Romanization" of people in the Empire's provinces. Less known is the impact that the organizational models carried by the army (administration, hierarchies, institutions, justice, fiscal revenue, etc.) had on the rising Barbarian and Romano-Barbarian societies, which progressively replaced the great construction of the Western Empire during the centuries between the passage from Late Antiquity to the Early Middle Ages. Increasingly open to the recruitment of non-Roman men, for centuries the Imperial army was also the meeting place of different cultures. Continuously forced to adapt to different situations and environments, the Roman army had to develop multiple and innovative solutions that allowed it to keep Roman control over very large territories with diminished troops, using force as little as possible. Sometimes Roman officers imposed, on the occupied territories, models taken from the Latin tradition (the use of language and writing, ownership structures, the separation between

* Assistant Professor in Medieval and Modern Legal History at Roma Tre University, Law Department.

administration and religion, etc.). In other cases, they realized that it would have been more useful and effective to adapt solutions already used by the local populations (simplified negotiating practices, formalism, reliance on divine judgment, gift economy, military and paramilitary clientele). Very often the groups of Barbarians that penetrated the borders dealt with these very models, and they eventually adopted them in the moment of settling within the Empire, replacing their model of governance with the Roman one. The great flexibility and adaptability of these solutions (which was a precursor to their durability and dissemination across Early-European spaces) represent today the greatest reason of interest for this kind of investigation.

It was on this basis – that of analyzing the defining moment when Antiquity was concluded and a new age began, (which to some extent continues today) – that scholars belonging to different disciplinary experiences and to different countries, gathered for the first time in Cagliari in October 2012. Their perspectives ranged from political, social and economic history to law, anthropology, religion and iconography. The purpose of that first meeting was to reconstruct the *status quaestionis* over different areas. The result was the volume "Civitas, Iura, Arma. Organizzazioni militari, istituzioni giuridiche e strutture sociali all'origine dell'Europa (secc. III-VIII)", F. Botta and L. Loschiavo (eds.), Il Grifo ed., Lecce 2015.

During the month of May 2019, the same group – in the meantime further enriched with new specialists – met again to continue the research and to share their knowledge. The conference at Roma Tre paid close attention to cultural and specifically lexical aspects. One of the main purposes of the meeting, in fact, was to work on strategies in order to avoid confusion and misunderstanding among scholars from different disciplines about the use of similar terms, which are recurrent along a temporal spectrum of various centuries and yet assume different meanings in different contexts. Such misunderstanding, in fact, could hinder (as has happened in the past) necessary dialogue. At the center of many contributions there was an attention to the legal aspects having had the greatest social impact: marriage, succession, personal status, personal bonds, dispute resolution.

The conference started with a greeting from Gisella Bassanelli (Bologna), President of "Ravenna Capitale d'Occidente" and Stefano Gasparri (Venice), who chaired the first session, entitled "The words of the soldiers". Ian Wood (Leeds), gave a

paper on "The transformation of the military in the Late Antique West", which focused on the profound transformation of the army between the 4th and 7th centuries. With her "*Significati di 'foedus' e 'foedera' in età imperiale*", Elvira Migliario (Trent) addressed the topic of the *milites foederati* in relation to the formation of the ethnic identity of Barbarian groups. Pierfrancesco Porena (Rome) dedicated his "*Hospitalitas*" to the famous Roman legal device called *hospitalitas* during the late Roman Empire, while Wolfgang Haubrichs (Saarland) proposed a detailed analysis of the military-style language of the Germanic people in the late Empire and in the Early Middle Ages in his "*Il linguaggio della guerra presso i popoli germanici occidentali*". The linguistic analysis continued with Carla Falluomini's (Perugia) "*I Goti e i termini militareschi*", as she focused on the Gothic terms related to the military sphere.

The second day of the conference opened with a session dedicated to "Rituals, religious beliefs, identity and iconographic models", under the chairmanship of Walter Pohl (Vienna). Jean-Pierre Poly (Paris Ouest-Nanterre) opened this session with a report entitled "*Comptez, comptez vos hommes… Les unités de l'armée romaine à la fin de l'Empire (394-437)*", dealing with the topic of the immigration of Barbarian soldiers within the borders of the Empire and the consequent problem of defining their social status. Francesco Borri (Venice) was the first one to focus attention on historiography by analyzing a classic work of early medieval history, *i.e.* Reinhard Wenskus' "*Stammesbildung und Verfassung*" (1961), which he defined as «often quoted (and criticized) but almost never read» in a speech entitled "*Ibi omnis nobilitas periit Foroiulanorum. 'Warband' e 'Traditionskern' tra sale dell'idromele e accademia"*. Andrea Verardi (Rome) shifted the attention to archaeological investigation analyzing the new meanings that the *cingulum*, *i.e.* the decorated belt worn by Roman soldiers and officials, assumed in the post-Roman world with his paper "*Cingulum militiae*". Esperanza Osaba Garcìa (Bilbao) introduced, with her paper "*Acudir o non acudir a la llamada de las armas*" the issue of "refusing induction", with particular focus on the late Visigothic kingdom. The power of images emerged through Saverio Lomartire's (Alessandria) paper "*Il potere militare e il linguaggio delle immagini, IV-VIII sec.*", which proposed a wide range of images related to military history between the 4th and the 8th century, often neglected by art historians.

The afternoon session, devoted to "Social structures and juridical models", was

chaired by Wolfgang Haubrichs (Saarland) and opened by Andrea Trisciuoglio (Turin), who proposed a further study on the fundamental institute of the *hospitalitas*, with his speech on "*I limiti del munus hospitalitatis. Come conciliare esigenze socio-economiche e militari nel Tardoantico*". The following report by Stefan Esders (Berlin) was devoted to the military organizational units in the Frankish and Anglo-Saxon kingdoms: «About *castrum, centena*, hundred». Stefano Gasparri (Venice) dealt instead with the topic of the organization of the Lombard army in his "*Fare, arimannie, arimanni: l'esercito longobardo fra mito e realtà*". The issue of soldier marriages before and after the fall of the Western Roman Empire was the topic of Francesco Castagnino's (Milan) "*Creare una famiglia. Il ius connubii e i figli dei soldati prima e dopo la caduta dell'impero*". The last speaker of the day was Iolanda Ruggiero (Rome), who dealt with the classic theme of inheritance from a very specific perspective: the one of the succession *mortis causa* in the military environment during the transition from Late Antiquity to the Barbaric legislation, starting from the classic work by Nino Tamassia "*Testamentum militis e diritto germanico*" (1927) in her "*Disporre dei beni dopo la morte. I privilegi dei militari in tema di successioni dalle costituzioni imperiali alle leges barbarorum*".

The last session of the conference, entitled "Geometries of power and military justice" was chaired by Arnaldo Marcone (Rome) and was opened by Soazick Kerneis (Paris Ouest-Nanterre) with a paper entitled "*La justice militaire des populations barbares de l'Empire. Les premières applications de l'ordalie*", devoted to the influence of the army on the development of the administration of justice in the Late Empire. With his paper on "'*Civitas' e 'militia' fra III e VI sec.*", Valerio Marotta (Pavia) approached the issue of the *Constitutio Antoniniana* in order to propose a different interpretation of Roman citizenship between the 3rd and the 4th centuries. Luca Loschiavo's (Teramo) aim was to propose an innovative interpretation of a classic problem of legal historiography: the one of which laws should be applied to the mixed population of the Roman-Barbaric kingdoms, in his "*Ius speciale o personalità del diritto? Il diritto dei soldati e le legislazioni romano-barbariche*". Fabio Botta's (Cagliari) report "*Forme di solidarietà di gruppo nel diritto penale militare (IV-VIII sec.)*" addressed the issue of the legal definition of joint criminal liability in the military sphere. Finally, Walter Pohl (Vienna), whilst closing the last session of the conference, proposed a paper on the multi-ethnic dimension of the Roman army in Late Antiquity with his "*Dall'esercito agli eserciti: cambi di ordinamento, cambi di identità?*".

