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* The Italian Law Journal does not endorse, support, or is associated with Professor Block's public views on race and gender.
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Is Libertarianism Thick or Thin? Thin!

Walter E. Block* and Kenn Williamson**

Abstract

Thin libertarianism, and only thin libertarianism, is valid libertarianism. Thick libertarianism is actually an attempt to hijack real, or thin, libertarianism. The present paper is devoted to stopping thick libertarianism in its tracks. We take as foils thick libertarians Johnson (2013) and Tucker (2014) and demonstrate that their thick libertarian views are contrary to true libertarianism.

I. Introduction

Thin libertarianism is defined as being based, solely, on the non-aggression principle (NAP). It is a theory of just law, or, equivalently, the proper use of violence. This philosophy maintains that it is licit to use force only in defense, or punishment against NAP violators. That is, people may lawfully do exactly as they please, except that they may not initiate aggression against non-aggressors, nor steal their property. Thick libertarianism, if it is to deserve this honorific, must also subscribe to the NAP. However, it adds what thin libertarians consider extraneous considerations to this basic principle. Here, the thick version of this philosophy breaks down into two sub-categories. The left wing variety maintains that in addition to the NAP, adherents must also adopt policies of inclusion, of non-discrimination against minority groups, support for enactments such as the Civil Rights Law of 1964; the right wing variant would combine the NAP with backing for the very opposite: namely, discrimination against these very demographics, favoring the second amendment to the constitution, religious morality, etc. For the thin libertarian, both left and right thickists are off the mark; these considerations are no more relevant to this philosophy than would for example, the claim be that checkers is somehow to be associated with libertarianism, or, maybe, instead, chess. All, everything, apart from the NAP, are strictly irrelevant to this perspective.

Before we begin, a true confession. The authors of the present paper regard ourselves as the thinnest of thin libertarians. We maintain that even those who consider themselves as part of the ‘thin’ crowd succumb on some issues where

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they try to make libertarianism ‘thicker’ than it really should be; namely, zero thickness. We shall address all of the ‘thin’ and ‘thick’ issues directly but first, let us say at the outset that ‘thin’ libertarianism is true libertarianism and so-called ‘thick’ libertarianism is based on otherwise libertarians making moral and strategic judgments and then trying to cloak them as libertarianism.

This is not an issue of leftist vs rightist thought. There are ‘thick’ philosophers on both sides of that particular ideological divide. However it cannot be denied that as an empirical truth the most steadfast proponents of ‘thick’ libertarianism are mostly from the left. And like this part of the political spectrum they have engaged in some troubling rhetoric. What is especially ironic about his choice of terms is that in calling us ‘Brutalists’ he has already done something he supposedly opposes. He has exhibited bigotry against those who do not conform to his ‘thick’ view of libertarianism.

In section II of this paper we address thick libertarian philosophy. Section III is devoted to a critique of thickster philosophy. We conclude in section IV. No truer words were ever written on this subject than those by Lew Rockwell1 who said that this is not a sectarian fight within libertarianism but one at the very core of what it means.

II. Johnson (2013)2

This author starts out with a most important point. ‘Thin’ vs ‘Thick’ is not equivalent to left vs right.3 It is rather a matter of definition and clarity. He starts out with this question:

2 Unless otherwise specified, all references to this author’s work will apply to this one essay of his, that is, C. Johnson, ‘Libertarianism through Thick and Thin’ Rad Geek People’s Daily, available at https://tinyurl.com/3nkovzj (last visited 15 June 2017).
'But if coercive laws have been taken off the table, what should libertarians say about other religious, philosophical, social, or cultural commitments that pursue their ends through non-coercive means, such as targeted moral agitation, mass education, artistic or literary propaganda, charity, mutual aid, public praise, ridicule, social ostracism, targeted boycotts, social investing, slow-downs and strikes in a particular shop, general strikes, or other forms of solidarity and coordinated action? Which social movements should they oppose, which should they support, and towards which should they counsel indifference? And how do we tell the difference?'

In this question we arrive at the essential nature of the debate. However his challenge is an easy one to answer. If the activity in question is violating the NAP then we oppose it but if it is not then let your conscience be your guide. Here we return to our main point Libertarianism, true libertarianism that is, is an extremely limited philosophy. It asks but one question, and gives but one answer. The question? When is violence justified? And the answer? Only in response to a prior act of aggression. That is it. Period. It cannot, it must not, oppose or support any other issue. This is something every libertarian and indeed every person needs to figure out for themselves. Is a general strike justified? Of course it is, if it embodies no initiatory invasion. If it does, then of course not. Ditto for every other act mentioned by Johnson.

Next this philosopher offers a seeming soft-ball to demonstrate that ‘there are clearly cases in which (...) commitments might just be an application of libertarian principles to some specific case’ to justify what he calls ‘thickness in entailment and conjunction (...)’ Here is his clearest and least interesting case:

‘Aztec libertarian might very well say, “Of course libertarianism needs to be integrated with a stance on particular religious doctrines! It means you have to give up human sacrifice to Huitzilopochtli!” ’

No it doesn’t mean that at all. Rather, it means you have to give up involuntary sacrifices to the gods. Willing participants should be allowed to be sacrificed if they wish to do so. Johnson goes on to make another important point:

It is unclear why a philosopher of Johnson’s stature should not insist on making this crucial distinction between voluntary and involuntary sacrifice. Not only does he not insist on this; worse he fails, utterly, to acknowledge this important distinction.

‘Considerations of entailment make clear that consistent libertarianism means not a narrow concern with government intervention only, but also opposition to all forms of coercion against peaceful people, whether carried out within or outside of the official policy of the state.’

Yes of course it does! Libertarians should be concerned with the cessation of all aggressive violence regardless of the perpetrator. Then he raises another good question but misses some of the nuance by talking in this context about ‘considerations of conjunction’:

‘(...) whether there are any other evils that libertarians should oppose, as libertarians, that is, whether there are any further commitments that libertarians should make, beyond principled non-aggression, at least in part because of their commitment to libertarianism’.

This is where so many ‘thick’ libertarians go astray. There are evils that would be morally good or strategically sound to oppose but not as libertarians. Maybe a better way to say this is that it is not libertarian to want a libertarian world. That is a moral judgment about how someone thinks society should be ordered. Libertarianism, in contrast, is a legal theory about how violence should be employed. It is the only moral legal theory but it does not have anything to say about morality as such. Johnson goes on to treat his four types of ‘thick’ arguments he calls ‘the most interesting’ which we will now endeavor to address.

**Thickness for Application**

Here our author takes an unfortunate turn for the worse. He opines:

‘One of the most important, but most easily overlooked, forms of

Had this author contented himself with this sort of thin libertarian statement, we would have no quarrel with him. Alas, alas, this is not at all the case. See below.

A (thin) libertarian theorist is one maintains that property rights and the NAP exhaust the basic premises of this philosophy. He need not favor the implementation of libertarianism. In contrast, a libertarian activist is someone who wants to promote liberty. The present authors fall into both camps.

We readily ‘concede’ that this sounds anomalous. A libertarian who does not to bring about a libertarian world? This sounds like a downright logical contradiction, but it is not, we insist. Remember, we are amongst the thinnest of thin libertarians. We insist that the libertarian, qua libertarian, is committed to espousing one thing and one thing only: that the just use of force is in retaliation only, never in initiation. But does that commit the libertarian to wanting to promote this philosophy amongst the populace, to bringing about a libertarian world, where the NAP is the order of the day. No, it does not. It is certainly possible, albeit rather unlikely, for the pure libertarian to maintain that this would indeed be just, but he opposes justice. The present authors are libertarians in that we maintain that the NAP is at the core of the just philosophy. Do we also want to bring about the free and just society? Yes, as it happens, we do. But buy into this, strictly speaking, not as libertarians, but rather as moral agents.
thickness is what I will call “thickness for application”. There might be some commitments that a libertarian can reject without formally contradicting the non-aggression principle, but which she cannot reject without in fact interfering with its proper application. Principles beyond libertarianism alone may be necessary for determining where my rights end and yours begin, or stripping away conceptual blinders that prevent certain violations of liberty from being recognized as such.

There are two problems. First, he seems to be saying that sometimes the general rule, in this case the NAP, can be wrong in some situations. However if a general rule does not apply to the specifics then something is wrong with it. Either it is not a general rule but more like a guideline to which there are exceptions or the general rule is wrong. By definition a general rule must apply to every specific situation that is part of it. Second, there are no principles beyond the NAP, property rights and homesteading which determine where my rights end and yours begin. The NAP is the general rule for all legal questions and applies in every situation. We cannot discuss 'moral' rights and 'legal' rights. The only rights are property rights and they are legal not moral.

Consider the case where A shakes his fist at B. If the two are separated by one mile, then, presumably, no NAP violation has occurred. It they are two feet from each other, then, depending upon the context it is a paradigm case of the initiation of a threat of force. But what if there is a distance between them of ten or twenty yards. Is this act of A's incompatible with the NAP? We need some sort of reasonable man to weigh in on the matter. But are these considerations 'Principles beyond libertarianism alone'? We think not. Rather, they are part and parcel of any rational interpretation of the NAP of libertarianism.

Johnson makes another mistake when he talks about how feminists are critical of:

‘(...the traditional division between the private and the political sphere, and of those who divide the spheres in such a way that pervasive, systemic violence and coercion within families turn out to be justified, or excused, or simply ignored, as something private and therefore less than a serious form of violent oppression’.

This is not a valid criticism of libertarianism. In libertarian legal theory there

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8 This political correctness is part and parcel of thick libertarianism. In the proper use of the English language, 'he' includes both 'he' and 'she'. Properly, 'she' is only used to refer to females only. When a concept applies to both genders, as it does in this case, the proper word is 'he'.

9 This is not a play or an opera, or two friends being silly with one another while smiling at each other.

10 Not woman; see n 7 above.

11 For a libertarian analysis of continuum problems of this sort, see W. Block and W. Barnett II, 'Continuums' Etica & Politica (Ethics & Politics), 151-166 (2008).
are no less or more ‘serious’ violent aggressions. There is a degree to which a violent aggression occurs but stealing a candy bar is just as ‘serious’ as cold-blooded murder. They are both violent aggressions against property and can be punished proportionally to their degree. Surely most people would agree stealing a candy bar is not as serious morally as murdering someone. In the libertarian legal theory these moral judgements would affect whether or not the victim will seek punishment of the crimes. But they do not affect the fact that both are crimes and can be punished.

Then he goes on to aver:

‘(…) To the extent that feminists are right about the way in which sexist political theories protect or excuse systematic violence against women, there is an important sense in which libertarians, because they are libertarians, should also be feminists’.

This is backwards. Instead, we maintain ‘(…) there is an important sense in which feminists, because they are feminists, should also be libertarians.’ Feminism is concerned with moral judgments about how females are being treated unfairly. Since they quite correctly oppose violence against women they should be libertarians as well because we oppose violence against everyone. Johnson thinks that adding in the additional commitments strengthens the NAP by giving it a ‘full and complete application’. However, again the very opposite is true. We weaken the NAP by adding additional commitments because we thereby reduce its status from a general rule to a guideline with exceptions.

 Thickness from Grounds

According to Johnson, how one arrives at libertarianism,\textsuperscript{12} has implications which apply to libertarianism. For example authoritarianism. In his view:

‘Yes, in a free society the meek could voluntarily agree to bow and scrape, and the proud could angrily but nonviolently demand obsequious forms of address and immediate obedience to their commands. But why should they? Non-coercive authoritarianism may be consistent with libertarian principles, but it is hard to reasonably reconcile the two; whatever reasons you may have for rejecting the arrogant claims of power-hungry politicians and bureaucrats – say, for example, the Jeffersonian notion that all men and women are born equal in political authority, and that no-one has a natural right to rule or dominate other people’s affairs – probably serve just as well for reasons to reject other kinds of authoritarian pretension, even if they are not expressed by means of coercive government action’.

\textsuperscript{12} Whether through utilitarianism, natural law, argumentation ethics, religion or some other method.
This goes much too fast. For instance, libertarians could hate spinach. However, for the love of all that is rational, not qua libertarians. Anyone and everyone has the right to hate this vegetable, libertarian or not. So, yes, if he wishes, Mr Johnson should by all means feel free to hate authoritarianism. Let him never ‘bow and scrape’ to anyone. He may with our blessing look them all straight in the eye. But it is unclear what this, any more than spinach hating, has to do with the NAP.

Our author is putting the cart before the horse. If the implication of the ideas that transmit you to libertarianism are contrary to this viewpoint we suggest finding some better foundations. Or, perhaps, jettison those invalid arguments that brought you to the one true political philosophy, while maintaining the latter. Just because the heart surgeon initiates the operation from the front of the patient’s body does not mean he has to exit from that spot.

He argues that libertarians should oppose authoritarianism. Authoritarianism is a way of ordering a social situation. It works in some cases better than others but the only problem libertarianism has with it is when aggressive violence is used to support it. Authoritarianism vs any other method of social cooperation is a matter of personal preference. There are many examples of voluntary authoritarianism that we take for granted such as a parent to their child, teacher to student and worker to boss. Many religious women believe their place is to be subservient to their husbands and fathers. To the extent that it is voluntary then more power to them (or maybe away from them.) Johnson believes that it is ‘weird’ that some people might prefer this kind of authoritarian social order but that is irrelevant. In our humble opinion, liking spinach is weird also. What either of these tastes has to do with libertarianism is unclear.

States Johnson:

‘While no-one should be forced as a matter of policy to treat her fellows with the respect due to equals, or to cultivate independent thinking and contempt for the arrogance of power, libertarians certainly can – and should – criticize those who do not, and exhort our fellows not to rely on authoritarian social institutions, for much the same reasons that we have to endorse libertarianism in the first place’.

If it floats your boat then feel free to criticize and exhort away; just stop calling it libertarian to do so. It is merely a personal moral judgement about the value of authoritarianism vs other forms of social cooperation.

*Strategic Thickness – the Causes of Liberty*

In the view of Johnson, libertarians *qua* libertarians should endorse policies

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13 And spinach too, while you are at it.
orthogonal to libertarianism in order to convince people of the virtues of libertarianism so as to save the world from statism. For example,

‘(...) libertarians have genuine reasons to be concerned about large inequalities of wealth, or large numbers of people living in absolute poverty, and to support voluntary associations – such as mutual aid societies and voluntary charity – that tend to undermine inequalities and to ameliorate the effects of poverty. The reasoning for this conclusion is not that libertarians should concern themselves with voluntary anti-poverty measures because free market principles logically entail support for some particular socioeconomic outcome (clearly they do not); nor is it merely because charity and widespread material well-being are worth pursuing for their own sake (they may be, but that would reduce the argument to thickness in conjunction). Rather, the point is that there may be a significant causal relationship between economic outcomes and the material prospects for sustaining a free society. Even a totally free society in which large numbers of people are desperately poor is likely to be in great danger of collapsing into civil war. Even a totally free society in which a small class of tycoons own the overwhelming majority of the wealth, and the vast majority of the population own almost nothing is unlikely to remain free for long (...)’.

Stipulate that this is true: a rough equality of income is more causally conducive to the free society than a vastly unequal one. Why, then, it would be a good idea to promote egalitarianism, in a voluntary manner, of course. But why qua libertarian? Why not merely as a means toward the free society? But, it is an empirical issue that equality preserves liberty. Posit the very opposite to be the case. Then, according to our author, it would be a crucial aspect of libertarianism to, again voluntarily, enhance policies that lead in the very opposite direction, a conclusion he would not likely accept. Nor would we. In contrast, the only thing we care about as libertarians are property rights, homesteading and the NAP. As men of good will, but not in our role as libertarians, we would encourage the poor to donate money to the rich, so as to promote inequality, and thus, freedom.

Thickness from Consequences – The Effects of Liberty

In this section of his paper Johnson wants us, as libertarians, to denounce the social evils created by the crony, statist system. In his view:

‘Thus, to the extent that sweatshop conditions and starvation wages are sustained, and alternative arrangements like workers’ co-ops are suppressed, because of the dramatic restrictions on property rights throughout the developing world – restrictions exploited by opportunistic corporations,
which often collaborate with authoritarian governments and pro-government paramilitaries in maintaining or expanding legal privilege, land grabs, and oppressive local order – libertarians, as libertarians, have good reasons to condemn the social evils that arise from these labor practices'.

This is invalid. As libertarians we concern ourselves only with aggressive violence. So, yes, by all means, as libertarians, we may condemn the aggressive violence used to aid and abet sweatshop conditions. But never, not ever, at least not qua libertarianism, do so for sweatshops themselves, totally divorced from NAP violations. There is a sect of Christianity called Calvinism that places great emphasis on the value of hard work, thrift, and avoiding moral temptation. Denizens of these organizations work all day, live simple lives and cannot be sinning while busy making iPhones, shirts or shoes. For them a sweatshop is a positive virtue.

He goes on to say that there is a good reason to support ‘(…) private fair trade certification, wildcat unionism, or mutual aid societies (…)’ But there are numerous studies that demonstrate that sweatshops themselves are a boon to the economy, especially for the poorest workers.\textsuperscript{14} The reason for this is straightforward. When a sweatshop moves opens up for business in a poverty stricken area, does it make offers lower than prevailing wages, equal to prevailing wages, or greater than them? To ask this is to answer it: of course, the latter,\textsuperscript{15} otherwise such a firm would not be able to attract a labor force. Alternatively, suppose a sweatshop is closed down, thanks to the policies urged on us by


\textsuperscript{15} And, typically, \textit{much} higher wages and better working conditions.
economic illiterate Johnson. Then, what happens to the disposed workers? Do they migrate to better, similar or worse remuneration? Again, the answer is obvious: it is the latter. If they had better options, they would have already accessed them, and not stooped to sweatshop labor. Instead the alternative to sweatshop labor too often consists of hunting in garbage dumps for food, or child prostitution.

III. Tucker (2014)\textsuperscript{16}

The first problem with this essay is his choice of terminology. ‘Brutalism’ sounds bad. Who would want to be a ‘brutalist?’ But he chose ‘brutalist’ and in doing so conceded most of the argument before even starting. If his view is that there are some libertarians who embrace this philosophy so as to essentially brutalize others and he believes it is bad to do so, eg, to be a bigot then why is he choosing an obviously bigoted term to describe his detractors? That means he is doing exactly what he denigrates in other people.

We reject the suggestion that libertarians fall into two camps: humanitarians and brutalists. But before we get to why let us give him the benefit of understanding what these distinctions supposedly mean. So according to Tucker humanitarian libertarians believe the following:

‘Liberty allows peaceful human cooperation. It inspires the creative service of others. It keeps violence at bay. It allows for capital formation and prosperity. It protects human rights of all against invasion. It allows human associations of all sorts to flourish on their own terms. It socializes people with rewards toward getting along rather than tearing each other apart, and leads to a world in which people are valued as ends in themselves rather than fodder in the central plan’.

Then he goes on to describe the brutalists as:

‘(...) a segment of the population of self-described libertarians – described here as brutalists – who find all the above rather boring, broad, and excessively humanitarian. To them, what’s impressive about liberty is that it allows people to assert their individual preferences, to form homogeneous tribes, to work out their biases in action, to ostracize people based on “politically incorrect”-standards, to hate to their heart’s content so long as no violence is used as a means, to shout down people based on their demographics or political opinions, to be openly racist and sexist, to exclude and isolate and be generally malcontented with modernity, and to reject

civil standards of values and etiquette in favor of antisocial norms’.

In his defense of this nomenclature, Tucker gives some of the history of the term he uses. He avers it was an architectural style that values function over form in the extreme. These brutalists rejected beauty because it ruins purity. If you were a ‘Brutalist’ architect you thought you were showing us something we didn’t want to face. We are supposed to be surprised that ugly buildings emanated from a theory that rejected ‘beauty, presentation, and adornment’.

Tucker then relates these considerations to ideological ‘Brutalism’:

‘By analogy, what is ideological brutalism? It strips down the theory to its rawest and most fundamental parts and pushes the application of those parts to the foreground. It tests the limits of the idea by tossing out the finesse, the refinements, the grace, the decency, the accoutrements. It cares nothing for the larger cause of civility and the beauty of results. It is only interested in the pure functionality of the parts. It dares anyone to question the overall look and feel of the ideological apparatus, and shouts down people who do so as being insufficiently devoted to the core of the theory, which itself is asserted without context or regard for aesthetics’.

Here is where the present ‘brutal’ authors part company with Tucker. Thin libertarians are innocent of all of these charges. Thin libertarians can have as much ‘civility’ as anyone else, thicksters included. Only, thinsters are not civil qua libertarian. They do so on their own time. Why not condemn thin libertarians for not being excellent violin players. Is not violin playing ‘beautiful’? Certainly it is, when done well. Does not violin playing exhibit ‘finesse, (...) refinements, (...) grace (...)’? This can hardly be denied. The point here, obvious to anyone other than a thick libertarian, is that Tucker is making a category mistake. He is conflating libertarianism with other good things such as, wait for it, violin playing.

‘Shouting down’ is entirely a different matter. This borders on the initiation of violence, or the threat thereof. It would appear that Tucker’s appreciation of the nuances of libertarianism is rather suspect. What evidence does he offer for the claim that thinsters engage in ‘shouting down’? None.

As for promoting our cause, libertarians, thick and thin, who sympathize with leftists policies such as social justice and helping the poor would be well-advised to use all the ‘grace and finesse’ they can muster to try to show their statist allies that their supposed goals are better served by libertarianism. Similarly for rightists, thick and thin, with regard to religious freedom and

17 Actually, this occurred at the outset with his choice of ‘brutalism’ to depict his intellectual opponents. Just because this is a school of architecture makes never no mind. Suppose we were to characterize the thick libertarians as ‘sissies’ on the ground that this terminology is used on school yard playgrounds. We could do so with as much, or, rather, as little, justification as his terminology.
family values. Here is the basic problem with ‘thick’ libertarians. They think their moral code and aesthetic sensibility is the best and so obviously their political philosophy should reflect that. Well maybe their taste is the best but, ‘thin brute’ libertarianism is the only political philosophy where it is possible to integrate different types of morality and aesthetics so it is uniquely suited to the real world where people have different tastes and preferences. So in order to have the best taste in political philosophy ‘thin’ libertarianism is the only option.

Tucker continues:

‘In the libertarian world, however, brutalism is rooted in the pure theory of the rights of individuals to live their values whatever they may be. The core truth is there and indisputable, but the application is made raw to push a point. Thus do the brutalists assert the right to be racist, the right to be a misogynist, the right to hate Jews or foreigners, the right to ignore civil standards of social engagement, the right to be uncivilized, to be rude and crude. It is all permissible and even meritorious because embracing what is awful can constitute a kind of test. After all, what is liberty if not the right to be a boor?’

It is imperative to convince the thick humanitarians to stop making their moral code part of the indisputable core truth. Yes, we all have every right in the world to be a boor! Libertarianism is a theory of the proper use of violence. Should boors be put in jail, violently, against their will? Of course not. No more than non-violin players should be treated in such a manner.

He goes on:

‘These kinds of arguments make the libertarian humanitarians deeply uncomfortable since they are narrowly true as regards pure theory but miss the bigger point of human liberty, which is not to make the world more divided and miserable but to enable human flourishing in peace and prosperity. Just as we want architecture to please the eye and reflect the drama and elegance of the human ideal, so too a theory of the social order should provide a framework for a life well lived and communities of association that permit its members to flourish’.

Tim Moen, leader of the Canadian Libertarian Party, gained international attention with his ‘meme’ calling for gay married couples to be able to protect their marijuana plants with guns. As a matter of pragmatism, if we are to attract the masses of people to our banner, we must be open to all shades of opinion on matters other than the NAP and private property rights. The thin version of our philosophy accomplishes this task; not the thick. That viewpoint imposes side order conditions that will be acceptable to some, but not others.

For a spirited defense of offensive actors, such as boors, who do not themselves violate rights, see W.E. Block, *Defending the Undefendable* (Auburn: The Mises Institute, 2008 (1976)); *Id, Defending the Undefendable II: Freedom in all realms* (Eastbourne: Terra Libertas Publishing House, 2013).
We have many such ‘social orders’; their collective name is morality. Tucker keeps mentioning that thinsters are technically correct. Then what is his argument based on? It is predicated on the fact that he seeks to hijack libertarianism to his own personal ends; not, to be sure, violin playing, which would be unjustified, but to his own equally unjustified agenda. Libertarianism by itself is not a complete social order. Every person must buttress his libertarianism with other parts of social order. Thinsters want to keep two obviously separate things separate; thicksters want to conflate them.

He continues:

‘As regards race and sex, for example, the liberation of women and minority populations from arbitrary rule has been a great achievement of this tradition. To continue to assert the right to turn back the clock in your private and commercial life gives an impression of the ideology that is uprooted from this history, as if these victories for human dignity have nothing whatever to do with the ideological needs of today’.

If Tucker is referring to the historical situation during the time when women were subjugated by men, when suttee laws compelled wives to be burned alive on the funeral pyres of their dead husbands, he makes a good point. Ditto when it comes to powerful populations enslaving and butchering weaker ones. But this, surely, is covered by the thin libertarian proscription against initiatory violence. On the other hand, more to the point, he presumably has in mind free association: men’s only golf clubs, or gated communities which are not totally inclusive. If so, then he is attacking yet another basic building block of libertarianism: free association. No one should be compelled to serve anyone else against his will, whether it is a baker, photographer or florist compelled to officiate at a gay wedding, or an Air-bnb that does not cater to all ethnic groups. Here, Tucker leaves the realm, even, of thick libertarianism, and embraces the non-libertarian view of left liberalism or progressivism. For a crucial part of thickism is the NAP, and in this case this author’s views are incompatible with that. Imagine, forcing some people to associate with others against their will, and calling yourself any kind of libertarian: thick or thin.

But is it not unfair to women and minority groups’ members if they are discriminated against? Perhaps, but Libertarianism is not an ideology of fairness. It is one of justice!

Nothing daunted, Tucker continues his diatribe:

‘Brutalism is more than a stripped-down, antimodern, and gutted version of the original libertarianism. It is also a style of argumentation and an approach to rhetorical engagement. As with architecture, it rejects marketing, the commercial ethos, and the idea of ‘selling’ a worldview. Liberty must be accepted or rejected based entirely on its most reduced form. Thus is it
quick to pounce, denounce, and declare victory. It detects compromise everywhere. It loves nothing more than to ferret it out. It has no patience for subtlety of exposition much less the nuances of the circumstances of time and place. It sees only raw truth and clings to it as the one and only truth to the exclusion of all other truth'.

Again this author misses the point. Yes, liberty must be accepted or rejected based entirely on its most reduced form: property rights, the NAP, and homesteading. This doesn’t mean that thin libertarians oppose marketing or selling the worldview. However, we insist on truth in advertising. We accept the nuanced point that while freedom means you can be a (non-invasive) jerk you probably will not do well as a human being if you are. If this is the great contribution of thick libertarianism, it can hardly be said to be worth all the fuss in its train.

He goes on with:

‘Brutalism rejects subtlety and finds no exceptions of circumstance to its universal theory. The theory applies regardless of time, place, or culture. There can be no room for modification or even discovery of new information that might change the way the theory is applied. Brutalism is a closed system of thought in which all relevant information is already known, and the manner in which the theory is applied is presumed to be a given part of the theoretical apparatus. Even difficult areas such as family law, criminal restitution, rights in ideas, liability for trespass, and other areas subject to case-by-case juridical tradition become part of an a priori apparatus that admits no exceptions or emendations’.

Yes, the libertarian legal theory is separate from time, place and culture. But how does it follow that we don’t want to change the way the theory is applied in specific cases, that is what it means to apply a theory. That is what principle is all about. In contrast, if the legal analysis changes with the wind, seemingly what Tucker is calling for, then its claim to be guided by the rule of law is invalid. His final statement is highly problematic. Whenever ‘case-by-case’ is mentioned, reach for your wallet; check the number of fingers still on your hand. For this means the abnegation of all principle, libertarian or not. Of course, libertarianism utilizes an ‘apriori apparatus’: the NAP and private property rights. Without them, this philosophy is a ship at sea with no rudder. No one can deny that there are gray areas in the law, and indeed in all arenas of human endeavor. There is of course a need for judges to interpret libertarian law in changing circumstances. But Tucker is calling for throwing out all of libertarian law. Thus, he does not qualify as a spokesman for any kind of libertarianism, including the thick variety. There are some principles that libertarians and non-libertarians do agree upon: the defendant in a libertarian court case would
always have the presumption of innocence; possession is nine tenths of the law, so the burden of proof always rests with the plaintiff. But these are deductions from the basic premises of libertarianism, not arbitrary accretions, as the thicksters would have it.

Tucker attempts defend his position:

‘Of course the brutalist as I’ve described him is an ideal type, probably not fully personified in any particular thinker. But the brutalist impulse is everywhere in evidence, especially on social media. It is a tendency of thought with predictable positions and biases. It is a main source for racist, sexist, homophobic, and anti-Semitic strains within the libertarian world – at once denying that this sentence is true while asserting with equal passion the rights of individuals to hold and act on such views. After all, say the brutalists, what is human liberty without the right to behave in ways that put our most precious sensibilities, and even civilization itself, to the test?’

These are serious charges. Does our author supply any evidence in support of these allegations? To ask this question is to answer it: of course not. We could with equal justification, namely none, accuse thick libertarians of beating their wives, supporting slavery, or embracing Communism. This is not the work of a serious scholar, who, when making such charges, at least attempts to back them up. Nor does he define his terms. Is it sexist to make empirical generalizations that are true? For example, men are on average taller and heavier than women. Is it racist to make empirical generalizations that are true? For example, blacks are better runners and basketball players than whites, while the latter are better swimmers and chess players than the former. Prejudice is a natural part of life. Literally, it means ‘pre-judging’. But pre-judging on the basis of what? Past experience, of course. Stereotypes are merely empirical generalizations. Indeed, they are inductions which, along with deductions, are half of the scientific method. Is this racist or sexist? Tucker offers us no guidance on these important matters, contenting himself with mere name-calling. For shame.

Tucker concludes his essay on this note:

‘An ideology robbed of its accoutrements, on the other hand, can become an eyesore, just as with a large concrete monstrosity built decades ago, imposed on an urban landscape, embarrassing to everyone, now only awaiting demolition. Will libertarianism be brutalist or humanitarian? Everyone needs to decide’.

It is his version of libertarianism that is the eyesore. He wishes to complicate the simple beauty of a universal system of justice with irrelevancies, just like a hipster who paints over a handmade mahogany finish. Libertarianism is both brutal and humanitarian.

IV. Conclusion

Writers such as Johnson (2013) and Tucker (2014) have attempted to hijack libertarianism from its roots, predicated on the NAP, into something quite different. Why, if they wish to establish an entirely different philosophy, did they not have the decency to proceed in that direction

on their own? Why this attempt to dilute real libertarianism? Why this desire on their part to play the role of tapeworm, using (thin)$^{22}$ libertarianism as a host.

The present authors have no more objection to thick libertarianism than to many other political philosophies, such as communism, Nazism, fascism, liberalism, conservatism, progressivism, etc. As a matter of fact, we object less to thick libertarianism than to any of these others. Far less, since thick libertarianism at least$^{23}$ adheres to the NAP, and none of these others do anything like that. However, we insist on product differentiation. If the thicksters insist on launching a new philosophy, we wish them the best of good fortune. As we say, they are closer to our views than any of these others. But if they really wish to be rid of the scourge of real libertarianism, that is, the thin version thereof, they should adopt new nomenclature. In the spirit of brotherhood$^{24}$ we offer the following suggestions: Private Property Pinkos,$^{25}$ Bleeding Hearts,$^{26}$ Progressive Capitalists, Left-Liberal NAPsters$^{27}$ and Hippies of the Marketplace.$^{28}$

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$^{22}$That is, real, valid, or legitimate libertarianism.

$^{23}$For the most part; we have seen some exceptions to this statement supra.

$^{24}$Something they conflate with libertarianism, but we do not.

$^{25}$This has the added benefit of good alliteration.

$^{26}$Their main blog is ‘Bleeding Heart Libertarians’: https://tinyurl.com/8zy9v2x (last visited 15 June 2017).

$^{27}$This is perhaps the most accurate description of their views.

$^{28}$Ayn Rand referred to (thin) libertarians as ‘Hippies of the Right’.
The Civil Responsibility of the Italian Judiciary: A Double Speed System

Antonio Cilento*

Abstract

This work illustrates the critical issues regarding the civil responsibility of Italian judges as regulated by legge 27 February 2015 no 18, modified by legge 13 April 1988 no 117 on compensation for damage arising in the execution of judicial office and the civil liability of judges.

I. The Issues at Hand

This paper aims to examine the system regulating the civil responsibility of the Italian judiciary in order to ascertain whether the reform of 27 February 2015 makes substantial changes and, if so, whether they achieve a balance between the need for accountability on the one hand, and judicial independence on the other. The paper also provides a brief overview of other major European legal systems on the matter, and aims to outline the orientation of the case law of the European Court of Justice in order to establish whether, and to what extent, this has had a bearing on the choices facing Italian legislation. A State which is subject to the rule of law must always ensure a balance between the interests of independence and liability as, naturally, ‘being independent does not make judges irresponsible’. Such a delicate issue has always sparked passionate debate, as it has always been an inherent element in political conflict and affects the relationships among the State powers. These are currently showing signs of increased tension, in light of the sensitive nature of their

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1 Published in the Gazzetta Ufficiale 4 March 2015.
6 D. Woodhouse, ‘Politicians and the Judges: A Conflict of Interest’ Parliamentary Affairs,
The problem takes on particular relevance today with the increased acceptance of the concept of justice as a public service – which as such, must be assessed in terms of the quality of the service rendered to consumers. Consequently, State authorities become accountable for the damage caused by magistrates in the exercise of their judicial function, now that the principle of the non-answerability of the ‘State as judge’ has lost some ground. From a theoretical point of view, a comparison may be made between two models of judicial liability depending on whether one considers a judge to be a State official or a professional: in the first case, a judge’s liability would be a disciplinary matter, so internal monitoring would prevail over any liability for damage caused to third parties. In the second instance, liability for third-party damage exists in parallel to the emancipation of the role of the judiciary from other powers, and thus in relation to the principle of judicial independence.

In terms of implementation, the division described here hardly appears representative of reality, which tends to reflect intersections between the two models. Art 28 of the Italian Constitution envisages the State liability for violations committed by State officials and employees. Historically, the Italian Constitutional Court has linked the legitimacy of conditions and limitations on the liability of its exercise to the peculiarities of the judicial function.

Moreover, when ruling on the articles of the law of civil procedure, which were submitted to referendum in 1987, the Italian Constitutional Court stated

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7 J. Waldron, ‘Judges as Moral Reasoners’ The International Journal of Costitutional Law, 5 (2009): ‘neither judges nor legislators are deciding what to do as individuals. When they deliberate and vote in their respective institutions, they are deciding what is to be done in the name of the whole society’.


10 A detailed reconstruction of the evolution of judicial liability involving the different views of their role within the regulations is found in N. Picardi, n 5 above, 288.


12 Corte Costituzionale 14 March 1968 no 2, Giurisprudenza costituzionale, 288 (1968): ‘the independence of the judiciary and the individual judge do not place the former beyond the State, as though legibus soluti, nor the latter outside the organisation of government. Judges are, and must be, independent of powers and interests not concerned with jurisdiction; but theirs is an office of government and the judges exercising it provide a service’ (my translation). The judgment went on to add, however, that ‘the peculiarity of judicial office, the nature of court orders, and the judge’s impartial position may lead, and have led ahead of their time, to conditions and limitations regarding their liability’.

13 Arts 55 (the civil liability of judges), 74 (the liability of public prosecutors), 56 (authorisation) Code of civil procedure.
that the question regarded

‘a coherent system of tutelage of the judicial office, both in respect of the restriction of the areas of the liability of judges – wilful misconduct, fraud or extortion, nonfeasance or delays in responding to applications or requests by the parties or in the exercise of their functions – and the discretionary assessment of the political authority with power to grant authorisation’.

The Court affirmed that ‘the State’s liability for the acts and the omissions performed by judges in the exercise of their office is to be deemed’ within the remit of these articles.

II. The Pre-Existing Framework

The reform on judicial responsibility enacted after an abrogative referendum, the referendum of 1987 concerned the repeal of various articles of the code of civil procedure: namely Art 55, whereby ‘Judges may be held liable solely: 1) when they are culpable of wilful misconduct, fraud or extortion in the execution of their duties; 2) when they refuse, omit or delay to act on applications from parties and, in general, in the execution of their duties without good reason. The premises for the second case subsist only when a party has submitted an application to the judge in the official registry in order to obtain a ruling or an act, and ten days have passed since registration with no result’; Art 56 reads: ‘Application for a ruling on judicial liability shall not be submitted without authorisation from the Ministry of Justice. Upon petition by the authorised party, the Italian Supreme Court shall appoint the judge required to pronounce on the question by decree in Chambers. The provisions of this and the previous article shall not be enforced when a party in a criminal hearing seeks compensation or brings a civil action following a conviction’ (my translation). Art 74 stated: ‘The rules concerning the liability of judges and any legal action pertaining thereto shall also be applied to public prosecutors participating in a civil hearing if, during the execution of their duties, they are culpable of wilful misconduct, fraud or extortion’ (my translation).

On this point, the best scholarship had long felt that a correction was required: ‘it is legitimate to harbour doubts concerning the impossibility of seeking legal redress. It is clearly necessary to modify article 55 of the code of civil procedure; but apart from this, it appears that the relationship between citizens, and that between citizens and the State is in need of reformulation: in the event of liability, wilful misconduct, or gross negligence, it is unclear why judges must not also answer to the State to which they are bound by a relationship centred on
necessary to fill the normative void existing up to that time, introducing the principle of compensation for unfair damage resulting from conduct, acts or orders of judges whose actions constituted wilful misconduct or gross negligence in the execution of their duties, or resulted from a denial of justice.\textsuperscript{18} The elements constituting gross negligence on which the reform has repercussions are listed as follows in the Vassalli law:

\begin{itemize}
  \item a) gross infringement of the law due to inexcusable negligence;
  \item b) the statement, due to inexcusable negligence, of a fact whose existence is indisputably excepted from the proceedings;
  \item c) the denial, due to inexcusable negligence, of a fact whose existence results indisputably from the acts of the proceedings;
  \item d) the issuance of a provision regarding the personal freedom of an individual, beyond the cases permitted by law or without due justification.
\end{itemize}

As a safeguard to the legislative framework, the second clause of Art 2 establishes that

\begin{quote}
‘during the execution of judicial office, neither the interpretation of the regulations nor the judgement of facts and evidence shall give rise to liability’
\end{quote}

The practical application of the regulation rests on a very restrictive interpretation by the Italian Supreme Court, such that

\begin{quote}
‘the execution of the judicial office concerning the discernment of the content of a particular law and the verification of a fact, with the corollaries of the enforceability or otherwise of one or the other, cannot give rise to liability, and this is also true of uncertainty concerning the solution adopted, the inadequacy of the argumentation, the absence of an explicit and convincing rebuttal of opposing hypotheses, with the obligation to subject a declaration of liability, also in such cases, to a non-permitted review of an interpretative or evaluative judgment. On the other hand, liability may arise
\end{quote}

\textsuperscript{18} There has, however, been some debate regarding the accuracy of stating that the subject matter of the referendum was the liability of judges rather than government. N. Picardi, n 5 above, 299; A.R. Briguglio and A. Siracusano, ‘Responsabilità per dolo e colpa grave’, in N. Picardi and R. Vaccarella eds, \textit{La responsabilità civile dello Stato giudice} (Padova: Cedam, 1990), 216; G.M. Berruti, ‘Sulla responsabilità civile dei magistrati (le fattispecie della legge n. 117 del 1988)’ \textit{Giurisprudenza italiana}, 235 (1988).