The conference highlighted a legal and administrative continuity in both the Roman and the Barbaric armies. It seems that the Barbarians adopted models, terminologies and iconographies well rooted in the Roman tradition, creating a framework of mutual and almost inextricable influences. The proceedings of the conference will be published by the end of 2020 by Maggioli di Santarcangelo di Romagna.

BENEDETTA GRAZIANI*

A CONFERENCE ON THE LAW GOVERNING THE ARBITRATION AGREEMENT AND THE VALIDITY OF ASYMMETRICAL CLAUSES: OLD PROBLEMS AND NEW PERSPECTIVES

(ArbIt; AIA; CAM; Arbitration Certificate – AIA-CAM Rome Pre-Moot Opening Conference, Rome, 20th February 2020)

On 20 February 2020 the Department of Law of Università degli Studi di Roma Tre hosted a conference on "The Law Governing the Arbitration Agreement and the Validity of Asymmetrical Clauses". The Italian Forum for Arbitration and ADR (ArbIt) organized the event with the support of the *Associazione Italiana Arbitri* (AIA), together with the Certificate for International Commercial and Investment Arbitration (Arbitration Certificate) and the Milan Chamber of Arbitration (CAM).

The opening ceremony of the AIA-CAM Rome Willem C. Vis International Commercial Arbitration Pre-Moot was the opportunity to the conference and a chance to deepen one of the issues related to the 27th VisMoot Problem: the asymmetrical arbitration clauses.

Professor Giovanni Serges, Dean of the Roma Tre University's Law Department, opened the conference and expressed his gratitude to Professor Maria Beatrice Deli for her commitment to the Vis Moot project and for the organization of the event at the University.

The session began with the introduction by Benedetta Coppo, Head of the

* Law Student, Roma Tre University.

Rome Branch Office of the Milan Chamber of Arbitration (CAM). She recalled the Vis Moot organization as a tradition and underlined the importance for all the arbitration institutions to be proactive.

The floor was left to Professor Maria Beatrice Deli, Secretary General of the *Associazione Italiana Arbitri* (AIA), who remarked the importance of the conference to gain new perspectives on the problem of asymmetrical arbitration agreements. She also reminded the next-day conference "An insight view on the LCIA Rules" held by Luca Radicati di Brozolo, Vice President of the London Court of International Arbitration.

Gianluca Benedetti, Co-Chair of ArbIt and Partner of BridgeLaw, moderated the debate related to the possible scenarios of different governing laws of an arbitration clause. Gustav Flecke-Giammarco, Founder of Seven Summits Arbitration, and Andrea Carlevaris, Partner of BonelliErede, participated to the debate.

The first issue faced during the conference was concerning the law applicable to the arbitration clause, which, according to the International Arbitration principles, is to be considered separate and independent from the contract in which it is contained. Gianluca Benedetti firstly illustrated the overarching problem of having more than one applicable state law in International Arbitration and specified that the doctrine of separability can be considered a milestone of International Arbitration.

The floor was left to Andrea Carlevaris who stated that problems arise when different solutions are adopted by a variety of jurisdictions regarding the validity of arbitration agreements. The doctrine of separability may rise concerns as the parties generally draft the contract as a whole and do not expect that the arbitration agreement could be interpreted by an arbitral court through different regulations. An additional problem arises when considering applicable laws: in the absence of choice-of-law clauses in the arbitration agreements, the formal and the substantial requirements of the agreement can be ruled by different laws. Dr. Carlevaris offered an overview of the different approaches to the problem. The majority of scholars believes that the applicable law should be the law of the place of arbitration, whereas others tend to apply the contract law. Dr. Carlevaris pointed out that, in the *Sulamerica Case* decision, the English Court of Appeal used the closest connection principle, which led to the application of the law of the place of arbitration. However, he stressed the fact that even the application of the closest connection principle does not lead to a harmonization of

the present matter. In fact, in France there has been an evolution concerning substantive rules governing the issue: it was decided to investigate the parties' real intention, which can be limited only by public policy and mandatory rules. Instead the United States courts found that, in the light of articles 2 and 5 of the NYC, an analysis of the validity of the resolution clauses can be exhaustive considering the domestic law and international standards, seeing the principle of estoppel and the general principle of validation as well.

The following speech was delivered by Gustav Flecke-Giammarco, who provided an overview of four different approaches to determine the validity of an arbitration agreement. Firstly, Dr. Flecke-Giammarco addressed the *lex contractus* approach, mostly used by the English courts. According to this approach, arbitrators must apply the contract law provisions to all the substantive disputes, including those concerning arbitration agreement. He stressed the importance of the safeguard of the arbitration agreement, as its validity might affect the enforcement of the award. In order to perform this purpose, Dr. Flecke-Giammarco and the majority of the German doctrine prefer the *lex arbitri* approach. Arguing this solution, the contract law cannot be applied to the arbitration clause since it has a different scope from the rest of the contract. The application of the *lex fori* constitutes the third approach described, which is criticized as the majority of arbitral institutions do not indicate a certain and specific condition for the identification of the forum. The fourth and last approach involves the applicability of the pro-validation principle, which was underlined in the decision of the *Sulamerica Case* as well. Finally, Dr. Flecke-Giammarco described a new trend on the validity of arbitration agreements: many practitioners have held that questions regarding the arbitration agreement may be resolved through an analysis under the light of the CISG.

The second topic faced during the conference was the scope and validity of the asymmetrical arbitration clauses. This second part was moderated by Andrew G. Paton, Partner of the *Studio Legale De Berti Jacchia*. Santtu Turunen, Secretary General of the Finland Arbitration Institute (FAI), and Niccolò Landi, Partner of the *Studio Legale Landi* in association with Beechey Arbitration, participated in the debate. The discussion began with a short definition given by Andrew G. Paton of an asymmetrical arbitration clause. He defined it as an arbitration clause that allows a party to have an option to unilaterally refer a dispute to courts or to arbitral tribunals. Afterwards, he interviewed

the speakers on the validity of those clauses and the possible objections.

Santtu Turunen discussed the need to be aware of the variety of case laws, as only some countries developed solid ground for the validation of this kind of clauses. Additionally, Santtu Turunen explained that the principle of equality has to be deemed as the core of the problem and needs to be considered in its procedural sense: both parties have the right to present their perspectives and to be in front of an impartial tribunal. He underpinned that the impact of this principle but clarified that just being unbalanced does not make a contract invalid, even the procedural idea of equal treatment does not lead to the necessary invalidation of the asymmetric resolution clause.

Niccolò Landi, as second speaker, argued that in transactions one party always holds a stronger position and attempts to impose a clause on the other parties in order to gain an advantage, as there are strong commercial reasons behind these choices. The validity of asymmetric dispute resolution clauses remains the subject of an intense debate. Dr. Landi argued that inserting an asymmetric dispute resolution clause may create a risk for the enforcement of the award. There is a possibility for the clause not to be accepted by the Arbitral Tribunal, depending on the legal system one deals with and how the jurisdiction considers the equal treatment of the parties. Dr. Landi gave the example of the approach undertaken by the French courts, which declared the invalidity of asymmetric clauses by considering them *clauses potestatives*, that is, clauses that can be unilaterally activated. Contrarily, in the Dyna-Jet award, the Singapore Arbitral Tribunal recognized the clause as asymmetric and, despite of this classification, stated that this characteristic did not compromise the validity and the nature of the arbitration agreement.

GIULIO PATRIZI*

ANTITRUST AND REGULATION FOR ONLINE PLATFORMS: CHALLENGES AND PERSPECTIVE

(University of Roma Tre, Department of Law, Rome, 5th December 2019)

On Thursday 5th December 2019, at the Council Room of the Law Department of the University of Roma Tre in Rome, a conference was held on "Antitrust and Regulation for Online Platforms: Challenges and Perspectives". The conference was organised by the Law Department within the activities of the course "European Competition Law", belonging to the 'Studying Law at Roma Tre' programme, and with the cooperation of the Italian Competition Authority. Professor Margherita Colangelo opened the conference and introduced the extremely qualified panel of experts from all over Europe.

Professor Colangelo argued that the development of technological innovation and digital economy came with several issues concerning the social, political and economic effects on markets and society, despite the commonly known benefits. In particular, she highlighted one of the most discussed topics in the current antitrust debate: the concentration of power by few large digital companies, including the so-called Tech Giants. Professor Colangelo explained that the conference would address some crucial topics, among which the issue related to the dichotomy between competition and regulation, questioning which of them may constitute the most suitable and appropriate means to deal with novel policy issues posed by digital platforms. Furthermore, it is debated whether the antitrust toolkit and rules are sufficient to deal with cases involving online platforms or new ones are necessary. These issues are far from being solved, considering the European competition authorities'

* Law Student, Roma Tre University.

fragmented approaches, as shown, for instance, by the dissimilar solutions adopted by the Italian, Swedish, French and German competition authorities in the cases involving *Booking.com*. However, some important documents published last year provide very valuable insights. Among these, Professor Colangelo mentioned three Reports containing policy proposals tackling with digital markets, *i.e.*, the Vestager Commission's Report,[1] the Stigler Committee's Report[2] and Furman's Report.[3] In particular, the Furman's Report is co-authored by Philip Marsden, who is the first speaker of the conference.

Philip Marsden, Professor of Competition Law at College of Europe, gave a speech about a possible European vision of Digital Competition. Professor Marsden illustrated the origin of the concerns about digitalization and its influence on human life through a very particular and "musical" approach. From the 1976 Eagles' "Hotel California", to the Queen's "Radio Ga Ga", just to use a couple of the several bands cited by Professor Marsden, the sense of power and the consumers' growing dependency from the tech giants have been told for decades. Professor Marsden considered artificial intelligence-based items in every house as possible threats and claimed the Report of the Digital Competition Expert Panel[4] provides a reliable approach to the problem. The Panel sustains to have found the necessary consensus on a consumer welfare standard to be defined as "dynamic" employing elements from both regulatory and antitrust approach supporters. The proposal is based on the introduction of a Digital Market Unit, composed by digital and competition experts and with the aim of enforcing a pro-competitive regulation. In Professor Marsden's opinion, bringing to the table Tech

1 "Competition policy for the digital era" a report by Jacques Crémer Yves-Alexandre de Montjoye Heike Schweitzer, 2019, available at: <ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

2 Stigler Committee on Digital Platforms, 2019, available at: <research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms–committee-report–stigler-center.pdf>.

3 Report of the UK Digital Competition Expert Panel, "Unlocking digital competition", 2019, available at: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>.

4 I. Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, *Yearbook of European Law*, Volume 38, 2019, pp. 448-499 <https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729>.

Giants, consumers' stakeholders and governments would be fundamental to obtain a code of conduct fit for the purpose and easily enforceable by the Digital Market Unit and that this innovative approach would have the benefit of having a single response to the issue, shared by all the parties involved. Furthermore, it would avoid what Professor Marsden describes as a "regulatory winter" that would definitely reduce innovation incentives.

Inge Graef, Assistant Professor at Tilburg Law School, delivered a speech on "Differentiated Treatment and EU Competition Law in Platform-to-Business Relations". Her recent paper about regulation on big tech companies and her participation in the European Commission's expert group to the EU Observatory on the Online Platform Economy were useful basis for her presentation. According to Professor Graef, distinguishing the anti-competitive treatments that the big tech companies lead in the digital platforms' field is fundamental to understand how to deal with the issue. The speaker defined the first group of treatments as "pure self-preferencing behaviours", whereby vertically integrated platforms favour their own affiliated firms by giving them preferential ranking positions in the platform or preferential access to data, managing to exclude competitors from the market as recently shown in the *Google Shopping* case.[5] Professor Graef then explained the second group, named "pure secondary line differentiation", which describes a scenario where a dominant firm harms a market in which it is not active by guaranteeing a preferential treatment to a not affiliated retailer above the others. However, the inconvenience for a company of guaranteeing such kind of preferential treatments in a market where the company is not even present makes this kind of abuse more difficult to capture for competition authorities. Leading examples in this group are the better ranking treatments that platform like *Booking.com* or *Expedia.com* are suspected to reserve to particular hotels paying more commission fees. The last group is defined by Professor Graef as "hybrid discrimination" and presents elements of both previous groups, whereby a platform engages in differentiated treatment among non-affiliated services

5 European Commisssion, *Google Shopping,* 27 June 2017, Case AT.39740, <ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf>.

in an effort to favour its own business. An example may be a platform blocking an app that interferes with its ability to gain revenues through advertising. Therefore, the motive has a double face: excluding competitors and exploiting the market. A clear example of this scenario is provided by the *Amazon Marketplace* ongoing investigation of the EU Commission.[6] Professor Graef offered an analysis of the outcomes of differentiated treatments, such as refusal to deal, blocking of access to the platform and to the services offered by the dominant company. Later, she quoted the leading cases in this field: the investigations promoted by the Italian Competition Authority on *Google*, which refused to give access to the android auto system to *Enel*, and the *Disconnect*'s claim against *Google* for being removed from the Google Play Store. Possible solutions to all the three differentiated treatments were also addressed in her speech. For the first group of treatment Professor Graef proposed a theoretical framework based on the application of the differentiated treatment used for the competitors of the affiliated companies and seeing if the dominant company's business is still effectively competitive whereas, for the second group, the proposed solution might be trying to device unfairness clauses fit for platform-to-business relations. For the last group, Professor Graef suggested to include in the legal notion of coercion these anti-competitive behaviours. Professor Graef claimed that the main area where EU competition law currently does not offer effective protection is the situation where a business is blocked from a platform without legitimate justification. To address harm in such cases, she suggested to give a stronger role to economic dependence both within and outside EU competition law.

Rupprecht Podszun, Professor of German and European Competition Law at the University of Dusseldorf, gave from remote his presentation on the most recent German proposals and cases about regulation of the data economy. First, Professor Podszun described the German Competition Authority's approach. In the German experience there is a dichotomy between the two lines of thinking, the first one that finds essential to put a break to the competition power of GAFA (Google, Apple, Facebook and Amazon) and an alternative view, called "help Siemens", that seems to

6 European Commission press release, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, 17 July 2019, <ec.europa.eu/commission/presscorner/detail/en/IP_19_4291>.

be nearer to the needs of the big European companies. The *Bundeskartellamt* has an organisation in divisions similar to a court with a bottom-up approach, there is not a fully-fledged strategy and this may lead to different lines of action. The first group of cases analysed by Professor Podszun were based on MFN (Most Favored Nation) clauses and were held in front of big companies such as *Amazon* and *Booking.com*.[7] The cases against *Google News* and *Asics* [8] are examples of the "help Siemens"' view, as the *Bundeskartellamt* sided with these companies, rather than contesting their irregularities. In several merger cases, the *Bundeskartellamt* adopted a curious approach. In Professor Podszun's opinion, the *Bundeskartellamt* used especially merger cases involving German and European companies[9] to elaborate and put in practice new concepts and strategies for later use in abuse cases of bigger companies. This approach could be considered a success in the case against *Amazon*,[10] where the company at the end cooperated and changed its policy on resolution conditions with retailers. This did not happen in the well-known *Facebook* case[11] and it is worth mentioning that the Higher Regional Court of Düsseldorf suspended the *Bundeskartellamt*'s decision. In the same years these

7 *Bundeskartellamt*, *Amazon removes price parity obligation for retailers on its Marketplace platform*, Case B6-46/12, 2013, B6-46/12, www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf;jsessionid=1F7BE2F3F590C9FCCA9461EEFDB6F5BB.2_cid381?__blob=publicationFile&v=2; and *Bundeskartellamt*, *'Best price' clause of online hotel portal Booking also violates competition law*, 22 December 2015, b9-121/13, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/ 2016/B9-121-13.pdf?__blob=publicationFile&v=2>.