\textsuperscript{19} The clause thus formulated creates a substantial degree of immunity, according to E. Navarretta, \textit{Il danno non iure e la responsabilità civile dello Stato}, in N. Lipari and P. Rescigno eds, coordinated by A. Zoppini, \textit{La responsabilità e il danno, Diritto civile} (Milano: Giuffrè, 2009), 287.
from failure to hand down a judgment, if this concerns decisive issues, also during the current phase of proceedings, and may be ascribed to inexcusable negligence.\footnote{Corte di Cassazione 5 December 2002 no 17259, Giustizia civile-Massimario, 2123 (2002).}

According to the Supreme Court, liability cannot arise from the action of a judge in interpreting the law or in assessing the facts or evidence, as it must be borne in mind that the safeguarding clause

‘cannot be subject to a reductive interpretation, as it is justified by the highly evaluatory nature of judicial activity and (...) ensures the constitutional protection of the independence of the judge, and at the same time, the judgment itself.’\footnote{Corte di Cassazione 27 November 2006 no 25123, Giustizia civile, 360 (2007).}

The Italian Supreme Court also underlines that

‘concerning damages payable arising from the wrongful action of a judge, gross negligence, under Art 2, para 3 of legge 13 April 1988 no 117, exists when a judge’s behaviour becomes a gross and glaring violation, or a wholly illogical interpretation, of the law, leading to the adoption of aberrant choices in reconstructing the will of the legislator, and the utterly arbitrary manipulation of the text of the law itself.’\footnote{Corte di Cassazione 18 March 2008 no 7272, Foro italiano, 2496 (2009).}

Concerning the notion of inexcusable negligence,\footnote{C.M. Bianca, ‘Negligenza (diritto privato)’ Novissimo Digesto Italiano (Torino: Utet, 1965), 596; G. D’Amico, ‘Negligenza’ Digesto delle discipline privatistiche (Torino: Utet, 1995), 24.} the Court defines it as a ‘\textit{quid pluris}’ compared with the gross negligence provided for under Art 2236 of the Italian Civil code, insofar as the negligence must be ‘inexplicable’.\footnote{Corte di Cassazione 26 July 1994 no 6950, Giustizia civile-Massimario, 1007 (1994); Corte di Cassazione 5 July 2007 no 15227, CED Cassazione (2007).}

In addition to the substantial limitations mentioned here, the system of liability set out in legge 13 April 1988 no 117 also contains a procedural element: once the claim has been made, it is subject to a ‘filter’ consisting of a close examination of admissibility by the court (Art 5).\footnote{G. Amato, ‘Responsabilità dei magistrati: la valutazione di ammissibilità della domanda di risarcimento’ Danno e responsabilità, 332 (1996).}

In order to evaluate the scope of legge 27 September 2015 no 18, it is necessary to consider how the ‘filter’ amounts to the establishment of a three-stage procedure\footnote{Corte di Cassazione 9 September 1995 no 9511, Giurisprudenza Italiana, 841 (1997); Corte di Cassazione 19 June 2003 no 9811, Diritto e giustizia, 99 (2003).} leading to further complication of the liability mechanism and a loss of efficacy in terms of protection.\footnote{Since the Vassalli law came into force and until January 2014, four hundred and ten liability claims have been submitted; thirty-five have been heard and seven have been upheld.}
III. The European Union Position: The Rulings of the Court of Justice and the Infringement Procedure

The European Court of Justice has twice ruled on the incompatibility between the Italian liability system regarding the execution of judicial office and European Union (EU) law. The first judgment, dated 13 June 2006, case C-173/03, Traghetti del Mediterraneo (Ferries of the Mediterranean Sea), was handed down after a preliminary adjournment by the Court of Genoa. The case concerned a claim for damages against the Italian State by a shipping company which denounced the erroneousness of a decision handed down by the Italian Supreme Court where a previous verdict on the dispute between Traghetti del Mediterraneo (TDM) and a company known as Tirrenia had been recorded. This verdict regarded the existence of state aid granted to Tirrenia which had allowed it to implement a pricing policy detrimental to TDM. TDM’s claim was rejected by the Court of Naples, as well as the Court of Appeal and the Supreme Court. The Supreme Court specifically affirmed the legitimacy of the state aid to Tirrenia, as it had been granted to promote the general interest of the development of southern Italy.

TDM, claiming that the judgment contained a misinterpretation of the Treaty regulations on state aid, and objecting that the Court of Appeal, as the court of last resort, had violated the obligation to make a prejudicial referral to the European Court of Justice, brought a case before the Genoa Court, requesting a second national hearing based on the civil liability of the State for judges under Italian law. The Genoa Court noted that the errors reported by the TDM were to be attributed to interpretation. The question then arose of whether the Vassalli law, which excludes State liability, creates compatibility in the Italian system of judicial liability with the provisions of European Union law.


29 Case C-173/03 Traghetti del Mediterraneo SpA v Repubblica italiana, [2006] ECR I-05177.

30 The European Court of Justice asked the Court the following questions: 1) whether a member State is to be accountable outside the terms of a contract towards individual citizens for the errors of its judges in the application or the non-enforcement of EU law, and in particular, the failure by the court of last resort to refer for prejudicial assessment to the Court of Justice according to Art 234, para 3, of the Treaty. 2) in the event that a member State is accountable for the errors of its judges in the enforcement of EU law and in particular for the omission of the prejudicial referral to the Court of Justice by a court of last resort in compliance with Art 234, para 3, of the Treaty, whether there is a conflict regarding the affirmation of such liability – and thus incompatibility with the principles of EU law – in the case of domestic
Commenting on the referral, the Court of Justice affirmed that the EU law was at odds with domestic law which does not provide for the liability of member States for damage caused to individuals resulting from an infringement of the EU law by a court of last resort. This is because the infringement is due to interpretation of the regulations or a judgment of evidence carried out by that court. Moreover, EU law is also at odds with domestic law which limits the existence of such liability solely to cases of wilful misconduct or gross negligence by a judge. The caveats applied to such liability also include where such a limitation would lead to the exclusion of the liability of the State concerned in other cases and in which a manifest infringement of the laws in force has been committed.

Concerning Traghetti del Mediterraneo, the Court of Justice naturally took into consideration its own precedents concerning the liability of member States in relation to the infringement of EU law (the wellknown cases of Francovich, Brasserie dupécheur and Factortame), in particular where the point at issue is attributable to the judicial authority.31

On this question, in Köbler,32 the Court affirmed that State liability may be subject to a less restrictive system than that governing liability for matters attributable to legislative power or to executive power, where the decision had been taken by a court of last resort. Nevertheless, such liability cannot be excluded in cases where a judge manifestly infringes existing EU law. In order to carry out such an evaluation, it is necessary to take into consideration a number of factors. These include the degree of clarity and precision of the rules infringed, the intentional nature of the infringement, the position adopted by an EU institution, and the possible infringement by the court of last resort of the obligation to make a prejudicial referral to the Court of Justice.

Moreover, a manifest infringement exists whenever a decision clearly ignores the jurisprudence of the Court of Justice.

legislation concerning State liability for errors made by judges that exclude liability in relation to the activity of interpretation of the law and evaluation of the facts and evidence, limiting State liability to cases of wilful misconduct or gross negligence by the judge’ (my translation).


The Köbler case stems from a prejudicial referral by an Austrian Judge, who had asked the Court to explain whether the case law by which the development of the State liability due to a violation of EU law concerns every governing body committing a violation (Brasserie dupécheur and Factortame), was also enforceable in cases where conduct contrary to EU law was established by a supreme court ruling in a member State.
After the TDM ruling, the European Commission observed that Italy had not adapted its internal system to the principles expressed in the aforementioned ruling. The Commission thus initiated infringement proceedings for the violation of EU law (procedure no 2009/2230). The Italian Republic sustained in its defence that the Vassalli law could be interpreted in a way that was compliant with the decision of the Court of Justice of the EU in the TDM case, ruling out the need for a regulatory policy. Considering this justification unacceptable, the European Commission referred the Italian Republic to the Court of Justice which, through its decision of 24 November 2011 (case C-379/10, Commission v Italy), upheld the Commission’s appeal. It deemed that the Italian Republic’s reliance on the Vassalli law led it to violate EU law because it excludes the Italian State from any kind of liability for damage caused to individuals due to an infringement of EU law ascribable to a court of last resort. Specifically, liability is excluded if such an infringement is the result of an interpretation of the regulations or a judgement of facts and evidence carried out by the court itself. Another aspect whereby Italian law infringed EU law highlighted by the Court was the limitation of liability solely to cases of wilful misconduct or gross negligence.

Given this persistent non-compliance, the risk of a referral to the Court of Justice by the Commission undoubtedly contributed to inducing the Italian legislator to enact and approve the reform, to avoid heavy fines. After the Treaty of Lisbon came into force, infringement proceedings, as regulated by the Treaty on the Functioning of the European Union (TFEU), Art 260 para 2, are very swift: if a member State does not comply with a judgment handed down for failure to perform obligations issued in accordance with Art 258 TFEU, the Commission can refer it to the Court of Justice without starting a new ‘pre-litigation’ phase.

IV. The Existing Framework

The Italian legislator seized the opportunity to reorganize the legal framework on this matter, going beyond what was strictly necessary to meet EU compatibility requirements. The political will incorporated into legge no 18 of 2015 seems to indicate will to comply with European guidelines, than the need to reform the Vassalli law. On this question, there is clearly a degree of incongruity between the subject matter of the judgments of the Court of Justice and that which is regulated

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33 Infringement procedure no 2009/2230, begun by the European Commission regarding the non-conformity to the EU law of legge 13 April 1988 no 117, concerning compensation for damage arising from the execution of judicial office and the liability of judges, has been notified under Art 260 TFEU. With its letter of formal notice dated 26 September 2013 moreover, the Commission challenged Italy for not having complied with the ruling.

by legge 117 of 1988: the former concerns the direct liability of the State as the holder of judicial power, to which is attributed an erroneous interpretation and incorrect application of EU law, whereas

‘the Vassalli law disciplines the vicarious liability of the State (...), which is accountable for the wrongful acts of its judges in the exercise of the judicial function’. 35

The so-called liability of the State-as-judge by analogy with the EU law is quite a different matter – where the allocation of competencies within a single member State is a matter of indifference – and yet another a wrongful act committed by ancillaries being attributed to the State. As a sort of compromise solution, the prevailing interpretation of the subject-matter of the Vassalli law, which states that claims for compensation must be brought against the State, represents a logic where the liability of the State-as-judge is a specification of the liability of the State for the activity of its employees. 36

In the light of the observations of the Court of Justice, orientated towards the deletion of the safeguarding clause and the expectation of State liability for the infringement of EU law attributable to the court of last resort, the model of liability as it stands – in cases of a manifest infringement of the law not only by courts of last resort – regards both EU law and domestic law. From this standpoint, the exclusion of the regulation of infringements of domestic law would have implied a different treatment of acts which constitute offences against the very same good, involving obvious risks of unconstitutionality. 37

The current legislative framework preserves the mixed system of the Vassalli law, constructed around the direct liability of the State (in its compensatory, remediary function) and that of the judge during hearings (preventive-punitive function). The aim is to create a means of effective tutelage for those who have been damaged by a miscarriage of justice: those who have been damaged as a consequence of the conduct, acts or orders of a judge, including honorary magistrates, with malice aforethought or gross negligence in the execution of

35 C. Castronovo, ‘La commedia degli errori nella responsabilità dello Stato italiano per violazione del diritto europeo ad opera del potere giudiziario’ _Europa e diritto privato_, 945 (2012). The author states that the principles established by the Court of Justice concerning the inadequacy of the Italian legislation to regulate State liability for violation of EU law, are ‘off target’ (my translation).
36 N. Picardi, n 5 above, 300; V. Scotti, n 16 above, 83.
37 A. Pace, ‘Le ricadute sull'ordinamento italiano della sentenza della Corte di giustizia dell'UE del 24 novembre 2011 sulla responsabilità dello Stato giudice’ _Giurisprudenza costituzionale_, 4726 (2011): ‘the differing positions of EU law and domestic law on the activity of judges must be considered unacceptable not only in terms of rationality/soundness (Art 3 of the Italian Constitution), but also – and most of all – because our legislator, in imposing a firmer discipline in order to safeguard EU regulations, manifests greater anxiety over the possible violations of EU law than violation of domestic law. And this infringes Art 54 of the Italian Constitution that imposes, at the highest level, the observance of the Constitution and the laws’.
their duties. From a systematic point of view, what is significant is that a ‘double speed’ liability system emerges, where the speed depends on whether the State is sued for damage resulting from the exercise of judicial power – as understood from the European perspective – or from the personal liability of the magistrate during the proceedings, based on the presumption of inexcusably negligent conduct. More precisely, while the range of the subject broadens and the definition of the seriously wrongful act expands, no longer being limited to inexcusable negligence, this remains the means by which an action against a judge is brought.

In fact, the redefinition of gross negligence represents one of the most innovative aspects of legge no 18 of 2015. According to Art 2, para 3 of the Vassalli law, gross negligence may encompass:
- serious infringement of the law caused by inexcusable negligence;
- assertion and/or denial, through inexcusable negligence, of a fact whose existence is evidently to be excluded from/included in the acts of the proceedings;
- the issuance of a measure concerning the freedom of the individual beyond the cases envisaged by the law or without providing an explanation.

Following a recent judgment by the Italian Supreme Court, the traditional notion of inexcusable negligence has been re-examined, and the possibility of bringing an action for gross negligence has thus been reworked:
- manifest infringement of the law as well EU law, now replaces the previous test of ‘serious infringement of the law’;
- misrepresentation of the facts and evidence, or the affirmation of a fact whose existence is evidently to be excluded from the acts of the legal proceedings or the denial of a fact that evidently exists;
- the issuance of a precautionary measure against a persona or property beyond the circumstances envisaged by the law or without providing an explanation.

In particular, the concept of misrepresentation has been the object of widespread and heated debate. Firstly, one can affirm that the conjunction ‘or’ has the meaning of ‘that is’, which precedes the meaning of misrepresentation. This follows a constitution-oriented interpretation wherein misrepresentation is ‘the affirmation of a fact whose existence is evidently to be excluded from the acts of legal proceedings’ or the ‘denial of a fact whose existence is evidently to be excluded from the acts of the legal proceedings’, possibilities already envisaged by Art 3, para 2, point b) and c) of the existing rule.

According to this definition, misrepresentation must be obvious, requiring...
no interpretative or evaluative effort, as affirmed by the Italian Constitutional Court. In particular, the Italian Constitutional Court stated that the constitutional guarantee of judicial independence also serves to defend ‘the autonomous evaluation of facts and evidence and the impartial interpretation of the rules of law’. Misrepresentation must therefore lead to abnormal interpretations of a specific law and huge distortions of the facts being examined, bringing about an activity which cannot be fully equated to interpretative or evaluative performance.

In connection with the misrepresentation of evidence, the Supreme Court has already clarified that, according to the new regulations, this

‘does not imply an evaluation of the facts, but an ascertainment or a verification that the evidence relied upon in reaching a decision is contradicted by a specific pleading’.

The evidence reported and used by the judge as the ground for his or her decision must be ‘different and incompatible with that contained in the pleading and documented in the claim’ or possibly not exist in the pleading at all. The Court underlines, moreover, that the evidence

‘resulting from the misrepresented evidence must appear to be decisive, that is to say capable in itself of inducing the trial judge, upon adjournment, to completely or partly reverse the outcome of the decision’.

This is because

‘only the evidence regarding a key point that has been presented but not evaluated, creates irreversible difficulties in the structure of the line of argument of the designated judge’.

The so-called ‘safeguarding clause’ remains insofar as judges still cannot be called to answer for their interpretation of the law and the way they assess the facts and evidence. In this same vein, there is an accurate reassessment of the range of application of the clause pertaining to interpretation, to exclude only wilful misconduct and gross negligence from the cases where a judge is not responsible, where the gross negligence consists in a manifest infringement of the law and the other cases envisaged. This aims to offset any idea of interference

40 From a general point of view, it is necessary to find that both the legislator and the judge ‘must exercise their independence and find solutions – in full obedience to the principle of legality – suited not to the single norm, but to the hierarchy of principles and normative values’ (my translation): G. Perlingieri, Profili applicativi della ragionevolezza nel diritto civile (Napoli: Edizioni Scientifiche Italiane, 2015), 29.
42 On this point, the Supreme Court asserted that ‘concerning the civil responsibility of
in judicial independence and the free expression of their rational interpretative power.

The law sets out the criteria which should be used to verify the existence of a manifest infringement of domestic and EU law: the degree of clarity and precision of the rules infringed, and the inexcusability and the gravity of non-observance. Where EU law is infringed, it is necessary to take into consideration the degree to which the act or the measure comes into conflict with the interpretation of the Court of Justice and the non-observance of the obligation to bring the case before the Court (under TFEU Art 267, para 3). The denial of justice due to delay, refusal or nonfeasance by judges in the execution of one or more official acts remains as a ground for bringing a liability claim.

A State compensation action for the recovery of money paid to the magistrate who carried out the wrongdoing through inexcusable negligence is explicitly compulsory and reinforced, increasing the sanction from a third to a half of the magistrate’s annual salary and increasing the time to submit the application from one to three years from the moment of the compensation hearing.

V. The Barring of Direct Liability

The possibility of suing a judge directly has been completely ruled out, despite several government attempts in recent years to introduce it. Such a system would not be in line with the aim of the reform, which tends to represent a harmonious point of contact between the compensatory-remediary function and the preventive-punitive function of the institution of the civil liability of judges. Such an approach seems to be supported by the first judgements of the Italian Supreme Court concerning legge no 18 of 2015, with reference to the fact that only the State can be called as defendant.43

judges, Art 21 of legge 13 April 1988 no 117, establishing the conditions for submitting an application for compensation against the State due to an act carried out in the course of the execution of judicial office – excludes the possibility that the interpretation of the law or the examination of facts and evidence may give rise to liability. This is in contrast with the Union obligations of the Italian State in the light of the provisions contained in the judgment handed down by the EU Court of Justice concerning domestic courts of last resort’ (my translation); Corte di Cassazione 22 February 2012 no 2560, Danno e responsabilità, 983 (2012).

43 Corte di Cassazione 23 April 2015 no 16924, Giurisprudenza italiana, 992 (2015): ‘Magistrates whose professional conduct is the object of a claim for compensation under legge 13 April 1988 no 117 do not become debtors in respect of those who bring the claim. This is because such a claim (albeit after legge no 18 of 2015) can only be brought against the State (except for cases of wrongful conduct under Art 13). Neither does a subsequent action by the State against a judge, in the event that the original judgment found against the Administration, change the conclusion since the assumptions and the substance of such a suit are partially different from those of direct action by a private individual against the State (Art 7; Arts 2, 3). This means that in the event of the involvement of a judge in a civil case brought under legge 13 April 1988 no 117 (Art 6), no direct relationship between the claimant and the judge arises such as to lead to the latter becoming a potential debtor towards the former’ (my translation).
It is important to underline that the Constitutional Court stated that, even if there is ample leeway for the legislator to modify the system regulating liability, any variation to the institution totally lacking in additional protections with respect to those in the existing system, would be anti-constitutional, given the special character of the judicial office (identified as ‘terms and limits’ which would be reduced in the event of direct liability). On this point, the recently adopted law is grounded in a coherent framework abolishing, on the one hand, the ‘filter’ of admissibility (as a possible limit or condition for legal action), and on the other hand, guaranteeing independence in the exercise of judicial office, excluding judges from any form of direct responsibility. In fact, it had long been erroneously argued that the filter of admissibility was a constitutional necessity, attributing to the Constitutional Court positions that it had never held. In reality, it would be a normative framework, completely disengaged from any terms and limits such as direct liability, which would prove to be unconstitutional.

VI. Civil Liability of Magistrates in Other European Legal Systems

From a comparative point of view, the direct liability of judges is unknown in almost all the other European legal orders. For example, in France, liability claims may be made against the State and direct action against judges is not permitted, notwithstanding the right of the State to act against them.

In France, the specific nature of the judicial office has historically suggested a tempering of the general principle of responsibility with the need to avoid the proliferation of specious compensation suits against judges. The system (like the Belgian and Portuguese system) is very similar to the Italian one, and Art

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46 Dossier by the Italian Chamber of Deputies, The Civil Liability of Judges. National Legislation and the Case Law of the European Court of Justice no 306, 16 December 2011, 17: ‘the following three systems regarding the liability of judges are envisaged (Code de l’organisation judiciaire, articles L. 141-1 et seq): the first concerns liability for the malfunctioning of the judicial service (fonctionnement défectueux du service de la justice), which is limited to two circumstances: gross negligence (faute lourde) and the denial of justice (dénie de justice) (article L. 141-1); and liability arising from the personal negligence (faute personnelle) of an ordinary judge (members of the judiciary) subject to the rules and regulations contained in the Statut de la Magistrature (article L. 141-2). The third concerns liability for personal negligence by other judges (eg administrative judges or those in special jurisdictions) and is governed by special laws or, in the absence of such, follows the procedure of the so-called “prise à partie” (article L. 141-3).’

141 of the Code de l’organisation judiciaire, allows legal action to be brought against the State only in cases of particular gravity and in the event of wilful misconduct.48

The German system, evoking the principle of the independence of the judiciary, allows State liability (Federal or Regional) in the event of the dereliction of duty pertaining to judicial office. Liability is thus indirect, due to the fact that the claimant cannot directly sue the judge whose liability is called into question.49 In accordance with Art 839 of the BGB, a judge is liable for damages as a public official in cases of wilful misconduct or negligence but direct action against the State does not provide for any compensation.

Judicial immunity is a historical characteristic of the legal system of the United Kingdom, intended to safeguard the independence of the judicial office; magistrates are subjected to ‘internal’ accountability (in respect of the public powers and the association to which they belong), and ‘external’ accountability, in areas such as the court of public opinion, to which their actions are subject.50 The applicability of the rules of civil responsibility against judges for acts executed in the exercise of their office, with the sole exception of cases of unlawful detention, is disregarded.51 The Spanish regime on the question of the civil liability of judges and magistrates is enshrined in the Ley Orgánica 1 July 1985 no 6 del Poder Judicial (LOPJ) 12, that envisages concurrent dual action against both the State and the magistrate. An action for compensation may be brought if, in the execution of their office, judges commit acts of wilful misconduct or negligence. Eligibility to bring an action is subject to a system of admissibility filters regarding the existence of grave negligence.52

VII. The Pitfalls of ‘Defensive Jurisprudence’ Between Civil and Disciplinary Liability

49 Dossier by the Chamber of Deputies n 46 above, 19: ‘Art 34 of the German Fundamental Law (Grundgesetz – GG), affirms the liability of the State (Federal or Land) in the event of the dereliction of duties by judges in office. Liability for damages is therefore indirect, as the claimant cannot directly involve the judge he/she wishes to sue for damages’.
The form of liability is set out in Art 839 of the German civil code (Burgerliches Gesetzbuch – BGB), the criterion for bringing an action (against the State) are regulated by Art 34 GG’ (my translation).
52 L. Bairati, La responsabilità per fatto del giudice in Italia, Francia e Spagna, fra discipline nazionali e modello europeo (Napoli: Edizioni Scientifiche Italiane, 2013).
The introduction of the regime has led some to discuss the risks connected with so-called defensive jurisprudence. The naming of the field as such alludes to the now well-established tendency in the field of medicine to reduce the risk of infringing a rule of conduct rather than to safeguard the health of the patient.

A further important consideration is that while a doctor has a duty to save a patient, the decisions of a judge nevertheless entail consequences impinging on the personal freedom of the accused or on the certainty of justice for the victims of crimes, ie those harmed by wrongful conduct.

In particular, there is the risk of a rupture in the characteristic and 'closed' State civil responsibility of a judge through the removal of the autonomous nature of the evaluation of facts and evidence, resulting from the possible introduction of the duty to give reasons for the choices judges make. Judges could, from a defensive perspective, be intimidated in the exercise of their judicial office and be induced to adopt unnecessary and redundant reasoning, not envisaged by the legal system itself. However, on the one hand, analysis of the case law relating to the Vassalli law, and on the other, the exclusion of the form of direct liability envisaged by the reform, lead us to consider the fears described to be totally unfounded, short of considering any form of judicial liability to be punitive. To verify the reasonableness of the above-mentioned risks, it may be useful to relate the issue of the liability of the 'State-Judge' in the forms and within the limits specified in the reform to the disciplinary liability of judges, which is far more ‘fearsome’ in the abstract, and which has already existed for some time in the Italian legal system.

Disciplinary liability follows a dereliction of the functional duties that a judge has towards the State and which are relevant to the relationship between judges and the legal system to which they belong. Civil responsibility, on the other hand, arises in respect of litigants or other subjects, due to any errors or failures in the exercise of their office and concerning the relationships between judges and the ‘users’ of the judicial office.

The system of disciplinary liability is characterised by a typified system of offences with explicit interests, which may be upheld before the disciplinary section of the Superior Council of Magistrates: impartiality, fairness, diligence, industriousness, discretion, balance and respect for human dignity. Disciplinary offences are divided into three categories: i) those committed in the exercise of the judicial office (for example, conduct which leads to unfair damage or an unfair advantage to one of the parties; failure to inform the Superior Council of Magistrates of the existence of one of the situations of incompatibility arising


54 C. Commandatore, ‘La responsabilità civile dello Stato per omissione del pubblico ministero. I pericoli di una giurisprudenza difensiva’ Responsabilità civile e previdenza, 1890 (2015).

55 The system of disciplinary liability is regulated by legge 23 February 2006 no 109, legge 30 March 2006 no 150, and legge 24 October 2006 no 269.
from family ties), ii) those committed outside the exercise of office (for example: the use of the judicial role in order to gain unfair advantages for themselves or others; association with persons subjected to penal or preventive proceedings by the same judge), and iii) those resulting from an offence.56

These then are cases that may theoretically bring about similarly defensive conduct: it follows that only the concrete application of the law on civil responsibility can reveal the actual risk of an increase in defensive sentencing, which is in any case difficult to detect, and which seems, in the abstract, to be averted by the presence of parameters hinging on the manifest infringement of the law and the doubling of the paradigm (in the action for redress).

VIII. Concluding Remarks

The discussion thus far confirms that the existing rules and regulations do not essentially change the basic criteria upon which the judicial liability in the Vassalli law is based. It is founded on wilful misconduct and gross negligence, formulating the latter in terms of a manifest infringement of the law: the manifest infringement of domestic (and EU law) law thus becomes a conduct characterised by gross negligence. Consequently, one of the chief causes of contention, namely that gross misconduct is said to derive from inexcusable negligence, is overcome. The peculiarity of the new framework, as mentioned before, lies in the creation of a ‘misalignment’ between the paradigm of State liability, linked to damage stemming from the exercise of judicial office, and that of a judge during a compensation hearing.

On the one hand, liability for manifest infringement of the law has been extended to both domestic and EU law, and the misrepresentation of facts and evidence are now grounds for serious misconduct, with the exclusion of any kind of reference to inexcusable negligence on the part of judges.

On the other hand, the State’s now compulsory action to obtain redress (of a higher monetary value than previously permitted) from members of the judiciary can be undertaken only in the event of liability arising from wilful misconduct, or gross negligence stemming from inexcusable negligence.

A ‘double speed’ system like this shows the search for a fair balance guaranteeing the broadest and most effective protection of citizens by the State. At the same time, it allows legal action against members of the judiciary only in situations of inexcusable negligence or wilful misconduct. The new rules may be applied only to wrongful acts committed by magistrates subsequent to the entry into force of the law. Concerning Art 2 of the ‘Vassalli’ law – which establishes that anyone who has been subjected to unfair damage due to the conduct,

action or order of a judge, may proceed against the State in order to obtain compensation for pecuniary and non-pecuniary loss – the reform extends this right which previously existed only in relation to damage caused ‘by the deprivation of individual freedom’.

‘Damage’ is to be understood as the effect of conduct or an act or order of judges acting in bad faith or with ‘gross negligence’ during the execution of their duties or as a consequence of a ‘denial of justice’.

Initial implementation has revealed some interesting aspects of inter-temporal law: in the current normative framework, a division between the substantive and the procedural sides of the issue seems to arise. In fact, in relation to wrongful acts committed in the past, the Vassalli law has been applied in its original formulation, albeit observing the general principle of the new law. Conversely, legge no 18 of 2015 incorporates no rule which permits the application of the abrogated procedural norms, on the other hand, in the case of the filter of admissibility under the old Art 5. A liability case brought today, under the new law, can only be brought following the procedural norms in force, and thus without the matter first being assessed for admissibility as in the original framework (the so-called ‘filter’). One could envisage the extended enforcement of the entire statute concerning judicial liability as set out in the original Vassalli law. This would include the procedural rules, when an application to establish liability is filed in relation to a wrongful act occurring prior to the coming into force of the new law. This, however, would seem to be a somewhat forced interpretation.

It should be noted, in conclusion, that legge no 18 of 2015 has already been referred to the Constitutional Court. Within the context of different kinds of proceedings that do not regard the liability of the judiciary doubt can be cast on the constitutional legitimacy of the foundations of the new provisions, based on the assumption that the rules being challenged would be important in specific judgments, and giving grounds for judicial liability for the misrepresentation of facts and evidence. The first challenge is the notion of misrepresentation of facts and evidence, which conflicts with Arts 101, para 2, and 111, para 2, of the Italian Constitution; as well as Art 2, para 1 (b) of the new law, which conflicts with Art 3 of Constitution. The Court denounces the equivocal nature and the indefinability of the ideas, questioning the effectiveness of the safeguard clause in its new

57 Concerning the retroactive effect of the new rules and regulations, see F. Bonaccorsi, ‘La nuova legge sulla responsabilità civile dello Stato per illecito del magistrato’ Danno e responsabilità, 445 (2015).
59 The Verona case is a trial for the illegal possession of tobacco manufactured abroad; the Treviso case is an appeal against an injunction concerning payment for some agricultural supplies.
formulation. Moreover, a review of the effectiveness of the safeguard clause brings to light a violation of the constitutional protection of the independence of the judiciary. In particular, during proceedings where the evidence is merely circumstantial, the ability of judges to exercise discretion would be compromised due to the new rules and regulations.

The abolition of the filter of admissibility appears to violate Arts 101, para 2, 111, para 2, and 25, para 1 of the Italian Constitution, paving the way for possible influence over judges’ opinions or leading them to abstain.

Another question mark regarding constitutionality concerns the fact that recourse is now compulsory, in contrast with Art 24, para 1, of the Italian Constitution, stating the ‘recognizing the right to be defended, implicitly recognises also the right not to be sued’. Obviously, the decision on these matters lies with the Italian Constitutional Court. Regardless the new rules on liability do, in fact, seem to find a satisfactory balance between the need to innovate, stemming from the scant application of the pre-existing rules and pressure from the Court of Justice of the EU, along with the need to improve the system.

60 On this point, the doubts raised in G. Verde, ‘Una questione di legittimità dalle basi fragili’ Guida al diritto, 26 (6 June 2015) do not appear unfounded. Giovanni Verde remarks the groundlessness of the assumption of the need to refer the matter to the Court. In fact, the reasons why the referring judge considers the new rules on judicial liability do not allow him to act are not clear: he ‘should have specified what had disturbed him to such an extent that she/he was unable to act on the application for the injunction he was examining’ (my translation).
Justice, Fault, and Efficiency in Contract Law

Larry A. DiMatteo*

Abstract

This article explores some of the core concepts that underlie contract law. It rejects the feasibility of a uniform theory of contract law including a critique of the economic analysis of contract law. The importance of efficient contract rules and efficient contracts is not disputed, but efficiency’s explanatory power is limited due to the breadth of contract law, as well as the complexity and dynamism of modern contracting. Behavioral law and economics is introduced as a method for making law and economics more predictive of real world contracting. The article selects three core principles for analysis – justice, fault, and efficiency that help explain the essence of contract law. It also reflects on the tension between freedom of contract and paternalism.

I. Introduction

On 2 April 2017, I was honored to give the Heremans’ lectures on the law and economics of contract law at KU Leuven. My closing speech was entitled: ‘Roles of Neoclassical and Behavioral Economics in the Future Analysis of Contract Law’. The speech was the culmination of hundreds of hours of work as I immersed myself in the literature on the economic analysis of contract law or law and economics (LAE). Previously, I had used the terminology of LAE in my writings and ventured into empirical legal studies to test the predictability of tools (heuristics and biases) advanced by behavioral law and economics (BLAE) or behavioral decision theory. But, before being asked to give the lectures I had no solid grounding in hard LAE and was not an advocate of it as a unifying theory of contract law. Early in my career, I wrote an article arguing that the normative infrastructure of contract law made a unitary theory of all of contract law impossible and undesirable. Others had previously and subsequently made

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1 Dieter Heremans Funds Lectures in Law and Economics 2017 available at https://tinyurl.com/y9b3x2mg (last visited 15 June 2017).

similar arguments.

The norms of contracts have been persistent over the past one hundred years and include: morality of promise, certainty of law, efficiency, fault, and fairness or justice. In fact, these norms, often in tension, are stronger today due to the breadth and complexity of modern day contracting. These norms or goals of contract law have been around for as long as there has been contracts, sometimes used overtly, often used covertly. In different eras of contract law and in different types of contracts this normative composite is rebalanced where some of the norms play a more dominant role in judicial thinking and reasoning.

Formalism sees the key role of contract law as providing certainty and predictability. The story goes that the impact of contract law in the real world of business should be facilitative in nature. Capitalism rests upon two foundational concepts—private property and freedom of contract. These concepts rest on the broader view that economic wealth and growth is most likely when people are allowed to obtain private property in order to improve their quality of life or substantive goals. A person so motivated can increase societal wealth by engaging with others in the transfer of property to those persons that place a higher value on the property. Thus, contracts to transfer property based upon freedom of contract are Pareto efficient or optimal since both parties are made better off due to their idiosyncratic preferences and valuations of the subject matter of their contracts. In a perfect world of pure competition, full information, and unbounded rationality there would be little role for government intervention into private contracts. But, such a perfect world does not exist in that most contracts are formed despite the existence of informational and bargaining power asymmetries, and are formed by less than fully rational human beings.

Yet, the legend behind the pure capitalist model of freedom of contract has continued reticence. Formalist contract scholars and judges often state that businesses and businesspersons value certainty and predictability. Certainty and predictability of the law certainly allows for more rational calculations of risk—what does the law require, how is a court likely to apply the law, and what are the consequences if a breach of the law (or a contract) is recognized? The law and economics scholarship includes the Schwartz-Scott Thesis, which poses that due to businesspersons craving for certainty they prefer a four-corner, non-contextual analysis of contracts in business disputes. Thus, even when a party’s intent can be proved, through extrinsic evidence (proper dealings, course of

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4 American law, especially the common law of contracts, has often been divided into three eras: era of classical contract law or legal formalism in the late nineteenth century and early twentieth century; neoclassical law influenced by legal realism; and modern or relational contract law. See G. Gilmore, The Ages of American Law (New Haven: Yale University Press, 1977).

performance or conduct subsequent to the conclusion of the contract, trade usage, business customs, and commercial practice), to be true to a formal or plain meaning interpretation of the written contract, the party is willing to have the contract interpreted and enforced other than how it was intended. The rationale is that business parties are willing to accept ad hoc injustice in exchange of for systemic certainty in the interpretation of contracts. Based upon this assumption, they argue that contract interpretation should be different in commercial or business transactions, as opposed to consumer or private contracts – business contracts should be formalistically interpreted based upon the apparent meaning of their words.

Professors Alan Schwartz and Robert Scott provide no evidence for their proposition (such as, empirical surveys). I am skeptical of such an assumption. Do businesspersons really want their contracts enforced based on strict interpretation of words against the parties’ actual or true intent? Is a businessperson harmed by the bad conduct of the other party willing to lose and pay damages, when in reality the other party was in the wrong? I think not! Some businesspersons or companies seek to deal with future contingencies with long, detailed contracts to reduce uncertainty and allocate all foreseeable risks. In the end, complex contracts (such as a joint venture agreement or intellectual property transfer) are likely to be more detailed then simple contracts such as a sale of goods, but detail doesn’t equate to greater clarity or the reduction of the likelihood of dispute, in fact, sometimes they can have the opposite effect. The reason is there is no all-knowing, Uber transactional attorney possessing full information and unlimited cognitive abilities and, hence, no perfectly clear and comprehensive contract. This is not to say that detailed contracts should be avoided in complex business transactions, but the length of a contract is often a function of cultural rather than legal factors. American contracts, especially those negotiated by large law firms, tend to be long and detailed; German contracts tend to be shorter for similar transactions; and internal Chinese transactions may not be based on any written or formal contract at all. Given the domestic context, all three of these types of contracting are equally efficient.

The rest of this article will focus on three concepts that have provided most of the fodder in American debates on contract law – justice, fault, and efficiency. In the early days of the LAE movement, the idea was that the efficiency principle could be the basis of a general theory of contract law, both at the descriptive or positive and normative dimensions. In reviewing the last forty or so years of literature on the economic analysis of contract law in preparation for the Heremans Lecture it is clear to me that such a notion of a unifying theory based upon the efficiency principle has failed. This does not mean that LAE research has not provided valuable insights into the workings of contract law and that the efficiency principle is not important to a full understanding of contract law. It is a realization that contract law is too complex to be captured by a single
principle. For this article I have chosen to examine the role of the principles of justice, fault, and efficiency in the hope of better understanding contract law’s complexity.

II. Justice

Grant Gilmore once stated that: ‘The values of a reasonably just society will reflect themselves in a reasonably just law’.\(^6\) The key word in this statement is ‘reasonably’ since it can be interpreted in a number of ways. All guiding principles are relative in some way – there is no absolute justice, absolute morality, or absolute efficiency at least not in contract law. This is because self-interested capitalism is always a trade off between the good and the bad of human behavior; between greed and altruism; and between the exercise of freedom and the need to regulate the abuse of that freedom.

‘Reasonably’ also provides room for other norms, such as efficiency, to play a role in which the seeking of justice is only one among different goals – this is clearly the case for contract law. Finally, the word justice has different meanings and can be reflected in different ways, such as ad hoc justice, systemic justice, procedural justice, and distributive justice. Contract law possesses less than absolute allegiance to these different forms of justice. It is less concerned with ad hoc justice than it is with systemic justice. It aims to provide a set of fair rules, which may result in injustice in particular cases. This is rationalized by the fact that parties’ private autonomy allows them to use or manipulate the rules to their personal advantage.

Freedom of contract itself is a reflection of procedural justice. Since contract law presumes that parties act voluntarily and there contracts are based upon at least a semblance of freedom then concerns of procedural justice are satisfied. Finally, distributive justice is not considered to be the goal of contract law. Law and economics, for example, focuses on the creation of efficient default rules that result in wealth maximization or net utility gains (Kaldor-Hicks optimality) and not on how those gains are distributed. Nonetheless, contract law has always served a regulatory function – duty of good faith, principle of unconscionability, foreseeability limit on damages, force majeure, and hardship – that at least tangentially allows for the reformation or adjustment of contracts to allow for just outcomes.

Some courts believe in legal formalism in which written contracts should be strictly enforced based upon the plain meaning of their words. For them, the protection of the sanctity of the written contract as an expression of private autonomy is not only paramount it is essential to the working of the capitalistic-market economy. The contract is an expression of the free will of the parties,

based upon their endogenous preferences and idiosyncratic valuations. Since, parties value the subject matter of the contract or the items being exchanged differently both parties will both better off and thereby society benefits with wealth creation. Under this view, contract law should be purely facilitative in nature – providing rules of formation, default rules to fill in gaps in the contract, and a remedial scheme for the peaceful resolution of disputes. Alternatively stated, there should be little contractual regulation or government intervention into contracts.

The common law’s objective theory of contract and legal formalism were the means to exercise morality from contract law. Great contract scholars at the turn of the twentieth century – Oliver Wendell Holmes, Jr, Christopher Columbus Langdell, and Samuel Williston – saw contract law as a set of external principles that could be objectively applied to real world cases and lead to right answers. Arthur Corbin can be seen as one of the first ‘modernist’ scholars seeing that the key to case decisions was not general principles, but are found in the ‘operative facts’ found in the cases. The conflict between general principles-legal formalism and operative facts-contextualism is seen in the First Restatement of Contracts in which Williston acted as Reporter and Corbin as Co-Reporter. Section 75 espouses the objective, promissory basis for contractual obligations championed by Williston, while Section 90 (detrimental reliance) advanced the importance of the reasonable expectations of parties as an alternative means to contractual liability, which was championed by Corbin. Grant Gilmore’s posed a thesis that the injustice resulting from the strict enforcement of promises or contracts resulted in numerous exceptions – recoverability of reliance damages based upon the reasonable expectations of the promisee or promissory estoppel and the recovery of restitution damages for benefits unjustly bestowed on another party – and thus making contract more tort-like.7

British scholar Patrick Atiyah puts forward a somewhat similar argument in his book The Rise and Fall of Freedom of Contract.8 He argues that prior to 1800, liability was based upon reliance or benefits received and not based upon consent. The courts were less concerned with the enforcement of promises or agreements based upon consent and more concerned with the equitable nature or the fairness of the exchange. A paradigm shift occurred in which courts saw the importance of enforcement of promises as products of freedom of contract; this model of contract theory persists into the present. But, Atiyah notes the narrowing of freedom of contract in the twentieth century through greater and greater interventions (regulation) into freedom of contract by governments, such as the rise of consumer protection law.

The pure freedom of contract or bargain principle advanced by formalism belies the contextual milieu in which contracts are formed, performed and enforced, and the context in which contract rules have been formed, adjusted, and changed. Society is always in a state of flux, which includes the creation of new types of contracts, new forms of trade usage and business customs emerge, and extra-contractual forces, such as technological change, emergence of the share economy (new methods of doing business that have disruptive impact on traditional ways of doing business), and the effects of globalization on international and domestic transactions. Given rapid change, the model of contract rules as relatively static in order to ensure certainty and predictability in contract law application, and the written contract as embodying the parties’ full agreement become untenable.

The formalistic application of contract rules and interpretation of contracts also belie legal history in which the roles of equity, conscience, and fairness have played significant roles. To neglect those influences and the outcomes of cases that can be characterized as reaching a just or fair result, despite the use of the language of formalism, misrepresents what contract law actually does. Formalism whether through the ‘mechanical’ process of going directly to a grand civil code or by way of strict adherence to the power of precedent in the common law, is more a state of mind or caricature of the reality of the law.

An interesting question is does morality of promise play a larger role in the civil law than it does in the common law? In Continental civil codes the parties are required to display good faith (buona fede; bonne foi; buona fede; treu und glauben) at every stage of contracting. A duty to act in good faith during the pre-contractual phase is an underlying principle in most civil law countries that reaches from the opening of negotiations, conducting of the negotiations, and to the conclusion of the negotiations. It is a general clause, intended to compensate for the rigidity of highly technical rules or precisely defined concepts found in Continental codifications. These ‘safety-valve clauses’ work to make the detailed rules more flexible, so that they can be adapted more efficiently to particular cases and just outcomes.