8 *Bundeskartellamt*, *Decision according to Section 32c German Competition Act in the dispute Google versus various press publishers and VG Media about the use of the ancillary copyright of press publishers*, 8 September 2015, B6-126/14, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf ?__blob= publicationFile&v=2>; and *Bundeskartellamt*, *Unlawful restrictions of online sales of ASICS running shoes*, 26 August 2015, B2-98/11, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2>.

9 *Bundeskartellamt*, *Clearance of merger between online dating platforms*, 22 October 2015, B6-57/15, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2016/B6-57-15.pdf?__blob =publicationFile&v=2>.

10 *Bundeskartellamt*, 17 July 2019, B2-88/18, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=5>.

11 *Bundeskartellamt*, *Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing*, 6 February 2019, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3>.

decisions were made, the German legislator did not lack of reacting. In 2017, the 9th Amendment to the German Competition Act was published with new elements such as criteria for dominance of platforms and a transaction value-based merger threshold of 400 million euro, which introduced a duty to notify the merger to the *Bundeskartellamt*. The draft of the 10th Amendment to the German Competition Act was released last January. It included innovations such as a special regulation of undertakings with paramount significance across the market and provision against tipping abuse. In conclusion, according to Professor Podszun, despite of the efforts made by the legislator, the greatest role in dealing with the digital market is still played by the courts, especially because the *Bundeskartellamt* has not yet reached a common strategy.

The conference proceeded with Andrea Pezzoli, General Director of the Italian Competition Authority. His speech was about the Italian experience and perspectives on digital economy. Despite the efforts made by the EU Commission and by national competition authorities, the Tech Giants' power does not seem to be undermined, and the smaller companies still suffer from being on the "wrong" side of the market. The Italian responses to the issue are in the hands of the triangle of agencies, i.e., the Competition Agency, the Data Protection Agency and the Communication Agency, which are making efforts to have a coordinated approach to the digital market. The cooperation between the Agencies has led to two interim reports, and to a final report on Big Data, published last February.[12] The goal of the report was to provide a better understanding of the digital economy, by using the competence of the Communication Agency on pluralism issues and the competence of the Data Protection Agency on privacy issues. The analysis, conducted on new forms of market power, on the relation privacy-antitrust and on developments on data acquisition and profiling, led to some important conclusions. According to Andrea Pezzoli and to the outcomes of the report, a new digital agency is not necessary. The tools that the Italian Competition Authority already has, *i.e.*, antitrust rules and cooperation between agencies, are all needed. The

12 The final report is available at: <www.garanteprivacy.it/documents/10160/0/Indagine+conoscitiva+sui+Big+Data.pdf/58490808-c024-bf04-7e4e-e953b3d38a9a?version=1.0>.

only two interventions that could lead to an improvement are more power to collect information, an essential weapon while dealing with digital giants, and an innovative market friendly public policy.

Then Andrea Mantovani, Associate Professor of Economics at the University of Bologna, presented his extensive research on *Booking.com* cases. Digital platforms, especially OTA (Online Travel Agencies), usually charge retailers with fees around 20/30% that sometimes even reach 50%. This incredible power for digital platforms was sustained by the existence of the so-called wide price parity clauses or MFN clauses. With regard to digital markets, there are basically two types of MFN clauses, according to whether the clause ensures that the price and terms quoted through the platform will not be higher than those available on the upstream supplier's website ("narrow MFN") or on other platforms or any other channel ("wide MFN"). Different approaches have been adopted by national competition authorities: whereas the Italian, Swedish and French competition authorities have settled with *Booking.com* committing to remove the wide MFN and maintain the narrow one, The *Bundeskartellamt*, on the other hand, in similar cases – firstly against the portal HRS and later against Booking – did not accept even the narrow MFN. Professor Mantovani's recent work[13] presents the first results of such kind of approach through an extensive analysis and comparison between the reaction of the *Booking.com*'s digital market in Corsica, after the *Macron Law*,[14] and in Sardinia, after the Italian equivalent new policy.[15] According to the data collected by Professor Mantovani and his co-authors, in the short run, effects on prices are detectable in the amount of a 4% reduction just for hotel chains. However, this represents a small part of the hotel market in both regions. By extending the Corsica's analysis to the medium run (1 year), the results are much more relevant: a 4% prices reduction for non-chain hotels and a 12% prices reduction for hotels chains. According to Professor

13 A. Mantovani-C. Piga-C. Reggiani, *Much ado about nothing? Online platform price parity clauses and the EU Booking.com case*, 2020,<questromworld.bu.edu/platformstrategy/files/2019/07/PlatStrat2019_paper_33.pdf>.

14 Law 2015-990 of 6 August 2015 "*pour la croissance, l'activité et l'égalité des chances économiques*".

15 2017 Competition Law, Legislative Decree No. 3/2017.

Mantovani, results are not disappointing but also not impressive. According to Mantovani, a possible improvement could be achieved by investing on research on an optimal commission fee for each market sector.

The last speaker to take the floor was Thibault Schrepel, Assistant Professor of European Economic Law at Utrecht University. Professor Schrepel defined the concept of Predatory Innovation as the modification of one or more elements of a product not to improve it but to eliminate competition. According to Schrepel, this concept is central, but too often ignored in digital market discussions. There have been cases where elements of such concept were present. The investigations which led the French government to fine *Apple* and *Samsung* for slowing down their phones is one of them. However, despite the notion has been mentioned in some of the digital market reports that have been recently published, competition authorities seem to avoid a direct discussion on the phenomenon and just few Europeans countries have started working in-depth with the concept. According to Professor Schrepel, innovating the competition authorities' personnel with computer scientists, coders and developers could be a solution for a better understanding of the issue. The second part of the speech was dedicated to blockchain and the concept of "Code is Law and Law is Code", which takes inspiration from the Lawrence Lessig's book.[16] From an informatics point of view, the entire digital system is based on codification. At the end, every site, platform or program is nothing than an order of numbers written by a programmer: a code. Therefore, in Professor Schrepel's opinion, in a market governed by codes, law should take the same shape. Law should be translated into a code and included in the codes digital platforms are written with. As a consequence, it would be the same codification of the platforms to exclude in the first place the behaviours the law wants to prevent. Of course, incentives for the platforms' owners would be necessary. In order to face the technical difficulties of codifying law, answers could be found in quantum computing, coupled with the constraints that Lessig's book describes as future rulers of the human behaviours in and outside digital platforms.

16 L. Lessig, *Code and other Laws of the Cyberspace*, Basic Books, 1999.

GIACINTO PARISI*

PIERO CALAMANDREI, *OPERE GIURIDICHE*, I-X, RIST., ROMA, 2019

Anyone who reads any of the essays written by Piero Calamandrei and collected in the ten volumes of the *Opere giuridiche* – re-published in 2019 by the publishing house Roma TrE-Press (*romatrepress.uniroma3.it*) and freely available online – can appreciate the depth and the originality of his thoughts, the elegance of the prose style and the vibrant modernity of the outlined ideas.

Indeed, the essays of the famous Florence-born jurist – who was full Professor of civil procedural law, Dean of the University of Florence, President of the Italian Bar and member of the Italian Constituent Assembly – cannot be reduced to a meticulous and tedious review, as such would be in disagreement with the extraordinary nature of his human and scientific existence.

Therefore, we believe it is useful to point out only some of the most relevant milestones of his scientific work, which can be considered a common heritage, also thanks to the further developments operated by other scholars, of the present procedural law: such are related to the nature of the Court of Cassation, the idea of the trial seen as a game, the purpose of the precautionary measures, the notions of truth and plausibility within the trial.

Many of the essays present in the sixth, seventh and eighth volumes of the *Opere* are dedicated to the Court of Cassation, which is considered the highest body of the Italian law system and set to regulate the intertwines between the different jurisdictions. Such essays represent one of the most relevant and important results of the scientific work of Piero Calamandrei, who in 1933, whilst commenting the ten-year anniversary

* PhD in Procedural Civil Law, Roma Tre University

of the foundation of the sole Court of Cassation in Rome, wrote that «la porta, per la quale la scienza del diritto entra più liberamente nelle aule di giustizia, è quella della Cassazione unificata» (the door through which law as a science can more freely enter the courtrooms is the one of the unified Cassation).

Such "door", which Piero Calamandrei concurred in opening and that he celebrated in the ten-year anniversary of the sole Cassation, has been kept open by the ongoing discrepancies in case-law and on the most problematic judicial issues. The control over the correct application of the law, which Article 111, § 7 of the Italian Constitution has bestowed upon the Supreme Court, also on the basis of Calamandrei's thoughts, is based on the idea that, as the law dictates, judgments are the result of a collective decision-making process and are supposed to benefit from ongoing discussions, not only in case-law but also involving external bodies.

It can also be stated that an undoubted merit of Calamendrei's essays, which makes them particularly attractive, is the very well-sorted union between the high level of his scientific work and his "practical" experience in the courtrooms: in relation to this, the essays on the legal professions collected in the second volume of the *Opere* and the assortment of closing arguments which are held in the tenth volume are particularly poignant, as they show how he fully understood that the trial experience has a concrete and emotional impact on the individuals involved.

The most relevant example of such can be appreciated in his renowned and fascinating essay called "*Processo come giuoco*" (Trial as a game), published in 1950 in the *Rivista di diritto processuale* and included in the first volume of the *Opere*, where he states that «se il giurista 'puro' può prendersi il lusso di trattar le leggi come congegni di precisione», solo a questo non può limitarsi l'avvocato, «il quale deve ad ogni istante ricordarsi che ogni uomo è una persona, cioè un mondo morale unico ed originale, che dinnanzi alle leggi si comporta secondo i suoi gusti e i suoi interessi, in maniera imprevedibile e spesso sorprendente» (if a 'pure' jurist can allow himself to treat the legal provisions as precise tools, a lawyer cannot do the same, as he needs to remember that every man is a person, and so a unique and original moral world, which acts before the law according to his preference and interests, in unforeseeable and often surprising ways).

The uniqueness of each individual can be fully appreciated in the game of the trial, which is formally aimed at administrating justice, but that at the same time is the

place where minds challenge one another. Therefore, it is to be considered particularly poignant the old say which claims that several ingredients are needed in order to succeed in a law-suit: to be right, to be able to state one's case, to find someone who understands and appreciates it and, finally, that the debtor is in the position to pay. Basically, the result of the fight which rages within the trial depends not only on which party is right, but also on their ability in playing the game, on their behaviours, their intelligence, their talent in surprising the enemy. However, such agonistic vision of the trial cannot be considered complete, given that – as stated by the same Calamandrei – the freedom of the tactics employed in the trial is limited by the obligation that the parties and their counsels have to behave with "*lealtà e probità*" (loyalty and honesty). However, the interpretation of such general phrase is still controversial and thus several issues – such as malicious litigation, the liability connected to unfair behaviours by the parties, the possibility to appreciate as evidence the conducts of the parties, the obligation of the parties of the trial to tell the truth – are still thoroughly discussed among scholars and in case-law nowadays.

Also some of the less-known essays of Calamandrei are to be considered extremely relevant as highly influential over the scholars who in the following years studied the same issues and relied on his thoughts. That is the case, as means of example, of the essay *Introduzione allo studio sistematico dei provvedimenti cautelari* (Introduction to the systemic study of the precautionary decisions) of 1936 and his last essay regarding civil procedural law called *Verità e verosimiglianza* (Truth and verisimilitude), which are respectively collected in the ninth and fifth volume of the *Opere*.

When Calamandrei publishes the essay *Introduzione*, which is dedicated to Giuseppe Chiovenda, he has just turned forty-seven and he is at the highest peak of his scientific life. The Florence-born scholar warns his readers that the essay is not devoted to the issue of the protection of rights through precautionary measures, but it is rather an introduction to a course on the precautionary measures meant for the students of the second two-year period of the Faculty of Law of the University of Florence. Although the essay has then an educational aim, it adopts a very interesting new and modern approach in tackling the issue of the precautionary measures and shows full awareness of the tight relation between this particular protection and the issue of effectiveness of the judicial functions.

First of all, Calamandrei states something that is now considered essential among procedural civil law scholars, which is that «in un ordinamento processuale puramente ideale, in cui il provvedimento definitivo (del giudice) potesse essere istantaneo, in modo che, nello stesso momento in cui l'avente diritto presentasse la domanda, subito potesse essergli resa giustizia in modo pieno e adeguato al caso, non vi sarebbe più posto per i provvedimenti cautelari» (in an ideal procedural civil law system, where the final decision of the judge is immediate, so that when the plaintiff presents his request he immediately receives justice, there would be no room for precautionary measures).

Therefore, precautionary measures find their origin in the need to ensure that the final decisions, whose issuing is the main aim of the judicial system, are effective and not impacted by the obstacles that can develop in the time needed for the delivering of the judgment and that threaten its effectivity. Calamandrei is clear on the fact that such tight relation between the precautionary measures and the need to guarantee the effectiveness of the decisions means that such measures are to be considered a direct emanation of the right to access to trial. Given that, due to its very nature, any trial needs more or less time before releasing its final decision, it is easy to understand that the regulation of such measures are intended has a sort of «corsa contro il tempo» (race against time): thus, they cannot last more than needed (in light of the principle of the reasonable length) but at the same time need to serve their purpose.

A direct consequence of all the above is that precautionary measures need to be attributed to an autonomous judicial function: in this sense, the scientific work of Calamandrei has been decisive.

The contribution that Calamandrei offered to the issue of the creation of the internal conviction of the judge with the very famous essay *Verità e verosimiglianza* is also very relevant. In such essay the author reviews – more than fifty years later – the scientific work of Adolf Wach, according to whom the trial is not aimed at assessing whether a fact is true but if it is plausible and then states that «anche per il giudice più scrupoloso e attento vale il fatale limite di relatività che è propria della natura umana» (also the most careful and meticulous judge is bound to the fatal limitation of relativity which is typical of the human nature).

When one says that a judicial fact is true – the Florence-born scholar states – «si

vuol dire in sostanza che esso ha raggiunto, nella coscienza di chi lo giudica tale, quel grado massimo di verosimiglianza che, in relazione ai limitati mezzi di conoscenza di cui il giudicante dispone, basta a dargli la certezza soggettiva che quel fatto è avvenuto» (what one really wants to say is that such fact has reached, in the conscience of the judging subject, the highest level of plausibility that, in relation to the limited knowledge-related instruments of the judging subjects, is sufficient in order to give him the subjective certainty that that fact took place); thus, nothing more than a «un surrogato di verità» (a surrogate of truth), dependent on the experience, the culture and the capacity of the judge.

In such sense, the judgment based on probability is functional in measuring the capacity of a given allegation to represent a concrete factual reality, on the basis of «l'ordine normale delle cose» (the natural order of things) and considering that, in the modern civil procedural law, the judge is expected to wait for the parties to present their case and provide the necessary evidence. This, in the end, can be considered as the reaffirmation, also in relation to the verification of evidence, of the garantistic idea of the trial, typical of the "processual liberalism".

PIERO CALAMANDREI was born in Florence on April 21st, 1880. After graduating in Law at the University of Pisa in 1912, he undertook further studies in Rome under Giuseppe Chiovenda. He was professor of civil procedural law at the universities of Messina (1915-1918), Modena (1918-1920), Siena (1920-1924) and Florence (1924-1956). At the University of Florence he taught, after the second World War, also constitutional law.