In the area of remedies: it is worth highlighting that French law uses the wording sanction (and not liability) to identify the consequences of contractual non-performance, which demonstrates the traditional ‘moral’ approach to non-performance of obligations. Enforced performance is known to be a distinctive

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feature of the law of contractual remedies in civil law jurisdictions compared to
the common law. The one who does not perform his contractual obligations is
seen as breaching a moral commitment and is therefore is forced, by the courts,
to keep her commitment. This moral dimension of the civil law partially explains
the tentativeness of Europe’s acceptance of LAE and its rejection of efficient
breach theory, which will be discussed below in the section on efficiency.

III. Fault

There has been a longstanding debate in the common law on the role of
fault in the law of contracts. Grant Gilmore provocatively claimed the death of
contract in arguing that tort law was swallowing up contract law. Gilmore saw
contract law as a residual category – it is what is left over from the other more
specialized areas of the law. The idea that general contract law is partially fault-
based is antithetical to the generally held view that the promissorial nature of
common law contracts and the compensatory nature of common law contract
damages reject the idea that the elements of fault or negligence play any role in
contract law. For example, Oliver Wendell Holmes, Jr’s famously stated in his
1897 article the Path of the Law that a binding contract entitles a non-breaching
party to the right to claim damages and nothing more. In that same article he
sketched his ‘bad man theory’ of law in which the lawyer and her client should
not view the law from the perspective of a virtuous, law-abiding citizen but,
instead from the perspective of the ‘bad person’. The bad person perspective is
part of Holmes’ prediction theory of law, which holds that law is nothing more
than a prediction of how a court may decide a case. Thus, a businessperson
makes a decision, assisted by its lawyer, on how much it should comply with the
law or whether to honor its contractual obligations. This decision is based upon
a prediction of the probability of being held accountable and if so, the seriousness
of the consequences in being held accountable.

The common law of contract is generally unconcerned with any fault
attributed to the parties. A party is seen as strictly liable for damages whether
due or not due to fault. For example, whether a party breaches a contract out of
necessity, willfully or negligently is not important and does not weigh on the
amount of damages to be paid. The Second Restatement of Contracts states:

‘Contract liability is strict liability. It is an accepted maxim that pacta
sunt servanda, contracts are to be kept. The obligor is therefore liable in
damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated.\textsuperscript{16}

Section 261 of the \textit{Second Restatement of Contracts} recognizes the role of fault in the impracticability doctrine:

\begin{quote}
\textit{Where, after a contract is made, a party's performance is made impracticable \textit{without his fault} by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.}\textsuperscript{17}
\end{quote}

But, there are concepts and areas of contract law that can be characterized as fault-based, such as the duty of good faith, principle of unconscionability, duty of reasonable efforts, the without fault requirement in excuse doctrines (such as the doctrine of impracticability in American law). Other contract doctrines that are also fault based include misrepresentation, duress, undue influence, and unilateral mistake, along with the foreseeability of damages limitation and the principle of mitigation. The duty of care (fault) can also be seen underlying specific types of contracts, such as bailment, escrow, trust and carriage contracts.

Elsewhere, the fault principle can be seen at work in the breach of professional services contracts where courts determine if a party breached its duty of care based upon professional standards. In agency contracts, the agent may breach the contract by not fulfilling its duties of loyalty and care. In American promissory estoppel (detrimental reliance) a party may be held liable for reliance damages involving a non-contractual promise if an injustice would result if the court did not provide some form of remedy.\textsuperscript{18}

In contract interpretation the idea that a party ‘should have known’ implies that a party is at fault for not knowing a fact. For example, if a party holds itself out as a certain type of businessperson or expert then it is expected to know the trade usage, business customs, and commercial practice known by a reasonable businessperson or expert in that industry or business.\textsuperscript{19} Professor George Cohen argues that the fault principle is part of the objective theory of contract that is the basis of Anglo-American contract law. He notes that a party who makes a promise, then subsequently argues an alternative intent or meaning (than that of a reasonable person) is guilty of intentional misrepresentation or negligence because he ‘knows or has reason to know that the other party may infer from his

\textsuperscript{16} Restatement (Second) of Contracts, chapter 11, introductory note (1981) (emphasis added).
\textsuperscript{17} ibid, Section 261 (emphasis added).
\textsuperscript{18} ibid, Section 90.
\textsuperscript{19} See, eg, Uniform Commercial Code §1-303(d) (stating that trade usage of which the parties ‘are or should be aware’ can be used to interpret the agreement).
Finally, the unilateral mistake doctrine and the duty to disclose in certain contracts are further examples of the influence of fault in contract law. A party that makes a mistake (usually a clerical or calculation error) may terminate a contract if the other party was aware or should have been aware of the mistake at the time of contracting and failed to bring the mistake to the attention of the mistaken party. In certain types of contracts, the modern trend has been an expansion of the duty to disclose facts known to the seller and not discoverable by the buyer through reasonable inspection or due diligence. Thus, a seller of a home is expected to disclose any hidden defects or material facts to prospective homebuyers.

In the civil law, the controversy over the role of fault in contract law is not as pronounced. Along with the relatively vague notion of the duty of good faith, there are a number of specific provisions that are expressly fault based. For example, Art 1175 of the Italian Civil Code states that: ‘The debtor and creditor shall behave according to rules of fairness’. The line between justice, fairness and good faith versus fault is a thin one. But, it is not implausible to argue that a party who treats another party unfairly is at fault for causing the other party harm due to its acting unfairly. But, this is a rather abstract analysis. Elsewhere in the Italian Civil Code, the fault principle is easier to discern. Art 1227 states that:

‘If the creditor’s negligence has contributed to cause the damages, the compensation is reduced according to the seriousness of the negligence on the consequences arising from it’.

Negligence is in the common law clearly a synonym for fault, sometimes referred to as contributory fault. Art 1229 of the Italian Civil Code states that:

‘Any agreement which, in advance, excludes or limits the liability of the debtor for fraud, malice or gross negligence is void’.

This provision illustrates an intersection between contract and tort or delict, namely a party cannot contract out of liability for harm caused by their gross negligence. The rule is the same in the common law.

Other examples of the fault principle in the civil law include Section 276 of the German Civil Code (BGB), which states:

‘(1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the

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21 M. Beltramo, The Italian Civil Code (Dobbs Ferry: Oceana Publications, 1991) (all citations to the Italian Civil Code are as represented in this source).
giving of a guarantee or the assumption of a procurement risk. (2) A person acts negligently if he fails to exercise reasonable care.'

In the French Civil Code, a distinction between strict liability and fault is made between the different obligations de résultat (promises of result) and obligations de moyens (promises of best efforts). The first obligation requires performance as required under the contract, while the second one only requires the use of best efforts in performing on the contract. In the later case, the failure to use best efforts is the fault of the promisor. Another example can be found in German and Italian law where in the sale of goods, a seller is not liable for the fault of a third party it employed to assist in the performance of the contract. Thus, the seller is only liable for damages caused by its negligence, such as failing to arrange substitute goods or supplies, following the breach by the third party.

IV. Efficiency

Historically, minus economic jargon, efficiency has long been an underlying norm of contracts. For example, the reasonable person principle is based on the notion of what a reasonably prudent, efficient person would have done in a given situation; something that would satisfy the efficiency norm. In sum, ‘everyone (is) held to the standard of the rational, efficient “reasonable” person’. Contracts by their nature serve an economic function; they allow for the creation of markets in a capitalistic system where private property is a fundamental principle. LAE takes the general economic function of contracts to enable the private transfer of property and refines it along economic principles. Thus, contract law functions to enforce efficient contracts, to reduce transaction costs, to deter inefficient conduct, and to deter inefficient performance.

Beginning in the early 1970s the Law and Economic Movement gained strength with the publication of Richard Posner’s The Economic Analysis of Law. Economic analysis had long played a role in specialized areas of the law, such as antitrust and regulatory law. LAE was different in that its purpose was to explain all areas of law. Soon it began an intense analysis of private law areas including contract law. Since then a deep literature has been developed mapping out a positive or descriptive and a normative theory of contracts based upon the

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22 Bürgerliches Gesetzbuch (BGB), § 276 (1) and (2) (2002) (emphasis added).
23 French Civil Code, Arts 1137 and 1147.
principle of efficiency, which LAE sees as the key to formulating contract law and to the interpretation of contracts. It is hard to argue that contract law and contracts should not be efficient. But, the lingering question is the extent of LAE’s explanatory power – has it explained the entire body of contract law and has it provided foundational insights into contract interpretation? The answer, after about forty-years of scholarship is a resounding – no! That is not to say that LAE hasn’t provided some important insights and that the principle of efficiency, often tied to the norms of predictability and certainty, is not an important part of the normative basis of contract law. A brief review of the basic contributions of LAE to contract scholarship is in order.

First, LAE takes an almost exclusive ex ante (at the time of contracting) perspective of contract law and how it is and should be formulated. LAE has much less to say about ex post or post hoc analyses of contract rules and principles that are applied after contract formation. This is because LAE focuses on the core concept of freedom of contract and the lowering of transaction costs at the time of the conclusion of the contract. It generally disdains post hoc regulation or the policing of contracts. However, one must be careful in the use of these terms for temporality of a rules application may seem ex post, but its existence is considered ex ante if available at the time of contracting. For example, non-mandatory default rules (which make up the bulk of contract law) apply ex post to fill in gaps in a contract. But, in LAE the default rules allow for the parties’ at the ex ante stage to make a more complete contracts.

Second, in incomplete contract theory the completeness of a contract is assessed by a combination of the express terms and default rules. The recognition that contracts are always incomplete and that this incompleteness actually increases the efficiency of contracts if contract law provides efficient default rules. This is why the efficiency of default rules is a major focus of LAE. The use of economics to test the efficiency of existing rules and replacing them with efficient ones, whether attainable or not, is a laudable and legitimate goal.

Third, another function of contract law, according to LAE, is to encourage efficient breach or deter inefficient performance. This idea of efficient breach is one of the most controversial concepts in the LAE of contract law. The idea of efficient breach is often viewed as immoral, especially in Europe. Steven Shavell suggests otherwise – that breach may often be seen as moral, once one appreciates that contracts are incompletely detailed agreements and that breach may be committed due to problematic contingencies that were not explicitly addressed by the governing contracts. In other words, it is a mistake generally to treat a

breach as a violation of a promise that was intended to cover the particular contingency that eventuated. Yet it is manifest that legal systems ordinarily do allow breach – the law usually permits breach if the offending party pays damages – and it is commonplace that breach occurs. Thus, a tension exists between the felt sense that wrong has been done when contracts are broken and the actual operation of the law. Breach may be seen as moral once one appreciates that contracts are incompletely detailed agreements and that breach may be committed when contingencies are not explicitly addressed in the governing contracts.\textsuperscript{32}

The problem with Shavell's morality of efficient breach is that breaches cannot be neatly divided between efficient and non-efficient ones. It is premised on the idea that the non-breaching party can be made whole through the payment of damages. However, it does not actually require the non-breaching party be made whole under Kaldor-Hicks criterion but only that the surplus gained from breaching the contract is greater than the loss sustained by the non-breaching party. Also, even if an attempt is made to pay damages to make the other party whole damages are almost always undercompensatory since contract damages fail to capture all of the harm caused by breach, such as loss of productivity, inconvenience, emotional distress, and negative, reputational effects. Also, even if efficient breach makes sense in short-term discrete contracts, it loses its plausibility in long-term relational contracts where efficiency of breach is even more difficult to quantify and where thick relational norms, such as trust, flexibility, and duty to re-negotiate play important roles in holding the contractual relationship together.

Fourth, many of the insights of LAE are tied to the reduction of transaction costs by developing default rules that would efficiently fill in gaps in contracts thus, lowering transactions costs at the front-end (negotiation and drafting of contracts). A classical example is the 1854 case of \textit{Hadley v Baxendale},\textsuperscript{33} which established the rule that a person is not entitled to consequential damages when those damages are not reasonably foreseeable. This moved common law damages from strict or absolute liability for damages to recovery for only reasonably foreseeable damages. This is deemed to be the more efficient rule since it incentives one party to share internal information in order to expand recoverable damages. This allows the other party, often the more efficient insurer to take precautions to prevent breach or to minimize its payment of damages. LAE highlights the \textit{insurance function} (intimately related to contracts' planning function) of contract as risk allocation devices, with contract law's default rules assigning unexpressed risk allocations to the most efficient insurers.

There have been numerous critiques of LAE and the explanatory power of the efficiency principle. Professor Ian Macneil, the father of American \textit{relational contract theory}, questioned the explanatory power of LAE across the breadth of

\textsuperscript{32} ibid, 1569-1570.

\textsuperscript{33} \textit{Hadley v Baxendale} [1854] EWHC J70, (1854) 156 ER 145.
transactional-types of contracts, especially regarding relational-types of contracts. Macneil noted that many contractual concepts do not work as efficiently in long-term and relational contracts. For example, at the ‘extreme transactional pole’, the subject matter is a ‘simple, monetizable economic (type of) exchange’.34

At the ‘extreme relational pole’, the subject matter includes ‘complex personal non-economic satisfactions’. The increased duration and complexity of many of today’s relational contracts makes efficiency valuations more difficult to determine.

The behavioral law and economics (BLAE) school of thought generally is traced to a 1998 article by Christine Jolls, Cass Sunstein, and Richard Thaler that challenges the assumptions of LAE, borrowing from the literature on behavioral decision theory from the field of psychology.35 It should be noted that the article did not seek to displace LAE but was meant to improve LAE by heightening its ability to predict human actions through the loosening of the assumptions behind the rational choice theory. BLAE shows that human decision-makers are characterized as quasi-rational with bounded rationality, bounded self-interest, and bounded willpower. Cass Sunstein has argued: ‘human preferences and values are constructed rather than elicited by social situations’.36 Just as BLAE seeks to add additional dimensions to the rational person to bring the economic model closer to the real quasi-rational human actor with her cognitive shortcomings (biases), as well as emotions. In fact, it was inevitable that economic modeling of the human condition would reach a point that it would evolve to include behavioral (psychological) and empirical insights.

A more fundamental critique of LAE is its assumption that contracts are an expression of pure freedom of contract and, therefore, should be strictly enforced. The linchpin of this argument is that the contracting parties are acting rationally with full information, and, as such, are the best evaluators of the value of the exchange and the most able to allocate risks to the most efficient insurer. However, a more realistic assessment of contracting is that contracts are often not the products of pure freedom of contact due to the existence of informational and bargaining power asymmetries. Given this reality, contracting parties’ preferences are exogenously influenced and true consent is often a façade given the asymmetries and the parties bounded rationality. One scholar has described contract law as a body of exceptions to freedom of contract.37 But, this is a false premise since the great bulk of contract law is facilitative and not regulatory.

Contracts are inherently Pareto efficient since both parties obtain a net

benefit at least based on their \textit{ex ante} evaluations. That is, parties to contract that is a product of voluntary consent expect the outcome will be benefit enhancing. The issue is what is meant by voluntary? And, what is meant be consent? Is consenting a uniform construct or does it mean different things in different contexts? In the idealized model of the ‘horse trade’ where the parties negotiate face-to-face and immediately exchange a horse for money true consent is realized. But, in the standard form contract provided by a merchant to a consumer who signs it unread on a take it or leave it basis is this also true consent? The law needs to recognize different levels of consent and determine what level of consent is needed for a given type of contract. For example, in the Internet age, consent means little more than the opportunity to read.\textsuperscript{38}

Another flaw in LAE analysis is the assumption that people purely work in their own self-interest. It is more likely that many persons employ a ‘bounded self-interest’ in that they process and are influenced by perceptions of fairness. In fact, parties often act against their own narrowly defined economic interests, by renegotiation of contracts, not enforcing minor breaches in the contract, and believe that by acting fairly they will benefit from reciprocal fairness in the future. If they are not motivated to act fairly, they generally, at least, want to be viewed as acting fairly. This acting fairly is viewed as self-interested because it may produce positive reputational effects and result in reciprocal responses in the future. Lisa Bernstein also notes the importance of non-legal sanctions like reputational effects.\textsuperscript{39} The power of reputational effects is especially strong in the context of a closely-knit industry with a thick relational structure.

The next section will discuss the pseudo-tension between freedom (facilitation) and paternalism (regulation), and how LAE and BLAE may offer insight into resolving this tension.

\textbf{1. Freedom and Paternalism}

Two contract principles underscore free markets – freedom to contract and freedom from contract. Freedom to and from contract means that individuals should be allowed to exchange their entitlements free from government restrictions. Both forced transfers through required contract terms (freedom to contract) and prohibited transfers where certain contract terms are prohibited by public policy (freedom from contract) frustrate the price system and erode efficiency. The importance of freedom of contract as protecting the parties \textit{ex ante} preferences is a core tenet of LAE that leads to a presumption against


governmental intervention into the substance of private agreements.

In the often-discussed tension between freedom and paternalism, the question should not be framed as a contest between the two. The question should be what justifies limiting a person’s freedom in order to protect that person’s interests? This is a question in which an LAE has provided insight. If paternalism is justified, how is it best implemented? However, to answer this question LAE scholars need to better confront the problems of asymmetrical information and distributive justice in different contracting scenarios. For example, if inefficient contracting exists should the law intervene to improve contractual efficiency? How does the core concept of consent as the linchpin of contract enforcement be understood in cases of asymmetrical bargaining power and asymmetrical information? Can efficiency be reconciled with distributive justice in some scenarios? Can the efficiency of distributive justice be recognized when different distributions create lesser or greater net welfare?

In the past, LAE has been deficient in dealing with the existence of values other than efficiency. The LAE literature has supported certain types of interventions based upon justice or paternalism by reframing them in terms of efficiency or simply avoiding the use of words like justice or paternalism, when a more honest approach would be to ‘tweak’ the normative assumptions of neoclassical economics.40

There is not one but numerous LAE approaches, especially in the area of normative economics, with some analysis highly critical of intervention or paternalism and others finding a place for certain types of regulatory intervention.

The more that a contract is a product of voluntary consent based upon a broad view of the private autonomy of a rational, fully informed actor, the closer and more predictive the economic person of rational choice theory will be as to the efficiency of contracts, and the greater the argument against regulation internal to contract law or by means of government intervention. However, the further one of the parties is from the above model the stronger the argument for intervention into freedom of contract.

Thus, paternalism-fairness is not always an anathema to freedom of contract-efficiency. Interventionism ex ante may lead to a more efficient contract or performance outcome. This argument is difficult to make under mainstream economics because the guiding principle is that individuals are the best evaluators of their interests and are best able to protect themselves, given that they are rational actors with purely endogenous, a priori set of preferences. Thus, if allowed they will contract around any paternalistic contract doctrine if they deem it is against their self-interest.

BLAE can help make economic analysis more predictive of real world behavior. An example of this is the realization that self-interest often includes utility calculations related to the interests of the other party – business-linked

40 P. Cserne, n 37 above, 29.
altruism is often efficient in certain situations – reputation and goodwill, relation building, and deterring opportunistic breach. This is where BLAE can provide insight and where the notions of ‘nudge’ and ‘debiasing’ seek to address. But, how can nudging or debiasing be made most efficient? This is where empirical legal studies can provide insight.

The complexity of contracts is not just in their incompleteness, but that their formation and performance are embedded in a context where rationality is bounded; non-legal sanctions, such as reputation effects, may be powerful; and the thickness of some contractual relationships create a normative matrix that includes trust, intra-contract altruism, and the expectation of renegotiation. It may be that different rules are efficient in different contractual settings. BLAE shows that some types of transaction costs are not always foreseeable or calculable because transactional players are irrational by nature. This is what has actually happened in the common law of contracts with a shift from formalism to contextualism and from a general body of contract law to a more nuanced contract law combining general principles with an increased body of specialized rules.

Economics yields rich insights into the incentive effects of laws, which society typically enacts to induce desirable behavior. A positive view of the relationship between LAE and BLAE is one that sees EAL as vision and BLAE as method – a way of nudging LAE in the right direction in making law more efficient. Normative LAE can be viewed as a utopian goal or as serving law’s expressive function, while BLAE can be seen as a method of moving toward that goal through its descriptive understanding of human behavior. But, in the end, beyond very simple contracting, contracts and contract law is too complex to be explained by a single efficiency principle. Finally, given the array of different contract-types, including thick contractual relationships (joint venture, long-term supply contracts, alliances), efficiency is one of numerous values found in the normative composite that are the foundation of contract law.

In the end, legal scholarship is or needs to evolve using all three approaches – economic modeling, psychological-based decision theory, and empirical analysis. Each approach has their benefits, but, as importantly, the researcher must be fully aware of their shortcomings. Together the different methodologies can be used to replicate each other’s insights or to question the findings of a given study within one of the approaches. Together they provide a more holistic accounting of the rationales for contract law rules and a more holistic understanding of human actors working within a market economy.

V. Concluding Remarks

Steven Smith in his excellent monograph, *Contract Theory*, maps out the minimal requirements in which to measure a theory of contract as being: fit, coherence, morality and transparency. First, any theory of contract law must fit the existing areas of contract law. It must mark out the boundaries of what is contract and what is contract law? A theory of contract fails if it fails to explain major areas of the law. Is what people think of contract law explained by the theory? Second, the theory must show contract as a coherent body of law. Does the theory show contract law as being unified? Can a theory or any single principle, such as promise or efficiency explain all of contract law’s different parts?

Third, in the words of Professor Smith, ‘a theory of law is better if it portrays the law as morally justified’. From an internal perspective, law must be linked to morality in order to be viewed as a legitimate authority. Legal philosopher Ronald Dworkin, whose interpretive theory of law requires the judge to find interpretations that best fit all of contract law, is an example of the strongest version of the morality criterion. If a rule interpretation fits the overall body of law then it is morally justified. A weaker form of morality and law is functionalism or instrumentalism, which asks: Does a rule, or rule application, serve their intended functions?

Fourth, ‘law is transparent to the extent that the reasons legal actors give for doing what they do are there real reasons’. The American legal realists of the 1930s challenged the transparency of law through their rule skepticism and the critical legal theorists of the 1980-1990s saw law as neither objective nor impartial.

Karl Llewellyn, the founder of American realism and the jurisprudence that was able to apply his thinking as the Reporter of the Uniform Commercial Code and the writer of Art 2’s sale of goods, rejected the possibility of a uniform theory of contract law. Instead, he advanced the idea of transaction-types. And yet, numerous unified theories of contract law have been posed and should not be disregarded out of hand. In Llewellyn’s pragmatism all may have explanatory power for a given transaction-type. It can be assumed that no grand, unified theory exists or can exist. Therefore the coherence requirement is satisfied when any theory explains most of the core elements of the field of contract law. Legal philosopher Brian Bix noted that while no single theory can explain all of contracts, contract law might have a ‘unitary essence’.

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43 ibid.
45 S.A. Smith, n 42 above.
48 B. Bix, ‘The Promise and Problems of Universal, General Theories of Contract Law’
plausible choice would be contract as promise-based, but that does not get us very far.

For if Llewellyn is right, and I think he is, the explanatory powers of different theories of contract law is rooted in the context in which they are applied. What may be an efficient rule for one transaction-type or in a given context may be inefficient in another. For example, American law has three breaches of performance standards – the prefect tender rule or any breach rule in the Uniform Commercial Code, the substantial performance doctrine in the common law, and the Convention on Contracts for the International Sale of Goods’ fundamental breach rule. A strong argument can be made that these diverse breach rules are all efficient given their context.

In the end, role of contracts is relatively simple. It helps enforce cooperation between parties. The role of contract law is to fill in gaps in the contract and regulate impermissible terms. Impermissible terms may be the result of agreements that are not a product of consent (fraud, coercion) or that produce negative externalities or spillover effects (negative effects on non-contracting parties from a contractual agreement), such as illegal contracts.

A key objection to LAE lies in the perceived inconsistency of normative economic analysis and law’s traditional focus on justice and fairness. In contract law, default rules should be both fair and efficient. If there is a divergence then it would be best to side with efficiency as fair default rules do no prevent the making of unfair contracts and parties would have to incur transaction costs to avoid inefficient default rules.

The fact that there is no unified theory of contract law, nor should there be, is a testament to its complexity and the complexity of its subject. The different influences that impact the formation and application of contract law makes it, along with other legal concepts, such as agency and trust law, one of the more flexible constructs in law. It is the flexibility of the contract construct, with its myriad of underlying principles – freedom, justice, morality, and efficiency that allows contract law to adjust to a rapidly changing society. The new discoveries for which contract law will need to respond are already upon us in the share economy, digital content regulation, and the continuing commodification of information. Contract law and the application of contract rules – due to their complexity and dynamism – can only be explained by a normative composite including morality, trust, and efficiency, among other norms.
On Abuse of Rights and Judicial Creativity

Nicolò Lipari

Abstract

The abuse of rights doctrine, which has received renewed attention in the judicial and scholarly debates, raises the fundamental tension between the formal attribution of a right and the concrete exercise of that right. In this article, the Author argues that the abuse of rights paradigm should not be reduced to asking only whether conduct is legal or illegal. That divide is simplistic, because any legal entitlement may be used as a screen to conceal arbitrary (‘abusive’) behavior, thus unreasonably impairing others’ legitimate expectations. Moving beyond the distinction between common-law and civil-law traditions, the Author vigorously defends the autonomy of judges, highlighting that the art of interpreting the law always entails a certain degree of creativity, to be exercised with the utmost rigor.


The abuse of rights doctrine, which has recently returned to the judicial and scholarly spotlight, is a paradigm (or at least a symptom) of the growing
jurisdictionalization of today’s legal environment.\textsuperscript{2} That development has shifted legal analysis from the origin of norms to their actual use as a function of what has been termed the ‘legality of the case’.\textsuperscript{3} Because the abuse of rights doctrine focuses on the application of norms to facts, it can blend facts and norms to foster ethics and shared values in a way that would be impossible if one were to focus only on the norms in the abstract. In the crucible of decision-making, once facts and norms are blended together it is impossible to restore the precise identities of the original elements as they were before the merger.

It has been noted, quite appropriately, that the wavering attention towards the ‘abuse of rights’ formula – a flexible tool enabling lawyers to introduce equitable instances into a system made of formally posited prescriptions – is linked to periods in history characterized by a widespread quest for anti-formalistic methodological approaches.\textsuperscript{4} The argumentative process whereby, through interpretation, the deontic status of a conduct is reversed (eg, by limiting the exercise of a formally allowed freedom) is the clear byproduct of an anti-formalistic methodology. Once rules are considered inherently limited by principles that legitimize their application to concrete problems, the law breaks the crust of formalism and meets reality, despite the fact that those principles, at certain times in history (especially the ones we live in), may appear to be conflicting, immeasurable, indefinite.\textsuperscript{5}

\textsuperscript{2} On the general theory implications, see N. Lipari, ‘I civilisti e la certezza del diritto’ Rivista di diritto e procedura civile, 115 (2015). Some commentators have doubted the jurisdictionalization of the law. See, eg, C. Castronovo, Eclissi del diritto civile (Milano: Giuffrè, 2015), 87, speaking of ‘creative courts and submissive scholars’, and maintaining that ‘values such as solidarity, substantial equality, social function, protection of the human being reveal themselves as deforming mirrors of otherwise uncomplicated and inherently coherent private law concepts’. More recently, see L. Ferrajoli, ‘Contrario a giurisprudenza creativa’ Questione giustizia, 2016, who (§ 6) contests any form of equitable assessment assuming that ‘what is evaluated, understood and judged is not the principle, but the individual and specific features of the case under scrutiny’.

\textsuperscript{3} See F. Viola ‘La legalità del caso’ La Corte costituzionale nella costruzione dell’ordinamento attuale, I, Principi fondamentali, Proceedings of the 2\textsuperscript{nd} SISDiC National Congress, Capri 18-20 April 2006 (Napoli: Edizioni Scientifiche Italiane, 2007), 315.


\textsuperscript{5} Obviously, such an approach may give rise to doubts and criticism. See, for all, A. Gentili,
As a result, abuse of rights should be studied as the paradigm of lawyerly reflection as practical science. And it should not be surprising that courts, even if immersed in a wholly different context, will keep on construing their decisions on the basis of well-established paradigms. If we look at the reasoning in the Renault case, for example, we can appreciate the effort made by the Supreme Court in supplanting what the Court itself called the ‘formal attributive frame of a right’, when it subjected an apparently clear contract clause to strict constitutional scrutiny. As always happens when a revolution of ideas occurs, in order for an apparently subversive outcome to be more easily accepted, there is a tendency to explain it as the natural development of deep-rooted and shared concepts. In the Renault case, the Court tried to explain and justify an unprecedented conclusion by making it appear to be the inevitable consequence of a coherent stream of previous decisions. Such an approach is not new at all. Indeed, the more a judgment is placed within a conventional frame of argument, the more likely it will gain acceptance. The Court attempted to follow this pattern in the Meroni case, which endorsed the idea that a creditor’s expectation could be impaired by a third party, and not only by its debtor. The Court did the same again when it finally concluded that the infringement of a ‘legitimate interest’ – and not only that of a ‘subjective right’ – could constitute the basis for a damages action. In both instances, the Supreme Court stressed the signs of continuity instead of those signaling a sweeping change. The legal system never takes sudden diversions; it always evolves along a stream of continuity, which needs to be carefully explained.

II. The Essential Role of Courts, Beyond the Common Law/Civil Law Divide. From *Jus Positum* to *Jus in Fieri*: The Paradigmatic Role of the Abuse of Rights Doctrine. Pointlessness of Seeking a Formal Legislative Ban on Abusive Behaviors

What we need is a profound reconsideration (without any fear) of the role of judges in applying the law. One possibility is to reject the outdated...

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6 See the formally impeccable remarks by F. Addis, *Sull’excursus giurisprudenziale del ‘caso Renault’* in 1 above, 245.

7 A. Gambaro, ‘Abuso del diritto, II, Diritto comparato e straniero’ *Enciclopedia giuridica* (Roma: Treccani 1988), I, 2, highlights that the skepticism towards the abuse of rights doctrine reflects the concern that judges not be eventually vested with too much power. Moreover, E. Navarretta, ‘Il diritto non iure e l’abuso del diritto’, in N. Lipari and P. Rescigno eds, *Diritto civile, IV, Attuazione e tutela dei diritti, III, La responsabilità e il danno* (Milano: Giuffrè, 2009), 260, rightly observes that the power entrusted to courts, according to the abuse of rights doctrine, should not be considered of an extra-juridical nature, because it is the essence of decision-making to assess the conduct ‘through evaluative parameters capable of intercepting the axiological strength of the sets of interests at stake’. Otherwise, it has no less rightly been noted...
presumption that the absence of a theory on abuse of rights under the common law (as well as classical Roman law) is explained by the very nature of the interpretative tools used in that system, whereas in other systems black-letter law is what severely circumscribes the horizon of relevant sources. The abuse of rights doctrine clarifies that the ‘subsumption’ process, the merely logical application of a given norm, is no longer, in contemporary legal thinking, the most suitable method for detecting the applicable law.

In checking whether a claim is well-founded or conduct is lawful, the judge allocates rights and duties, and does it by looking not at pre-established, abstract models of subjective rights, but at the peculiar features of the case.

It is widely accepted, witnessing a substantial move away from legal positivism, that the abuse of rights doctrine exists at the intersection of formal legal equality and the interpreter’s power to question it: a sort of ‘super-legality concurring and dominating formal legitimacy, if not a return to natural law’.

that ‘the abuse of rights is by-and-large the product of the operation of (different) intertwined legal sources within a single system’: thus R. Sacco, ‘L’esercizio e l’abuso del diritto’, in Id, Trattato di diritto civile, La parte generale del diritto civile, Il diritto soggettivo (Torino: Utet, 2001), II, 320. For the idea that the power to sanction an abuse was amongst the judge’s prerogatives see P. Rescigno, ‘L’abuso del diritto’ Rivista di diritto civile, 213 (1965). In my opinion, the problem’s scope should not be restrained to the abuse of rights. In this respect, always vivid is the warning by L. Mengoni, Ermenneutica e dogmatica giuridica (Milano: Giuffrè, 1996), 89, according to whom it is necessary to avoid that, in applying the law, there would ‘remain irrational traces of non-cognitive elements originating from the judge’s pre-comprehension’. I cannot tackle here the issue of the intimate connection between the new role of judges and the function of scholarship as a source of law: I can only refer to N. Lipari, ‘Dottrina e giurisprudenza quali fonti integrate del diritto’ Rivista trimestrale del diritto e procedura civile, 1 (2017). For a significant analysis see P.G. Monateri, ‘Abuso del diritto e simmetria della proprietà (un saggio di Comparative Law and Economics)’, in G. Furgiuele ed, L’abuso del diritto. Diritto privato 1997 (Padova: Cedam, 1998), 93.

Likewise, see A. Gambaro, Abuso del diritto n 7 above, 2. For an account of the reasons which led the Italian legislature not to codify a clear-cut ban on abuse of rights, see V. Giorgianni, L’abuso del diritto nella teoria della norma giuridica (Milano: Giuffrè, 1963), 5. See S. Pugliatti, ‘Libro della proprietà’, in M. D’Amelio ed, Commentario al codice civile (Firenze: Sansoni, 1942), 140, on the pointlessness of a specific rule prohibiting abuse of rights.


The abuse of rights doctrine frees the judge (who must always start from the *jus positum* and build on it) from the pretentious idea that he is subject to an unalterable, pre-established meaning of a precept.

Our legal system has endured a profound transformation (actually, a nebulization process), as its sources have increased in number and complexity. Such a transformation is furthered through the constitutionalization of hermeneutics, which undoubtedly puts the judge at the center of the stage. All this has facilitated the emergence of doctrines such as the abuse of rights. The criteria utilized by judges in filling the ‘spread between strict law and real law’ need to be acceptable both in theoretical and in social terms, thus showing one of the essential features of contemporary legal thinking: a *jus* constantly *in fieri*, not restrained by the formalities of a single prescription.

The role of the interpreter being necessarily linked to a plurality of factors, it is absolutely irrelevant whether the law explicitly prohibits abuse of rights. This is why I deem unimportant, except for its symbolic value, the fact that the abuse of right doctrine has been formally recognized by Art 54 of the Charter of Fundamental Rights of the European Union. The abuse of rights principle,

Gualazzini, ‘Abuso del diritto, diritto intermedio’ *Enciclopedia del diritto* (Milano: Giuffrè 1958), I, 163. As to the relationship between law and ethics, see G. Pino, *Il diritto e il suo rovescio* n 4 above, 45.

13 Thus A. Gentili, ‘Abuso del diritto, giurisprudenza tributaria e categorie civilistiche’ *Ianus*, 10 (2009). See R. Sacco, n 7 above, 310, employing the ‘de-qualification’ criterion. Two opposite ways of conceiving the law are here in conflict. Those who reject the idea that an abuse of rights may actually occur, consider the phrase an ‘oxymoron’ (M. Orlandi, ‘Contro l’abuso del diritto’, in S. Pagliantini ed, *Abuso del diritto e buona fede nei contratti* n 1 above, 99). On the other side, those who believe that any prescriptive norm can be understood solely in connection with the principles, maintain that the formal attribution of a right should never be considered conclusive, as it is yet to be ascertained whether its exercise is in fact consistent with the principles governing the overall network of relevant relationships. Though referred to a different historical context, see P. Rescigno, *L’abuso del diritto* n 11 above, 129, highlighting that the abuse of rights doctrine brings about a reaction against the ‘mounting de-humanization of legal relationships’. Such a need has become even more evident today. Lawyers would give up their fundamental mandate if, in this very moment of great inequalities and dramatic conflicts, they confined themselves, in the name of strict formalism, to the mere ratification of decisions taken elsewhere on the grounds of power relations. The positivistic attribution of a right is always a starting point in view of the realization of an interest that inevitably implies a plurality of subjects beyond the one who, of that right, is identified as the holder. In favor of a ‘legislation by principles’, see S. Rodotà, ‘Ideologie e tecniche della riforma del diritto civile’ *Rivista del diritto commerciale*, 83 (1967).

14 Art 54 (whose text is basically symmetrical to that of Art 17 of The European Convention on Human Rights, and is recalled today by Art 1 of the EU Treaty, as amended by the Lisbon Treaty, ratified in Italy through legge 2 August 2008 no 138) reads as follows: ‘Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein’. It is hard to imagine that a court, called on to balance a conflict of such kind, will resort to different argumetative techniques based on whether it has to apply this very provision or another. In favor of a differentiated approach, justifying a different interpretive methodology at the European level, see F. Galgano, ‘Qui suo iure abutitur neminem laedit’ n 1 above, 319. Trenchant R. Sacco, n 7 above, 317: ‘in
inevitably projected into reality, evades all attempts of formalization.\textsuperscript{15} From this point of view, it makes no difference whether the abuse is sanctioned by a legislative text,\textsuperscript{16} because – as correctly noted – the abuse of rights doctrine mirrors ‘the very history of the law trying to measure itself (…) as a whole of ‘reasons’ that coexist within a system’.\textsuperscript{17} Taking the legal system as a whole, it is unavoidable that the concrete exercise of a formally attributed right might reveal itself to be incompatible with the fundamental value for the fulfillment of which that right was in the first place granted and, hence, ensured legal protection.


\textsuperscript{16} A growing number of national jurisdictions are recognizing by statute the abuse of rights doctrine: Germany (§ 226 BGB), Portugal (Art 334 Civil Code), Switzerland (Art 2 Civil Code), Greece (Art 281 Civil Code and Art 25, § 3, of the 1975 Constitution), The Netherlands (Art 13 Civil Code), Spain (Art 7 Código Civil: Título Preliminar). Generally, see M. Gestri, \textit{Abuso del diritto e frode alla legge nell'ordinamento comunitario} (Milano: Giuffrè, 2003), 24; G. Vettori, ‘L’abuso del diritto. Distingue frequenti’ \textit{Obbligazioni e contratti}, 168 (2010).

\textsuperscript{17} Thus, clearly, U. Breccia, ‘L’abuso del diritto’, in G. Furgiuele ed, \textit{L'abuso del diritto} n 7 above, 84.

\textsuperscript{18} U. Breccia, n 17 above, 5. For an account on the different question pertaining to the ‘abuse of freedom of contract’, see R. Sacco, ‘L’abuso della libertà contrattuale’, in G. Furgiuele ed, \textit{L'abuso del diritto} n 7 above, 217. Hence, outside the scope of the general perspective take in this article are also the hypotheses related to consumers contracts based on Art 33 of the Italian consumption code (see F. Astone, ‘L’abuso del diritto in materia contrattuale. Limiti e controlli all’esercizio della libertà contrattuale’ \textit{Giurisprudenza di merito}, 8 (2007)), the law on asymmetrical business contracts (see F. Macario, ‘Abuso di autonomia negoziale e disciplina dei contratti tra imprese: verso una nuova clausola generale?’ \textit{Rivista di diritto civile}, 663 (2005),
on the assumption that any right, formally recognized in abstract terms, should always face the reality of its concrete application in specific contexts, because in some instances that right could be used as a screen to conceal arbitrary behaviors or to introduce into the system such weighty negative effects as to justify a limitation on the ability to exercise the right.

Abuse of right is becoming more commonplace, and therefore the issues raised by the doctrine cannot be dismissed as exceptional. Abuse of right is needed more and more frequently to deal with cases in which different interests intertwine, each susceptible of being qualified in terms of freedom or duty, hence raising attributive problems when they come to a crossing point. Despite the different formulas utilized by legal scholars, the abuse of rights paradigm should not be reduced to the area of unlawfulness or illegality, because an abuse is never referable to a single, abstract scheme; the actual way in which a right is exercised ought to always be weighed against correlated interests, which are seldom definable ex ante.

Undoubtedly, the elasticity and vagueness of the abuse of right doctrine, the flexibility of the relationship between a rule’s attributive content and the actual exercise of the right stemming therefrom, underscore the importance of in particular legge 18 June 1998 no 192, G. Sbrisà, ‘Controllo contrattuale esterno, direzione unitaria e abuso di dipendenza economica’ Contratto e impresa, 815 (2015)) A. M. Benedetti et al, I ritardi di pagamento nelle transazioni commerciali. Profili sostanziali e processuali (Torino: Giappichelli, 2003), 4, there an explicit reference to the conception of abuse). More in general, see S. Pugliatti, ‘Esercizio del diritto, diritto privato’ Enciclopedia del diritto (Milano: Giuffrè, 1966), XV, 622; and also V. Frosini, ‘Diritto soggettivo’ Novissimo Digesto italiano (Torino: Utet, 1960), V, 1049.

19 R. Sacco, L’esercizio e l’abuso del diritto n 7 above, 316, rightly observes, in the context of a thorough comparative analysis, that an abuse is usually sanctioned because an ‘exclusive intent to harm’ was detected, or the infringement of public morality, or an exercise departing from the right’s inner function, or a situation in which the importance of the sacrificed interest outweighs the one related to the right being exercised.


22 See B. Celano, ‘Principi, regole, autorità’ Europa e diritto privato, 1081 (2006), who described a typical abuse of right situation as a separation between two assessments: the one in abstracto, and the other in concreto. See also B. Celano, ‘Come deve essere la disciplina costituzionale dei diritti’, in S. Pozzolo ed, La legge e i diritti (Torino: Giappichelli, 2002), 89.

23 Thus U. Natoli, ‘Note preliminari ad una teoria dell’abuso del diritto nell’ordinamento giuridico italiano’ Rivista trimestrale del diritto e procedura civile, 18 (1958).

adequate argumentation on the part of the interpreter, whose viability can be assessed only with regard to a given social environment. In this respect, one ought to keep in mind that the legitimization of legality should not be assumed as a part of a self-sufficient rationality, morally neutral, inherent in the form of the law. The interpreter’s discretion is especially apparent because the law today arises from interaction between the legal system and its environment, where the moral-cultural sphere plays an essential role.