In 1924 he co-founded the *Rivista di diritto processuale civile*, of which he was the first supervising editor and then, since 1927, co-editor in chief together with Giuseppe Chiovenda and Francesco Carnelutti. In 1926 he created, with Enrico Finzi, Silvio Lessona and Giulio Paoli, the journal *Il Foro Toscano*.

In 1945 he founded and directed until his death the journal *Il Ponte*, which had political and literature-related contents. He created and directed the collection *Studi di diritto processuale* (first series, twelve volumes, Padova, Cedam, 1932-1938; second series, five volumes, Padova, Cedam, 1940-1942). He directed, together with Alessandro Levi, the *Commentario sistematico alla Costituzione italiana* (two volumes, Firenze, Barbera, 1950).

From 1945 until 1946 he took part in the *Consulta Nazionale*. In 1946 he was elected deputy of the Italian Constituent Assembly. In 1948 he was elected deputy of the parliament for the first republican legislature (1948-1953). He was dean of the University of Florence from September 1944 until October 1947. From 1946 until his death he was President of the Italian Bar. From 1946 until his death he was member of the *Accademia Nazionale dei Lincei*. He was vice-president of the Italian Association of the scholars of the civil trial; he was a member of the *Accademia Colombara* of Florence and of other Italian and foreign academies.

He died in Florence on September, 27th 1956.

ANTONELLA MASSARO*

THE *LAST TANGO IN PARIS* CASE

Ultimo tango a Parigi (Last Tango in Paris) was the protagonist of a highly discussed and intricate lawsuit that gave Bernardo Bertolucci's film the fame of a leading case in the connection between cinematography and law, firstly for what it obtained in administrative censorship, that fought against many "symbolic films" in those years, and secondly for the possible criminal charges of cinematographic works deemed obscene.

This is, in a nutshell, the "plot" of the "Last Tango case."

After being subjected to screening by the Commission for cinematographic censorship, Bertolucci's film was initially denied programming permissions. Only after the producer accepted the Commission's request to adapt the film by cutting a few metres of film (the legendary eight seconds) and changing a line, they granted permission to show it. On 12 December 1972 the film received also the authorization of the Ministry of Tourism and Entertainment.

In that same month, the film is shown in a few cinemas in the capital, but Niccolò Amato, Public Prosecutor in Rome, orders for the film not to be shown on the whole national territory because of the "obscene" nature of Bertolucci's film. The documents were transferred to the Public Prosecutor's Office of Bologna for jurisdiction, since the first showing of the film happened at Porretta Terme on 15 December 1972.

The film, according to the prosecution, seemed filled with that famous «exaggerated pansexualism that is an end to itself» that still to this day, as a quick synecdoche, is used to summarize the whole legal matter of *Last Tango in Paris*.

Action is taken against Alberto Grimaldi, producer of the film, Bernardo Bertolucci, director, Ubaldo Matteucci, distributor, Marlon Brando and Maria

* Associate Professor, Criminal Law, Roma tre University.

Schneider, lead actors, accused of complicity in the crime pursuant to Article 528 of the Italian Criminal Code (obscene publications and shows). The crime provided by Article 528 was decriminalized by legislative decree no. 8 of 15 January 2016.

The Court of Bologna, in February 1973, resolves the matter with a rare forward-thinking judgement. The «revolting and realistic representations of carnal congresses» contested by the prosecution is contrasted by the «elegant discretion» that characterizes one of the most famous scenes of the film, that is sustained, not without a veil of pungent irony («if that wasn't enough to calm the itchy viewer»), by a solid system of further considerations. Although admitting that the content of the two sodomisation scenes, defined from the off as «highly dramatic and artistically exceptional» could in itself only «skim the limits of obscene schemes or be inserted for an average viewer», the first instance judges recognize the instrumental value of the scenes in the entire narrative and they do not deny the fact that *Last Tango in Paris* satisfies in a clear way the artistic standards of the work of art. After all it can't be up to a court – say the judges – to decide what other means of expression the director could have used to render his intuition «because that would mean introducing a principle of jurisdictional censorship with ethical content in contrast with the effective scope of Article 529 of the Italian Criminal Code».

Therefore, the Court, based on the second paragraph of Article 529, acquits all of the defendants «because the fact does not constitute an offence», maybe putting the hardest verdict in the hands of the audience: «it's up to the public, in a Republic in which freedom of expression is guaranteed for every citizen, to determine if Bertolucci's work, deemed of artistic value by this court, will be considered as such or as a masterpiece».

After also disregarding the requests of the prosecution, the immediate restitution of the original copies of the film is ordered; but the legal peregrinations of *Last Tango in Paris* are only just beginning.

The case reaches the Court of Appeal of Bologna that, with a ruling dated 4 June 1973, believes it must fix the «obvious» and «blatant» «error of judgment» in which the court incurred. Scenes like «the butter one» appear to be of an «emphasized vulgarity that exceeds any breaking point», appear to clearly reveal «the will to excite the lowest of sexual instincts» and turn out to be «condoning pornography, with the intent to pull in the masses to the show, attracted by the stories of this scandalous film».

After underlining insistently (almost obsessively) the motivations of «the disruption of social values» that the film intended to communicate, the Court classified *Last Tango in Paris* as «profoundly immoral», sometimes «boring» or «extraordinarily trivial», giving it the label of a «spectacular "cartoon"». The positive opinions, that indeed were not missing, come only from the worry of being treated as incompetent after the grand clamour the film caused. Even in this case the bitter irony wasn't missing: «oh, that scene in the empty room... it's Pirandello», «the nude canvas of Jeanne near the bathtub… it's a Renoir», the clanging of the subway «it's the preoccupation of poor Paul, the woodworm in his brain, thinking about that unexplainable death». Speaking badly of the film – unless you are with trusted friends – is like speaking ill of the «marvellous (inexistent) dress of the little king in Andersen's fairy tale».

Last Tango in Paris represents a clearly obscene cinematographic production and excludes any recognizable sign of a work of art: an "average" viewer, in fact, is not capable of understanding the "pseudo-philosophic intellectualism" that, according to many, is an integral part of the expressive language that Bernardo Bertolucci chose. The lack of artistic dignity in the work, according to the Court and contrary to what the defendants hypothesized, doesn't require artistic expertise to be confirmed.

Each defendant is charged with two months of prison, a fine of 30.000 *lire* and ordered to confiscate all copies of the film in circulation.

The defendants decide to present an appeal to the Italian Supreme Court (*Corte di Cassazione*). They do not object to the obscenity of the film, but they criticize the lacked application of the punishability exemption established by the second paragraph of Article 529 of the Italian Criminal Code. The Supreme Court, with the ruling of 20 December 1973, clarifies that, whilst the obscene nature of a production should be judged based on the common sense of modesty of an average person, the inquiry on the artistic value of the same production must necessarily be conducted through aesthetic canons. One must evaluate the «balance between the contents and the form, between the message that the director offers and the means that he uses, nonetheless the absence of an excessive satisfaction in obscene work, to appear as an end to itself, that is to say introduced to give the viewer an erotic sensation, instead of harmonising in a combination growing towards feelings and ideal values. The work of art – that isn't necessarily a masterpiece – has to distinguish itself from ordinary commercial

production for dignity in form and expression, for any content of universal intuition».

The Court of Appeal, on the other hand, excluded the artistry of the work, only observing that it's «profoundly immoral because it denies moral values (family, religion, human coexisting, love, etc.) on which civil society is based»: the ruling on the lack of artistry, in short, coincides with that of the obscenity, without the judge having sufficiently separated the two sides of the investigation.

The verdict is cancelled for inadequate reasoning, with consequent transfer of the lawsuit to another section of the same Court of Appeal.

The Court of Appeal of Bologna, returning to have its say on the "Last Tango case" on 26 September 1974 and abandoning the parameter of the average person for the opinion of artistry, tries to clarify the aesthetic canons that would undoubtedly exclude the possibility to apply the second paragraph of Article 529 of the Italian Criminal Code.

In the motivation it is clear that «far from being a masterpiece, *Last Tango in Paris* remains a work of pornography artificially lined with pseudo-cultural implications thought up to assure the accessibility without excessive risk; not dissimilar to similar products destined to be made commercial». The metamorphosis of Paul is resolved in a «cartoon-like stunt that Bertolucci's talent should not have allowed itself» (*sic!*) and all of the film comes down to a «blunt work of pornography».

Here the sentence for the crime of Article 528 of the Italian Criminal Code is confirmed and the confiscation of all of the copies of the film that had already been seized is ordered.

The defendants try again the route of the judges of Piazza Cavour (i.e., the Italian Supreme Court). This time the Supreme Court, on 29 January 1976, confirms the ruling, believing that the sentence itself had sufficiently given reasons to convince the Court of the impossibility to recognize in Bertolucci's film any trace of a masterpiece.

After a series of announcements that followed each other in an unusually short amount of time for the Italian justice system, and after the "seal" given by the Supreme Court's judges, the "Last Tango" *affaire* comes to a standstill for a few years.

The lights shine hard on the case again when, on 25 September 1982, during the *Ladri di cinema* festival – an international event that was held in Rome at *Centro Palatino* – Bertolucci's "obscene anything but masterpiece" is shown, in the presence of the director and other viewers. The film is seized, and a criminal case is opened against

the organizers of the festival. Even Bernardo Bertolucci ends up on the defendants' bench again: in this new chapter of the juridical case of *Last Tango in Paris* the defence of the director is taken on by the attorney Luigi di Majo.

The prosecution asked for the case to be archived, but the judge Paolo Colella decides to proceed with formal inquiry against the defendants. In that instance, after viewing the film, judge Colella orders a collective report to assert the possible artistry of the work. Two cinema critics of different cultural and ideological origins are nominated (Fausto Gianì and Claudio Trionfera) together with a professor of history of entertainment critique (Maurizio Grande). All of them had never expressed an opinion in the past about Bertolucci's film.

With a particularly discussed sentence, the judge Colella, taking on the role of an authentic *deus ex machina* with the possibility to rewrite a finale that was deemed inadequate on more than one account, puts *Last Tango in Paris* in the frame of cinematographic art without hesitation and acknowledges the radical changes that regard sexual morale in the fifteen years that had passed since the first viewing of the film and from which had come a significant downsizing of the sense of reserve surrounding sexuality and its manifestations.

Last Tango in Paris – this is the new finale of the story – not only is a masterpiece, but it contains no trace of obscenity. The defendants are acquitted on the grounds of no case to answer («the fact does not exist»).

A few years ago, I decided to collect and to publish all of the rulings, regarding substance and legitimacy, that defined the court case of *Last Tango in Paris*, and I did so without "cutting" anything out of the (sometimes very long) motivations, to avoid that "censorship", sometimes masked behind *omissis*, that could obscure any useful inspiration for thought. The sole quantity seems to have a certain eloquence: it seems very interesting that so many words and so many reasons were needed to exclude that the "pornographic cartoon" like *Last Tango in Paris* could undergo the punishability exemption established by the second paragraph of Article 529 of the Italian Criminal Code.

Going through many of the original documents of those trials, it was very impressive to read one of the names and the addresses that "rule" in the list of the accused: «Brando Marlon, born on the 3/4/1924 in Amaha (USA) resident in Los

Angeles, Beverly Hills Mulholland Drive 12900».

Times have changed, prosecutors don't deal with cinema for years and it is not a case that, recently, the crime provided by Article 529 was decriminalized. However, I think that is still important to tell the story of *Last Tango in Paris*: this is a story that is too recent to stay in the dust covered case files of the offices of a forgotten Court, and in the hope that the obscuring fog that surrounded that Court can now be considered completely gone.

Bibliographic Note

A. Massaro*, Ultimo tango a Parigi quarant'anni dopo,* in *Osceno e comune sentimento del pudore tra arte cinematografica, diritto e processo penale*, Roma, Aracne, 2013.

G. Fiandaca, *Problematica dell'osceno e tutela del buon costume*, Padova, Cedam, 1984.

B. Williams, *Obscenity and Film Censorship*, Cambridge, Cambridge University Press, 1879.

R. Dhavan-C. Devies, *Censorship and Obscenity*, London, Rowman and Littlefield, 1978.

STEFANIA GIALDRONI*

AN INTERVIEW WITH PROFESSOR EMANUELE CONTE

Prof. Emanuele Conte, the Chair of Medieval and Modern Legal History at the Roma Tre University and *Directeur d'études* at the *École des Hautes Études en Sciences Sociales* (EHESS, Paris), is also founder and instructor of the Law and the Humanities course at the Roma Tre Law Department since 2008. The course is part of the Studying Law at Roma Tre Program.

Prof. Conte, first of all, could you please explain what do we understand under the expression "Law and the Humanities"?

A relevant difference between the teaching of law in the U.S. and in continental Europe is that in America many important law schools offer an external point of view on law. This is an effect of the success of legal realism: at the very beginning of the 20th Century, a number of American law professors took seriously Jhering's idea that the best way to understand legal institutions was to ask about their economic or social aim. The legal realists considered law as a "craft" more than as a "science". They were sceptic about every attempt of building a set of rational and aseptic legal rules, and considered much more effective a legal education aimed at creating in the future lawyers the necessary abilities to understand the complexity of social, political and economic intercourse.

The same dissatisfaction for the picture of law as a science, and the same need for an analysis of the interconnection of legal institutions with their context was felt also in Europe: however, on this side of the Ocean, even though the need for an "external" view on law produced extraordinary scholars, like Max Weber, it was not strong enough to change the structure of legal teaching. The interest of jurists for philosophy and history resulted in the inclusion of courses of legal philosophy and legal

* Assistant Professor in Medieval and Modern Legal History at Roma Tre University, Law Department.

history in the curriculum, but both were taught as "internal" subjects. For philosophy, for example, scholars have developed a distinction between the legal philosophy of the jurists and the legal philosophy of the philosophers, meaning that the first was part of the legal science, while the second was meant as an external view of the philosophers on the legal phenomenon.

In the U.S., the interest for this external point of view on legal institutions led to a large development of law school courses labelled as "Law and…". Among them, the most popular courses were by far those on Law and Economics.

The idea of the functionality of every legal system led to the study of the economic efficiency of every legal institution, in private as in public law and regulation. Law and Economics quickly became a kind of master key, good to open every door, provided that the logic of capitalism is accepted as ultimate goal to be pursued through the functioning of legal institutions. This led to a reaction in the main law schools in America. Many scholars, in fact, did not share the faith in capitalistic economy as the main objective of every society. And even though many considered capitalism as desirable for contemporary societies, they were also aware of the serious flaws of western capitalism, feeling the influence of French philosophy and sociology.

The need for an externalist point of view on law did not fail, but it became clear that the adoption of economic efficiency as the only parameter led to a distortion in the evaluation of legal institutions. So, the first reaction to the prevalence of economics was the reevaluation of literature. As everybody knows, it was the book by James Boyd White, *The Legal Imagination* (1973), that started a new movement that was later called "Law and Literature". It offered a new kind of external point of view on law: literature could be connected to law mainly because it offers a very human sensibility, reflecting the feelings of the human being as confronted with the formalisms and the obligations of a legal system. In some sense, the opening of courses on Law and Literature in the U.S. was felt as a counterbalance against the rigidity of the economic analysis of law. It did not deal with the "efficiency" of the legal institutions, but much more with the role they played in the real life of human societies.

It was easy, after that, to go from literature to cinema and theater, to performing arts, to iconography and visual arts, to architecture, and so on. The whole of those external views on law has been called "Law and the Humanities". Soon, a proper

academic field was created, with some law journals based in the major law schools, and an increasing number of scholarly articles and books.