Scholars seem to agree, albeit with some reservations, on the importance of argumentation in the application of the law. Indeed, certain authors, though conceiving of argumentation as a formal source of objective law, end up sharing the most rigorous frontiers of deductivism, that the very idea of ‘judicial creativity’ should be sharply rejected. Others, concerned with preserving the certainty of law and the judges’ sole obedience to formal law, try to distinguish between different argumentative forms.

Personally, I am persuaded that case law should be included among the sources of law. And I do not believe that a ‘creationist’ conception of legal argumentation is incompatible with the rule of law (état de droit) paradigm. Without lingering now on a theme that is too vast to be exhaustively dealt with here, it nonetheless needs to be emphasized that the rule of law does, of course, impose limits on the legal system, but this does not mean that the law ought to

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25 J. Habermas, Morale, diritto, politica (Torino: Einaudi, 1992), 16.
27 See A. Gentili, Il diritto come discorso n 5 above, 3.
29 Thus, L. Ferrajoli, Contro la giurisprudenza creativa n 2 above, §§ 5 and 6.
30 Far in times but probably not yet sufficiently metabolized are the lucid reflections by L. Lombardi Vallauri, Saggio sul diritto giurisprudenziale (Milano: Giuffrè, 1967), 371, who spoke of ‘inevitable courts’ creativity’. Before that, see G. Capograssi, Il problema della scienza del diritto (Roma: Giuffrè, 1939), now in Opere (Milano: Giuffrè, 1959), II, 379, who maintained that the legal science (conceived of in a broad sense as a reflection on the legal experience, hence including court opinions) is ‘the only true source of law’ (385). On this point, I allow myself to refer to N. Lipari, Dottrina e giurisprudenza quali fonti integrate del diritto n 7 above, 1; see, also, Id, ‘Introduzione’, in C. Perlindieri and L. Ruggeri eds, L’incidenza della dottrina e della giurisprudenza nel diritto dei contratti (Napoli: Edizioni Scientifiche Italiane, 2016), 11. Always enlightening the reflexions by G. Gorla, ‘Dans quelle mesure le giurisprudence et la doctrine sont-elles des sources de droit’ Foro italiano, 241 (1974), and by R. Sacco et al, ‘La dottrina, fonte del diritto’, in Id et al, Studi in memoria di Giovanni Tarello, II, Saggi teorico-giuridici (Milano: Giuffrè, 1990), 457, who correctly noted: ‘all that affects interpretation is a source’ (hence, including courts and scholars). More recently, see also V. Ferrari, ‘L’interpretazione e i canoni ermeneutici dell’esistenza’, in D. Dalfino ed, Scritti dedicati a Maurizio Converso n 28 above, 270; S. Cotta, Il diritto nell’esistenza (Milano: Giuffrè, 1991), 65, emphasizing the privileged role of case law.
31 Contra, L. Ferrajoli, n 2 above, § 6.
be considered in isolation, resistant to any interpretive incursion. Quite the contrary. If we recognize that a norm is the result of interpretation, and that interpretation draws its plausibility from the level of acceptance by the community, then it could be maintained (just like Gadamer did) that the task of interpretation is the ‘materialization of the law in a particular case’, that is, its application. And that interpretive process can be synthetized as the creative perfecting of the law.

In sum, the limitations on the ‘sovereign’ required by the rule of law need not be derived solely from formal prescriptions (which are, after all, just a series of words). Rather, they can be derived from shared values as well. Sovereignty today receives a type of legitimization based on the concrete function that it serves: that of a ‘neutral’ intermediary of a pluralist society, characterized by polytheism of values, multiplicity of beliefs, valorization of differences.

Obviously, ‘creativity’ is an ambiguous term. Courts’ creativity, just like the lawmaker’s creativity, is not the fruit of fate. Courts’ creativity, however, presupposes that the legislator has made the first move. Indeed, in a legal system such as ours, in solving a legal problem, one cannot avoid referring to a rule or to an argumentative criterion, which is always derived from a formal source. In this sense, and only in this sense, the principle expressed in Art 101 of the Italian Constitution (‘judges are subject only to the law’) can be fully understood. Such a principle not only insulates the judges from the influence of any other branch (other than the legislative one), but aims also at making explicit (in the framework of a system based on ius positum) that the application of law to facts necessarily includes a normative element, even if that normative element is not reflected in a written source. This does not mean that interpretation is completely independent of positive law. The process of identifying the ‘law’ involves the construction and detection of legal sources, and interpretation

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36 As correctly suggested, today it is not simply a matter of being able to draw a norm out of a legal precept, but rather to detect the relevant source, that is to construe the source: N. Lipari, ‘Diritto e sociologia nella crisi istituzionale del postmoderno’, in V. Ferrari et al, *Conflitti e diritti nelle società transnazionali* (Milano: Giuffrè, 2001), 667; G. Zaccaria, ‘Trasformazione
provides a necessary mediation between that law and society’s normative values.

The law should not be considered as an abstract or immutable matter. Rather, it should be studied in terms of effectiveness, that is, by allowing the interpreter to find a meaning that fits a certain historical and social context. This is the sense accompanying the Italian Constitutional Court’s constant references to the ‘living law’, which obviously do not abandon the principle that the judge is subject only to the law. The process of ascertaining what is ‘living’ inevitably implies a certain degree of creativity. That is why it could be argued – recognizing the central role of argumentation in the application of the law – that the norm is ‘posited’ not because it was formally promulgated, but because it is concretized in a specific situation. In law-application, starting from a formal precept, interpreters define the course of conduct that appears to be the most plausible, understandable, and acceptable according to the legal system as a whole, not just to a single, isolated rule.


From this perspective, the time-honored debate among private law scholars concerning the place of the abuse of rights doctrine is destined to settle down. It has been argued that ‘the abuse of rights doctrine is redundant’, but it can be

legitimately used ‘in order to fight socially harmful behaviors and fulfill higher values’.38 To be sure, the application of the abuse of rights doctrine is a symptom of the new role entrusted to courts in mediating the transition from a system based on a priori identifiable law to one in which legal statements can be appraised only when they are applied to the peculiarities of a concrete set of facts.

We have to get used to doing away with our old categories, which we have too often used as a cage within which to constrain reality.39 It has been rightly stated that the constitutionalization of the law, especially through the principle of protection of the human person as such (forming the basis of pluralism), makes the law less generalizable.40 The heterogeneity of human nature precludes, in itself, the possibility of construing a ‘subjective right’ as an abstract paradigm, applicable in any context, always in the same manner. When applying the law to a concrete case we need to reaffirm equality in diversity. From this point of view, the doubts concerning the allegedly contradictory nature of the abuse of right doctrine41 are destined to fade away, considering that the prescriptive force of a subjective right is not inherent; rather, it reveals itself at the intersection between the prescriptive and the argumentative dimensions.42 What appears to be legitimate in one case may prove abusive in another,43 because it is only through application that the prescriptive scope of the law can be uncovered.

38 In this sense R. Sacco, L'esercizio e l'abuso del diritto n 7 above, 373, but see also C. Salvi, ‘Abuso del diritto, diritto civile’ Enciclopedia giuridica (Roma: Treccani, 1988), I, 1. The same substantial conclusion reached by G. Pino, Il diritto e il suo rovescio n 4 above, 60. Besides, it should not be forgotten that, in the contemporary judicial experience, it is not just the result that matters, but the way through which it is achieved. In this light, it is crucial to recognize – and to this extent the doctrine of abuse of right seems to be the paradigm – a double discretion to judges: that of ‘the choice of the criteria of evaluation among those abstractly available (and that are not predetermined by the formula)’ and its ‘application to the concrete case’ (in this sense G. Pino, n 4 above, 56).

39 In relation to the Aristotelian idea of category and the Kantian one and regarding its impact on jurists’ way of thinking, see N. Lipari, Le categorie del diritto civile (Milano: Giuffrè, 2013), 11.

40 In very clear and convincing terms F. Viola, La legalità del caso (Napoli: Edizioni Scientifiche Italiane, 2007), 320.

41 Argument that has an authoritative heritage: see F. Santoro Passarelli, Dottrine generali del diritto civile (Napoli: Jovene, 6th ed, 1966), 77, in the view of a subjective judicial position that, by definition, cannot affect interests outside those of the parties’ relation, which is nowadays an opinion in crisis. In the same sense see L. Carraro, ‘Frammenti inediti di Dottrine generali: il rapporto giuridico’ Rivista di diritto civile, 20 (2016), according to which ‘beyond the scope of the interest for whose protection the power is conferred, the exercise of power is not abusive but impossible’.

42 See F. Viola, n 40 above, 322. With a different wording, it is recognized the need that ‘the judicial content of the subjective right shall be determined and integrated by the interpreter so that to guarantee the full compatibility with the auxiological dimension of the legal state system’ (in this sense N. Gullo, ‘L’abuso del diritto nell’ordinamento comunitario: un (timido) limite alle scelte del diritto’ Ragion pratica, 181 (2005)).

43 In the same sense, albeit starting from different grounds R. Sacco, n 7 above, 324, notes that, wherever abuse is concerned, ‘injuries to victim’s interest for sure exist. However, that interest is protected against the injury in relation to the peculiarities of the conduct of the agent’. 
Critics of the abuse of right doctrine have argued that it would be illogical, let alone illegal, to limit the exercise of a right when the right itself contains no explicit limit on its exercise. But once it has been made clear that the law should not simplistically be reduced to *jus positum*, that argument loses much of its foundation.

Any consideration of the abuse of rights doctrine is, hence, tied to the principles and values forming the basis of the legal system. In the incessant search for a balance among principles, rights, and rules, the role of judicial interpretation is of fundamental importance. And the abuse of rights doctrine is a paradigmatic example showing that powers are not given to citizens regardless of the effects that they, when exercised, will eventually produce. Rather, they implicitly contain limits precisely because their effects may end up contradicting the principle (and, therefore, the underlying value) in light of which the powers were originally granted.

I am well aware of the fact that our legal culture, influenced by positivistic models, has not yet seriously interiorized the constitutionalization of legal discourse, which construes the concept of unlawfulness in terms of violation of principles rather than of rules. If one abandons the positivistic archetypes, then such a renewed methodology should not scandalize, considering that, as it has been correctly noted, the role of courts is to determine the indeterminate. And I think it is not incorrect to maintain that principles matter more than rules, since ‘behind all rules there is always a principle’. If principles can be inferred from the Constitution, then they shall necessarily prevail over statutory law, as well as over any other lower principle simply mirroring a set of recurring rules. In other words, we should accept the idea that the law enacted by the legislator may be illegitimate, which is a concept that Hans Kelsen considered an inherently contradictory one. Judges have the power to check the constitutionality of rules, hence they are asked to adjust the content of the statutory provision to constitutional principles, notwithstanding the apparent specificity of the former and the allegedly general nature of the latter. As has been said, principles cannot be used to foresee legal consequences; principles are balanced, not applied, in

44 In this sense, instead, M. Orlandi, *Contro l’abuso del diritto* n 1 above, 147.
45 See M. Atienza and J. Ruiz Manero, ‘A uso del diritto e diritti fondamentali’, in V. Velluzzi ed, *L’abuso del diritto. Teoria, storia e ambiti disciplinari* (Pisa: Edizioni Ets, 2011), 33, who notes that there are actions that, at first sight, appear to be allowed by a permissive rule, but that then result forbidden in the name of principles that reduce the scope of the rule itself.
the sense that, on a case-by-case basis, the one that is considered the most important or the most appropriate will eventually prevail.49

Courts have often referred to the principle of solidarity embodied in Art 2 of the Constitution as shaping every interpretative process. And this is so even if, for instance, at the time when a contract was concluded the parties had in mind to regulate a completely different set of interests. According to a formalistic way of thinking, the reference to a principle outside of a contract’s original structure is deemed to surreptitiously alter the law.50 However, this is not the case when the binding strength of the living law is found beyond the formal structure of a single provision.51 This is why it is wrong to criticize the Renault case52 by saying that good faith in the execution of contracts is not what the parties had originally agreed upon; actually, the duties of good faith and fair dealing shape every negotiation from their very beginning, expressing the fundamental principle of solidarity embodied in Art 2 of the Constitution.53

Similar considerations, although in a different context characterized by a higher degree of axiological convergence, can be extended to other prominent positions such as that assumed by Norberto Bobbio who, while recognizing that not all principles can be inferred from express provisions – especially those grounded on ‘ideas and moral beliefs emerging in the society (which is in constant evolution), not yet embodied in positive law’ –, ended up accepting

50 In this sense A. Gentili, n 5 above, 467. It is by now entered into judicial awareness the idea of a proportionality among performances, which therefore leads the contract away from the principle of pacta sunt servanda: see P. Perlingieri, Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 380; Id, ‘Equilibrio normativo e principio di proporzionalità nei contratti’ Rassegna di diritto civile, 334 (2001); F. Casucci, Il sistema “proporzionale” nel diritto privato comunitario (Napoli: Edizioni Scientifiche Italiane, 2001). On the issue of justice in contracts see most recently N. Lipari, Intorno alla “giustizia” del contratto (Napoli: Editoriale scientifica, 2016).
51 It is recognized also by A. Gentili, n 5 above, 469, fn 77.
52 See supra n 1.
53 See, among many judgements, Corte di Cassazione 6 December 2012 no 21994, Contratti, 680 (2013); Corte di Cassazione 19 May 2009 no 11582, available at www.dejure.it. In recognizing the importance of the principle of solidarity in private parties’ negotiations, the role of private autonomy should not be denied, but it needs to be acknowledged that it cannot be exercised without any reference to constitutional principles. In this view, the abuse of rights doctrine takes on a general dimension. For a completely different perspective, see A. Cataudella, ‘L’uso abusivo dei principi’ Rivista di diritto civile, 761 (2014). See D. De Caria, ‘La nuova fortuna dell’abuso del diritto nella giurisprudenza di legittimità: la Cassazione sta “abusando dell’abuso”? Una riflessione sul piano costituzionale e della politica del diritto’ Giurisprudenza costituzionale, 3627 (2010). In general terms see also G. Bognetti, Costituzione economica e Corte costituzionale (Milano: Giuffrè, 1983), 251, who denies that the Constitution tends to sacrifice the individual interest for the benefit of the public and sustained that the limitation of individual economic freedoms was a by-product of later legislation and practice, contrary to the original spirit of the Constitution. To my humble opinion, this is an anti-historical way of reading the legal experience.
‘the controversial principle of the prohibition of abuse of rights’, which ‘did not emerge from this or that rule, but from the auscultation (…) of ethical and political needs typical of a certain society, against declining opinions’.54 Basically, the theorist of positivism felt the need to use unwritten values to limit written provisions, in order to ensure that solutions reflect instances and values emerging after the rule’s enactment.

Today, the same criterion requires an even greater articulation. From a practical point of view, a legal solution is likely to be accepted not only because of the inherent strength of a single provision, but due to the persuasiveness of the reasons provided by the interpreter and on the degree to which those reasons reflect widely shared values. Based on all these assumptions, the reference to general principles55 no longer fills the gaps in the system, but becomes the expression of the continuous adaptation of formal structures to ethical, social, and political principles, which are the basis of peaceful coexistence.56 The abuse of rights doctrine becomes one of the many instruments through which ‘justice pursuant to the law’ meets its own limits, but at the same time ‘justice beyond the law’ discovers its outer rules.57 Faced with the specific features of a concrete case, and outside the conditioning limitations of a methodology based on pre-confectioned circumstances (‘fattispecie’),58 we become aware of the fact that a...

54 In this sense N. Bobbio, ‘Principi generali del diritto’ Novissimo Digesto italiano (Torino: Utet, 1966), XIII, 891.
55 On these issues see, most recently, N. Lipari, ‘Intorno ai “principi generali del diritto”’, Rivista di diritto civile, 28 (2016).
56 See U. Natoli, Note preliminari ad una teoria dell’abuso del diritto n 23 above, 23. The already mentioned opinion (see n 39 above), according to which the abuse of right doctrine, despite being formally legitimate, turns out to be redundant (as basically the same results can be achieved through the general notions of civil liability law), is not, should we merely proceed on the basis of exclusively formal paradigms, referable only to that doctrine, but can be easily extended to a number of other doctrines which, more and more common in the current age of constitutionalization of private law, in which the hermeneutical process requires to bring together rules and principles. Indeed, while rules hint at institutions, principles draw attention to values; the former is mainly described by formal standards, the latter depends on a-formalistic elements. Understandably, some authors have considered ‘the prohibition of abuse of right as a path less arduous than others (…) in fighting harmful practices and enforcing high values’ (cf R. Sacco, L’esercizio e l’abuso del diritto n 7 above, 373). When recognizing that the interpreter, faced with the peculiarities of a case, is called on to weigh the underlying values against (or adapt that specific event to) a broader social context, we have abandoned the hypostasis of formalism, acknowledging that a new right has been crafted in relation to the peculiarities of the case at issue, linking together the horizon of the past with that of the system (assessed in the light of the needs and values of the society at the time of application) (thus M. Vogliotti, Tra fatto e diritto. Oltre la modernità giuridica (Torino: Giappichelli, 2007), 204).
57 See F. Viola, n 40 above, 327.
58 On this matter see N. Irti, ‘La crisi della fattispecie’ Rivista di diritto processuale, 41 (2014); Id, ‘Calcolabilità weberiana e crisi della fattispecie’ Rivista di diritto civile, 36 (2014); most recently see also Id, Un diritto incalcolabile (Torino: Giappichelli, 2016); N. Lipari, I civilisti e la certezza del diritto n 2 above, 1123. Against keeping old models see instead A. Cataudella, ‘Nota breve sulla “fattispecie”’ Rivista di diritto civile, 245 (2015). Obviously reference to general clauses excludes the individual case paradigm. It has been correctly pointed out by J. Isser,
law based on immutable forms does not exist.

V. The Sensitive Case for Argumentation. Resistance of Old Categories and the Need to Supersede Them. Argumentation as a Means to Adapt the Text to the Context

Obviously, such an approach requires the utmost rigor in developing the argumentative process. The criticized length of certain judgments handed down by the Joint Chambers of the Italian Supreme Court is probably the direct effect of the heightened level of rigor required. Evidently, if the courts were allowed to focus only on one statutory provision, their task would be much easier.

One of the difficulties is to deal with non-consolidated interpretative tools, sometimes even brand new ones; and this often causes some tensions or clashes. Moreover, it is quite common to frame the qualification process within well-known paradigms. For example, it has been argued that the abuse of rights doctrine is in a broad sense part of analogy – an analogy of a special kind, which, in setting aside a provision in abstracto applicable to a specific case, tends to apply a different rule according to its inner rationale. However, once we agree to abandon reasoning based on pre-confectioned circumstances (‘fattispecie’), the analogy assumes a different connotation, as the law actually applied is derived directly from the principles.

In the framework of a constantly evolving society it is difficult to establish, if one fails to look at the peculiarities of the concrete case at issue, why an entitlement was originally assigned to one subject. When applying the law, we either enable the holder of an entitlement to exercise his or her interest freely (as long as he or she does not betray that entitlement’s original paradigms), or we consider it interconnected with other interests directly or indirectly affected by its exercise, and leave with the judge the task of assessing, case by case, the actual scope of that right. Hence, one cannot maintain that the formal attribution of a right makes it useless – or ‘irrelevant’ – to assess how that right was actually

*Precomprensione e scelta del metodo nel processo di individuazione del diritto* (1972), Italian translation by S. Patti and G. Zaccaria (Napoli: Edizioni Scientifiche Italiane, 1983), 57, that in that case ‘the judge is disenchanted regarding the existence of a ready-made legal provision and is faced with the duty to “understand the rule in the right way”, and needs to show it in the judgment’.


60 For an attempt in this sense see N. Lipari, ‘Morte e trasfigurazione dell’analogia’ *Rivista trimestrale di diritto e procedura civile*, 1 (2011).

61 And this regardless of the habit (accepted by our legislature long time ago) of inserting in the first article of each law a sort of programmatic statement of the purposes in light of which it is assumed that it was enacted. If it was allowed a more detailed analysis of the point in this context, it will be easy to verify how the implementation ends in heavily contradicting those indications of principle.
exercised, on the ill-founded assumption that once an entitlement is granted, it is inherently unlikely to impair the interests of any counterparty. All abuse of rights cases decided by the courts demonstrate the exact opposite: in most instances, a right’s holder, convinced of having legitimately exercised a right in accordance with a formally recognized model, is eventually found to have directly affected, if not damaged, one or more counterparties.

That is why, in my opinion, the abuse of rights doctrine reflects today’s most essential feature of the legal discourse. The abuse of rights doctrine has been criticized as ‘subversive’ because ‘statutory provisions always provide the structure of the regulated case’, but ‘hardly ever tell the function of the rule’. But if we concede that formal precepts arise out of a confrontation between text and context, where the text is inevitably static and the context historically dynamic, then the argumentative application of the doctrine is unexceptional. Apart from the need – as explained above – to overcome the theory based on fattispecie, the juxtaposition of structure/function only reproduces, mutatis verbis, that of text/context, which describes the law itself, in continuous evolution. As correctly noted, if we resort to the juxtaposition between structure and function, we reintroduce the alternative between ‘static’ and ‘dynamic’, which is absurd in the legal context, because the law, by definition, can never be considered static. Even if the legislature spelled out the function pursued by means of a certain precept (and this is an attitude that more and more often characterizes the approach of our legislature), this would not modify the place and role of interpretation; the judge would nonetheless remain free to apply it also for different purposes (historically supervened or not foreseen). In any case, apart from the versatility of the term ‘function’, those precepts need to be verified in concreto, in their capacity to achieve certain goals, beyond a merely stated program. Therefore, the relationship between the structure of a statutory provision and its function in concreto cannot be limited by the fact that a precept declares the intention of achieving a certain purpose (often for purely political opportunism).

It is useless to recall in this context that there is no perceptive value to the statement, embodied in Art 12 of the preliminary rules to the Civil code (Preleggi), that interpretation shall take into consideration the ‘intention of the legislator’. Whatever that intention may be and however intention may be identified, the process of implementing the law is inevitably connected to the relationship between text and context; such a relationship reasonably leads to the supersedence of some of the traditional paradigms on which the distinction

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62 In this sense instead L. Carraro, Frammenti inediti di Dottrine generali: il rapporto giuridico n 41 above, 20.
63 In this sense A. Gentili, Il diritto come discorso n 5 above, 460.
64 See G. Giannini, ‘Struttura’ Enciclopedia filosofica Bompiani (Gallarate: Bompiani, 2006), 11, 1190.
65 See Art 12 of the preliminary rules to the Civil code (Preleggi).
between civil law countries and common law countries has been commonly based.\textsuperscript{66} We should realize that the prohibition of abuse of rights inevitably entangles law-enforcement and argumentation, despite all concerns about the degree of discretion enjoyed by interpreters.\textsuperscript{67}


If we consider the abuse of rights doctrine as a paradigm of the new role entrusted to courts in implementing the law, we cannot automatically refer it to institutions that are still understood through the lenses of the theory of \textit{fattispecie}. Paradigmatic, in this respect, is the relation between abuse of right and \textit{frode alla legge} (\textit{fraude à la loi}).\textsuperscript{68}

\begin{footnotesize}
\begin{enumerate}
\item See N. Lipari, \textit{Le fonti del diritto} n 35 above, 8, 154.
\item See G. Pino, \textit{Il diritto e il suo rovescio. Appunti sulla dottrina dell’abuso del diritto} n 4 above, 55; see also P. Comanducci, ‘Abuso del diritto e interpretazione giuridica’, in V. Veluzi ed, \textit{L’abuso del diritto. Teoria, storia e ambiti disciplinari} n 45 above, 19. It is clear that on the slippery ground of these arguments it is not possible – as instead done many times in the past – to be content with formulas synthesized in maxims, unrelated to the circumstances of the tried case. When, for example, the Supreme Court states (Corte di Cassazione 7 May 2013 no 10568, \textit{Repertorio Foro italiano}, no 11 (2013) followed by Corte di Cassazione 25 January 2016 no 1248, \textit{Foro italiano}, I, 1290 (2016)) that ‘abuse of right cannot only be found in the fact that a party of the contract behaved in a way that was unapt to protect the interests of the other party, every time the conduct pursues a lawful result through legitimate means, being instead possible whenever the holder of a subjective right, albeit without formal prohibition, exercises it in an unnecessary manner and disrespectfully of the duties of good faith and fair dealing, causing a disproportionate and unjustified sacrifice of the counterpart, and for the purpose of obtaining different and further results from those for which those powers or rights were given’, it clearly uses an ambiguous form of argumentation. On the basis of exclusively formal or logic models, it would not be easy to distinguish between a conduct unapt to protect the counterparty’s interest and another contrary to the principles of good faith and fair dealings. For an abstract evaluation of the abuse, regardless of intersubjective dynamics, see C. Restivo, \textit{Contributo ad una teoria dell’abuso del diritto} n 1 above, 184. See F. Piraino, \textit{La buona fede in senso oggettivo} n 10 above, 410 (considering abuse of right a concretization of good faith in an evaluative function). It is fundamental, in my opinion, not to stick only with a qualitative formula. See P. Rescigno, \textit{Abuso del diritto} n 11 above, 26.
\item See, most recently, M. Gestri, \textit{Abuso del diritto e frode alla legge nell’ordinamento comunitario} n 16 above, especially 54. The distinction between the level of abuse of right and that of \textit{frode alla legge} is considered marked in U. Breccia, \textit{L’abuso del diritto} n 17 above, 14. There are however some scholars who underline an alleged similarity between the purposes of the two normative techniques, assuming that both are headed to prevent an inappropriate use of legal institutions: see F. Audit, \textit{La fraude à la loi} (Paris: Dalloz, 1974), § 199; P. De Vairesles-Sonnieres, ‘Fraude à la loi’ \textit{Encyclopédie juridique Dalloz – Repertoire de droit International} (Paris: Dalloz, 1998), II, § 53. Some authors ended up even considering \textit{fraud à la loi} as a particular application of the theory of abuse of right: see L. Josserand, \textit{De l’esprit des lois et de leur relativité (théorie dite de l’abus des droits)} (Paris: Dalloz, 2nd ed, 1925), 161. M. Gestri, n 16 above, 196, maintains that in the EU legal system within the general concept of abuse of right,
Of course there is an evident connection between abuse of right and *frode alla legge*. Both doctrines tend to avoid the realization of an illegal result contrary to the principles of the legal system, even though the situation appears to be formally legitimate. However, while in the case of *frode alla legge* – which can be qualified subjectively or objectively⁶⁹ – the evasion of a legal provision is identifiable, in merely structural terms, by comparing an abstract scheme to one implemented in practice, abuse of right involves an analysis of different factors, some of which are not standardized and do not stem from the same source. What is formally legitimate may become abusive not necessarily and not only in relation to the holder’s situation, but also by reference to the impact on third parties’ interests. A comprehensive evaluation of the context leads one to define as abusive, and therefore sanctionable, a behavior that appears legitimate when viewing the text in isolation. While *frode alla legge* requires a statutory provision,⁷⁰ the abuse of rights doctrine does not. (As noted, the hermeneutical process for detecting an abuse is the same both in the legal systems expressly accounting for it and in those that are silent about it). In other words, *frode alla legge* has its own definite structure, whereas abuse of rights is grounded on very diverse reasons: a lack of interest by the right’s holder or even an intent to harm, an action not in line with objective good faith, a deep imbalance between the interest of the holder and that of the counterparties, a clear departure from the institutional purpose for which the conferral was made, and the infinite results potentially obtainable from the various combinations of these criteria or models. A legal provision favoring one or the other of such models⁷¹ would not prevent the judge, in a particular case, from detecting an abuse, for whatever reason, using an alternative model.

The distinction between *frode alla legge* and abuse of rights is signaled by the fact that legal formalism has always considered its own approach compatible

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⁷⁰ In his classic monograph L. Carraro, *Il negozio in frode alla legge* n 69 above, 143 peremptorily states that ‘the fraud is possible only with respect to cogent law’; this is an argument that cannot be reproduced with regard to cases of abuse tried in courts. Indeed, Luigi Carraro adds that the *fraud* in the tax law context is by its nature not comparable to *frode alla legge*, because what is actually evaded is ‘the interest of the State in cashing the tax payment, rather than a provision enacted to protect of a social interest’; with the consequence that the *fraud* to the tax system should be included in the category of *fraud to third parties* (173).

⁷¹ That this fact really happened is clearly illustrated in U. Breccia, *L’abus del diritto* n 17 above, 27.
with inhibiting fraudulent behavior. Any deviation from the legal precept would entail a violation, irrespective of the actual conduct of the party. This clearly no longer holds true with respect to a case of abuse of right, which by itself does not violate or evade any provision, but rather counteracts its spirit or infringes the underlying principles.

On this basis, despite the tendency of our legislature to use the phrase ‘abuse of rights’ in a generic meaning or as a synonym for law evasion, it is not possible, in my opinion, to properly ascribe to the doctrine a number of provisions affecting the tax system, in which the ‘abuse of right’ notion is often used to produce very specific effects. Rather, we should reserve the phrase ‘abuse of right’ for cases in which it is necessary to reconcile an abstract provision with the peculiarities of a case – the emblematic paradigm of the process of juridicalization of the law.

It appears to me that the suggestion to trace law-evasion (frode alla legge) back to an abuse of right does not give the judge any better interpretive tool. If anything, it increases the complexity of the qualification process: while frode alla legge emphasizes a substantial contrast with a formal rule establishing an unquestionable duty, the reference to the abuse of rights doctrine presupposes a power that, when exercised, goes beyond its inherent function. What needs to

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73 It has been noted that the use of the expression ‘abuse’ embodies a frequent phenomenon in the jurists’ argumentation, phenomenon that might be defined as an ‘institutionalization of words’, so that the persistent repetition of a linguistic expression tends to ‘form the conviction that in addition to the word also the “thing” indicated by that word exists’ (in this sense M. Taruffo, ‘Abuso del processo’ Contratto e impresa, 834 (2015)).
74 In the view of an important rereading of the role of general clauses, see most recently, E. Scoditti, ‘Concretizzare ideali di norma. Su clausole generali, giudizio di cassazione e stare decisis’ Giustizia civile, 685 (2015), who, among other things, notes (709) that ‘the general clause is not susceptible of being balanced because in the course of its concretization it meets factual circumstances only and not competing normative value too, as it happens instead in the case of constitutional principles’. It is quite possible, however, that in applying the abuse of rights doctrine, the judge, broadening the landscape to subjective spheres different from that of the right holder, ends up balancing the different interest at place. In another essay the same author assumes that the general clause is the ‘ideal of a norm’ similar to the transcendental concept of Immanuel Kant: Id, Interpretazione e clausole generali, in D. Dalfino ed, Scritti dedicati a Maurizio Converso n 28 above, 557. On the relevance of general clauses for the abuse of rights doctrine, as they are directed to promote, by virtue of their nature and aptitude to interpretative mediation, ‘the system’s ductility, already build up in accordance to models that are characterized by a formal flexibility’, see D. Messinetti, Abuso del diritto n 15 above, 9.
75 See G. Fransoni, Abuso ed elusione del diritto n 4 above, 410. It generally refers, regarding abuse in tax matters, to the ‘need to grant the respect of substantial legality’, A. Merone, Abuso ed elusione del diritto Il libro dell’anno del diritto 2016 (Roma: Treccani, 2016), 429. See L. Carraro, Il negozio in frode alla legge n 70 above, 75, who deemed impossible to trace frode alla legge back to the abuse of rights doctrine because individual freedom can never be considered a subjective right (diritto soggettivo). In the same sense see already M. Rotondi, Gli atti in frode alla legge (Torino: Unione tipografico-editrice torinese, 1911), 135.
be overcome is the logic of *fattispecie*,\(^\text{76}\) even in its broadest sense,\(^\text{77}\) otherwise we would always be faced with black-and-white alternatives – to pay or not to pay taxes – which do not give the judge the power to evaluate third parties’ interests, or (to resume the above mentioned picture of Bobbio)\(^\text{78}\) to pay attention to superseding ethical and political needs, arisen after the enactment of the legal precept.

Personally I would not worry about the tendency to use the word ‘abuse’ in a higher number of contexts. Albeit an inevitable source of confusion, its growing use is the symptom that courts are becoming aware of the need to examine the exercise of rights *in concreto*, taking into account all of the interests potentially involved. The law thus discovers that its purpose is not to impose values, but to recognize them; that pluralism does not require blind adherence to the limiting dullness of an imposed provision, but rather a normative analysis that respects the inevitable diversity of concrete situations; and that the concept of legality should hence be reconsidered, basing it on cases decided by the courts according to socially shared values.\(^\text{79}\) Only in that sense the law can rediscover its intrinsic morality and contradict the model – unfortunately still supported by many politicians – which tends to reduce it to an instrument in the hands of the ruling power.

\(^\text{76}\) F. Gallo, ‘La nuova frontiera dell’abuso del diritto in materia fiscale’ *Rassegna tributaria*, 1327 (2015), qualifies the intervention of the legislature against tax evasion (*elusione fiscale*) as directed to offer ‘a final content to abuse’. The same author has noted that the role-play, in the tax domain, between the legislator and the courts has always taken place within the framework of the logic of *fattispecie* (Id, ‘Elusione, risparmio d’imposta e frode alla legge’, in Id et al, *Studi in onore di Enrico Allorio* (Milano: Giuffrè, 1988), II, 2041.

\(^\text{77}\) G. Fransoni, n 4 above, 411, correctly notes that, in the identification of the provision, the tax regulator refers to many general concepts (‘objects’, ‘exclusive purpose of’, ‘not marginal’, ‘prevailing’) in the frame of what it calls an ‘evaluative integration’.

\(^\text{78}\) See n 56 above.

\(^\text{79}\) F. Astone, *L’abuso del diritto in materia contrattuale. Limiti e controlli all’esercizio della libertà contrattuale* n 18 above, 15 states that a ‘system based on written rules is wholly unapt to regulate societies in constant evolution, because societal data evolve in such a swift manner that the written law simply cannot follow along. Hence, good faith and abuse of rights necessarily enter into play*. 


Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective

Roberta Montinaro

Abstract

The essay is centred on the role played by private ordering in regulating the financial terms of marriage dissolution. The Italian legal scholars’ attitude regarding this issue has changed over time. It has transformed from a paternalistic perspective, mostly rejecting the spousal parties’ freedom, to a novel view that favours an expanded role for contracts to determine the economic terms of separation and divorce. This process has been prompted by the evolution of family law provisions. Private ordering in marital dissolution poses several issues. It entails the need to establish a clear divide between those aspects that can become the subject of an agreement between the spouses, on the one hand, and what is outside the realm of private ordering, on the other. Private ordering also raises concerns regarding (1) the possible condition of bounded rationality by one of the parties at the time the agreement is concluded and (2) the substantive fairness of the terms agreed upon. The paper shows that scholars tend to tackle those risks by resorting to general contract law rules and principles provided by the Italian legal system.

I. The Role of Private Ordering of Marriage in Light of the Evolution Undergone by Italian Family Law

Scholars have scrutinized the private ordering of marriage under the Italian legal system, and yet it remains highly controversial. The terms of the debate have significantly changed over time due to the evolution of family law rules since the enactment of legge 19 May 1975, no 151, which amended the family law provisions contained in the 1942 Italian Civil Code. Such change was prompted by legge 1 December 1970, no 898 (as amended by legge 6 March 1987, no 74), concerning marriage dissolution through divorce, and more recently by legge 10 November 2014, no 162 (Arts 6 and 12) on consensual resolution of litigation related to separation and divorce.

A traditional scholarly view regards marriage as a status in which the
spouses’ rights and duties are set by mandatory rules of law. Those rights and duties are therefore beyond the realm of private ordering and, as a consequence, the spouses cannot structure their lives according to their preferences. However, after the enactment of the Italian Constitution, the main features of marriage have changed. The spouses are held as equal in every respect, monetary and non-monetary (Art 29 Italian Constitution). Moreover, marriage itself is seen as a relationship between two individuals, which is aimed at enhancing their personality and boosting their fundamental rights (Art 2 Italian Constitution). The corollary of this change is the so called ‘privatization’ of family law, a term which denotes the broader role played in this field by party freedom. Indeed, within the frame prescribed by the mandatory rules of law governing marriage (Art 160 Italian Civil Code), the spouses are allowed to regulate their relationship by resorting to agreements (the so called accordi d’indirizzo; Art 140 Italian Civil Code) which, nevertheless, are not qualified as contracts.

II. The Uncertain Boundaries of Contract Under Italian Family Law

Italian scholars have generally been reluctant to resort to the concept of contract to denote the spouses’ agreements relating to the monetary aspects of their relationship. This attitude can be explained as an historical perspective that sees marriage as a status and rejects, as a corollary, party freedom in this field. The term marital contract was in use under the 1865 Italian Civil Code

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5 On the nature of those agreements, see P. Zatti, ‘Famiglia, famiglie – declinazione di un’idea. La privatizzazione del diritto di famiglia’ Famiglia, 9 (2002); M. Fortino, ‘Verso una nuova privatizzazione del diritto di famiglia nella società globale’ Rivista di diritto civile, I, 170 (2003). Indeed, under the Italian legal system the concept of contract is not wide enough to include the agreements aiming at governing the non-monetary aspects of marriage: under the Italian Civil Code a broader notion of negozio can be envisaged, a juridical act characterized by voluntariness and subject to the rules applicable to contracts, upon an assessment of their compatibility. See A.C. Jemolo, ‘La famiglia e il diritto’ Annali della facoltà giuridica di Catania, II, 38 (1948).

with regard to agreements concluded either between the spouses or between the latter and a third party, characterized by the so-called *causa familiare* the intention to settle the spouses' monetary interests related to marriage. Such term could be found in the 1942 Italian Civil Code provisions, but later was abandoned by legge no 151 of 1975, which, in amending those provisions, adopted instead a different terminology.\(^7\)

Currently, the Italian Civil Code contains specific rules regarding agreements on marital property, known as *convenzioni matrimoniali*.\(^9\) Their scope has been conceived narrower than envisaged under the former provisions. Indeed, those agreements, though qualified by the majority of scholars as contracts, are nevertheless subject to an *ad hoc* legal treatment aimed at achieving financial equality between the spouses and promoting a fair division of property at marriage dissolution. Community property is the default regime which cannot be altered either unilaterally, nor by spouses' agreements. And yet party freedom in this field is given a significant place, at least by the majority of commentators. Not only may the spouses contract out of this regime and opt for the separation of property, they may also establish a regime not recognized by the law, as long as it is consistent with the mandatory law rules (Art 210 Civil Code).\(^10\) Any agreement that modifies or varies the legal regime is not valid unless it is concluded before a notary, and it cannot alter the statutory prescriptions regarding entitlement, assets management and property division. Contrarily, agreements that regulate the duty of economic support set by the law on the wealthier spouse, which in other legal systems are included in the broad category of marital contracts,\(^11\) are not subject to a definite set of rules. Rather, they are referred to by several statutory provisions on separation and divorce proceedings.

Notably, Art 158 Italian Civil Code provides that, in separation proceedings based on the spouses' consent, the latter are allowed to agree on the terms of separation. And, in such case, the court's scrutiny is limited to the parts of the agreements regarding child custody and support, consequently entailing broad freedom of the spouses in determining the economic aspects of their relationship under separation. Nonetheless the majority of scholars have long refused to

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regard such agreements as contracts,\textsuperscript{12} though admitting that they can be deemed subject to the contract law rules regarding defects of consent and incapacity affecting one of the parties.\textsuperscript{13} Furthermore, Italian case law and scholars qualify as valid separation agreements transferring (or planning to transfer) property from one spouse to the other, in order to: fulfill the duty of maintenance set by the law on the wealthier spouse; or to compensate the other for loss in her/his earning capacity occurred during marriage (see discussion below); or to settle any economic dispute over division of marital property, etc. These agreements, more generally, may be characterized as the so-called \textit{causa familiare} mentioned above.

At the same time, Arts 4 and 5 legge no 898 of 1970 provide that the spouses may agree on both personal and financial aspects of divorce, in order to remove the divorce proceeding from the adversarial process. In such case, those terms shall be taken into consideration by the court in quantifying the post-marital support due by the wealthier spouse upon divorce.

\textbf{III. The Spousal Parties’ Freedom to Regulate Economic Support upon Marriage Dissolution}

Originally, agreements on financial support were deemed valid and binding by legal scholars and courts, but only within the limits prescribed by the mandatory provisions of law regarding such duty. And those limits were seen as stringent, in order to protect the disfavoured spouse. The duty to support a spouse during marriage (Art 143 Italian Civil Code) and upon marriage dissolution (Arts 155 Italian Civil Code and 9 legge no 898 of 1970) was conceived as an inherent and long-lasting feature of the marital relationship. It was a responsibility which could not be waived.\textsuperscript{14} Rather, it was regarded as an expression of the principle of solidarity underpinning marriage.

Indeed, this paternalistic perspective almost entirely rejected party freedom, fearing that it would exacerbate socio-economic inequality between the spouses and eventually lead to more people in need of public assistance.\textsuperscript{15} Consequently,
regulating the economic aspects of marriage and marriage dissolution was regarded as a prerogative of public ordering through mandatory operation of legal rules. Conversely, marriage-like relationships (same sex or opposite sex couples) were almost entirely governed by party freedom. Cohabitation contracts were the only means to which those couples could resort in order to regulate the monetary aspects of their relationship (entitlement and division of property, support during the cohabitation and upon its dissolution, etc). Given the historical lack of statutory provisions (until recently, when those provisions have been introduced by legge 20 May 2016, no 76 on same sex civil unions and de facto relationships) scholars called for the enactment of rules to protect the economically disadvantaged party, especially upon the relationship’s dissolution.