In the Preface of his book "Songs without Music: Aesthetic Dimensions of Law and Justice" (University of California Press, 2000), Desmond Manderson affirms that "Aesthetics is the faculty which reacts to the images and sensory input to which we are constantly exposed and which, by their symbolic associations, significantly influence our values and our society. 'Legal aesthetics' suggests that the discourse of law is fundamentally governed by rhetoric, metaphor, form, images, and symbols". Do you agree with this statement? If so, could you provide us with some examples?

If law is craft, aesthetic is central in it. Legal institutions are artificial creations, which must be well shaped in order to be accepted by the society. At the origins of law there is this aesthetic creation of an artificial environment, in which human disputes can be sublimated in a rational liturgy. Now, liturgy, in the western tradition, has developed by mobilizing the arts and the humanities: literature to proclaim the Word, architecture to build the temples, painting and sculpture to show the sacred, music to praise the Lord, even fashion to dress the clergy. Also the law has its liturgy: public palaces, paintings, frescoes and murals, statues, symbols, public music, literary narratives, and a dress code. None would claim to understand religion by paying no attention to liturgy and worship, but the vast majority of jurists are convinced they can understand law completely neglecting its formal and symbolic environment. Don't you think this is odd?

There are other universities in Italy providing courses and seminars on "Law and Literature" but your course on "Law and the Humanities" is something really peculiar. Could you tell us how did you come to this idea and why is this field important within legal studies?

In 2006 I was invited to give a talk at the Yale Law School. In the beautiful library of the School I found the series of issues of the Yale Journal of Law and the Humanities, funded in 1988/89. I had no idea of the existence of this review, and I wondered why, because the cultural context of the legal phenomenon is central in a

mature approach to legal history. As a legal historian, I think that understanding law is a complex phenomenon, formed by the interactions between legislation, legal traditions and values, interpretative adaptations in court and in books, legal education. If observed in this way, what we call "the law" is a major actor in the historical process. When we try to understand its role, we must pay attention to the conflicting forces of social and economic intercourse, to the game of politics, to religion and common beliefs, to culture. In other words: we can grasp the very existence of the law in history only if we are able to mobilize all our knowledge in the humanities to understand its context.

When I suggested to introduce a course on Law and the Humanities in my Roma Tre Law School, I felt like it was a natural extension of my job as a legal historian. With a major difference: as said, legal history, as legal philosophy, are disciplines now fully internal to the field of law. Law and the Humanities claims for an external point of view. It is a little piece of legal realism introduced in the very traditional system of Italian legal education.

I must add that this was possible because my new teaching was meant to be held in English. If it had been in Italian, I bet I would have found some more oppositions to my proposal.

What kind of didactical method do you use in this course?

As part of the program Studying Law at Roma Tre, Law and the Humanities shares with the other courses a pretty interactive method. But it would not be possible to teach such a discipline in another way, because there are no specific notions to teach and learn, but the whole focus is on being aware of the alternative point of view on law offered by the humanities. So, my courses want to offer to the students an intellectual experience, much more than a set of notions. Since the beginning, I have used a blog to keep in contact with the students, to share readings and collect comments. So written participation is coupled with physical attendance. I think this is a major key to face the transformation of the communication paradigms introduced by the internet. We need an integrated use of both, virtual and real attendance. This is meant to create a learning community, as is the visit to the Italian Supreme Court offered every year to the students, the creative competitions we have proposed, student's presentations, the classes on law and music with guest musicians offering live performances.

In order to offer a really external view, I have had many invited guest lecturers every year. They are foreign professors from four continents (we had North and South Americans, Australians, Chinese, and Europeans from five or six different countries), but also young researchers and PhD students. They are sometimes jurists, but very often they are not. I find this plurality of voices very enriching, provided my constant effort in keeping the course together, underlying connections between the different classes held by the guests.

In 2019 the first Spring School on "Law & Humanities", organized in collaboration with the Australian National University and the University of Lucerne, took place at Roma Tre (15-18 April 2019). Seventeen graduate students and post-doc researchers from different countries (including Russia, Brazil and Greece) and with different academic backgrounds joined the School. Could you describe this experience and the network it established?

As said, dozens of colleagues from many different countries have taught in our Law and the Humanities course; and hundreds of visiting students have attended to the classes over the years. The cooperation with the Australian National University became particularly strong in the last decade, thanks to the engagement of Desmond Manderson, one of the world-leading scholars in the field. In Europe, one of the liveliest centers is the Swiss Department of Lucerne, named "Lucerna Iuris" and focused on Legal History and Legal Theory. Desmond, Steven Howe from Lucerne, and I, are convinced that a Law and Humanities perspective can represent an important opportunity of critical reflection for Master and PhD students at a global level. We had our first International School on Law and the Humanities in Rome, as a first attempt to raise interest on the field. It has been a success in terms of audience, participation and quality of the classes. Our idea is to create a series of schools at a global level, calling for participation of the students in both hemispheres.

The present virus emergency has stopped our second school, that was already organized for June 2020 in Lucerne. We will postpone it, but we are confident that the program will go on and will be a success.

ARTICLES

Flaminia Aperio Bella
Composite Procedures and Procedural Guarantees:
the "Borelli Doctrine" in the Light of *ReNEUAL* Model Rules

Stefania Gialdroni
Was the East India Company a "Democratic" Organization?
Majority Principle and Power Relations in 17th Century England

Barbara Cortese
'Causa' and Restitutory Conditio

Giulia Maria Guida
The Analogy in the Lex Aquilia: D.9.2.27.22

Ottavia Dora Lo Sardo
The Role of Supreme Courts in the Uniform Application of the Law

Sara Galeotti
"Solutio per errorem".
The Significance of the Solvens' Mistake in the Context of the Condictio Indebiti

Dario Ippolito
Chantiers beccariens. Loi pénale e liberté civile chez Genovesi, Filangieri et Pagano

Giulio Bartolini and Francesco Ferracci
Interpreters in Conflict Zones: an International Legal Assessment

NOTES ON ITALIAN LAW

Giacinto Parisi
New Scenarios for the Italian Class Action

Giorgio Pino
Forms and Methods of Constitutional Interpretation – Italian Style

LEGAL WORLDWATCH

Chiara Greco
The Italian Constitutional Court has changed its mind (and is not afraid to say so)

Federica Fedorczyk
After the Fifth Anti-Money Laundering Directive:
How EU Members States Are Expected to Implement AML/FT Regulations

Ilaria Capossela
The European Arrest Warrant in the Post-Brexit Era

Giulia Romano
Armed Drones: A Humanitarian Weapon?
Targeted Killings by U.S. Drones and the Role of Italy

Marta Caredda and Giulio Napolitano
The Judgement of the German Federal Constitutional Court on the Public Sector
Purchase Programme (PSPP) of the European Central Bank (ECB): has the Court gone too far?

INTERNATIONAL CONFERENCES AND SEMINARS

Stefania Gialdroni
9-11 May 2019: The Roman army and the dawn of Europe.
Conceptual models and social experimentations: languages, institutions, law (4th-8th centuries)
– organized by Luca Loschiavo, Roma Tre University and University of Teramo

Benedetta Graziani
A Conference on the Law Governing the Arbitration Agreement
and the Validity of Asymmetrical Clauses: Old Problems and New Perspectives

Giulio Patrizi
Antitrust and Regulation for Online Platforms: Challenges and Perspective

BOOKS REVIEWS

Giacinto Parisi
Piero Calamandrei, Opere giuridiche, I-X, rist., Roma, 2019

Antonella Massaro
The *Last Tango in Paris* case

LAW AND HUMANITIES

Stefania Gialdroni
An Interview with Professor Emanuele Conte

ROMA TRE
UNIVERSITÀ DEGLI STUDI
DIPARTIMENTO DI GIURISPRUDENZA