More recently such a view has been questioned by an emerging perspective that favours the role of contracts in regulating the financial aspects of marriage. Party freedom is seen as an expression of marriage equality and as a means to promote gender justice (see discussion below). Indeed, some argue that the statutory provisions on separation and divorce proceedings allow the spouses to agree on the economic terms of separation and divorce (Art 158 Italian Civil Code and Arts 4 and 5 legge no 898 of 1970). In addition, agreements regarding the support obligation upon marriage crisis can be deemed valid and binding even though they are concluded after separation or divorce. As previously stated, separation agreements are regarded as an expression of party freedom, and consequently they are binding irrespective of a judicial order. Such conclusion suggests that the spouses are allowed not only to implement the terms agreed upon during the separation procedure, but also to vary or modify them.

Nevertheless, any such agreement must be consistent with the mandatory provisions of law regarding marital support. Italian legal scholars have long


21 P. Rescigno, ‘Autonomia privata e limiti inderogabili nel diritto familiare e successorio’
argued over the role played by private ordering in this field, particularly in relation to the limits imposed by the statutory family law provisions concerning marital support over marriage crisis. This uncertainty implies a need to establish a clear divide between those aspects which can become the subject of an agreement between spouses and those residing outside the realm of private ordering.

Many scholars do agree on the theoretical premise that party freedom cannot alter the available grounds for claiming marital support under separation or divorce. Nor can they change the criteria set by the law for the quantification of such support. The spouses may only ‘agree on the determination’ of the support obligation.\(^22\) However, despite this traditional distinction, the boundary between agreements that settle the parties’ rights based on the law and those that conversely alter the rules of law (and therefore are void) cannot be easily drawn.\(^23\) This ambiguity demonstrates the need to devise a clearer line between what may be contracted and what may not.

In the attempt to reach some clarity, a scholarly perspective argues that, considering the wide scope granted to private ordering by family law rules, in principle the spouses should be regarded as free to determine the financial consequences of marriage dissolution, although within the limits set by such rules. According to this view, contracts that settle one spouse’s right to claim economic support upon separation are valid, unless they result in a substantive waiver (either explicit or implied) of such right. This is the case, when the spouse is left in a condition of financial need. This doctrine imposes the same limit on contracts regulating the support obligation of one of the spouses towards the other upon divorce. Under the relevant statutory provisions, in case of separation or divorce, the spouse who lacks adequate assets and income and has little or any earning capacity, in the absence of his or her fault, shall be granted by the court the same economic standard of living enjoyed during marriage (the so called right to maintenance).\(^24\) Conversely, being in a condition of financial need is the requirement set by the Italian Civil Code to claim alimony. In marriage relationships such right is granted to satisfy the basic economic needs of the spouse whose behaviour contrary to the marriage duties has caused the marriage’s crisis. The right to seek alimony represents a minor form of solidarity (compared to the right to claim maintenance) and a limit to the spouses’ party freedom.\(^25\) Given its function, it cannot be waived neither unilaterally nor by

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\(^25\) F. Anelli, ‘Sull’esplicazione dell’autonomia privata nel diritto matrimoniale’ n 4 above,
agreement.

Simultaneously, another prominent view advocates a change in the terms under which the agreements should be regarded. It emphasizes the evolution undergone by family law rules and also underscores the fact that party freedom manifests the equality between the spouses. It is no longer questionable that spousal parties are allowed to settle the financial terms of their relationship in case of marriage crisis. Nonetheless those terms shall be scrutinized by the courts in order to assess, not only whether they comply with public policy principles and rules, but also whether they are fair and reasonable under relevant principles, notably, under the concept of solidarity. This perspective signals a significant departure: the debate over party freedom in marital contracts is no longer centred on their consistency with public policy principles; instead it is focused on the issue of their fairness (see ultra).

IV. The Rebus Sic Stantibus Principle Underpinning Marital Contracts

Most scholars share the opinion that agreements regarding the financial support obligation are subject to revocation or modification in case of subsequent, material change of the circumstances existing at the time those contracts were made. According to the law, the judicial order settling the economic terms of separation or divorce can be subsequently reviewed by the court when review is deemed reasonable. The right to seek revocation or modification should be granted upon every and any variation of the circumstances which were taken into account by the court when it determined the support obligation under the criterion of the standard of living enjoyed during marriage (Art 156 Italian Civil Code and Art 9, para 1, legge no 898 of 1970). This right cannot be waived.

44 and M. Comporti, ‘Autonomia privata e convenzioni preventive di separazione, di divorzio e di annullamento del matrimonio’ Foro italiano, V, 115 (1995), according to whom, unlike the right to maintenance, the right to seek alimony cannot be waived.

26 This opinion is shared by G. De Nova, ‘Disciplina inderogabile dei rapporti patrimoniali e autonomia negoziale’ n 22 above, 263 and M. Comporti, n 25 above, 113.


31 P. Angeloni, Autonomia privata e potere di disposizione nei rapporti familiari n 4 above,
This statutory provision is explicitly addressed to the adversarial procedures of separation and divorce. Nevertheless, scholars and courts also deem it applicable to the spouses’ agreements regarding financial support upon marriage dissolution. According to this view, a principle (the so called rebus sic stantibus principle) underpins every contract between spouses: each party has the right to seek revocation or modification of the terms in case of subsequent material change of the circumstances under which those terms were agreed upon, irrespective of the presence of an explicit hardship clause. Traditionally, such principle has been regarded as evidence that marital agreements are inherently different from contracts concluded between ordinary parties. While the latter have the same binding force of the law (Art 1372 Italian Civil Code), conversely the former are not able to reach the goal of finality and predictability.

However, more recently some scholars claim that a similar principle applies to every contract. Under the general duty of good faith, in case of subsequent unforeseeable events resulting in a disadvantage to one of the parties, the disadvantaged party has the right to claim modification of the contract terms. Such argument undermines the doctrine advocating that marital agreements do not belong to the area of general contract law.

On the other hand, finality is not a goal that is beyond the reach of marital agreements. Indeed, the spouses are allowed to agree on terms purporting to be a ‘final’ settlement of the support obligation and to exclude the possibility of future variation or modification. Nevertheless, under the law (see Art 5, para 8, legge no 898 of 1970), contracts that provide for a single lump sum payment from one spouse to the other (or a transfer of property, a waiver, etc) shall undergo a judicial fairness test in order to secure finality. Only a positive fairness assessment by the court prevents each spouse from obtaining the revocation or modification of the economic support agreed upon. Hence, the parties’ intention to reach a final agreement can be fulfilled, but is still subject to judicial scrutiny. Such a provision cannot per se be regarded as proof of the peculiarity of marriage contracts in comparison with every other sort of contract. According to a prominent scholarly view, the judicial review of contractual terms should be envisaged under the general duty of good faith and those contractual terms should be rejected any time they cannot be considered as fair and equitable.

33 E. Quadri, ‘Autonomia dei coniugi e intervento giudiziale nella disciplina della crisi familiare’ Familia, 6 (2005).
35 See F.D. Busnelli, ‘Note in tema di buona fede ed equità’ Rivista di diritto civile, I, 537
Those doctrinal arguments show a clear trend: on the one hand, party freedom has a broad scope in regulating the economic aspects of marriage; on the other hand, marriage contracts can be deemed as subject to the same rules that are applicable to any contract and to the principles that underpin every manifestation of party freedom (e.g., the duty of good faith).

V. Prenuptial (or Post-Nuptial) Agreements and the Evolution of Family Law

The enactment of legge no 162 of 2014 (Arts 6 and 12) prompted the view described above. This law adjoins to the spouses’ separation and divorce agreements certain legal effects that are similar to those deriving from a judicial order. It also pre-supposes that the bargaining process has taken place with the assistance of an independent legal representative. In such case the judicial scrutiny is limited to the contract terms affecting the interests, either personal or monetary, of the children that are minor, disabled or not economically self-sufficient.

Legal scholars have not yet explored the impact that such law has had on the role of private ordering in the field of marriage dissolution. The fact that spousal agreements can entirely govern a marriage crisis enhances the proximity of family law to general contract law rules. Furthermore, this fact is also relevant to the controversial issue of the validity of prenuptial (or postnuptial) agreements in contemplation of divorce. These contracts aim at settling the financial consequences of marriage dissolution before it occurs. In practice, such contracts are often entered into during separation and in view of divorce, given that under Italian law separation and divorce represent different stages of marriage dissolution. Traditional doctrinal opinion and the relevant case law qualify prenuptial or postnuptial agreements as void. They are regarded as contrary to the public policy principle that forbids any form of bargaining related, either directly or indirectly, to marital status. Under this principle, consent to


36 G. Oberto, ‘Simulazione e frodi nella crisi coniugale (con qualche accenno storico ad altri ordinamenti europei)’ Famiglia, 774 (2001); A. Arcieri, ‘Il consenso nella separazione personale, tra diritto al ripensamento, impugnazione per vizi della volontà e procedimento di modifica’ Famiglia e diritto, 1131 (2008).

37 M.N. Bugetti, ‘Separazione e divorzio senza giudice; negoziazione assistita da avvocati e separazione davanti al sindaco’ Famiglia e diritto, 515, 521 (2015); Id, La risoluzione extragiudiziale del conflitto coniugale (Milano: Giuffrè, 2015), passim.

separation or divorce shall be given by both spouses freely, in other words, without coercion or exchange of consideration. Again, according to this position, such contracts are inconsistent with the statutory family law provisions on post-marital support, which are heavily laden with mandatory rules.

Notably, in the past, Italian courts considered such agreements as invalid, based on the above described grounds. Under this outlook every agreement concluded in contemplation of divorce is void, irrespective of its content and even though it may set economic terms that are advantageous to the spouse having the right to claim maintenance.\(^39\) Only more recently has Italian case law partially phased out of this approach. On the one hand, courts have ruled that the wealthier spouse is not entitled to claim the invalidity of the agreement;\(^40\) on the other hand, judges have deemed valid the agreements aimed at settling disputes between the spouses arising from facts that occurred before the marital crisis started (for example, transfer of property from one spouse to the other agreed in exchange for the money lent by the latter to the former during marriage, etc.).\(^41\)

The prevailing scholarly view criticizes those arguments, claiming that regulating the financial consequences of marriage dissolution does not constitute bargaining over the marital status, given the fact that those type of agreements do leave each spouse free to deny his or her consent to divorce. Furthermore, the assumption that regulating the duty of post-marital support is beyond the realm of party freedom shall be rejected, for the reasons above mentioned.

On the contrary, more substantial is the scholarly opinion fearing that the spouses, when negotiating with each other, are not fully aware of the rights and duties arising from the marriage dissolution or that the terms agreed upon may be unfair in light of changed circumstances, given the fact that those agreements have been entered into (sometimes long) before the crisis. Such argument, however, is not persuasive. Party freedom implies the risk of exploitation of one spouse’s vulnerabilities and the inequality of bargaining power; still, this only entails that those risks shall be addressed by resorting to the available remedies under the legal system.

In addition to these arguments, the view that claims the invalidity of the

\(^{39}\) See Corte di Cassazione 11 June 1997 no 5244, Giurisprudenza italiana, 218 (1998) and, more recently, Corte di Cassazione 30 January 2017 no 2224, in www.dejure.it.


spouses’ agreements in contemplation of divorce can no longer be considered as grounded in law. After the enactment of legge no 162 of 2014, agreeing on the existence of the requisites of separation or divorce and regulating the economic terms of marriage dissolution cannot per se be regarded as being against any public policy principle; the spouses are free to express their consent either before or after the crisis occurred.

It follows that a contract in contemplation of the marriage crisis can be deemed void as contrary to public policy only when it is proved that the spouse’s consent was not given freely.\textsuperscript{42} In every other respect, these sorts of contracts are subject to the same limits set by the law with regard to every marital contract. As a consequence, clearly spouses may settle the financial consequences of separation or divorce and agree on terms that seek to be final and therefore cannot be subsequently modified nor varied. At the same time, the parties may agree on the economic aspects of the marriage crisis, contemplating both separation and divorce. This may be held true because under the Italian legal system, separation and divorce represent two different stages of this crisis and yet recently legge 6 May 2015 no 55\textsuperscript{43} drastically reduced the duration of separation in order to secure divorce (requiring a year length in case of separation through adversarial process and six months in the opposite case), consequently blurring the difference between those stages.

In addition, such agreements may be seen as an indispensable means to arrange the consequences of marriage dissolution before the marriage or before the crisis occurs, as seen in several foreign legal systems. Notably, the spouses may resort to those agreements, in order to plan a transfer of property from one party to the other or to assign to one of the spouses financial support which is greater than that to which the disfavoured spouse would be entitled under the law. In practice, those agreements compensate the latter for any loss in earning capacity, due to an unequal distribution between the spouses of the burden related to child rearing and, more generally, to family caretaking. Indeed, a common feature of marriage has one of the spouses investing in increasing his or her earning capacity, while the other is primarily involved in children rearing and domestic jobs.\textsuperscript{44} Since the role of primary children or family caretaker is often held by women, such issues normally result in a matter of gender inequality.\textsuperscript{45} The statutory provisions regulating the support obligation upon divorce are not adequate to award full compensation for such loss. The right to claim support aims at securing the economically disfavoured spouse the same

\textsuperscript{42} M.R. Marella, ‘La contrattualizzazione delle relazioni di coppia’ n 26 above.
\textsuperscript{43} R. Lombardi, ‘Si abbrevia la distanza tra separazione e divorzio’ \textit{Diritto di famiglia e delle persone}, 325 (2016).
\textsuperscript{44} R. Lecky, ‘Relational Contracts and Other Model of Marriage’ 40(1) \textit{Osgoode Hall Law Journal}, 1-47 (2002).
standard of living enjoyed during marriage (Art 5, para 6, legge no 898 of 1970). In quantifying the amount due, the court does not consider the lack of investment in earning capacity by one of the spouses and the related increase in this capacity by the other, for the reason that such increase normally results in incomes that do not yet exist at the time when the divorce terms are settled.46 Concurrently, community property, which represents a means to promote financial equality between the spouses through a fair division of property upon marriage dissolution, is a default regime from which the spouses may opt out. And the experience shows that a vast majority of the couples do resort to this option.

VI. Marital Contracts and the Issue of Procedural and Substantive Fairness

Many scholars express concerns regarding the possible lack of information and bounded rationality by one of the parties at the time the prenuptial agreements are concluded, which can lead to inequality of bargaining power or inability to foresee subsequent events that may render the agreement substantially disadvantageous to one of the parties.47 More generally, the broader role given to private ordering in regulating the financial aspects of marriage and marriage dissolution raises concerns about the possible distortion of bargaining power due to the unique emotional dynamics between spouses. Indeed, contracting between spouses creates the risk that one may be the victim of coercion and overreaching by the other. One party may threaten the other with a tough position regarding the issue of child custody in order to obtain an unfair advantage over the other spouse (eg a waiver of the right to claim maintenance) or may exchange the other’s consent on the same issue with the promise of a generous financial support.

Beside the concern that such agreements may be contrary to public policy (and therefore void), spouses, when contracting with each other, may act with less caution than they would ordinarily exercise with a different contracting party. It is likely that most parties enter marriage ignorant of the rights and duties of marriage, and that they are unaware of the rules governing separation and divorce. Therefore, their consent to alter those rules or waive their rights cannot be deemed informed and knowing. This is often the case with agreements wherein spouses opt out of the community property regime. In addition, the


parties’ bounded rationality at the time of the conclusion of the agreement may prevent them from taking into proper account subsequent events that are likely to occur, like unemployment, birth of a child, illness, etc.\(^{48}\) In essence, the unique context of the spouses’ bargaining position (their ‘inherent vulnerabilities’) calls for high standards of procedural and substantive fairness.

Given those risks, as already stated, many scholars advocate the invalidity of agreements concluded in contemplation of marriage dissolution, but similar concerns arise in case of separation and divorce agreements.\(^{49}\) This is due to the lack of specific statutory family law provisions, particularly of the kind that have been enacted in other legal systems.\(^{50}\) Moreover, there are no procedural safeguards in place in the Italian legal system with regard to agreements (the so-called *convenzioni matrimoniali* above mentioned) through which spouses opt out of the legal regime of community property. This is unlike other systems where those safeguards are in place.\(^{51}\)

Such concerns suggest a need for careful scrutiny of marital agreements for procedural and substantive fairness. In essence, the broad role of private ordering of marriage requires an accommodation between party freedom (whose undoubted benefits are efficiency and predictability) and the need to set limitations and constraints on such freedom, given the special context in which bargaining over the terms of family relationships tends to occur. It follows that in marital contracts the weaker party should be allowed to resort to the remedies available – in every case of inequality of bargaining power and lack of substantive fairness – under general contract law, as interpreted by Italian scholars.\(^{52}\) In the Italian legal system, procedural constraints on party freedom and safeguards to protect the vulnerable spouse, even though not explicitly prescribed by any statutory family law provision, can be identified on the basis of general contract rules that govern party freedom, irrespective of the area where the latter is expressed.

Alongside the rules governing defect of consent, every party bears a duty of

\(^{49}\) E. Bargelli, ‘L’autonomia privata nella famiglia legittima’ n 23 above, 324-328.
\(^{52}\) G. Ferrando, ‘Il matrimonio’ n 27 above, 132, claiming that, under the duty of good faith (Arts 1337 and 1375 Italian Civil Code), the spouse who exploits the other’s condition of inequality of bargaining power may be deemed liable. This conclusion is grounded on the principles underpinning the European private law: Art. II.-7:207 of the Draft Common Frame of Reference (available at https://tinyurl.com/3kdljxf (last visited 15 June 2017)), on the ‘Unfair Exploitation’, and Art 4:109 of the Principles of European Contract Law (available at https://tinyurl.com/yc33nbv8c8 (last visited 15 June 2017)) on Excessive Benefit or Unfair Advantage. See also F. Anelli, ‘Sull’esplicazione dell’autonomia privata nel diritto matrimoniale’ n 4 above, 48.
good faith and fair dealing (Art 1337 Italian Civil Code).\textsuperscript{53} In addition, in contracts between a trader and a consumer or between traders, in case of inequality of bargaining power, the law explicitly requires the party that lacks information or awareness to be informed by the other party in clear language and in writing about the factual aspects and rights which are the subject matter of their agreement. Similarly, when contracting with each other, the spouses have a duty of good faith and fair dealing. Such duty is paramount, given that the special relationship between them shall be based on the principle of solidarity (Art 2 Constitution), which underpins marriage even at the time of its dissolution.\textsuperscript{54} It follows an obligation of full financial disclosure and frankness. At the same time, it can be argued that each spouse bears a duty of care towards the other, at least where the former knew or should have known that the latter was not aware of his or her rights under family law rules.

Legge no 162 of 2014 contains provisions regarding independent legal counselling in negotiations leading to the conclusion of separation or divorce agreements (Arts 4 and 6). Those provisions’ main purpose is encouraging private consensual resolution by imbuing those agreements with the same legal consequences arising from judicial orders of separation and divorce. This law reflects a specific policy prompted by the need to reduce the substantial backlog affecting civil courts. Legge no 162 of 2014 does not explicitly set any procedural requirement, nor provides any judicial review of the parts of the agreements that delineate the spouses’ economic rights. Such a feature represents a major difference between legge no 162 of 2014 and the provisions contained in Art 2067 of the French Civil Code (which is the model that inspired Italian legislators). According to this provision the enforcement of the spouses’ agreements is subject to the courts’ scrutiny of their voluntariness and substantive fairness regarding not only child custody and child support, but also the spouses’ financial rights and obligations.\textsuperscript{55}

Nevertheless, the fact that legge no 162 of 2014 (Art 6, para 1) requires that each party be advised by an independent legal representative also implies that the same representative has a duty to transfer knowledge about the assisted spouse’s legal rights and to explain the consequences of any waiver of the latter’s rights under the law. Moreover, this law requires the legal representative to act pursuant to a duty of good faith, entailing, as a consequence, a duty of

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care not only towards the assisted spouse, but also towards the other. The breach of those duties may result in the legal representative’s liability.\textsuperscript{56}

This law seems to suggest a duty of transparency underlying negotiations between the spouses, similar to the duty provided by the law on commercial contracts. However, a duty of transparency can already be partially envisaged under Art 161 Italian Civil Code, which requires that in agreements on marital property, the parties may choose the governing law, on condition that the provisions of such law are not merely referred to, but are included in the drafting by the notary, so that both spouses can be fully aware of their rights and duties under this law.\textsuperscript{57} Consequently, it can hardly be denied that similar or major safeguards are in place with respects to contracts negotiated under legge no 162 of 2014, given the role played by the legal representative and the duties imposed on the parties.

As to the issue of substantive fairness of marriage contracts, it has been argued that those contracts are subject to the \textit{rebus sic stantibus} principle (see discussion above), to ensure that they are equitable at the time of the execution.

With regard to agreements purporting to be final, as previously mentioned, judicial review is provided by Art 5, comma 8, legge no 898 of 1970. This provision enables courts to assess the proportionality of the terms agreed upon, considering not only the circumstances and the parties’ condition at the time when the agreement was concluded, but also their fairness in light of a possible change of circumstances that are foreseeable.\textsuperscript{58} By doing so, the court can tackle the risk of bounded rationality by one of the parties, due to information asymmetry or lack of bargaining skills, which might prevent the same party from foreseeing subsequent predictable events.

\textbf{VII. Conclusion}

Considering the evolution of family law provisions in Italian law, it is no longer questionable that spouses may negotiate the financial terms of their relationship in case of marriage crisis. As explained herein, such an outcome is a corollary of the change in the main features of marriage, prompted by those provisions. Furthermore, private ordering represents a means to pursue the

\textsuperscript{58} According to a scholarly view, the court, in assessing whether the terms agreed upon by the spouses are fair, shall base its scrutiny on the current conditions of the recipient (age, illness, earning capacity, education, likeliness of being engaged in a future marriage, etc), in order to evaluate whether in light of the foreseeable evolution of those conditions, the terms are adequate to ensure her/him a decent standard of living. On this issue, see V. De Paola, \textit{Il diritto patrimoniale della famiglia coniugale} (Milano: Giuffrè, 2002), 297 and A. Finocchiaro and M. Finocchiaro, \textit{Diritto di famiglia} (Milano: Giuffrè, 1988), 452.
equality between the spouses that may have been altered during marriage, especially due to the distribution burden related to child rearing and family caretaking.

However, the broader role given to party freedom brings about the need to set a clear line between what parties’ may freely negotiate and what may not. Italian civil law continues to limit the parties’ freedom in order to ensure that marriage dissolution does not lead one of the spouses to an economically disadvantageous condition.

Party freedom also potentially risks the exploitation of one spouse’s vulnerabilities and inequality of bargaining power. This requires a change of perspective by courts and legal scholars. In the realm of private ordering, their attention should be centred on the issue of procedural and substantive fairness of marital contracts, in line with an analogous trend that can be registered in other legal systems.  

Functions of Soft Law in Transnational and Local Governance: A Case of the Land Rush in the Mekong Region

Naoyuki Okano

Abstract
This paper analyzes land law history in the Mekong region, a recent land rush there, and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), a soft law measure on governance of tenure. This work will generally illustrate recent developments of land governance. Following a survey on the broader discourse and scholarship on the global land rush, it will argue for further analysis in soft law measures as a crucial element to understand and critique land governance in the Mekong Region. The VGGT is presented as a case study to show two possible functions of soft law: (1) it legitimizes the self-determination of countries in their policy reforms in the Mekong region and (2) it forms the basis for gradual policy changes toward dominant conceptions of ‘clear and strong’ property rights by reaching a minimal, but fundamental agreement while carefully avoiding controversial issues.

I. Introduction
The purpose of this paper is to analyze recent developments of land governance and its relevance to the Mekong region. Although there are various important developments in the field of land governance, this paper focuses on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), a non-binding measure developed by the Committee on World Food Security (CFS). The VGGT responded to the 2006 world food crisis and the subsequent phenomena of land rushes, a rapid and sharp increase in foreign land acquisitions. Specifically, this paper asks if the VGGT is helpful to tackle the problem of the land rush in the context of the

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1 For the purpose of this paper, the Mekong region is considered to include Cambodia, Vietnam, Laos and Myanmar.
3 This paper prefers the term ‘land rush’, rather than other common terms such as ‘land grab’ or ‘land grabbing’, because what is striking about the recent phenomenon of foreign land acquisitions is not its mechanism, but its scope and rapid expansion. In this regard, see T.M. Li, ‘What Is Land? Assembling a Resource for Global Investment’ 39 Transactions of the Institute of British Geographers, 589, 594-595 (2014).
Mekong region.

This study is situated in a theoretical debate of how legal instruments developed from one functionally differentiated field have an impact on historically constituted national legal order. It intends to contribute to the current debate on governance and law by analyzing the favorable possibilities of soft law measures. After the public debates in response to the 2006 food crisis, land governance has been increasingly considered in relation to transnational food security governance. Therefore, this paper analyzes the relationship between land governance and food security governance. It also examines various efforts to regulate the land rush: public, private and hybrid, national, regional and transnational. Although the VGGT was a response to transnational food security governance, it has also contributed to the discourse on land property regimes.

In order to analyze the effectiveness of the VGGT and its potential impact on the Mekong region, this paper adopts an analytical framework that enables a detailed treatment of soft law instruments. Soft law is herein defined as a wide range of international instruments that are legally non-binding. This general definition provides a starting point to construct an analytical framework. As described in Section IV below, the framework breaks down ‘softness’ of the soft law by discussing those elements of obligation, precision, and delegation, on the one hand, and emphasizing the importance of contexts in which certain soft law operates, on the other. Applying this framework, the implication and potential of the VGGT is discussed in detail. For example, in the context of transnational food security governance, the VGGT has functioned to mark a preliminary agreement of the good practices of resource governance, and has thereby driven

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the policy debate forward.9 Generally, this case study intends to show how certain soft law measures cannot be discredited merely by their non-binding nature and calls for a more nuanced understanding of them.

This paper further discusses the effectiveness of the VGGT in the context of the Mekong region. So far, most of the debates on the land rush have focused on Sub-Saharan Africa, and scholarly engagements have also mostly emphasized that region.10 Much of the land rush discussions that focus on the Mekong or South East Asia have emphasized case studies of peoples’ resistance from political or sociological perspectives.11 Legal analysis of the land rush problem, however, has been limited.12 As discussed in the following sections, there are institutional reasons explaining why it is difficult to address land rush problems in Asia from a legal point of view. This paper tries to fill the gap by analyzing a soft law and13 using the above-mentioned framework. Specifically, it asks if the VGGT is helpful to improve the situation of land governance in the Mekong region. Additionally, this case study intends to highlight the emerging recursivity between the Mekong and transnational legal order, even without explicit commitments by regional institutions.14

This paper is organized as follows. First, it presents a brief overview of land governance and a recent history of the global land rush. Second, it surveys scholarly and policy responses to the land rush, thereby arguing that soft law measures are relatively underexplored despite their potential importance for the Mekong. Third, against this background, the paper deploys its analytical framework to investigate soft law measures and analyzes the VGGT's relevance to the Mekong Region. Finally, the paper draws theoretical conclusions and suggests further areas of study.

II. Recent History of Land Governance and the Land Rush

Given that there is already a wide range of publications regarding the

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9 See K.W. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’ 54 International Organization, 421, 423 (2000). (Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization’.)

10 See, eg L. Cotula, The Outlook on Farmland Acquisitions n 7 above.


13 Of course, this paper does not claim that an analysis of the soft law is more important than the traditional legal analysis. Rather, it considers that the analysis of the soft law is a necessary complement to consider the land governance in the Mekong region comprehensively.

14 By recursivity, this paper means that discourses between different institutions within one transnational legal order (in the case of this paper, transnational food security governance) spark an evolution of legal orders by referring to each other. See, T.C. Halliday and G. Shaffer, Transnational Legal Orders (Cambridge: Cambridge University Press, 2013), 37–42.
History of land governance in general, this paper does not reproduce it, but instead presents only a short outline of the trajectory.\footnote{For the African context, see L.A. Wily, ‘Looking back to See Forward: The Legal Niceties of Land Theft in Land Rushes’ 39 The Journal of Peasant Studies, 751 (2012); for the Asian context, see A.B. Quizon, Land Governance in Asia: Understanding the Debates on Land Tenure Rights and Land Reforms in the Asian Context (Rome: International Land Coalition, 2013), available at https://tinyurl.com/ybyj7u5m (last visited 15 June 2017).} As developed more fully in subsequent sections, this paper takes the view that the recent land rush phenomenon is a structural problem caused in large part by the historical commodification of land and the deepening of globalization.\footnote{For a recent thoughtful elaboration on how land has become investible, see T.M. Li, ‘What Is Land?’ n 3 above, 592-597.} The commodification of land originally took place in the United Kingdom, forming the basic context for the evolution of land problems.\footnote{K. Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (New York: Farrar & Rinehart, 1944), 325. (What we call land is an element of nature inextricably interwoven with man’s institutions. To isolate it and form a market out of it was perhaps the weirdest of all undertakings of our ancestors.)} After the enclosure movement during the industrial revolution, disputes related to land have been connected to political, economic, and social conditions. Commoditized and traded in an era of globalization, land, like labor and currency, have been embedded in the globalizing political economy.\footnote{S. Frerichs, ‘Law, Economy and Society in the Global Age’, in A. Perry-Kessaris ed, Socio-Legal Approaches to International Economic Law: Text, Context, Subtext (Abingdon, UK and New York, USA: Routledge, 2013), 36, 44.} The commodification of land, coupled with the emerging global economy, trading practices, global capitalism, and the global value chain,\footnote{D. Held et al, Global Transformations: Politics, Economics and Culture (Cambridge: Polity, 1999).} has created an enabling structure for land rushes.\footnote{B. Müller and G. Cloiseau, ‘The Real Dirt on Responsible Agricultural Investments at Rio+20: Multilateralism versus Corporate Self-Regulation’ 49 Law & Society Review, 39, 44 (2015). (‘While the agricultural crops produced in these investments are withdrawn from the global market and connected directly to the national economies of the investor countries, land and water themselves become globally traded commodities and thus objects of intense speculation.’)} Likewise, Lorenzo Cotula argues that investment arbitrations have played a crucial role in commoditizing land at the level of global market.\footnote{L. Cotula, ‘The New Enclosures? Polanyi, International Investment Law and the Global Land Rush’ 34 Third World Quarterly, 1605, 1612-1623 (2013).} In short, after commoditization at the domestic market level long ago, land increasingly became a commodity in the global market.

The global food crisis beginning from 2006 and the subsequent land rush have triggered vibrant policy debates.\footnote{FAO Food Price Index provides a data of prices of five major food commodities (meat, cereal, dairy, vegetable oil and sugar cane) weighted with the average export shares of each of the groups for 2002-2004. According to the index, prices of these five commodities have raised around sixty per cent from 2006 to 2008. Data is available at https://tinyurl.com/6xlv3h (last visited 15 June 2017).} Those states concerned with food security...
and the volatility of food prices went on to acquire foreign land on a large scale, especially in developing areas of the world: Africa, Latin America, and Southeast Asia. The rush for acquisition caused problems for people who were traditionally settled in the targeted areas, as they lost their lands without fair compensation. A variety of actors are involved in the acquisitions, and it is a structural problem unable to be controlled by one country’s domestic policy. According to the report published by the United Nations Conference on Trade and Development (UNCTAD) in 2013, there are several reasons for the land rush: volatile food prices, which, in turn are caused by climate change, food price speculation, and the direct link between fuel and food prices created by the growth of the biofuel industry. A precise estimation of acquired land is hardly available. However, expanding populations, mounting demands for biofuel, and the decreasing amount of arable lands due to land degradation indicate trends for increasing demands for land. The urgency of food security is still under debate, but at least the problem of land rush has sparked vibrant discussions. Various policy approaches from various actors, on different levels, and across sectors, such as the elaboration of ‘right to food’ or additional soft regulations to the financial sector, have been observed. The next section will illustrate various approaches to regulate the global land rush as an example of transnational governance.

Large-scale foreign land acquisition is understood as cross-border affirmation of the right to control land by public, private, or hybrid actors. Compared with traditional, domestic land disputes, it is characterized by the variety of actors as land grabbing at the early stage. GRAIN, ‘Seized: The 2008 Land Grab for Food and Financial Security’ (Barcelona: GRAIN, 2008), available at https://www.grain.org/article/entries/seized-the-2008-landgrab-for-food-and-financial-security (last visited 9 June 2017).


Many international organizations and NGOs have provided their estimations of transferred land. For example, according to a report by International Land Coalition published in 2011, fifty-one–sixty-three million ha of land has been affected in twenty-seven African countries. L. Cotula, The Outlook n 7 above, 6; According to the estimation by the World Bank in 2011, fifty-six point five million ha has been affected through four hundred sixty-four projects. K. Deininger and D. Byerlee, Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits? (Washington, DC: The World Bank, 2011), 51, available at https://tinyurl.com/yastbz7o (last visited 15 June 2017).


26 Journal of Peasant Studies, for example, covers a lot of trajectories on land grabbing. Especially, see the special editions of 38(2); 39(3–4), 40(3).


involved and the facilitative role of the state. For example, foreign investment actors vary in form, including multinational corporations, joint ventures, sovereign wealth funds, public-private partnerships and others. And land investment extends to such sectors as agriculture, infrastructure, and the extractive industries. The right to control land implicates many legal issues such as possible human rights abuses because of forced evictions without adequate compensations; infringement of a right to food; as well as global governance in terms of global food security, energy, and sustainable development.31 In terms of the facilitative role of states, this paper draws on two historical threads. First, in the history of public international law, resource sovereignty has been asserted by the third world, resulting in series of United Nations resolutions. In line with this historical argument, the land rush is substantively a problem of sovereignty crisis in developing countries.32 Second, from an era of colonialism to neo-liberal development policy, there has been a diffusion of western legal notions imposed on the East. In the context of land law, it took shape in two ways: the concept of private property from Locke, for whom improvement to land makes it the subject of private property,33 and a belief in ‘clear and strong’ property rights as a prerequisite of development.34 As a result, there has been a conflict between customary, pluralistic notion of land rights and western notions of property rights. Large-scale foreign land acquisition is, on these two grounds, closely related to each state’s land and development policies.

III. Responses to the Land Rush

Faced with problem of the land rush, both practical and scholarly responses have emerged. This section analyzes these and shows how they may or may not apply to the Mekong. The global land rush has surprised the world by its temporality and scope, and it has garnered policy responses as well as scholarly attention.35 Some scholars have called for modifications to the investment law regime by utilizing human rights.36 Others consider transnational private litigation37 or transnational corporations’ corporate social responsibilities

31 Recently adopted Sustainable Development Goals share this view by stipulating the importance of life on land in its Goal 15.
33 J. Locke, Two Treatises of Government and a Letter Concerning Toleration (Stilwell, KS: Digireads.com, 2005).
37 C.M. Scott and R. Wai, ‘Transnational Governance of Corporate Conduct through the
and other soft law instruments as methods of restraint on the land rush.\(^{38}\) Also, on the one hand, there are deep criticisms toward a notion of ‘clear and strong’ property law\(^{39}\) and, on the other, there are arguments for the emergence of global property rights regime.\(^{40}\) Regardless of the wide-ranging topics and approaches employed by scholars, there are two tendencies: first, a presupposition of certain legal institutional frameworks that is not necessarily applicable to the Mekong region, and second, the emphasis on the gap between policy practices, where soft law measures are blooming in response to the land rush, and scholarship, which is less engaged with soft approaches.

Criticism against the investment law regime is one of the most vibrant points of discussion. Given the widely accepted observation that the investment law regime has facilitated the ability of investors to secure their property rights on land in foreign countries, scholars have made various attempts to take human rights considerations into account. Horatia Muir Watt, from a viewpoint of private international law, for example, argues that the investment law regime is one-sided by emphasizing the strong protection for the property of foreign investors, a focus that results in ‘a confiscation of local regulatory sovereignty, in fields as sensitive as taxation, public health, and environment’\(^{41}\). Based on this understanding, Muir Watt suggests that to make arbitrators in investment arbitrations pay due attention to human rights there should be an avenue to sue investors in violation of human rights in the domestic courts of the home state, based on the horizontal effect of the human rights.\(^{42}\) This argument is founded on institutional analysis\(^{43}\) and on the idea of human rights as disruptive vocabulary that triggers institutional change.\(^{44}\) For these authors, there exists a necessity for a place for contestation that can reverse the one-sided decision making processes seen in investment arbitrations. Such a site may be a regional human rights court or transnational private litigation.

What is notable here, however, is that this approach of scholarly intervention takes specific institutional arrangements for granted, and therefore it has only limited applicability to certain areas such as the Mekong. Debates emphasizing...
the potential for interaction between investment law and human rights regimes usually presuppose the existence of a regional human rights court. However, such a human rights court does not exist in the Mekong region. In 2008, the Association of Southeast Asian Nations (ASEAN) Charter was adopted, and its Art 14 stipulates the future establishment of the ASEAN Human Rights Body. The ASEAN Intergovernmental Commission on Human Rights (AIHCR) was subsequently established in 2009. AIHCR further adopted ASEAN Human Rights Declaration, but the regional human rights court is yet to be created. To restate it differently, because of this institutional constraint, the Mekong region is a difficult place to observe transnational regulatory developments. For example, Tomaso Ferrando has argued that based on the jurisprudence of the Inter-American Court of Human Rights and the African Commission on Human and Peoples Rights, ‘transnational property rights regimes can offer people an external platform to be used counter-hegemonically against the abuses of sovereign prerogatives, and to defend local diversities’.

However, given that there is no such external platform in the Mekong, this line of argument cannot be applied directly to this region.

Similarly, analysis of institutional change does not apply to the Mekong. The concept of institutional change as exemplified by conflicts among multiple courts as a trigger of institutional change, presupposes the existence of sites where actors can assert property rights. Given the limited numbers of local court cases available, the Mekong region tends to appear as a regulatory vacuum, with fewer examples of law in action. Although some transnational human rights litigation has emerged from the region, such as the Unocal case and the Song Mao case, it is still minimal. The region appears to have little legal discourse on human rights incidents related to land acquisition.

This observation suggests two theoretical and methodological challenges. First, the debate on transnational governance evolving in the other regions, especially in the West, is less relevant in the Mekong region, where the legal arguments and courts proceedings are simply limited and institutional change triggered by such legal discourses is not apparent. Second, although this paper does not take a normative position regarding the establishment of human rights courts in the region, one can nonetheless perceive that the lack of such human rights courts makes the region isolated from the growing transnational property

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46 K. Pistor, n 43 above.
rights regime.

Therefore, other pathways to critique the situation of the land rush in the Mekong are required. Most scholarly treatment of the land rush in the Mekong or South East Asia is predominantly based on empirical or political analysis related to the counter movements.49 This paper argues, in this regard, that an endeavor toward a nuanced understanding of soft law measures is necessary to propel the debate forward. There is significant usage of soft law measures to regulate the land rush. Other than those instruments that will be discussed in the subsequent section, there are international, regional and national initiatives, either public or private, or hybrid. For example, in 2009 Oliver de Schutter, United Nations (UN) Special Rapporteur on the Right to Food elaborated Eleven Principles: Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases.50 Moreover, the United States Agency for International Development (USAID) has prepared Operational Guidelines for Responsible Land-Based Investment, which discusses ‘recommendations for best practices related to the due diligence and structuring of land-based investments’. Private sector initiatives include self-regulatory mechanisms that set certain guidelines for land investment, such as the Principles for Responsible Investment in Farmland51 or Equator Principles.52 More loosely, the Colombia Center for Sustainable Investment, a research institute, maintains a webpage called Negotiations Portal,53 aimed at comprehensive information sharing at four stages of land management: Setting the Legal & Policy Framework, Pre-Negotiation Stage, Contract Negotiation Stage, and Contract Implementation and Monitoring Stage. This website, previously an independent initiative by one research institute, is now endorsed by G7’s CONNEX Initiative, which aims at improving ‘the quality of advisory support provided to low income country governments in their negotiation of complex commercial contracts’.54

However, generally scholars have not analyzed these soft regulatory instruments.55 As a notable exception, Smita Narula has made a contribution

49 See, eg conference papers of the recent international conference on ‘Land Grabbing: Perspectives from East and Southeast Asia’ held in 2015. The papers are available at https://tinyurl.com/yaytw4c7 (last visited 15 June 2017).
50 This provides a set of eleven core principles and measures for host states and investors.
51 This initiative was launched by five pension funds. It subsequently opened up to private equity funds as well. Five principles were prepared by eight investment funds for the financial sector.
52 The Equator Principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects.
53 See the website available at https://tinyurl.com/y9re247x (last visited 15 June 2017).
54 G7 CONNEX Initiative was first launched at Brussels Summit in 2014 and then reaffirmed by the Schloss Elmau Summit in 2015.
55 For a similar standpoint, see T. Xu, n 5 above, 20. (‘Although soft law protection of communal property rights is alleged to have limited legal effect due to its “non-binding” nature and a lack of formal enforcement mechanisms, soft law may provide a timely response to
by discussing actual instruments through the analytical framework of the market-plus approach, represented by ‘Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources’, as well as the rights-based approach, represented by ‘Eleven Principles: Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases’.56 The market-plus approach maintains that large-scale land transfers can achieve a win-win relationship between the investor and host populations if properly regulated. The rights-based approach prioritizes a state’s human rights considerations over any other considerations.57 Land can be commodified under both approaches, but the rights-based approach allows only those land transfers that ensure protection of human rights, such as the right to food. Starting from this distinction,

‘the market-plus approach tolerates and facilitates rights violations, whereas the rights-based approach sets a normative baseline that repudiates these impacts and addresses key distributive concerns’.58

There is another intervention explicitly focused on the importance of soft law, emphasizing its substantive function in the rule-making process. With a specific normative position supporting communal property rights,59 it is argued that there is a

‘need to inquire into the actual roles played by different actors in this “meta-power game”, their role in making governance standards, and their willingness to be bound by these “soft” governance standards’.60

Here, the ‘meta-power game’ means the complex and expansive norm-making process characterized by soft law instruments. In this context, soft law measures are an important building block to uphold communal property rights, or in other words, ‘the starting point for negotiating international binding commitments’.61 This paper shares the view that soft law plays a complex role in norm creation in an interaction with hard laws, and to grasp such a norm creation one needs a refined analysis on soft law measures.

Besides these exceptional engagements with the soft law measures in the

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57 ibid 108.
58 ibid 101.
59 Her normative position is further elaborated in the recently published edited volume, which explores a possibility to uphold communal property right as a human right. See, T. Xu and J. Allain, Property and Human Rights in a Global Context (Oxford: Hart Publishing, 2016).
60 T. Xu, n 5 above, 20.
61 ibid.
field of land governance, there is a significant gap between practice and scholarly discussions. Although there are expanding numbers of soft law measures in the field of land governance, scholarly attempts to analyze them seem scant and yet necessary in order to engage with and provide critiques to real world legal practices. Moreover, when considering the specific context of the Mekong region, as mentioned above, these soft law measures have a higher importance.

IV. The VGGT and its Relevance to the Mekong Region

The preceding discussions should have demonstrated, among other things, the necessity to investigate carefully the relevance of soft law instruments to assess recent developments in land governance. This observation echoes with the recent discussions of global governance, where the proliferation of various types of soft law instruments, such as standards, guidelines, recommendations and multilateral agreements, are calling for renewed empirical and theoretical attention. Against this background, this section provides an analytical framework to examine soft law measures. It then examines in detail the possibilities and implications of the VGGT, the first global agreement on the issue of governance of tenure of land, fishery and forest, and its relevance to the Mekong region. By situating the VGGT into the history of policy developments in response to the land rush, and into the context of the Mekong, this case study describes how soft law can impact the management of transnational land deals and the property rights regime.

1. Analytical Framework

Among various possible approaches to analyze the VGGT, this paper emphasizes its soft nature, and supplements its analysis with a case study to draw empirical insights about its effectiveness and legitimacy. In this paper, effectiveness means how certain soft laws practically achieve the policy purpose behind such measures, and legitimacy denotes how far stakeholders will treat

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63 See M. Goldmann. ‘We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law’ 25 Leiden Journal of International Law, 335 (2012).

64 See, eg, an approach to the legislative process of the VGGT from the viewpoint of participatory governance, J. Duncan, Global Food Security Governance: Civil Society Engagement in the Reformed Committee on World Food Security (London: Routledge, 2015).

65 As far as the author is aware, the sole existing research to approach the VGGT from the viewpoint of soft law is given by Xu. Her analysis of the softness of the VGGT is, in my view, close to the one presented in this paper. See T. Xu, n 5 above, 20. (‘Soft law is a metaphor, denoting non-binding governance standards. We need to inquire into the actual roles played by different actors in this “meta-power game”, their role in making governance standards, and their willingness to be bound by these “soft” governance standards.’)
certain soft laws as right, just or normative. Both terms are regarded as relative and descriptive concepts, enabling this paper to speak about 'low effectiveness' or 'high legitimacy' as drawn from the empirical insights. The analytical framework presented below guides the empirical case study by delineating which aspects in the case should be focused. To formulate the analytical framework, this work draws heavily on existing research and discussions on soft law.

Soft law has been discussed in different fields of law and in different contexts, and these discussions have been deeply embedded in the temporal and spatial contexts in which those debates operate. Soft law has been associated with specific political implications, first in the field of international law, and then in the context of European regulations with different genealogies. Most recently, an accumulation of soft laws is understood as one of the crucial characteristics of international governance. Therefore, the current challenge is to evaluate the expansion of divergent soft laws at various levels and sectors of governance, in relation to hard law on the one hand, and to conceptual discussions of law itself, on the other. Moreover, this problem of the blurring dichotomy of hard and soft law is found in the context of transnational governance, where in parallel, other blurring dichotomies of public law and private law, or conflict of laws and substantive law, are vigorously discussed.

Keeping these debates in mind, this paper is consistent with the view that, given an accumulating amount of various soft law measures, the current challenge mainly revolves around how to better understand and analyze soft

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69 Background of this phenomenon is out of focus of this paper. This phenomenon is in parallel with an emergence of various non-state actors as regulator in a shift from government to governance. For a recent discussion of private regulations, see A. Marx, M. Maertens et al, Private Standards and Global Governance: Economic, Legal and Political Perspectives (Cheltenham: Edward Elgar Publishing, 2012).
law measures, as a prerequisite to the question of how one should re-conceptualize, if necessary, the conceptions of law.\textsuperscript{73} Based on such understanding, the following will briefly discuss important building blocks, namely a regulatory approach and critical and anthropological insights.

\textbf{a) Regulatory Approach: ‘Softness’ of Soft Law}

What this paper calls the regulatory approach denotes those scholars who endeavor to bridge knowledge of international law and international relations, and concentrates on how to better understand and conceptualize various soft law instruments. To analyze abundant types of soft and hard instruments, a seminal study in this approach has provided three criteria: providing binding obligation; being precisely worded; and providing some type of delegation in the implementation of the law.\textsuperscript{74} To elaborate, a more recent study has evaluated soft law through the concept of ‘softness’.\textsuperscript{75} From this viewpoint, the voluntary nature of soft law is only one component of softness in certain instruments. In refining the concept of soft law, it is argued that levels of ‘softness’ or ‘hardness’ are determined not only by the dichotomy of binding and non-binding, but with three additional criteria: obligation, precision and delegation. Under these criteria, for example, binding law without precision is not necessarily hard, but has certain ‘softness’. The core of this regulatory approach counters the argument discrediting soft law due to its non-binding nature and unpacks varieties of soft laws. Then, a real challenge lies in how these criteria of softness correlate with quality, measured by effectiveness, legitimacy, dynamic efficiency, and others.\textsuperscript{76}

A common, yet critical, criticism to the regulatory approach is relativism. That is, if one dissolves hard and soft laws using such a framework, then an inherent normativity built in (international) law will be eventually lost.\textsuperscript{77} However, the purpose of the analytical framework explored here is not to directly re-conceptualize the dichotomy between hard and soft law based on the results of the empirical analysis. Such a re-conceptualization is a different question requiring different arguments, and the herein-presented framework serves only for the empirical analysis. The result of the empirical analysis only informs such conceptual debates.\textsuperscript{78} Another difficulty is that evaluating the level of precision


\textsuperscript{74} K.W. Abbott and D. Snidal, n 9 above.

\textsuperscript{75} H. Kalimo and T. Staal, n 38 above.

\textsuperscript{76} ibid 397.

\textsuperscript{77} From the standpoint of critical legal studies, see M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ 70 \textit{The Modern Law Review}, 1, 27-50 (2007).

\textsuperscript{78} In this regard, this paper is sympathetic with sociological jurisprudence. See the recent treatment B.Z. Tamanaha, ‘The Third Pillar of Jurisprudence: Social Legal Theory’ 56 \textit{William & Mary Law Review}, 2235 (2015).
or delegation is always relative, and such an evaluation is only subjective. As those subjectivities exist, this paper does not intend to claim that certain soft law measures are effective or legitimate. Rather, they provide only viewpoints for an analysis. Then, policy developments triggered by certain soft law instruments, analyzed as a case study, will illustrate how effective and legitimate certain soft law measures are.

b) Political Economic and Institutional Contexts

The idea of effectiveness and legitimacy brings the discussion to the second building block of the analytical framework, namely critical and anthropological insights. From a critical scholar’s viewpoint, there is an implicit limitation for soft law, depending on the legal framework in which it is embedded. As typically shown in the case of corporate social responsibility or United Nations Guidelines on Business and Human Rights (UN Guiding Principles), soft law measures often operate merely within already-settled legal frameworks, developed through ‘a process of hegemonic consolidation’. For example, the UN Guiding Principles have been a compromise based on an understanding that liabilities of corporate misconduct cannot adequately be treated given the current constellation of laws on territoriality. According to David Kennedy, these surrounding legal frameworks are taken for granted merely as a fact, and not politically contestable. This insight shows that when evaluating the effectiveness of soft law, one needs to be careful about the surrounding legal frameworks that impact current political and economic situations where certain soft law measures operate. In sum, the political and economic contexts constituted by legal institutions are an important target for case study analysis to evaluate effectiveness.

Another important element is an operationalizing technique residing in soft law, as recently revealed by anthropology scholars. According to Sally Engle Merry, given the situation of global legal pluralism characterized by an array of laws, guidelines, recommendations, practice and standards, its temporality is important. Namely, when the idea built into certain soft laws is translated into indicators, such as Human Development Index, to borrow her example, then such an idea ‘can become a widely accepted perspective that influences policy-

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82 ibid.
83 See for a concise introduction to the issue, K.E. Davis, B. Kingsbury, and S.E. Merry, ‘Indicators as a Technology of Global Governance’ 46 Law & Society Review, 71 (Spring 2012).
84 S.E. Merry, n 62 above.
draws from her insight, this paper asserts that the effectiveness of soft law measures needs to be considered in relation to the technique employed to operationalize the idea built into certain soft laws. Then, only by paying attention to the temporality, or process, the effectiveness and legitimacy of the soft law can be judged.

Indeed consideration for this technical operationalization in relation to relevant institutions overlaps with the analysis of the level of delegation, but here more emphasis is placed on actual techniques employed to operationalize the soft law. In the case study below, the discussion of relevant institutional contexts is included within the discussion of delegation, as far as it concerns the delegated authority of the soft law.

In sum, the analytical framework employed here analyzes soft law measures by focusing on their softness, consisting of obligation, precision, and delegation. Following the insights of critical and anthropological scholars, an assessment of their effectiveness and legitimacy takes into account contexts in which they operate with a temporality, or a process, in mind. The term context in this situation means two things: the political economic context that certain soft law measures address, on the one hand, and relevant institutions that operationalize the soft law, on the other. The following case study of the VGGT and its relevance to the Mekong region will be conducted focusing on these elements. This case study eventually illustrates the current effectiveness and legitimacy of the VGGT, particularly in the Mekong region.

2. The VGGT from the Analytical Framework of Soft Law

This section applies the analytical framework to the VGGT. The VGGT, although non-binding, has a moderate level of precision and clear delegation, and thereby shows the potential to have a high effectiveness in building transnational norms of land governance. Again, these three elements are discussed in order to characterize the VGGT among many other soft laws. And the actual effectiveness or legitimacy does not flow directly from these three elements. Rather, the analysis of the surrounding contexts of the VGGT illustrates its certain effectiveness and legitimacy.

After the land rush appeared as a problem that required an international response, private sectors, in collaboration with the World Bank and other international organizations, took the first initiative to make agricultural investment responsible and accountable.  

85 ibid 109.
86 As discussed above, this is what Narula called ‘the Market-Plus Approach’. See, S. Narula, n 56 above, 121.
which launched a vast amount of debates,\textsuperscript{88} the World Bank, the Food and Agriculture Organization (FAO), the World Bank, the Food and Agriculture Organization (FAO), UNCTAD and the International Fund for Agricultural Development (IFAD) prepared the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (PRAI). The PRAI is a voluntary, self-regulatory measure of responsible agricultural investment. However, after its issuance, it received much criticism.\textsuperscript{89} The main critique arises from the alleged fact that lands classified as idle or underdeveloped, and therefore investable, were actually under traditional or customary usage by indigenous people or other local communities. In consequence, the PRAI, based on the findings of such research, has been criticized not just for its inability to regulate the land rush adequately, but also for facilitating or legitimizing the land rush.

Another regulatory measure was initiated by the UN related organization, the Committee on World Food Security (CFS). The CFS was established in 1974 as an intergovernmental forum to review policies on food security, reporting annually to the United Nations Economic and Social Council. In response to the food crisis, it reformed its organizational structure in 2009,\textsuperscript{90} welcoming participation from relevant actors into the policy-making processes. Learning from the criticisms of the PRAI, the CFS formulated an inclusive policy-making process, with civil society organizations being organized and actively participating in the drafting of soft law measures.\textsuperscript{91} Due to this inclusive mechanism of policy making, arguably, the CFS currently has sufficiently high legitimacy in the global policy making on food security.\textsuperscript{92} In 2012, the CFS re-enforced the VGGT. Thanks to the reform of the CFS,\textsuperscript{93} one of the acclaimed characteristics of the drafting process of the VGGT is the wide participation of relevant actors,\textsuperscript{94} thereby ensuring high legitimacy from wide ranging stakeholders.

\textsuperscript{88} See, eg, Tania Murray Li has provided a thoughtful criticism on the influential research by the World Bank. See, generally, T.M. Li, ‘Centering Labor in the Land Grab Debate’ 38 \textit{The Journal of Peasant Studies}, 281 (2011).

\textsuperscript{89} See, eg, S. Narula, n 56 above, 134.

\textsuperscript{90} For a detailed description of the reform of the CFS, see J. Duncan, n 64 above, 84-122.

\textsuperscript{91} B. Müller and G. Cloiseau, n 20 above, 43. (‘For the first time in the UN history, at the CFS meetings in Rome, civil society organizations and private sector organizations were sitting with representatives of governments around the negotiating table to make proposals and negotiate about food policy issues’.)

\textsuperscript{92} As discussed, there have been two strides of regulations of land rush: the Market-Plus approach and the Rights-Based approach. In case of land rush and its regulation, these two approaches broadly correspond with industries’ self-regulation and UN based public regulation. A symbolic event to show that the UN based approach represented by the CFS has a higher legitimacy was the fact that promoters of PRAI have tried to have an endorsement by the CFS to secure its legitimacy. In the end, this move was not successful being faced with much criticisms by CSOs, and the CFS did not endorse the PRAI, but instead it stated ‘taking note of the on-going process’ of the PRAI. See P. Stephens, n 29 above, 190.

\textsuperscript{93} For a detailed explanation of how this inclusive policy-making process has worked out, see J. Duncan, n 91 above, 123-152.

\textsuperscript{94} P. Seufert, ‘The FAO Voluntary Guidelines on the Responsible Governance of Tenure of
a) Softness: Obligation, Precision and Delegation

The VGGT has been prepared as a non-binding instrument. However, since it has a moderate level of precision and clear delegation, as shown below, the VGGT has the possibility of remaining relevant as a transnational norm of land governance.

First, the VGGT is not a mere declaration of aspiration, but is rather an instrument with clear subjects and statements of obligations and responsibilities. The rights and obligations it imposes on states and non-states’ actors and its delegation of authority to implement are well stipulated. To contextualize, the VGGT first states that it operates within the framework of States’ existing obligations under international law, including the Universal Declaration of Human Rights and other international human rights instruments.

It goes on to mention that it covers extensively not just land law, but all the institutions that enable land law instruments. The subject of the VGGT is not just state, but also non-state actors, which have a responsibility to respect human rights and legitimate tenure rights.

To underscore one concrete element, for example, the VGGT explicitly accepts various patterns of land ownership. It stipulates:

“These Guidelines are global in scope. Taking into consideration the national context, they may be used by all countries and regions at all stages of economic development and for the governance of all forms of tenure, including public, private, communal, collective, indigenous and customary.”

Further, in its Part 3, the VGGT acknowledges various types of property ownership. It addresses the governance of the tenure of land, fisheries, and forests with regard to the legal recognition of tenure rights of indigenous peoples and other communities with customary tenure systems, as well as informal tenure rights. It also speaks of the initial allocation of tenure rights to land, fisheries and forests that are owned or controlled by the public sector. It is remarkable that the VGGT acknowledges not just customary tenure systems, but also informal tenure. It is more comprehensive and inclusive regarding a variety of tenure systems that exist in various contexts. In other words, it


95 See especially, the VGGT, Part 3 and 4.
96 See especially, the VGGT, Part 5 and 7.
97 The VGGT, 1.1. This shows a clear contrast with the PRAI, the World Bank’s measure for responsible agricultural investment, which does not make explicit mention to human rights obligations.
98 ibid 3.2.
99 ibid 2.2.4.
100 ibid 9.
101 ibid 10.
102 ibid 8.
underlines the availability of multiple methods of governing land, fishery and forests. In this way, using detailed provisions, the VGGT presents its main ideas in a precise way.

Also, the VGGT delineates allocation of authority in terms of its implementation. As such, its delegation is clear. The Food and Agriculture Organization (FAO) mainly directs the implementation of the VGGT through advocacy, assistance for each country and regional organizations, and preparation of various technical guidelines for implementations. These technical guidelines are detailed tools to implement the VGGT, covering such topics as gender, indigenous people, agricultural investment, and so on. Moreover, the FAO has a legal team to facilitate such implementation, and they work on the preparation of database, called FAOLEX, which accumulates the relevant legal and policy data of each country. The FAO also publishes the Land Tenure Journal to spark scholarly discussion. When new issues emerge, they are first treated by the High Level Panel of Experts on Food Security and Nutrition, which operates as a policy-science interface of the Committee on World Food Security. Then this Committee decides if it needs to revise existing policies or formulate another policy, the outcome of which is again implemented by the FAO. The VGGT is embedded into this policy cycle, and as such, the delegation of the VGGT is clear.

b) Process: Political Economic and Relevant Institutional Contexts

Due to the effort by the FAO, which is charged with diffusing the VGGT, it has been endorsed by various organizations, ensuring its legitimacy. For example, G7, General Assembly of the UN, and other private companies including Cargill, Illovo Sugar, Nestlé, PepsiCo, the Coca-Cola Company, and Unilever have explicitly mentioned their commitment to the VGGT. Various organizations have already formulated policy guidelines with respect to the VGGT. Subsequently, based on the basic agreement on tenure governance of resources reached by the VGGT, further policy instruments came into being. The most prominent is the CFS-RAI, new principles on responsible agricultural investment. Recalling the PRAI’s shortcomings, the CFS-RAI represented significant progress. Two elements are particularly important. First, the CFS-
RAI explicitly builds upon the VGGT, thereby operating within the existing framework of other international instruments; the PRAI tends to operate rather distantly from surrounding instruments of human rights or resource governance. Second, the CFS-RAI explicitly regards the traditional knowledge of indigenous people and communities and adopts Free, Prior and Informed Consent as a procedural approach. The PRAI only stipulates a consultation. Although an implementation of the VGGT and the CFS-RAI is a matter of continuous work by relevant actors, and their relationship with the PRAI is ambiguous and calls for further examinations, these instruments are at least showing positive developments.

Additionally, there is another lesson to be learned from the trajectory of regulatory policies in response to the land rush, namely the PRAI, the VGGT, and the CFS-RAI. What is striking is the similarity of the area covered by the PRAI and the CFS-RAI. McKeon, who took part in the policy making process of the VGGT and the CFS-RAI, observes that the VGGT was a successful case of reaching agreement within a short time (almost two years) considering the participatory and inclusive mechanism being employed in the process. She believes the agreement was possible because the VGGT carefully avoids most controversial issues such as free trade and detailed rules on investment. The VGGT deals with governance of tenure of resources rather than marginal issues. Property ‘rights truly are foundational for economic life and how you set them up powerfully inflects the development trajectory in a society’. Subsequently, based on the VGGT with high precision and legitimacy, the CFS-RAI, an alternative measure on responsible agricultural investment, has been made possible. To summarize, the case of the VGGT illustrates one of the tactics that can be employed in an era of regulatory competition, where a firm and stable policy-based agreement, in this case governance of tenure, works as a powerful instrument to evolve further regulatory policies. The effectiveness of soft law measures cannot be judged solely by direct effectiveness, but rather a more contextualized understanding is necessary. At this stage, the non-binding nature of the VGGT has worked by lowering the hurdle to reach the agreement and producing a baseline for further policy discourses. Although issues such as lack of transparency and perceptions of high level

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110 The CFS-RAI, 25-(i). (‘Responsible investment in agriculture and food systems respects legitimate tenure rights to land, fisheries, and forests, as well as existing and potential water uses, in line with: (i) The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security, in particular, but not limited to, Chapter 12’).

111 Ibid Principle 7. (‘Respect cultural heritage and traditional knowledge, and support diversity and innovation’).


113 Ibid.

114 D. Kennedy, ‘Some Caution about Property Rights’ n 39 above.
of corruption exist in the Mekong, this paper maintains that furthering the understanding of soft law measures in the context of law and development in developing countries is necessary and valuable. It submits that soft law measures are effective in developing countries by becoming a reference point in reviewing and improving national policies on land law. Also, by situating the VGGT between the two other policy instruments, the PRAI and the CFS-RAI, it may be suggested that the VGGT has functioned as a basis for gradual policy shifts.

Lastly, another operationalizing technique calls for attention, specifically the Land Governance Assessment Framework by the World Bank. There exists ongoing discussions that potentially the Land Governance Assessment Framework can be modified and utilized to facilitate implementations of the VGGT. The recent Implementation Manual of the Land Governance Assessment Framework mentions that ‘(i)nstruments for country level assessments, priority setting and monitoring are important for putting the VGGT into practice.’ A thorough analysis of this framework exceeds the scope of this paper, but sustained attention is needed, particularly cognizance of the strong influence that those frameworks would have on policy outcomes.

3. Relevance to the Mekong Region

This section considers the relevance of the VGGT within the context of the Mekong region. After briefly explaining the historical background, this section analyzes regional implications from the viewpoint of the political economy. Then, it discusses how the VGGT has made an impact on the strategies and discourses of actors in the Mekong, especially the third sector actors. Lastly, actual impacts to the legal and political situations will be discussed, especially based on the experience from Myanmar.

a) Historical Background

The Mekong region is in danger of a land rush, and there are deepening controversies. Although a comprehensive history of land governance in the Mekong is beyond the reach of this paper, a brief summary is still useful.


116 More information on the Land Governance Assessment Framework is available at https://tinyurl.com/y8syha2t (last visited 15 June 2017).


119 In writing this part of the situation of the Mekong, generally, the following studies, among others, have been valuable: Y. Kaneko, ‘Ajia No Mondai Jyokyo (Problems in Asia)’ 81
Land has been one of the areas of conflicts between states and society in the Mekong, and a dynamic relationship between the state and civil society has developed within the constraints of external factors. All countries in the region have experienced a period of colonization by western countries. After the era of colonization, the Mekong has become one of the battlefields between capitalist and socialist views. Land governance has also been divided into two types, namely, privately owned and publicly owned lands. Recent developments in each country of the Mekong show that they are becoming more open to foreign investment, and their lands are being turned into investable assets in the global market.

In Vietnam, the Party instituted economic reforms under the policy of Doi Moi in 1986 to address a growing economic crisis. Resolution 10 of 1988 gave peasant households usufruct rights to land for up to fifteen years for annual crops, and forty years for perennial crops. The Land Law of 1993 extended land tenure to twenty years for annual crops and fifty years for perennial crops. Although land remained the property of the state, peasants were given the right to inherit, transfer, lease, and mortgage their land use rights. In Vietnam, the land rush is embedded in its 'search for its ideal balance between Communist control and a market-led economy'.

Cambodia has had various land systems within a short period of time, due to the unstable political situation and civil war. Its recent history begins with French colonization and a return to monarchical rule (1953-1975), then continues with land collectivization under the Khmer Rouge (1975-1979), de-collectivization under Vietnamese occupation (1979-1989), and finally full privatization under a liberalized market economy (after 1989). Currently, Cambodia’s main land controversy centers on how to treat the economic land concessions that have been facilitating the land rush.

References:

119 P. Hirsch and N. Scurrah, n 117 above; A.B. Quizon, n 15 above.
120 A.B. Quizon, n 15 above.
123 A.B. Quizon, n 15 above, 32.
Laos has abundant land, and most of its population has historically been rural. The war between royalist government and Pathet Lao revolutionary force (1964-1973) resulted in extensive population displacement. After the 1986 Party Congress, Laos mobilized as an outward-oriented and market-based economy. The current Land Law was passed in 2003 and since then, there have been public concerns about the impact of large-scale land concessions.

Lastly, in Myanmar, it is important to understand the colonial era to appreciate the current legal status of land. Of particular note is the State’s assumption of rights to land, on the one hand, and the relationship between the central government and the various ethnic-based states, on the other. Following the economic development of the late 1990s, the national elections in 2010 opened the country to foreign investments under President Thein Sein. Most recently, Myanmar is revising its National Land Use Policy, which will be analyzed below.

Apart from each country’s unique development, this paper is more focused on their common historical features of land governance. The recent histories of land, the technological revolution of agriculture, the Green Revolution, and the impact of policies taken by the International Monetary Fund (IMF) and the World Bank (and occasionally by the Asian Development Bank) have fostered privatization of land and have put pressure on traditional small-scale farmers in these countries. Between 1965 and 1990, the Green Revolution resulted in a dramatic increase in three cereal crops: rice, wheat, and maize. It also gave rise to a tendency to favor large-scale, commercial farming which put pressure on small-scale farmers that are thought to be too inefficient for export-oriented farming. Moreover, development policies by donor agencies have had a major impact on the land governance in the Mekong. In the 1970s the World Bank strongly encouraged the establishment of a property rights system as
the key for improving agricultural productivity.\textsuperscript{134} Around the end of the Cold War, the same policy was promoted because of its effectiveness in the transition to a market economy,\textsuperscript{135} and such a policy was continued until recently.\textsuperscript{136} The World Bank strongly pushed export-oriented development through a series of policy instruments including deregulation, the opening of domestic markets, and reducing or eliminating state subsidies. Through this process, countries in the Mekong have, to a varying degree, committed to the notion that property rights have an impact on investment and development.\textsuperscript{137} This history of land governance has prepared the Mekong as another place for land rush.\textsuperscript{138}

b) Political Economic Context

Based on this history, the crucial question must be asked: is the VGGT helpful to tackle the problem of the land rush in the context of the Mekong region? As discussed in section III, the Mekong region does not have a useful legal institution like a regional human rights court. However, this paper still submits that the VGGT and its apparently high legitimacy in relation to other relevant instruments, as discussed above, are useful for the Mekong region by triggering necessary policy changes, or at least providing an institutional forum. As indicated, the Mekong is committed to the notion that property rights have an impact on investment and development. To understand the political-economic meaning of this history, a review of the recent conceptualizations of the land rush will be helpful.

From the perspective of law and development, as well as legal pluralism, Ferrando has grafted the land rush narrative onto what he terms, ‘three legal homogenizations’.\textsuperscript{139} Central to his criticism against the land rush phenomenon


\textsuperscript{135} R.A. Posner, n 34 above.


\textsuperscript{137} Land governance in the Mekong has another important factor. It is a field of transboundary water management of the Mekong river basin. Although this paper does not delve into the relationship between land governance and water management in the Mekong deeply, it needs to note that the water management of the Mekong has been one of the important fields to discuss effectiveness of soft law or transnational legal measures in the context of the Mekong. See, F. Johns et al, ‘Law and the Mekong River Basin: A Socio-Legal Research Agenda on the Role of Hard and Soft Law in Regulating the Transboundary Water Resources’ 11 \textit{Melbourne Journal of International Law}, 154 (2010).


\textsuperscript{139} T. Ferrando, n 45 above, 72.
is the fact that Foreign Direct Investment operates as a way both to ease access to land by national and international investors, while protecting their interests against the singularity of the local law. Tomaso Ferrando argues that before the current situation that enabled the land rush, a process previously existed that replaced pluralism in the local context. Such a process originated in decolonization, where all states appear as equal sovereigns, but in fact some are economically subordinated to others (the first legal homogenization). Then, the notion that the sovereign state has absolute power over its people and territory served as a pretext for the importation of a public/private dichotomy to property regime, replacing the legal pluralistic architecture that considered peripheral land (the second legal homogenization). These two processes of legal homogenization have paved the way for the land rush, where the singularity of the local law has been replaced through the coercive enforcement of the investment contract (the third legal homogenization). Ferrando provides important insight, describing how these three legal homogenizations function as preparatory structures that frustrate the plurality of the property regimes in host countries.

Drawing on development policies, a thesis has also been advanced that critiques ‘clear and strong’ property rights as a prerequisite of economic development. Kennedy criticizes the importation of ‘clear and strong’ property rights to developing countries because they are deeply indebted to the particular experiences of developed countries. Kennedy notes, for example, that

‘(p)roperty rights truly are foundational for economic life and how you set them up powerfully inflects the development trajectory in a society like China which has, over the last generation, substantially transformed the rules about who can do what to whom and with what’.

Acknowledging ‘the allocative role of law’, he concludes that a property regime is ‘all about choices’. To apply these insights in the context of global land rush is insightful. From this angle, the central problem of the land rush is that the right to determine ownership and use of land is limited by legal and ideological constraints, namely, the structural impediment of ‘clear and strong’
property rights. In an era of globalization, the most appropriate public space to determine the right to control lands becomes more difficult to identify. The land rush phenomenon is simply an expression by critical observers denoting the unfairness of the process of such determination. A criticism that people affected by the land rush are excluded from the land investment process is just one aspect of this fundamental problem.

Another problem is that land values are calculated solely in economic terms, and other metrics, such as cultural, religious, or political value, tend to be ignored. Sociological and anthropological interventions are helpful here. Saskia Sassen observes that the extreme monetization of land triggers the land rush and subsequently causes ‘further disassembling of national territory’. This view stresses that transnational networks and deepening globalization have replaced a state’s control over its land. From a rather different perspective, one anthropologist elaborates a thoughtful consideration on what is special about land. Tania Murray Li maintains that ‘what land is for a farmer is not the same thing as for a tax collector’, and underscores the materiality of land that is not movable, and provides a bundle of usages not limited to the economic use.

These differing conceptualizations provide a framework to understand the historical importance of the VGGT. The Mekong region is at a crucial crossroad. Countries in the region must decide whether to preserve their traditional ways of land ownership or open the country to more investment. This decision has lasting effects, given that once the usage of land has been modified, it takes an extremely long time to revert to the old way. Of course, it is ultimately a decision each country needs to make. Admittedly, this paper is inclined to the preservation, as the existing legal institutions cannot ensure adequate and fair compensations when a land rush takes place, as discussed in section III. Therefore, one can understand the formidable task of the VGGT in facilitating autonomous decision-making in its resource governance regime while also embedding a plurality of resource governance mechanisms from various countries. In other words, given that managing the land rush problem is made difficult by pressure for legal homogenization and an ideology of ‘clear and strong’ property rights, the VGGT has unique potential. It can mark an important shift for each country in the Mekong to retain some authority with which to decide its land

\[\text{For the former, see S. Sassen, n 32 above, and for the latter, see T.M. Li, ‘What Is Land?’ n 3 above.}\]
\[\text{S. Sassen, n 32 above, 27.}\]
\[\text{ibid 26. (‘It is that the simultaneous privatizing and globalizing of market economies is producing massive structural holes in the tissue of national sovereign territory.’)}\]
\[\text{T.M. Li, ‘What Is Land?’ n 3 above, 589.}\]
\[\text{ibid 592. (‘Why do your arguments and forms of inscription (lines on a map, or words on paper) prevail against my arguments, my modes of inscription (the axe, the plough, the presence of spirits) and my need to sustain myself?’)}\]
\[\text{For a powerful presentation on this point, see S. Sassen, Expulsions (Boston: Harvard University Press, 2014).}\]
c) The VGGT as a Trigger for Policy Discourses

It is also notable how the VGGT has shifted the strategies and discourses of land rush actors. Although there are no explicit commitments to the VGGT by regional international organizations surrounding the Mekong, such as ASEAN, Asian Development Bank or the Greater Mekong Subregion, the FAO has made partnerships with Cambodia, Myanmar, Laos and Vietnam bilaterally. Through these bilateral networks, the FAO provides capacity development programs and coordinates policy discussions among stakeholders with the goal of optimal implementation of the VGGT.

More importantly, the formulation and implementation efforts of the VGGT have created dense networks among different actors, including state agencies, non-governmental organizations (NGOs), civil society organizations (CSOs) and research groups. The prominent research group, the Mekong Region Land Governance Project, now aims at promoting the VGGT principles related to transparency of land related information. Specifically, the Mekong Region Land Governance Project is currently working on building an online land data platform that will strengthen the security of small landholders’ tenure rights.

Also, regional NGOs in the Mekong have actively participated in the discussions behind the VGGT formulation, as well as its subsequent implementation. The most notable example is the regional NGO, Focus on the Global South, which provides continuous monitoring of VGGT implementation.

The active participation of NGOs should not be underestimated. Their work here is a fruitful result of the institutional innovations of the Civil Society Mechanism for relations to the Committee on World Food Security (CSM), an international space for collaboration of CSOs in relation to food insecurity and malnutrition, employed in the VGGT drafting. The CSM mechanism was created to facilitate civil society participation in policy processes of the

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154 Ibid.

155 The website of the NGO is available at https://tinyurl.com/59g7sk (last visited 15 June 2017).

156 See the report by the Working Group on Monitoring of the Civil Society Mechanism, ‘Synthesis Report on Civil Society experiences regarding use and implementation of the Tenure Guidelines and the challenge of monitoring CFS decisions’ (2016), 29, available at https://tinyurl.com/yahu2pnk (last visited 15 June 2017). This report prepared for the Global Thematic Event during the forty-third Session of the Committee of World Food Security (CFS). Shalmali Guttal, a member of the Focus on the Global South, was also a part of the drafting team of this report.

157 More information on the CSM is available at https://tinyurl.com/8xkch3w (last visited 15 June 2017).
Committee on World Food Security. It helped unite NGOs, civil society organizations, and research groups to promote the value of the VGGT. The Mekong region has already witnessed its First Regional Land Forum organized by such networks.\textsuperscript{158} Moreover, the political shifts are partly due, for example, to advocacy efforts in Cambodia. These have resulted in partial reduction in economic land concessions in Ratanakiri.\textsuperscript{159} According to a report by the Mekong Region Land Governance Project, sustained commitments and efforts by multi-stakeholders to mediate the relationship between traditional communities and investors have been formidable. And these successful experiences are documented and circulated within the policy network. This emerging virtuous circle was made possible by the VGGT.

d) Positive Example: A Case of Myanmar

Lastly, this paper would like to highlight a recent practice in Myanmar. Myanmar presents the most advanced usage of the VGGT in the region. Other countries may well see it as a showcase in the future, as the government has moved to actively commit to the VGGT. Recent political transition and the process of land reforms in Myanmar illustrate this. After a series of drafts of its National Land Use Policy, the Myanmar government issued the Policy in January 2016. During the process to formulate the National Land Use Policy, a civil society partnership was established, framing an advocacy strategy consistent with the VGGT.\textsuperscript{160} Moreover, international NGOs, Namati and Landesa, provided input to the policy process, also drawing on and referring to the VGGT.\textsuperscript{161}

As a result of these collaborative efforts, the National Land Use Policy section 8-(d) states

\textit{‘(t)o adopt international best practices such as voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security and human rights standards’}.\textsuperscript{162}

Here, the VGGT, a soft instrument, has contributed significantly towards its implementation in Myanmar by being mentioned in the National Land Use Policy. In other words, since the National Land Use Policy provides a general

\textsuperscript{158} More information is available at https://tinyurl.com/ybs2vdbv (last visited 15 June 2017).
\textsuperscript{160} R. Hall, I. Scoones, G. Henley, n 153 above, 38.
\textsuperscript{162} National Land Use Policy of Myanmar, 8-(d).
framework for subsequent discussions on legislating actual land law, the VGGT has become a starting point for formulating a land law regime for Myanmar. The National Land Use Policy further maintains,

‘(w)hen drafting National Land Law, take into consideration experiences of countries in the region and around the world, the unique characteristics of the country, issues being faced, and the interest of those using land and natural resources in the country, then inform the stakeholders and public, including media, through consultation events and other means, so that they may provide feedback’. \(^\text{163}\)

Here, the VGGT, namely its recommendation for pluralistic, nationally contextualized land governance, is appreciated in the National Land Use Policy in Myanmar. The VGGT now functions as one of the reference points for Myanmar municipalities and civil society organizations to debate appropriate land policy. It demonstrates in detail which issues should be addressed and discussed. It also highlights options, for example, of forms of land ownership that may be considered legitimate. \(^\text{164}\) Moreover, continuous policy discussions, a necessary element for just land governance in Myanmar, have been set based on the VGGT. This is, from this paper’s point of view, an ideal realization of the VGGT.

4. Limitations and Further Issues

The previous sections analyzed the importance of the VGGT from the viewpoint of soft law, emphasizing that the VGGT, although not legally binding, has a sufficient level of precision and clear delegation, which makes it effective. Also the previous section has discussed the relevance of the VGGT, paying attention to its political-economic contexts, as well as current status and process of implementation. Now this last section proposes some preliminary thoughts on the relationship between soft law and regional institutions, and the problem of the scope of legitimacy. The main argument is that the VGGT’s emphasis on plurality of tenure governance has the potential to support developing countries in improving their land governance by considering their respective national contexts.

a) The VGGT Implementation and Issues Ahead

There are observable differences in the level of implementation of the VGGT from region to region, from country to country. \(^\text{165}\) As a collective regional

\(^{163}\) ibid 77-(c)(ii).
\(^{164}\) This draws its inspiration from the idea of ‘ recursivity’ in the theory of transnational legal order. See, T.C. Halliday and G. Shaffer, n 14 above, 37-42.
\(^{165}\) For a monitoring of how donor agencies are working on land governance issues all
effort, there are limitations in the implementations of the VGGT in the Mekong. Africa appears more active in implementing the VGGT than Southeast Asia. Regional entities, such as the African Union and the African Development Bank, have worked to implement the VGGT. On the other hand, Southeast Asian regional institutions such as ASEAN, the Asian Development Bank, or the Mekong Commission have seemed less active. An interesting question emerges: what are the policy consequences of this difference? One could hypothesize that even though regional institutions are reluctant to be involved in political matters, each individual country is nevertheless influenced by transnational regulatory regimes through various channels.

Another limitation is the limited coverage of the VGGT, especially with regard to water governance. The Mekong from time to time faces water management issues. As Howard Mann points out, agricultural investment is essentially an extractive venture, as land is useless for agriculture without water. However, water is a limited resource that calls for a coordinated distribution. The Mekong has been a place where trans-boundary coordination and management of the Mekong River is a long-lasting problem. The VGGT does not extensively address the problem of water management, which may well be regarded as one of the major limitations of the VGGT. However, it does state that such issues need to be resolved by the states in their implementation of the VGGT. If the Mekong Commission, an intergovernmental organization focusing on the management of the Mekong River, can interact with the policy matters sparked by the VGGT (in collaboration with state municipalities), it would mark another step toward better governance of land in the Mekong.

The two limitations described above are related to the issue of transnational decision-making sites for regional land governance. A significant problem over the world, see the website of Global Donor Working Group on Land available at https://tinyurl.com/y7oe2nqv (last visited 15 June 2017).


The VGGT, iv (Preface). (‘It is important to note that responsible governance of tenure of land, fisheries and forests is inextricably linked with access to and management of other natural resources, such as water and mineral resources. While recognizing the existence of different models and systems of governance of these natural resources under national contexts, States may wish to take the governance of these associated natural resources into account in their implementation of these Guidelines, as appropriate.’)

On the general issue of the transnationalization of public sphere, see N. Fraser, ‘Special Section: Transnational Public Sphere: Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World’ 24 Theory, Culture & Society, 7,
with the land rush phenomenon, in the view of this paper, is that determination of who can use which land in what way has shifted from democratic decision-making institutions to decisions taken by a limited number of people. The shift exemplifies the ‘partial disassembling of national territory’.\textsuperscript{171} This paper has argued that the VGGT’s framework embraces the idea that land management is a local problem, which requires a nuanced understanding of social, political, cultural considerations. It also has regarded that the VGGT is a starting point for many policy and legal instruments emerging from or based on it. Recent practices of community development agreements,\textsuperscript{172} for example, manifest a potential to create a more inclusive investment than the current practice of state contracting.\textsuperscript{173} Based on these basic instruments, further challenges lie in how one conceptualizes an appropriate public sphere to negotiate and renegotiate each land investment project. This inevitably impacts not only so-called ‘affected people’, but also affects other people in the country and even beyond.\textsuperscript{174}

\textbf{b) A Problem of the Scope of Legitimacy}

Lastly, there may be a possible question regarding the scope of legitimacy. The VGGT’s legitimacy derives from the CFS, the intergovernmental body for the functionally differentiated field of food security governance. It also draws legitimacy from the inclusive process of its policy-making. As such, the legitimacy of the CFS is not the same as democratic legitimacy. Such legitimacy is not an absolute one, and it can be questioned, for instance, when other normative claims emerge from different actors. One particularly interesting case study in this regard is the policy debate that occurred at the Rio+20 conference.\textsuperscript{175} It took place in June 2012, after the issuance of the PRAI in 2010 and the VGGT in May 2012, and while the CFS was working on the CFS-RAI. Birgit Müller and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{171} S. Sassen, ‘Land Grabs Today’ n 32 above, 27. (‘The issue here is not one of nationalism versus globalism, but one of complexity: where once there was a prospect of democratic decision-making, now there is an expansion of opaque transnational networks that control the land.’)
\item \textsuperscript{172} Community development agreements are one of emerging practices to incorporate local community’s interest into an investment contract between state and investors. See further, I.T. Odumosu-Ayanu ‘Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment’ 65 University of New Brunswick Law Journal, 269 (2014).
\item \textsuperscript{173} As Muir Watt correctly points out, it is too optimistic to assume that affected community’s interest is already represented by the state: ‘However, the assumption of alignment of governmental interests and those of local communities is clearly overly optimistic.’ H. Muir Watt, n 36 above, 234. Based on this understanding, while Muir Watt goes on to make an argument that horizontal obligation of home state to respect human rights is necessary, this paper adds another aspect that negotiation and renegotiation of land investment contract is another space that we should further consider about sufficient public sphere to determine an allocation of land property.
\item \textsuperscript{174} In this regard, one has to also imagine about those tribes whose livelihood have been torn into different countries.
\item \textsuperscript{175} See, generally, B. Müller and G. Cloiseau, n 20 above.
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Gilles Cloiseau have analyzed ‘negotiating practices and power games’ as a part of responsible agricultural investment. They have framed an issue in a way that

‘two modalities of global governance clashed: the governance through a human rights based multilateral processes in the CFS and the idea of corporate self-regulation through PRAI’,

and concluded

‘the weakening of the role of the multilateral agencies of the UN bound by the mandate of advancing and promoting human rights and simultaneously the rise of self-governing instruments promoted by groups of states and international agencies without a multilateral legitimacy’.176

Their case study has shown that a further analysis of independent variables that correlate with the ex post legitimacy (a kind of legitimacy attained from the positive outcomes of certain governing tools)177 is required. Also, the dichotomy between public and private in the field of transnational regulatory governance is blurring. There may be a need to explore such questions as legitimacy or effectiveness in each respective sector, such as food security governance, before forging a renewed theory of compliance, effectiveness, or legitimacy in an era of transnational governance.

The scope of legitimacy is also problematic when the VGGT has a substantial effect on neighboring functionally differentiated fields, such as energy governance, climate change governance, or labor governance. Arguably, the scope of the legitimacy of the CFS may be limited within the sector of food security governance. Indeed, the VGGT mentions possible effects and responses to climate change in the context of governance of tenure in its Part 6. To investigate the interface between food security governance and labor governance, initially, one needs to have a nuanced contextual understanding of agrarian reform in each country. And the shape of agrarian reform cannot be assumed to be the same as what Western countries have experienced, as surrounding contexts can never be the same.179 Further investigation of these interfaces between functionally differentiated policy fields is an essential task for the

176 ibid.
178 For a seminal introduction of this aspect of the problem, see T.M. Li, ‘Centering Labor in the Land Grab Debate’ n 88 above.
179 See, eg the project to Open Agriculture at the Massachusetts Institute of Technology (MIT), aiming at ‘creation of an open-source ecosystem of food technologies that enable and promote transparency, networked experimentation, education, and hyper-local production’. This kind of ‘disruptive technology’ has a potential to substantially change the pathways of agrarian reforms.
future. Where is the appropriate forum to manage such interfaces? Are such forums necessary in the first place? Who should be included in the policy discourses and in what way? What could be the influence of these policy-making processes in the local context? A continuous discussion to engage with these questions seems to be a necessary step.

V. Concluding Remarks

This paper has emphasized the historical importance of the VGGT as a soft law mechanism that advances the plurality of land governance in various countries, especially in the Mekong Region. Soft law measures are from time to time discredited because they do not have a binding legal effect.\textsuperscript{180} This paper has taken a different view, especially of the possibilities of the VGGT to be understood in its facilitative influence to domestic, contextualized policy-making. Also, this paper has proposed that the VGGT functions as a basis for gradual policy change, by reaching a minimal but fundamental agreement whereby further policy discourses are derived. The viability of these arguments will be further tested in continuous and future implementation processes.

As a case study, this paper leaves many questions unanswered. This paper’s initial examination of the VGGT calls for further sociological studies of each country in order to critically assess the implementation phase of the VGGT at a local level. It also explores the VGGT’s effectiveness and legitimacy in relation to other relevant international soft and hard laws at a transnational level. Moreover, a profound study of the roles of regional actors in the implementation process will be particularly important. Arguably, the majority of current conceptualizations of regional transnational governance have been based on Western models, notably the European Union (EU). The Mekong region has different institutional landscapes, and that fact calls for a comparative analysis among regions.

Lastly, as briefly indicated in the presentation of the analytical framework, the analysis in this paper is situated in the current debate on theoretical clarifications of the concept law, by providing empirical knowledge on functions of soft law at various levels. Although a full theoretical treatment is beyond the scope of this work, it nonetheless considers questions for such theoretical debates. First, this paper should have suggested the importance of the empirical and contextualized knowledge to the theorization of fast growing legal order. This point runs in parallel with a recent turn to empiricism in theoretical discussion of law, as exemplified in New Legal Realism.\textsuperscript{181} The meaning and function attributed to


\textsuperscript{181} See, eg V. Nourse and G. Shaffer, ‘Varieties of New Legal Realism: Can a New World
the VGGT differ significantly depending on legal and institutional contexts of regions. This paper submits that political-economic contexts attach additional meanings to certain legal instruments. The ideological significance of the VGGT can only be revealed against the background of historical development of land grabs. Such aspects are elusive when certain legal measures are analyzed in a manner that is detached from its context. In sum, this paper modestly maintains that the theoretical conceptualization of the transnational legal order cannot be detached from nuanced understandings of legal and institutional contexts, on the one hand, and political economic contexts, on the other.

Legal Principles and Values*

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Abstract

This paper analyses in depth the distinction between values and principles in light of the process of legal interpretation. The logical and legal status of principles are examined from a conceptual standpoint at the outset, as well as the slippery border between principles and values and the interplay between law, politics and ethics. The above-mentioned interaction directly affects the outcome of the interpretive process: by focussing on the weight and appropriateness of legal principles, the present study highlights the width of the latter concept, which mainly lies in the hands of the interpreter when he is concretely applying them to the facts of a case in terms of his role. In light of the above, this paper argues that it is necessary to discard a presumptive approach to the issue in question: otherwise, the inherent appropriateness of a legal principle would be inevitably frustrated. Indeed, if the interpreter is afraid to contravene the sacrosanctity of legal certainty and thus refuse to employ legal principles, then he will not find a solution which is the best fit for the specific features of the actual case, since the ‘law’ is a broader experience than the mere application of rules. In this vein, the present study points out the need for the interpreter to use the entire toolbox at his disposal with confidence, so that the final decision can reasonably mirror the actual facts it concerns.

I. Legal Values Cannot Be Anything Other than Normative Principles

The distinction between ‘principles’ and ‘values’¹ is proposed essentially with

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¹ However, see P. Perlingieri, ‘Relazione conclusiva’, in Id and A. Tartaglia Polcini eds, Novecento giuridico: i civilisti, La cultura del diritto civile (Napoli: Edizioni Scientifiche Italiane, 2013), 351-362, disputing the position taken by N. Irti, ‘La filosofia di una generazione’, in Id and A. Tartaglia Polcini eds, Novecento giuridico: i civilisti. La cultura del diritto civile (Napoli: Edizioni Scientifiche Italiane, 2013), 333-350. See also P. Perlingieri, ‘Editoriale. I valori e il sistema ordinamentale “aperto” ’ Rassegna di diritto civile, 3 (2014), where ‘a strictly dualist reading of the relationship between values and norms’ is rejected: the two entities are of necessity dialectically opposed, but are not in any way mutually exclusive. By contrast both are necessary; if, and only if, both subsist within the legal system, as an open system adapted to reality, capable of learning from itself and evolving by reflecting on the outcome to previous applications of norms’. Values thus ‘form part of the legal system’ and ‘when they are fixed as principles they become norms’. On this issue, see: P. Femia, ‘Segni di valore’, in L. Ruggeri ed, Giurisprudenza della Corte europea dei diritti dell’uomo e influenza sul diritto interno (Napoli: Edizioni Scientifiche
reference to two arguments.

A principle is asserted to be a ‘structurally normative proposition’, albeit ‘functionally very close to the axiological level’; thus, principles and values are supposed to be ‘dogmatically distinct categories’.

It is argued that principles never protect one single value, but always a ‘range of values’; they are the result of a balancing operation, ‘representative of a hierarchy of values’. A value is thus assumed by law, whilst a principle is constructed through law.

However, it is difficult to exclude for example the possibility that informative pluralism, which is taken by the legal order to be a value in itself, may not be a principle (Art 21 Constitution). The creation of a principle implies not only ‘necessarily a choice as to which value must prevail and which must cede ground’, but, ‘prior still to that’, ‘a choice regarding the very values that are considered to be in conflict’.

In actual fact however, whilst a legal principle is a norm – and in fact a norm ‘of particular general application and/or particularly fundamental status, that is with a more intense meaning on the historical and legal level’ – so too a value that is incorporated into the legal order is not a pure ‘value’ capable of exerting influence merely through guidance, but also a norm and as such a principle. Thus, for a jurist the distinction between principles and values – ‘both of which are necessary for the proper functioning of the legal system’ – proves to be a nominalistic issue, and hence meaningless.

Whether considered individually or as a whole, normative principles express fundamental general choices, inevitably expressing inter-related values and interests, which may in some cases be hierarchically ordered when compared with one another on an abstract level. Above all constitutional principles constitute


A. Longo, I valori costituzionali come categoria dogmatica. Problemi e ipotesi (Napoli: Jovene, 2007), 358. Author’s italics.

ibid 358. Author’s italics.

ibid 358.

ibid 372. Author’s italics.

ibid. Author’s italics.

ibid 373.

ibid 374 et seq.

ibid 384. Author’s italics.


ibid 4, according to whom, for example, the principle of ‘legitimate expectation’ is not a pure ‘value’ but a ‘norm’.


‘the normative formalisation of values’. Just as a conflict between values, whilst legally significant, cannot but be resolved by recourse to the system of principles, similarly a conflict between principles

‘cannot take the form of a logical alternative and thus cannot be resolved on a formal abstract level according to the principle of non-contradiction; on the contrary, it is only open to an axiological solution, which is almost always based on balancing operations’.16

The technique of balancing can be applied to principles, values and interests without distinction due to the simple fact that

‘the only interests that are significant for legal practice are those derived from norms; similarly, the justification for norms lies in their adequacy for those interests, and thus in their suitability to represent them in a satisfactory manner’.17

The balancing operation takes on its full meaning ‘on the basis of the demands manifested in individual cases and from the way in which these cases are treated by norms’.18 Interests consist in a composite system of special requirements and normative provisions, which must constantly be related back to constitutional principles and the values expressed by them.19 Thus, when ruling invalid a clause (in a lease) imposing a prohibition on guests on the grounds that it violated the duty of solidarity, the Supreme Court asserted that party autonomy cannot be detached from the nature of the interests which a given provision is destined to affect.20 Moreover, if any interest can be associated

18 ibid.
19 The perspective is amply analysed in P. Perlingieri, Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti (Napoli: Edizioni Scientifiche Italiane, 2006), 111 et seq, and is authoritatively supported by P. Grossi, ‘Il diritto civile nella legalità costituzionale’ Rassegna di diritto civile, 919 (2009), who suggests a ‘private law immersed within constitutional values construed as values of social and legal life’, conceptualising the Constitution as ‘a harmonious body not of commands but rather of principles and rules’, which derive their normativity from the fact that they are an undoubted expression of ‘values of historical culture’ (again Id, ‘La formazione del giurista e l’esigenza di un odierno ripensamento metodologico’ Quaderni fiorentini, 32, 47 (2003)) and in P. Maddalena, ‘Interpretazione sistematica e assiologica’ Giustizia civile, 65-77 (2006) (see also in Id, ‘I percorsi logici per l’interpretazione del diritto nei giudizi davanti la Corte costituzionale’ (presentation to the XV Conference of European Constitutional Courts ‘La giustizia costituzionale: funzioni e rapporti con le altre pubbliche autorità’, Bucharest, 23-25 May 2011) Federalismi.it, 8-13 (2011)).
20 Corte di Cassazione 19 June 2009 no 14343, Rassegna di diritto civile, 992 (2011), with
with at least one value, by analysing interests it should be possible to ascertain which of these express values that are recognised by and protected within the Constitution.\textsuperscript{21}

The balancing of interests must be performed with due regard to the values and their hierarchy, which the system along with its life philosophy is capable of expressing. Where this hierarchy is precisely stated, it will be binding on the interpreters of the law, who will be held responsible for giving effect to it and prevented from making findings that are at odds with it. This occurs within the context of contemporary constitutionalism, both within Europe and beyond, specifically with regard to the indisputable absolute primacy which the value of the individual has over ownership or business. This primacy must inevitably direct and limit the discretion of the courts.\textsuperscript{22}

While the balancing operation is performed solely upon interpretation and application, this does not mean that the legislature cannot make choices and stipulate the hierarchical structure for the principles asserted by it.\textsuperscript{23} Otherwise, the legal system would by definition be neutral, without a soul, consisting in a mere list of propositions – none being incompatible with any other and all being equally appreciable – and without any ‘hard core’ of principles and values\textsuperscript{24} which could be fleshed out upon application. On the other hand, to assert the overriding value of life and human dignity – which are, generally speaking, absolute interests that cannot be sacrificed – does not mean that they cannot be limited where justified by the specific circumstances. This does not refute, and in fact confirms, the utility of a hierarchy of values in terms of argumentative validity, albeit having regard to historical and cultural developments and the specific circumstances of each individual case in which a balancing operation is to be carried out. It is thus not appropriate to assert that

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\textsuperscript{21} See again Corte di Cassazione 19 June 2009 no 14343 n 20 above, 996, citing P. Perlingieri, \textit{Manuale di diritto civile} (Napoli: Edizioni Scientifiche Italiane, 2007), 344 et seq.


\textsuperscript{23} See in fact M. Bin, \textit{Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale} (Milano: Giuffrè, 1992), 33 et seq.

\textsuperscript{24} However, see for example Corte costituzionale 23 April 1998 no 80, \textit{Giurisprudenza costituzionale}, 1097 (1998), ‘(i)t falls to the interpreter to take account of the historical development of legal institutions that it is called upon to apply, attributing to them the meaning that is most in keeping with the overall structure of the applicable legal order, in the light of the principles and values expressed by the Constitution’; more recently, see the commendable reasons provided by the Corte di Cassazione-Sezioni Unite 11 July 2011 no 15144, \textit{Foro italiano}, I, c 2254 (2011), rapporteur Mario Rosario Morelli.
‘(n)o authentically pluralist system (…) may bind itself to immutable socio-cultural paradigms, or to inflexible axiological hierarchies, without paralysing democratic dialectics, and along with these the progressive development of constitutional values’.25

Precisely pluralism, which is in itself a primary value, and democratic dialectics themselves presuppose respect for the individual and his inviolable rights (Arts 2 and 3 Constitution) – which in itself encapsulates a clear ideological choice – without which there would be no scope for the possible development of constitutional values, which thus cannot be classified as ‘fundamentally destructive value tyranny’.26 An inflexible axiological hierarchy asserted by the sources of law does not preclude balancing operations outright; in fact, it allows different values and principles to be combined for each specific situation, therefore providing a specific and adequate response. It also cannot be asserted that the dimension of the ‘weight’ or importance of principles ‘must be measured on a case by case basis when one principle conflicts with another, having regard to the circumstances within which the collision occurs’,27 whilst at the same time holding the view that values transcend the legal order.28

The theory of values is not conceptualised as a simple ‘technique to reconstruct and interpret the Constitution’29 considered in isolation. This is because, whilst values may not comprise ‘their own cultural hierarchy’ vis-à-vis that asserted by the Constitution, the two hierarchies without doubt overlap during interpretation,30 and one cannot purport to justify each provision ‘in relation to a specific area of law’ without the requisite coordination with other principles and values within a multi-faceted and open system such as our own.

II. Express and Implicit Legal Principles

25 G. Scaccia, n 14 above, 3964.
28 To that effect, see L. Mengoni, ‘Problema e sistema nella controversia sul metodo giuridico’ Jus, 3-40 (1976) and in Id, Diritto e valori (Bologna: il Mulino, 1985), 70; also Id, ‘Dogmatica giuridica’ (1988), in Id, Ermeneutica e dogmatica giuridica. Saggi n 27 above, 25 et seq, in particular 58; Id, ‘Interpretazione e nuova dogmatica’, in Id, Ermeneutica e dogmatica giuridica. Saggi n 27 above, 82 et seq; Id, ‘Note sul rapporto tra diritto e morale’ Iustitia, 305 et seq (1998), along with the polemical view of N. Irti, ‘Diritto e tecnica’ Rivista trimestrale di diritto processuale civile, 1 et seq (2001), in particular 7 et seq. See also N. Irti, ‘La filosofia di una generazione’ n 1 above, 228 and Id, ‘Sugli interventi di Luigi Mengoni e Bruno Romano’, note concerning N. Irti and E. Severino, Dialogo su diritto e tecnica (Roma-Bari: Laterza, 2001), 103 et seq.
30 Clarification by ibid 657 et seq.
The assertion that only the algorithm of the rule demands all-or-nothing application is a priori and beyond question. It is not the algorithmic formulation that gives legal relevance to the proposition. Moreover, rules do not apply as atomistic components of a system, but are always read and interpreted in conjunction with others, which enable them to take on meaning and render their application possible. It is sufficient to consider the rules on liability and joint liability. Strictly speaking, no norm, even if expressed within a rule and in relation to a specific factual situation, can be applied on an all-or-nothing basis.

Moreover, there is a widely-held and accredited view that principles, which by their nature are not ‘determinate, foreseeable or morally correct, have nothing to prescribe as norms’, should not be referred to for any reason and, insofar as they do not serve to ‘coordinate behaviour’, lack normative significance. However, they are considered to be unattractive where ‘they require outcomes that are different from those dictated by moral principles and legal rules’, whilst they are not necessary where they dictate ‘the same outcomes’ as those resulting from legal rules or moral principles. For example, the principle of freedom of thought (Art 21 Constitution), which is proclaimed without providing any instructions as to how it is to be applied, has been asserted to lack normative significance; on the other hand were it to be accompanied by such instructions, it would take on the form of a standard rule. Legal technique is thus stated to avail itself of only two types of norm – ‘correct moral principles and posited legal rules’ – and to not require any legal principles.

This conception appears to be characterised by a variety of prejudices or reasons that do not appear to be well-founded.

A first prejudice is the assertion that legal principles, in contrast to moral principles, ‘must be created by human lawmakers’ and ‘cannot create non-algorithmic norms that have weight’, as no such thing exists, and that if ‘anybody considers himself to be promulgating legal principles, then he will be mistaken’. However, it still remains to be demonstrated that legal principles

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32 However, see N. Irti, I ‘cancelli delle parole’ (Napoli: Editoriale Scientifica, 2015), 13 et seq and 22, who, in responding to those who view rules as norms for guiding conduct, which lead to an ‘all-or-nothing’ approach (R. Dworkin, I diritti presi sul serio (1977), Italian translation by F. Oriana (Bologna: il Mulino, 1994), 93), asserts: ‘a rule is one thing, a norm another. A rule is a typical attitude as a means of achieving a purpose. A rule does not pertain to the legal world, but to the world of technical abilities. A norm means the legal command, which must be obeyed unconditionally’.
33 L. Alexander, ‘Cosa sono i principi?’ n 31 above, 15.
34 ibid.
36 ibid 98.
37 L. Alexander, ‘Cosa sono i principi?’ n 31 above, 13.
cannot be posited as such and that they may only be inferred indirectly from legal rules or decisions;\(^{38}\) moreover, one must ask why it should only be these principles that have a ‘weight’, and thus a role capable of justifying a sufficient number of rules and decisions.

That legal principles cannot be posited directly as integral parts and qualifying elements of the legal system would appear to be at odds with the practical reality and with the techniques used within ordinary laws, and above all in constitutions and international conventions. Legal principles are introduced formally into law,\(^{39}\) in some cases as parameters for establishing the legal validity of rules, and in other cases as rules of behaviour. It thus appears to be entirely gratuitous to assert – invoking a violation of the dogma of legal certainty – that ‘when the courts purport to decide on cases by reference to principles and their relative weight, they are in fact making them up’.\(^{40}\)

This conclusion is significantly influenced by the experience of ‘binding’ case law precedents as a self-standing and independent source of principles, providing reasons for the decisions reached. However, legal principles are used within all legal systems, and not only in those incorporating precedent, and it thus does not appear to be tenable to argue that they do not exist or, more prudently, that their use within judicial decision making is necessarily avoidable.\(^{41}\)

Alongside the prejudice that legal principles cannot be posited or imposed,\(^{42}\) in contrast to moral principles which have the virtue of moral correctness, they are purportedly not morally correct and not open to unequivocal application.\(^{43}\) In truth, it is not clear why legal principles could not be morally correct and, since they are not applied unequivocally on an all-or-nothing basis, not capable of impinging upon or determining decisions. Principles that are associated with rules, and above all those that are fundamental to, and identificatory of, the legal system may indeed be morally attractive as moral principles: there is thus no a priori separation between law and morals.\(^{44}\) In fact, the binary proposition whereby ‘either legal principles are only (correct) moral principles or they are nothing’\(^{45}\) is entirely unacceptable.

Legal principles provide an indication of politics and morals, although they

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\(^{38}\) This perspective is overly conditioned by a theory of sources from the common law tradition.


\(^{40}\) L. Alexander, ‘Cosa sono i principi?’ n 31 above, 18.

\(^{41}\) L. Alexander and K. Kress, n 31 above, 44, fn 67.

\(^{42}\) See however ibid 45.

\(^{43}\) ibid 45.


\(^{45}\) L. Alexander and K. Kress, n 31 above, 68.
are not necessarily moral or morally superior;\textsuperscript{46} they express choices, assert value judgments and provide guidelines that are not extraneous to the legal system.\textsuperscript{47}

III. The ‘Weight’ and ‘Appropriateness’ of Legal Principles

Amongst the arguments brought against the existence of legal principles, a distinction may be made between those that focus on ‘weight’ and those that focus on ‘appropriateness’.\textsuperscript{48}

With regard to the former, it is not convincing that principles can only arise out of other legal materials, such as rules or decisions, on the grounds that the typical ‘weight’ of principles cannot be established ‘for all contexts’.\textsuperscript{49} It is in fact acknowledged – although not entirely consistently – that principles can have an effect on results, ‘adding normative weight to each result in opposition to another’,\textsuperscript{50} and that rules themselves have weight for they have a rationale and express or specify a principle. This means that, when reaching their decisions, the courts use legal arguments and their weighting more than formal legal rules; in other words they use both rules and principles at the same time depending upon the context. Consequently, interpreters will refer to the principles underlying the individual rules and the legal system as a whole, and not only in situations in which the rules are not conclusive. If rules are not devoid of weight, as where ‘they apply, they assert that their weight is infinite’,\textsuperscript{51} principles too have their own weight – in fact their application is dependent ‘on their weight’.\textsuperscript{52} Rules themselves, whether as expressions of a rationale or of a principle, which in turn complies with principles on a higher level, are never applicable on an exclusively inflexible basis because they are never applied in isolation (rather applying in a coordinated fashion with other rules and other principles). Thus, the difference in weight between rules and principles is quantitative: both have weight on the decision. The existence of weight for principles is not necessarily and exclusively dependent upon the courts’ rule-producing activity.\textsuperscript{53} The approach to this issue risks becoming subjective, if not linguistic, if for example, when confronted with the official recognition in the Constitution of the principles of freedom of speech, one does not hesitate to discern within it ‘a rule (with

\textsuperscript{46} However, see R. Dworkin, n 32 above, 95 et seq.

\textsuperscript{47} On this issue, ibid 118 et seq, 439 et seq, 446.

\textsuperscript{48} L. Alexander and K. Kress, n 31 above, 64 et seq.

\textsuperscript{49} ibid 24.

\textsuperscript{50} ibid 25 and, to this effect, S. Burton, \textit{Judging in Good Faith} (Cambridge: Cambridge University Press, 1992), 39 et seq.

\textsuperscript{51} L. Alexander and K. Kress, n 31 above, 58, original italics.

\textsuperscript{52} ibid 59.

\textsuperscript{53} See contra ibid 60.
infinite weight within the scope of its own application'), whereas the constituent lawmaking body should have clarified that ‘it be applied whenever possible’.55

Rules and principles are norms, irrespective of their difference in weight and whether they are absolute or relative, or limited or unlimited. Both use language that expresses conventionally defined meaning, elastic meaning which may be determined from time to time as well as delineating concepts (known as standards) for the scale and quality of the acts or results. Standards and general clauses are mere techniques and, as such, may feature within both rules and principles. It is necessary to ascertain their consistency with one another in order to be interpreted, and hence applied.

That legal rules and principles are distinct does not mean that they are separate, nor less that they are different in nature: both are manifestations of juridicity, and as such do not constitute an ideal or metaphysical superstructure, but rather supplement reality as one of its structural and ontological elements. For the sake of consistency, this should be confirmed by the acknowledgement that legal principles result from the combination of the factual world of legal rules with moral value.57

The appropriateness, or in other words the adequacy, of a principle, is particularly significant in interpreting and applying rules, and obviously all the more so – given their nature – also principles. Appropriateness cannot fail to entail adaptability to the specific case by respect for a variety of principles, which may be suitably and consistently balanced without any arbitrariness whatsoever in such a manner that ‘principles and judgments reach a state of equilibrium’58 that is compatible with the legal system and its sources.59 It is principles more than rules that are more suited to adaptation to the specific facts of an individual case according to a methodology, which is certainly not that of subsumption. Moreover, it is not appropriateness, understood as a method, that gives rise to principles because – as clarified above – principles may also be asserted by the legislature. In such cases, appropriateness is dependent upon the proper assessment of the fact (Tatsache) to which principles are to be applied, and there is no need for the those who interpret the law to consider the problem that legal principles may collapse into moral principles.60 This does not mean that there is not necessarily any relationship between appropriateness and moral acceptability. The correct reaction of moral disapproval does not entail

54 ibid 60.
55 ibid 61.
56 See ibid 62, fn 96.
57 This is also asserted ibid.
58 ibid.
59 However, see R. Dworkin, n 32 above, 159 et seq; on this point see L. Alexander and K. Kress, n 31 above, 67.
60 On this problem see L. Alexander and K. Kress, n 31 above, 70 et seq and the references therein.
casting aside 'principles that are believed to be morally correct in favour of principles that nobody defends',61 identifying the latter with legal principles.62

Furthermore, legal principles cannot be reduced to the role of guaranteeing equality between present and past decisions63 from the perspective of a continuity view of justice64 in which principles, which are considered to be inherent within past decisions, by a kind of pointless fiction guarantee continuity and protect individual rights from 'retrospective upheaval'.65 The modern theory of inter-temporal law refutes this absolute assertion in the area of private law and relativises it in terms that are specific to the particular sources of the legal system.66

It is widely known that the development of experience, and in particular of legal experience, occurs along a scale of continuity and discontinuity67 where, in line with developments in the culture of a community, new principles and new values may even be at odds with past principles, whilst the past principles seek to remain valid by attributing at times different meanings to legal rules that have, formally speaking, remained unchanged.

This does not mean68 that legal decisions based on new general principles

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61 As clarified by ibid 97, disputing the position taken by R. Dworkin.
62 See however ibid 99.
64 L. Alexander and K. Kress, n 31 above, 49.
65 Dworkin, I diritti presi sul serio n 32 above, 90 et seq, 107 et seq and 148 et seq, cited and criticised by L. Alexander and K. Kress, n 31 above, 49.
67 P. Grossi, Prima lezione di diritto (Roma-Bari: Laterza, 2003), 20 et seq; Id, ‘Storia di esperienze giuridiche e tradizione romanistica (a proposito della rinnovata e definitiva «Introduzione allo studio del diritto romano» di Riccardo Orestano)’ Quaderni fiorentini, 533-552 (1988); Id, ‘Storicità del diritto’ Diritti lavori mercati, 217 et seq (2006), and again, literally, S. Puglatti, ‘La giurisprudenza come scienza pratica’ (1950), in Id, Grammatica e diritto (Milano: Giuffrè, 1978), 74: the law ‘in its birth and in its implementation is the (...) life and history of the people that created it and have lived according to it, as is the formation and development of legal thinking or dogmas, and the application of the law’: ‘those who legislate, who wait for the formation of the system, who implement the law in specific cases’ reconstruct, recreate or relive ‘the entire human history that is brought together in it’. Thus, ‘innovative ruptures and capricious jumps (are not permitted): this is the deep sense of what is known as the legal continuity of a politically organised society’; A. Falzea, ‘Dogmatica giuridica e diritto civile’ Rivista di diritto civile, 1, 773 (1990); P. Perlingieri, ‘Lo studio del diritto e la storia’, in N. Cipriani et al, Annali della Facoltà di Economia di Benevento (Napoli: Edizioni Scientifiche Italiane, 2006), XI, 127-159, also in Id, L’ordinamento vigente e i suoi valori n 44 above, 537-552 and in C. Cascione and C. Masi Doria eds, Fides Humanitas Ius: Studi in onore di Luigi Labruna (Napoli: Editoriale Scientifica, 2007), VI, 4163 et seq; N. Lipari, n 1 above, 37.
68 As noted by L. Alexander and K. Kress, n 31 above, 50.
IV. The Myth of Reasoning by Syllogism and Wariness Towards Legal Principles and Their Variety

The widespread climate of mistrust towards legal principles does not have one single origin and appears to have arisen in part out of legal positivism and in part out of a continuing self-referential jurisprudence. It in any case expresses an underlying conservatism characterised by a certain degree of intellectual laziness, which will attract natural support from supporters of the dogma of legal certainty; however, this falls far short of the real problem of proposing new forms for the theory of legal interpretation. Within this cultural climate, lawyers, including above all Italian private lawyers, have had little sympathy for principles,

69 On this point see R. Dworkin, I diritti presi sul serio n 32 above, 99 et seq.
71 See on this point A. Gentili, Senso e consenso. Storia, teoria e tecnica dell’interpretazione dei contratti (Torino: Giappichelli, 2015), I, 137 et seq, in particular 166 et seq, who, whilst stressing the presence of ‘traditionalists for whom, since interpretation is regulated, it must be literal, without any possibility for those who interpret the law to ascribe any other meaning to the law’, clearly highlights that ‘also within our literature it is now stated within most textbooks that the text of the provisions does not represent normative content, that legal provisions often change with time, and that the interpreting body has discretion in choosing the meaning to be preferred, which exercises and justifies this through recourse to argument’, thereby forcefully asserting ‘the need’ to take account ‘of the content-based method’.
72 F. Santoro Passarelli, ‘Intervento’, in F. Santoro Passarelli et al, I principi generali di diritto. Atti del Convegno (Roma, 27-29 maggio 1991) (Roma: Accademia Nazionale dei Lincei, 1992), 7; and more recently, albeit with more than one expression of openness, see the reports by: A. Jannarelli, ‘I principi nell’elaborazione del diritto privato moderno: un approccio storico’, G. Alpa, ‘I principi generali. Una lettura giurisnaturalistica’, U. Breccia, ‘Principi: luci e ombre nel diritto contemporaneo’, A. Gambaro, ‘La dinamica dei principi: due esempi e una ipotesi’ and E. Del Prato, ‘I principi nell’esperienza civilistica: una panoramica I principi nell’esperienza giuridica’ (Atti del Convegno della Facoltà di Giurisprudenza della Sapienza, Roma, 14-15 novembre 2014) Rivista italiana per le scienze giuridiche, special issue, respectively 33-76, 77-120, 121-192, 209-228, 265-278 (2014). However, see in general N. Bobbio, ‘Principi generali del diritto’ Novissimo Digesto italiano (Torino: UTET, 1966), XIII, 887 et seq, who, at least cautiously, demonstrates his preference for the identification of principles in the various areas regulated by positive law, starting from the premise that they amount to a ‘complex, obscure and fleeting concept’ and not by any means ‘a simple and unitary category’ (ibid 889 and 893 et seq.). See recently N. Lipari, n 1 above, 28. A greater openness is also found amongst commercial lawyers: see inter alia, G. Terranova, ‘I principi e il diritto commerciale’ Rivista di diritto commerciale e del diritto generale delle obbligazioni, I, 183-223 (2015) who, in the clear awareness that principles may be subject to ‘implicit limits’ that do not depend upon the ‘existence of a provision of equal standing although with opposite content’, but on to the ‘articulation of (different) scenarios and the different weight ascribed to the constellations of values in the various contexts’ (ibid 202), stresses that ‘it would be a pity (…) to have to give up the wealth generated by the creative capacity of the interpreting body solely in order to expound a faithfulness to the text.
and have used them with particular caution, essentially displaying mistrust for them on account of the variety of meanings that they have, along with their vagueness and mutability, and thus the excessive discretion they leave to legal interpreters, which have traditionally – since the era of codification – been used to construing the law above all as a rule applicable to situations that are determined or are determinable \textit{a priori}.

First of all, it cannot be contested that principles take on various forms. As regards the way in which they are formulated, they may be either explicit or implicit, thus being inferred through interpretation from the coordination of a variety of legal provisions; as regards their status and the scope of their applicability, principles are not only sectoral but also general and fundamental as they may identify and characterise either individual areas of the law or the legal system as a whole; they may also be external in origin and therefore, in our current experience, fall under European or transnational sources, and differ in value depending on the hierarchy permitted by the level of openness of the system.\footnote{We have obviously been a lively debate between constitutional scholars since the paper by V. Crisafulli, ‘Per la determinazione del concetto dei principi generali del diritto’ \textit{Rivista internazionale di filosofia del diritto}, 43 (1941); Id, ‘A proposito dei principi generali del diritto e di una loro enunciazione legislativa’ \textit{Jus}, 207 and 213 et seq (1940). The axiological orientation in the solution to conflicts is also confirmed within the criminal law literature, which more clearly aims to demonstrate that, based on the ‘identification’ of the function of the penalty, it is ‘possible to reconstruct the ‘face’ of the individual system under consideration’; see S. Moccia, \textit{Il diritto penale tra essere e valore. Funzione della pena e sistematica teleologica} (Napoli: Edizioni Scientifiche Italiane, 1992), 32 et seq, in particular 37.}

Principles are always in any case ascribed the role of attesting interests but above all values of legal culture,\footnote{See G. Gorla, ‘I principi generali comuni nelle nazioni civili e l’art. 12 delle disposizioni preliminari del Codice civile italiano del 1942’, in F. Santoro Passarelli et al, \textit{I principi generali di diritto} n 72 above, 177 et seq, in particular 179.} of the dominant culture,\footnote{ibid 183.} and of European populations,\footnote{R. Sacco, ‘I principi generali nei sistemi giuridici europei’, in F. Santoro Passarelli et al, \textit{I principi generali di diritto} n 72 above, 163 et seq.} subject however to an express awareness of the need for prudence in identifying them, especially if they are innovative, as they are difficult to handle during application.\footnote{A. Trabucchi, ‘I principi generali del diritto nell’esperienza comunitaria’, in F. Santoro Passarelli et al, \textit{I principi generali di diritto} n 72 above, 187 et seq.}

and a purity of method, which will end up being strikingly refuted as soon as one moves from words (law in books) to an examination of the facts’ (201). See also: G. Baralis, ‘Atto primo (Il pensiero dogmatico e la complessità)’, in Id and P. Spada, ‘Dialogando su dogmatica e giurisprudenza (dopo aver letto un libro sull’ipoteca)’ \textit{Rivista di diritto privato}, 7-53, 21 (2013); M. Libertini, \textit{I principi della correttezza professionale nella disciplina della concorrenza sleale} (Milano: Giuffrè, 1999), 21, 33 et seq and 42; V. Cariello, ‘Osservazioni preliminari sull’argomentazione e sull’interpretazione “orientate alle conseguenze” e il “vincolo del diritto positivo per il giurista” ’ \textit{Rivista del diritto commerciale e del diritto generale delle obbligazioni}, I, 309-344 (2015).
However, the founding fathers of Italian legal science did not by any means display this prudence, or even this mistrust towards principles.\textsuperscript{78} This is not only due to the different levels of certainty and stability within the institutional framework, but also and above all to a methodological reason. This reason is separate from that framework and relates to the legal reasoning, which may be inductive in that it is sensitive to the process of generalisation with the goal of extracting broader norms from rules, but also deductive in that it is sensitive to provisions that are in themselves general, albeit adopted on a different level (constitutional, international, national, etc), and express values with expansive force. The appropriateness, and in fact the inevitability, of both ways of legal reasoning is based in the fact that the legal system cannot be comprised exclusively of syllogistic propositions. It is also based in the fact that the theoretical and practical elaboration of individual rules results inexorably in the adoption of common rationales, the formulation of generalisations, and thus the identification of principles within the necessary coordination with rules in terms of their impact on the variety of specific cases. It is equally inevitable that the legislature may express itself through more or less general assertions, attributing to them also roles that are broader in scope in order to guarantee sectoral or even pan-systemic requirements (such as the principle of \textit{neminem laedere}: Art 2043 Civil Code), which in some cases may be of primary and inderogable standing (such as the principle of equality: Art 3 Constitution, or the republican form of the state: Art 139 Constitution). And it is singular to note that lawyers’ contemporary concerns are focused more on principles that are expressly stated and manifest strong values than on those inferred through induction.

In factual fact, the syllogism in itself ‘does not provide greater stability to legal structures’ as it simply infers the logical consequences of the premise; thus, if the premise is vague and questionable, or in some sense ambiguous, it will only be possible to establish its scope through interpretation so as to give meaning to the aspects that are unclear, and this must inevitably involve principles along with the related values, both express and implicit.\textsuperscript{79} Rules and principles complete one another. The problem issue is thus centred on the expansive force of principles which in some cases, amongst other things because they express heterogeneous values, are difficult to harmonise and reconcile (also) with one another and need to be supplemented by rules, the premises of which enable the consequences to be identified with greater precision. It is thus inevitable that a balance will always have to be struck between different principles and between principles and rules, which may represent different interests and values; this balance will have to be struck as part of the process of concretisation and will have some level of effect on the argumentative process. In fact, the task of those who interpret the law is to adopt solutions that are appropriate for the specific

\textsuperscript{78} G. Terranova, n 72 above, 185 and the references contained therein.

\textsuperscript{79} As noted also recently ibid 187.
case according to the system’s guidelines, paying due attention to its not entirely flexible axiology and the social and cultural experience which in any case conditions its dynamic and likely evolution.\(^80\)

Also explicit principles cannot be applied through syllogisms. This is the case irrespective of whether they have ordinary or elevated status, and thus applies not only for those that lack specificity\(^81\) which, as for implicit principles, do not contain any reference within the series of specific provisions from which they originate (which may in any case be of assistance in identifying the scope of their applicability). Precisely because they are express, these indicate the conduct that is required or the value that is to be achieved\(^82\) or concretised through the albeit gradual\(^83\) cultural operation of interpretation, which is embedded within the culture of the time. This process of concretisation concerns both principles and rules within a balancing of interests and values for the purposes of application, inspired by reasonableness which may be shared or at least justified.\(^84\) However, this does not mean that only values can be organized according to purely formal criteria,\(^85\) nor less that the hierarchy of sources of law is not relevant in identifying the hierarchy of values,\(^86\) with the result that the latter may be conceived of entirely separately from the former. It cannot be disputed that any hierarchy of values indicated within the formal sources of law must inevitably be fuelled by a community on a cultural level.\(^87\)


\(^81\) G. Terranova, n 72 above, 197.

\(^82\) C. Luzzati, *La vaghezza delle norme. Un’analisi del linguaggio giuridico* (Milano: Giuffrè, 1990), 262 et seq.

\(^83\) E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)* (Milano: Giuffrè, 2\(^{nd}\) ed edited by G. Grifò, 1971), 310 et seq.

\(^84\) For specific corroboration, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 95 et seq.

\(^85\) See however G. Terranova, n 72 above, 203.

\(^86\) See however ibid 203.

This account of principles, along with the necessary recourse to them ‘even when the legal system does not make express provision to that effect’ — which is also supported by an inherent notion of juridicity originating from the fact88 — has no corroboration, not to speak of ‘detailed’ corroboration, in Art 12 of the Provisions on the Law in General (preleggi).89 If principles have normative relevance this is certainly not because a provision, as interpreted, refers to them as a final canon, and all the more so to a specific and limited conception of them. It may be established that this corroboration is not decisive by asserting that factuality may also ‘impose a limit on the scope of the principles, including those that are generally universal in scope’.90

Within this process, principles and values (which may be discerned as parts of the legal system) are fuelled by facts that are corroborated by the specific circumstances of the individual decision and within the context of which they fall to be applied.91 This occurs without any aprioristic or simplifying limits imposed by the formal schemata of dogmatics92 — which is justified by the certainty of legal relations93 — and with the due openness towards the rules of experience,94 adequately historicised. Thus, the jurist may aspire only to ‘a certain level of reasonableness’95 without any claim to truth or certainty.

L’ordinamento vigente e i suoi valori n 44 above, 239-246; Id, Il diritto civile nella legalità costituzionale n 19 above, 5 et seq.

88 Juridicity means that the law is supposed to be ‘immanent’ to facts.

89 Although this view is not followed by G. Terranova, n 72 above, 204. Under Art 12 of the Provisions on the Law in General, the only meaning that can be ascribed to the law is that which is made explicit by the terms’ own meaning according to their connection, and by the lawmaker’s intention. This rule is known as in claris non fit interpretatio. Some scholars argue that when the legal text is clear, it does not have to be interpreted; if the literal interpretation results in a clear norm, no further interpretation (be it logical, systematic etc) is necessary. However, this understanding of the in claris non fit interpretatio is both false and unacceptable. It is false, because no norm can be applied without interpreting the text of its source. It is unacceptable, because legal method requires that the interpretation be systematic and axiological. On this issue, from different points of view, cf N. Irti, Testo e contesto. Una lettura dell’art. 1362 codice civile (Padova: Cedam, 1996) and P. Perlingieri, ‘L’interpretazione della legge come sistematica e assiologica. Il broccardo in claris non fit interpretatio, il ruolo dell’art. 12 disp. prel. cod. civ. e la nuova scuola dell’esegesi’ Rassegna di diritto civile, 990 (1985).

90 G. Terranova, n 72 above.

91 ibid 192, 194, speaks of ‘scenario’.

92 However, see N. Luhmann, Il diritto della società (Torino: Giappicelli, 2012), 361, according to whom, since ‘concepts must be used consistently and uniformly in relation to themselves and in relation to the distinctions marked out by them (such as the words of language), one cannot ‘rebel against concepts’: this would be ‘something meaningless, as would any attempt to arrive at a judgment based only on values and interests’.

93 In this regard see: J. Raz, ‘Legal Principles and the Limits of Law’ 81 The Yale Law Journal, 823-854 (1972) who, as Hans Kelsen, regards the lawyer as a ‘pure’ expert regarding the normative system: see G. Terranova, n 72 above, 191; N. Irti, L’età della codificazione (Milano: Giuffrè, 1989), 144.

94 G. Terranova, n 72 above, 195.

95 ibid 196; see in fact G. Perlingieri, Profili applicativi della ragionevolezza n 84 above, 37 et seq: ‘certainty is not a feature that is acquired by the system but rather an objective
V. Principles and General Clauses

It would appear to be out of place to ask whether or not the rules on the interpretation of the law are applicable to assertions which lay down and contain general clauses. This is not only because canons of interpretation are not limited solely to those laid down in Art 12 of the Provisions on the Law in General, but also because general clauses – as legislative techniques present in various guises within the formulation and definition of propositions – take on meanings within specific legislation and specific arrangements, although always in the light both of the principles of the relevant sector concerned and also, and above all, of the principles expressing the identity of the legal system. Whilst it may appear to be a matter of course that to interpret a general clause means to interpret the legal norms that established them, it is also the case that general clauses are contained in the formulation of both rules and principles and may in some cases be asserted independently, to the point that they themselves take on the value of principles.

Besides, every syntagma used by the lawmaker must be interpreted within the legal system (which is at the same time normative and factual), within a process of enshrining that cannot have the claim to end in syllogistic argumentation. This is because the special circumstances of the individual case always require – on the basis of a convincing argumentation that is rooted in the legal system – adequate legislation, which thus also innovates on previous decisions. However, a general clause does not have a pre-existing objective meaning that is independent of the specific case and of sectoral legislation.

towards which the lawyer’s activity must be directed, also as the case may be in cases involving typical circumstances; besides ‘the assessment of reasonableness presupposes that the starting point for interpretation is not the text but rather a fact of life regarding which the system, which also comprises the individual text, is questioned in order to ascertain the most appropriate response to the requirements called into play’ (ibid 150).

98 S. Patti, n 96 above, 266.
99 See n 101 below concerning Art 2043 of the Civil Code. On this point, see in particular S. Pugliatti, ‘Alterum non laedere’, in Id, Responsabilità civile (Milano: Giuffrè, 1968), II, 66 et seq, according to whom that provision must be construed not as a ‘summary of specific duties’ but as a ‘general clause’, which must be provided with content in the specific case depending upon the protected interests, which however have been infringed.
100 For example, the syntagma ‘social function of ownership’ shows its enduring “utility” towards the normative proposition which, precisely for this reason, takes on a renewed meaning: see P. Perlingieri, ‘«Funzione sociale» della proprietà e sua attualità’, in S. Ciccarello et al eds, Salvatore Pugliatti, I, I Maestri italiani del diritto civile (Napoli: Edizioni Scientifiche Italiane, 2016), 187 et seq, in particular § 4 for detailed references to legislation and case law. See contra S. Patti, n 96 above, 266 et seq.
101 A. Falzea, ‘La Costituzione e l’ordinamento’ n 87 above, 285 et seq; S. Patti, n 96 above, 273.
An emblematic instance of this is the general clause on ‘unfair loss’ contained in Art 2043 of the Civil Code.\textsuperscript{102} This is a provision that expresses a principle formulated using (also) the technique of the general clause. It does not make sense to ask whether or not this principle and general clause are to be interpreted by subsumption reasoning when in actual fact interpretation can never be relegated to syllogistic reasoning.\textsuperscript{103}

Similarly, it would appear to be begging the question to assert that the clause requiring good faith and fair dealing is already in itself an expression of a duty of solidarity between creditors and debtors or between contracting parties (Arts 1175 and 1375 Civil Code) with the result that it is not necessary to supplement it with the duty of solidarity provided for under the Constitution.\textsuperscript{104} Solidarity under the Code is not the same as constitutional solidarity; without the constitutional ‘crutches’, good faith and fair dealing are different things. Similarly, there is no full overlap between the hierarchy of values present within the European treaties and those present within the Italian Constitution. Also the more traditional literature considers the process of concretisation of general clauses to represent ‘a secure linkage for values within the sequence dignity-freedom-equality-solidarity, within which precisely the value of dignity has particular significance’.\textsuperscript{105} Thus, in a kind of schizophrenic manner, values at

102 P. Perlingieri, La personalità umana nell’ordinamento giuridico (Napoli: Edizioni Scientifiche Italiane, 1972), 175 et seq; Id, ‘La responsabilità civile tra indennizzo e risarcimento’ Rassegna di diritto civile, 1061-1087, 1063 (2004); Id, ‘L’art. 2059 c.c. uno e bino: una interpretazione che non convince’ Rassegna di diritto civile, 775-783 (2003); Id, ‘L’onnipresente art. 2059 c.c. e la “tipicità” del danno alla persona’ Rassegna di diritto civile, 520-529, 528 (2009); see also S. Rodotà, Il problema della responsabilità civile (Milano: Giuffrè, 1964), 79 et seq; F.D. Busnelli, in Id and S. Patti, Danno e responsabilità civile (Torino: Giappichelli, 2013), 87 et seq.

103 See in fact S. Patti, n 96 above, 278, according to whom ‘the element that is most characteristic of the interpretation of general clauses (...) consists in the fact that the aim is not so much to classify specific conduct under a provision that stipulates an abstract model but rather to identify, in the light of the directions provided by the norm and the circumstances of the case, which conduct must be regarded as correct’. But – at a later stage – it is noted that ‘(t)he court called upon to resolve the case will refer to the provision laying down the general clause, but in actual fact it applies the rule governing the group of cases under which that brought before it for examination has been subsumed, without prejudice to the possibility of referring to the general clause in order to adapt the specific rule to the requirements of the new case or in order to elaborate a new rule’ (290). However, there cannot be one single interpretation if there is one single system: see P. Perlingieri, ‘Il diritto come discorso? Dialogo con Aurelio Gentili’ Rassegna di diritto civile, 781 (2014). On the requirement that the courts must not consider that it is possible to resolve disputes only according to logic, see T. Ascarelli, ‘L’idea di codice nel diritto privato e la funzione dell’interpretazione’, in Id, Saggi giuridici (Milano: Giuffrè, 1949), 41 et seq; Id, ‘Norma giuridica e realtà sociale’, in Id, Problemi giuridici (Milano: Giuffrè, 1959), I, 74; Id, Antigone e Porzia, in Id, Problemi giuridici (Milano: Giuffrè, 1959), I, 156 et seq.


105 C. Scognamiglio, ‘Principi generali, clausole generali e nuove tecniche di controllo
times act as ‘crutches’ and at times as fundamental criteria for argumentation depending upon whether they pertain to the European Charter of Fundamental Rights or the Italian Constitution, subject to the clarification that it is necessary to avoid ‘any overly easy direct reliance on constitutional principles as an arguementative support for decisions that may be based directly on the principle of good faith’.  

In reality, despite a certain reluctance and mistrust in relation to principles, the process of concretising general clauses cannot be detached from the class of values, depending upon whether they are expressed by constitutional principles or laid down in European law yet nonetheless integral parts of ‘constitutional legality’. Given that there is thus no justification, it turns into an ideological prejudice to admit that this class of values includes some values and not others, and that some may be included if present at European level but not at constitutional level. Either the axiological approach must be excluded, as is argued by the more traditionally minded, or, if it is to be allowed, it must not entail any entitlement to make arbitrary choices, but it is subject to a requirement of respect for the various values inferred from the various and complex sources of law as a whole. Once it has been established that it is useful and necessary to rely on a value as a pair of ‘crutches’, for the sake of consistency this must never be refused.

In terms of content it must be admitted quite singularly that there has been ‘particularly intense axiological intervention on the level of principles’, as in the Nice Charter, whilst at the same time seeking to reject or downplay the scope of constitutional values and European constitutional traditions that pointed in the direction of personalism and solidarism even earlier and with greater


106 C. Scognamiglio, n 105 above, 46, fn 71.

107 S. Rodotà, Le fonti di integrazione del contratto (Milano: Giuffrè, 1965), 109 et seq; see in fact also S. Patti, n 96 above, 270 and 296.

108 C. Scognamiglio, n 105 above, 17 et seq.

109 G. D’Amico, ‘Applicazione diretta dei principi costituzionali e nullità della caparra confirmatoria “eccessiva”’ ,Contratti, 933 (2014), who, concerned about the destabilising function brought about by axiological interpretation, asserts that: ‘if constitutional “principles” (and general clauses) are directly capable of shaping the power of party autonomy, this will “relativise” in one fell sweep any legal regulation of the exercise of that power, because any limit may (more or less easily) be traced back to a constitutional principle (or a general clause), with the result that its explicit enactment by the legislature would not add anything that was not already inherent within the “system”, and conversely the failure to make express provision would by no means preclude the assertion that a limit existed (which may be inferred from principles and general clauses).’

110 C. Scognamiglio, n 105 above, 17, 26 and 29.

111 The Italian legal system is founded on the protection of the human personality (Art 2 Constitution). It is a supreme constitutional principle, which gives legitimacy to the legal system and to the State’s sovereignty. The human persona is an open value not implying a specific right or duty provided for by the law, but appearing in an endless, potentially atypical series of
vigour and consistency. To detach constitutional principles from the general framework of principles turns into an intellectualist apriorism; it is not consistent not even when one refuses to provide general clauses with the content of constitutional values, applying them moreover also in the area of corporate law or – for the Charter of Rights – to the abuse of rights and concluding that such values cannot be inferred from a pure market logic. These stances are manifestly contradictory and contribute to the creation of significant uncertainty and confusion!

To dismiss indeterminacy and vagueness, the usual tyranny of values or the hegemony of principles as mere sabre-rattling by timid interpreters who prefer to give a role and significance in the area of contract law to general clauses in isolation from principles is to presuppose that such clauses exist in order to delineate principles, and not vice versa, or that these clauses cannot be delineated.

In determining the content of general clauses it is also considered appropriate to refer to general principles. This is confirmed precisely by the examples provided as scenarios that do not involve a reference to 'legal concepts':

- good faith refers to the principle of solidarity or that of loyal cooperation,
- public morality refers to the principle of human dignity,
- and equity refers to the system’s values, as has been clarified in the case law of the Constitutional Court.

The process of enshrining is thus achieved by reference both to the evolution of the societas – using also statistical results – and to principles and values which can be inferred from the formal sources of law, without drawing any positivist distinction between elements that are external or internal to the legal system, whilst respecting the (albeit pluralist) culture of a community. The situations connected with the existential aspects of humankind: P. Perlingieri, La personalità umana nell'ordinamento giuridico (Camerino-Napoli: Università degli Studi di Camerino. Scuola di perfezionamento in diritto civile, 1982), 174-175.

- C. Scognamiglio, n 105 above, 27 and 31.
- ibid 30.


- S. Patti, n 96 above, 280.
- G. Teubner, Standards und Direktiven in Generalklauseln (Frankfurt: Athenäum-Verlag, 1971), 9 et seq.
judiciary must always draw on these principles and values when determining the legal framework taken as a parameter for its decisions. It is thus relatively important to stress whether there is a qualitative or quantitative difference within the argumentative process.\(^{120}\)

Even where they express rationales or rules of conduct in a formally independent manner or as parts of propositions of normative significance, general clauses supplement the legislation, which is systematically identified with a focus on the *societas* and on the *ius*, the latter understood not as *lex* but as a legal experience characterised by the historicity of its values, and thus of its principles. Clauses and principles contribute to the process of concretisation, having due regard to the specific circumstances.

### VI. Concluding Remarks

On the basis of the analyses carried out above, it is possible here to summarise several considerations, which are set out in schematic form:

1) it is impossible to reduce principles to the implicit propositions that can be inferred from the body of rules comprising the legal system;\(^{121}\)

2) the principles to which normative significance is ascribed also have that significance independently, and not exclusively and predominantly with reference to the application of one or more rules;

3) principles are valuable not only when interpreting rules but also in their own right, albeit to differing extents depending upon the hierarchical level of the sources to which they pertain;\(^{122}\)

4) it is not acceptable to consider the recourse to legal principles to be residual, justifying their use through interpretation only in cases involving gaps or where there are no suitable rules for the specific case;\(^{123}\)

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\(^{121}\) N. Lipari, n 1 above, 34 and also N. Bobbio, ‘Principi generali del diritto’ n 72 above, 895, cited therein.

\(^{122}\) N. Lipari, n 1 above, 35. On the direct applicability of principles, see first and foremost P. Perlingieri, ‘Norme costituzionali e rapporti di diritto civile’ *Rassegna di diritto civile*, 95 et seq (1986), now in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 109 et seq, in particular 120 et seq: ‘(c)onstitutional provisions (…) are substantive law, and not merely interpretative; thus the recourse to them, including during interpretation, is justified, in the same way as for any other norm, as the expression of a value which that interpretation cannot disregard’ (ibid 122); see again Id, *Il diritto civile nella legalità costituzionale* n 19 above, 205 et seq.

\(^{123}\) As in U. Natoli, ‘Note preliminari ad una teoria dell’abuso del diritto nell’ordinamento giuridico italiano’ *Rivista trimestrale di diritto e procedura civile*, 23 (1958); see also N. Lipari, n 1 above, 37 et seq: ‘Whilst from a constitutional perspective reference to the principle amounts
5) principles, which express the values on which the Italian Constitution is based — as characteristic features of the system, albeit historically conditioned — perform the role of rationales for bodies of rules according to a mode of argument that can no longer be classified under the technique of syllogistic reasoning, but according to a balancing operation involving an assessment of the specific circumstances of the case;

6) consequently, legal principles and values have eliminated the false problem of gaps within the legal system;\(^{124}\)

7) within the relationship between principles and general clauses it does not appear that the perspective that general clauses feature a ‘limit’ which will contain the expansive force of principles can be privileged\(^{125}\) whilst on the other hand general clauses represent a legislative technique that draws content from principles, whilst in some cases contributing to the definition of a principle. The standard itself of fair dealing cannot be conceptualised without recourse to principles (for example the principle of solidarity: Art 2 Constitution);

8) it is not possible to conceptualise a clear separation between questions that may be dealt with by a formalist interpretation\(^{126}\) (ie without recourse to principles) and questions for which principles are preferred. There are principles and principles, and supreme principles — which are inspired by particularly protected and guaranteed values — cannot remain immune to interpretation, construed as the identification of the applicable legislation and thus as a balancing operation. This is the case throughout any sector or area of law, irrespective of the interpretative traditions of each sector;\(^{127}\)

9) the normative relevance of principles, which is conditioned by the context and therefore by their application, does not constitute justification for the autonomy of individual sectors of the law where the unitary of the system — and of the primary values on which it is based — extends to all sectors, in keeping with their specific features, which are often recognised and guaranteed by supreme principles (such as for example family law: Arts 2, 29, 30 and 31 Constitution);

10) legal certainty and efficiency, understood objectively, are not guaranteed even by specific and detailed rules — which besides could collide with principles

\(^{124}\) N. Irti, ‘La crisi della fattispecie’ Rivista di diritto processuale, 42 (2014), where it is asserted that ‘values, be they historian or meta-historian, express the totality of meaning, and thus dominate the unforeseeable, ignoring empty spaces, and providing an answer to all questions. The theory of values has cancelled from our debate the problem of gaps in the law. Everything has now been filled in” with the result that it would be inconsistent to assert that they exist “beyond norms and principles, being characterised by their transcendence vis-à-vis the positivity of the law’ (Id, I ‘cancelli delle parole’ n 32 above, 18).

\(^{125}\) G. Terranova, n 72 above, 204.

\(^{126}\) ibid 222.

\(^{127}\) ibid, citing G. Gorla and R. Sacco.
– with the result that it is relatively meaningful to speak of ‘certainty in broad terms or successive approximation’\textsuperscript{128} whilst at the same time, in order to ensure that the court’s decision is sufficiently supported by reasons, allowing it to have recourse to the ‘fundamental canon of reasonableness’;\textsuperscript{129}

11) more generally, whilst legal certainty and the protection of legitimate expectations – which requirements are strongly felt in some areas of the law, such as for example financial and business relations characterised by the swift conclusion of contracts and the circulation of wealth\textsuperscript{130} – are not regarded as values to be defended at all costs by the enactment of detailed legislative rules (and not principles), equally valid requirements obtain in relation to inviolable human rights, which by contrast – not by chance – it is preferred to enumerate as principles (Art 2 Constitution),\textsuperscript{131} without any particular sensitivity to the critical nature of legal certainty;

12) legal certainty, construed as a dogma, is irreconcilable with the recognition that a variety of meanings can be attributed to legal rules – which meanings will besides have been heavily influenced during the process of determining the facts of the individual case\textsuperscript{132} – and transforms into a myth which does not take account of the fact that the theoretical foundations for the law have changed significantly;\textsuperscript{133}

13) the restriction to positive law to which those who interpret the law are subject cannot be regarded, according to paleo-positivist dogmatics, as the origin of the restriction to following the letter of the ‘law’ without recognising that, through their argumentation, those who interpret the law are capable of clarifying the reasons for their decisions by a convincing and strong intellectual contribution – although certainly not that of a free thinker – not only from rules but also from principles, including above all fundamental principles;\textsuperscript{134}

\textsuperscript{128} G. Terranova, n 72 above.
\textsuperscript{129} ibid.
\textsuperscript{130} ibid.
\textsuperscript{131} P. Perlingieri, \textit{La personalità umana nell’ordinamento giuridico} n 102 above, 20-21, 74, 150 et seq.
\textsuperscript{132} For example, see Corte di Cassazione 11 July 2011 no 15144, \textit{Foro italiano}, I, c 2254 et seq.
\textsuperscript{133} See n 94 above. ‘The law (...) cannot without doubt admit lawyers who are insensitive to the problematics and complexity of legal issues, and who are steeped in dogmatism and logical-deductive sciolism’: see again G. Perlingieri, \textit{Profili applicativi della ragioneveolezza nel diritto civile} n 84 above, 147; see also Id, ‘Venticinque anni della Rassegna di diritto civile e la «polémica sui concetti giuridici», in P. Perlingieri ed, \textit{Temi e problemi della civilistica contemporanea (Atti del Convegno per i Venticinque anni della Rassegna di diritto civile, 16-18 dicembre 2004)} (Napoli: Edizioni Scientifiche Italiane, 2005), 543 et seq.
14) within our legal system, the principles adopted by the Constitutional Court or the Court of Cassation in their respective functions of centralised control of constitutionality or respectively of the uniform interpretation of the law have persuasive effect, due to the authoritativeness of those courts and also to a procedural choice, which has preclusive effect (Art 366 Code of Criminal Procedure) for the purposes of the very exercise of the right of action;

15) even the explicit reference within the system to ‘principles of Community law’ is a clear indication for those who interpret the law that they cannot decline to infer principles from the experience and provisions of those sources of law, also taking account of the reasons provided as a basis for decisions taken within European case law, above all by the Court of Justice;

16) finally, the decisions of the European Court of Human Rights must be regarded as having persuasive significance.
The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU

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Abstract

Digital economy is nowadays a Platform economy. This pervading expansion of platforms has been triggered by their value-creating ability and trust-generation potential. The emergence and increasing popularity of disruptive models, such as sharing-based economy, crowdfunding or fintech variants, have been greatly accelerated by platform-based solutions. Platforms have also transformed social, political, public and educational contexts by providing participative and collaborative environments, creating new opportunities, facilitating the creation of communities, mobilizing resources and capital, and promoting innovation. Along with these visible social and economic disruptions, platforms are also legally disruptive. Their self-regulating power, the internal relational complexity, and the potential role of platform operators for infringement prevention and civil enforcement in a possible policy shift towards an increasing intermediaries’ responsibility have triggered regulatory interest. The aim of this Paper is to examine the platform model in order to explore the legal anatomy of electronic platforms and identify the key issues to consider for possible legislative actions in respect of the same within the context of the European Union (EU) Digital Single Market. First, the analysis concludes that existing transaction-oriented rules are insufficient to fully cover all legal angles of platforms and do not capture its ‘institutional dimension’. Regulations would have to define operators’ obligations in relation to users’ protection, transparency, prevention or private enforcement. Then, the first key regulatory issue to consider is the role that platform operator may or should play. Second, the analysis reveals that the binominal division of information society service providers is not entirely consistent with the actual role of platform operators for the purposes of the application of the specific intermediary liability rules. Thus, the adoption of a set of uniform criteria under which the platform operator might be deemed as an intermediary, and the devising of a common liability regime for platforms would be critical areas to focus regulatory attention on. Third, as the community-based architecture of platforms enables the articulation of decentralized trust-generating mechanisms (reputational feedback systems, recommender systems, rating and listing), it would be pertinent to consider the elaboration of uniform concepts regarding those decentralized reputational systems, speculate on possible common criteria in design and operation (good practices, standards), and ultimately clarify liability scenarios.

I. Platform Economy: The Role of Electronic Platforms in the Digital Economy

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Digital economy is actually nowadays a Platform economy. Electronic platforms are the dominant organizational model for economic activities, social networking, and emerging businesses in today digital society. Interestingly, the emergence and increasing popularity of disruptive models, such as sharing-based economy, crowdfunding or fintech variants, have not only been made possible but greatly stimulated by platform-based organizational solutions. Platforms have also transformed social, political, public and educational contexts offering participative and collaborative environments, creating new opportunities, facilitating the creation of communities, mobilizing resources and capital, and promoting innovation.

The prominent position held by electronic platforms in the digital economy is based on their ability to reduce uncertainties, enhance users’ trust, and generate value by combining a technological and structural solution – they are closed electronic environments – and a complex legal and organizational strategy – they are contract-based architectures. Platform-based models offer a flexible organizational solution to overcome problems that derive from the specific nature of digital technologies: high uncertainty, low-confidence relationships, information asymmetries, substantial transactions costs (searching, negotiating, monitoring compliance, solving disputes), and parties’ identification problems.

The scaling-up presence of platforms in digital economy and their growing market power has unveiled a visible disruptive effect on varied angles. Social, economic, and legal disruptions are perceptible, or certainly expected to explode soon. Their social and economic disrupting potential is clearly observed in the transformation of social relationships, market structures, and economic paradigms induced by platform-based emerging models (sharing-driven business models, fintech variants, crowdfunding). Along with these noticeable social and economic disruptions, platform model is also proving to be legally disruptive. Their self-regulation power linked to an intense centripetal force that accelerates concentration, the critical role likely to be played by platform operators in prevention and civil enforcement, and the trust-generating capacity of platforms in a digital society have started to strongly attract an interest of regulators and

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2 For a further analysis of the technological trigger as one of the three enablers of the current expansion of crowdfunding, T. Rodríguez de las Heras Ballell, ‘El Crowdfunding como mecanismo alternativo de financiación de proyectos’ Revista de Derecho Empresarial, 121-140 (2014); Id, ‘Modelos jurídicos para el Crowdfunding. Nuevas formas de financiación colectiva de proyectos’ La Ley, 1-4 (2013).

3 A thorough legal and business analysis of electronic platforms (e-marketplaces) in T. Rodríguez de las Heras Ballell, El régimen jurídico de los Mercados Electrónicos Cerrados (e-marketplaces) (Madrid: Marcial Pons, 2006).

supervisors. With the launch of several public consultations and the release of special reports, and the efforts made by research groups, first moves have been made at the EU level and in some national jurisdictions showing interest in platform economy.

From a legislative point of view, platforms' activity is not framed by a clear, consistent, and well-defined body of rules likely to be comprehensively labelled as a 'law of platforms'. The absence of an identifiable and all-embracing legal framework for platforms does not, however, mean that their structure, operation, and activity are unregulated. Primarily, on the one hand, platforms are in essence contract-based architectures. As such, platforms have settled in the digital market and evolved to meet new needs by adapting, articulating, and combining contractual solutions. Platforms do essentially operate under a contractual framework. Besides, on the other hand, platforms are subject to existing general rules on electronic commerce, consumer protection, data protection, intellectual property (IP) rights, or competition. These sets of rules apply tangentially

5 C. Busch et al, 'Research group on the Law of Digital Services. Discussion Draft of a Directive on Online Intermediary Platforms' EuCML Journal of European and Consumer Law, 164-169 (2016). The Project is today a European Law Institute (ELI) Project (Model Rules on Online Intermediary Platforms) approved by the ELI Council on 7 September 2016. I have joined the ELI Project Team in 2016 and participated in the Project meetings in Krakow (January 2017) and Osnabruck (March 2017). Project Rapporteurs are Christoph Busch (University of Osnabrück); Gerhard Dannemann (Humboldt University Berlin); Hans Schulte-Nölke (Universities of Osnabrück and Nijmegen); Aneta Wiewiorowska-Domagalska (University of Osnabrück); Fryderyk Zoll (Universities of Krakow and Osnabrück). The opinions expressed in this Paper are exclusively personal views of the author and do not represent the Project Team’s views.


though and define a patched legal framework for platforms. Therefore, platforms are not certainly unregulated but rules likely to be applied to platforms depict today a partial, tangential, fragmented, and to some extent uncertain regulatory image.

Firstly, there is not a comprehensive, general regulation on platforms. Sector-specific rules have been adopted at different levels to tackle issues arising from sectorial platforms such as regulations on crowdfunding platforms\(^9\) or Alternative Trading Systems\(^{10}\)/Multilateral Negotiating Systems or Facilities,\(^{11}\) or the most recent timid, and to some degree erratic regulatory actions on sharing-economy models.\(^{12}\) Given their sector-specific nature, these rules do not embrace platforms as a whole, but solely address special features of those platform sectors.


platforms falling within their scope of application and for the purposes of protecting certain interests, including market stability, transparency, investors’ interests, prevention of systemic risk, consumer rights, tax collection, prevention of fraud.

Secondly, the existing rules on e-commerce are essentially transaction-oriented – United Nations Commission on International Trade Law (UNCITRAL)-texts-inspired legislation regulating the use of electronic communications in negotiation and contracting\(^\text{13}\) – or, less frequently, operator-oriented – EU Directive on electronic commerce\(^\text{14}\) setting out a legal regime for information society service providers (ISP) –. These approaches do only deal tangentially with platform-related issues, insofar as they have been framed, constructed, and applied from a transactional perspective. An ‘institutional approach’ to platforms is missing in these first-generation norms on electronic commerce.\(^\text{15}\) Considering platforms as institutions may be an enticing and challenging approach.

Thirdly, rules likely to anyhow tackle issues related to platforms’ structure, operation or activity are, as a result, scattered and distributed in a variety of legal acts, at different levels, and with very diverse scopes. Not surprisingly, that offers a fragmented image of a legal framework with a low degree of harmonization.

Finally, and more importantly, the legal regime applying to platforms is to a great extent uncertain. Precisely, it is questionable whether platform operators are genuine intermediaries for the purposes of the specific intermediary liability regime and, if so, under which conditions, to which extent, and in which cases.\(^\text{16}\)

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\(^\text{15}\) The necessary change of focus from transaction-oriented rules to a platform-oriented approach as described in this Paper is shared by C. Busch, H. Schulte-Nölke, A. Wiewiorowska-Domagalska and F. Zoll in ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’ EuCML Journal of European and Consumer Law, 3-10 (2016), who explain the problem from the perspective of the transaction configuration: from ‘bipolar’ to ‘triangular’ relationships, 4.

\(^\text{16}\) As far as the legal framework for the provision of online services is concerned, electronic platform operators can be deemed intermediary service providers (ISP) in relation to contents, activities and behaviours published, transmitted or performed by their users. Accordingly, the ‘safe harbour’ regime would be applicable to restrict their liability – Arts 12-15 Directive on Electronic Commerce with direct antecedents in the US legal model divided into the [Communications Decency Act of 1996](https://en.wikipedia.org/wiki/Communications_Decency_Act) included as Part V of [Telecommunications Act](https://en.wikipedia.org/wiki/Telecommunications_Act) (Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. 230)) and the [Digital Millennium Copyright Act](https://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act), Pub. L. No. 105-304, 112 Stat 2860 (28 October 1998) (codified at 17 U.S.C. 512) –. The European Court of Justice confirmed that assertion when expressly held in European Court of Justice (ECJ), C-324/09 L’Oréal SA and Others v eBay International AG and Others, Judgment of 12
Within the traditional division under electronic commerce rules between service providers (information society service providers) and intermediaries (intermediary service providers), platform operators do not fit smoothly. Frictions arise, as platform operators seem to be placed in a grey area not properly covered by the above-described binomial categorization.

Likewise, the blurred lines of the legal conceptualization of platforms within the current regulatory environment are even more eroded by the international policy debate on the role that platforms and intermediaries are likely to play in the present digital economy and the discussion on the need for recalibrating the safe harbour for electronic intermediaries. That policy approach might lead to consider a (general or infringement-specific) narrowing of the intermediaries’ liability framework and propose a ‘fit for purpose’ regulatory action for platforms and intermediaries. Even if the EU seems to endorse the current intermediary liability regime, the implementation of sectorial, problem-driven actions and the encouraging of self-regulatory efforts by platforms appear to deploy a policy shift from intermediary liability to intermediary responsibility. Under the resultant policy, special emphasis will be given to the promotion of voluntary measures from intermediaries to prevent illegal activities and content.

Against such background, an interest in considering the need for a legislative response to the evolution of platforms, albeit still partial and limited to certain jurisdictions, is visible and growing. The convenience of adopting specific rules on platforms at a general level is at present being considered by the European Union and other domestic jurisdictions with the aim to either updating, modernizing or simply expanding the scope of their electronic commerce laws, or formulating an entirely bespoke regimen instead. Nonetheless, any regulatory

July 2011, available at https://tinyurl.com/y8jprlah: ‘Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored’.

However, case law is not well-established, decisions are not consistent, and, more importantly, concepts and rules are not uniform and there are no clear standards to assess when the operator is playing an active role.


action on platforms, if considered, should be preceded by a prior understanding of the platform ecosystem and the existing rules regulating the constellation of business models comprised by the platform economy.

Should regulatory initiatives be undertaken, it is also critical to emphasize that a number of regulatory actions, likely to lead to diverging outcomes, is not consistent with the natural cross-border nature, or more precisely a-nationality, of activities of and within electronic platforms. More importantly, a multi-jurisdiction regulatory approach is frontally colliding with the rationale behind the emergence of electronic platforms: to create self-regulated environments, to the maximum possible extent, self-sufficient and separate from domestic jurisdictions. As global digital economy is growing on the basis of platform-based models, disparities in approach, or in regulation raise obstacles to international trade, arouse uncertainties, increase risks in electronic commerce transactions conducted, indeed, through online platforms, and obstacle the flourishing of innovative and disruptive business models. In absence of a harmonized framework for electronic platforms, case law and legal rules at domestic/regional level differ. As a consequence, not only cross-border activities and electronic transactions are discouraged, but, above all, efficiencies deriving from and opportunities associated to the resort to electronic platforms are missed and the trust-creating potential of electronic platforms is seriously undermined.

Electronic platforms are a key element in the trust-creating policies for digital economy. A common legal framework for platforms would infuse more predictability in digital activities, reduce the likeliness of jurisdiction arbitrage, catalyse the development of emerging models, and better prepare the international legal system for the coming of new disruptive technologies (including, among others, block chain and distributed ledger).

Any possible regulatory response resulting from these prior assessments and consultation processes should carefully define policy decisions, be based on a cost-analysis evaluation, effectively manage the territoriality factor, and previously understand the anatomy of electronic platforms. As per Organisation for Economic Co-operation and Development (OECD) and European Commission principles of good regulation a prior full analysis of the market that is the object of regulation, and whether existing law can be used to address the problem is imperative. Regulatory responses must be technological-neutral and adaptive to business models' evolution.

24 W. Maxwell and T. Penard, Regulating Digital Platforms in Europe n 20 above.
The aim of this Paper is to X-ray platform model in order to trace the legal anatomy of electronic platforms. This prior study is aimed at unveiling the personal, relational, governance and structural angles that should be integrated in the discussion on the need for a legal framework for platforms, in the process of drawing the scope of a future regulation and developing specific solutions, and in the assessment of risks and benefits.

Considering the above-anticipated aims, the Paper is structured as follows. Part II tackles the complexity of framing a legal concept of platform and proposes three alternative approaches to delimit the scope of application of a future regulation on platforms. Part III provides a succinct efficiency assessment on platforms as closed electronic environments to understand its extraordinary proliferation and its popularity as dominant organizational models in digital society. Part IV describes how platforms operate and separates platforms into their personal and relational components that articulates their legal anatomy. Part V summarizes possible angles of a regulation on electronic platforms.

II. Defining a Legal Concept of Platform and Delimiting Possible Scopes of the Law of Platforms

1. Proposal for a Legal Description of Platforms

The concept of platform is well-described in technological terms and widely understood as a business model. However, the formulation of a legal concept of platform needs to embrace a complex structure involving a range of actors and a bundle of relationships. Consultations and reports on platforms produced to date offer a wide range of definitions differing in formulation and, in some measure, in taxonomy of models comprised thereby. Nonetheless, it seems that several common features can be inferred from the catalogue of definitions. Firstly, they are based on the economic theory of multi-sided markets. Secondly, they stress the role of platforms as facilitators or enablers and value creators. Thirdly, the intermediary function of the platform operator is highlighted, albeit undefined in legal terms. Under these features,

‘online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications


services, payment systems, and platforms for the collaborative economy.\(^{27}\)

would be potentially covered by the definition of platform. From this perspective, it is my understanding that definitions may result for regulatory purposes too wide-ranging, and in practice rather vague to serve as a legal basis for devising a regulatory framework.

My proposal is then to incorporate in the legal definition of platforms a most clear distinctive legal element likely to differentiate platforms from other existing service providers, and to justify the need of a singular regulatory approach beyond the current legal regime for information society services. Under this premise,\(^{28}\) I would suggest a more limited conceptualization of platforms for the purposes of framing a specific legal regime. Such a limiting approach is needed to avoid an undesired overlapping with existing regimes or a confusing double-characterization of providers resulting from a too extensive definition of platforms. To that end, I propose below a definition of platforms based on the isolation of their main components: participants and relations.

Platforms are run by operators whose main business activity is precisely to create, manage, regulate, and supervise (under the conditions and with the extent that the obligations laid down in the membership agreements state, as further explained below) a digital environment that enable users, depending of the type of platform, to interact, negotiate, conclude and perform transactions, or carry out other activities within and in relation to the relevant community. Therefore, the existence of a platform is based on the activity of an operator and a community of users. The identification of these two personal dimensions is crucial to frame a concept distinctive enough from other service-providing business models.

For the purposes of depicting a legal paradigm of platforms, it is essential to understand which relationships are established between the operator and the users and how this plurality of actors interact each other. To that end, two relational dimensions have to be explained: a vertical dimension and a horizontal one. Under the vertical dimension, the operator and each user enters into an agreement (membership agreement). This agreement sets out rights and obligations of the parties: the operator (as service provider, regulator, supervisor) and the user as a member of the platform (registered user). By virtue of the vertical agreement, the operator defines, delimits the extent, and sets out the conditions regulating its role as a service provider (supplying comparison services, recommender systems, rating facilities, payment services, insurance, aggregating activities); as a (contractual) regulator (adopting rules for the platform); as a


\(^{28}\) A theory that is already inspiring and guiding my analytical work at T. Rodríguez de las Heras Ballel, El régimen jurídico de los Mercados Electrónicos Cerrados n 3 above.
supervisor (monitoring users’ activity and applying the Infringement and Penalty Policy); and/or even as a mediator or dispute resolution facilitator. Such a contractual framework shapes the platform business model, articulates governance standards and deploys strategy. Hence, as further explained below, platforms may, to better deploy the business strategy, decide to decentralize regulation activities getting users involved in, facilitate user-driven reputation system, implement decentralized supervision mechanisms (report system, take-down system, complaint mechanisms), or opt for user-led models in any of the dimension of the platform.

Under the horizontal dimension, users interact each other to exchange information (digital contents, reviews, opinion, ratings), negotiate, provide services or conclude transactions of any nature within the platform and in accordance with the internal policies (code of conducts, rules book, market rules, negotiation policy, community rules). Users commit to abide by these internal policies, anytime in force, as per the membership agreement. Interaction among users within the platform is a conspicuous distinctive feature distinguishing platforms from other third party service-provision schemes. It is my impression that some platform-like models, such as music platforms, search engines, or app stores, might not be adequately qualified as platforms in legal terms, albeit clearly operating as platforms from a technological standpoint, and for the sole purposes of regulation, insofar as they might be sufficiently regulated by the existing rules on information society services, intermediary services and even agency and distribution activities. The extension of prospective rules on platforms to the above described models, if it is nonetheless deemed appropriate, should be at least considered carefully to avoid an overlapping of regimes or an unjustified deviation from the existing legal framework.

The two-tiered architecture of platforms reveals that, at a general rule, platform operators and platform users carry out different activities. In fact, the operator is engaged in managing and operating the platform and providing the services due as per the membership agreement; whereas platform users may carry out a variety of activities either for business purposes or for personal, family or household ones, depending upon the platform variant that one takes into account. Thus, in a social network, the operator provides a venue for users to socially interact and exchange information; in an electronic marketplace, the operator manages (and usually regulates, monitors and supervises) an environment enabling users to negotiate and conclude transactions; or, finally, in an equity crowdfunding platform, the operator facilitates the publication of projects and crowdfunding campaigns and provides a market-like environment for fundraising. In all these hypotheticals, the operator is not undertaking the activity that users are expected to carry out. Should this premise be accepted, any regulatory action affecting platforms ought to consider the need of taking as a general rule this initial (and presumed, unless otherwise proved by the real functioning of the
platform) division of activities.

Therefore, the operator is always (as a general rule) engaged in a commercial activity, whereas users’ activities can, depending upon the characteristics of the platform, be for commercial purposes or non-commercial ones. Then, users can operate as traders or consumers, as suppliers or customers, in business to business (B2B), business to consumer (B2C) or peer to peer (P2P) transactions, or even alternate their positions. Certainly, business models range along a great variety of possibilities. Besides, some platform operators, in addition to their main role, run other services and may act as providers, supplying digital contents, goods or services to users; or supply added-value services relating to users’ transactions (logistics, insurance services, payment services, rating). In that regard, and in relation specifically to these activities, operators would be acting, as well, as service providers or traders and be subject to the applicable rules accordingly (ie if Amazon provide transportation services or if it also offers and sells, in its own name, products to users as a genuine trader). Between the above-described pure models under which the operator acts either as a mere facilitator of users’ interaction, or a genuine and direct supplier, a broad range of hybrid models exist in the market. With different levels of control or influence by the operator over users, a plethora of platform models operate in the digital world. How influence should be assessed and which conditions are to be met in order to qualify the operator as a provider of users’ activity or to declare anyways its liability are questions that require attention and a harmonized treatment. Therefore, a prior analysis of the business model machinery is critical and revealing.

A proper empirical understanding of platform-based business models does also lead to conclude that, under the standard platform model, the operator is not acting as a genuine intermediary in the legal conception (commercial agent, representative, distributor). As a matter of fact, the operator is acting neither as an agent or a distributor, nor as a representative in name and/or on behalf of the users. On the contrary, the activity of the operator consists in making available a venue for users to interact, negotiate and conclude transactions without any intervention of the operator. In business models adopting this ‘no-legal-intermediation’ approach, the operator’s obligations are limited to creating the digital market or community (software, safety measures), enabling communication (information exchange and communication facilities), providing hosting services for users to publish contents, offering interfaces and functionalities for negotiation and contracting, offering added-value services (searching, comparison, rating, feedback, complaint handling, reputation systems), and, if agreed, implementing monitoring mechanisms and dispute resolution systems. Nevertheless, the

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29 Collaborative economy challenges the classical conceptualization of trader and consumer, G. Smorto, Critical assessment of European Agenda for the collaborative economy n 12 above.
30 ibid.
operator does not intend to act on behalf of any of the parties in the negotiation, the conclusion, or even the performance of the prospective transactions.

Certainly, the previous assumptions based on the prevailing market benchmark does not mean that the operator will never be a commercial intermediary. The business model will define the real role of the operator that could be, in light of the contractual structure, the technological architecture, and the reasonable expectations of users generated by the operator’s actions, of a genuine intermediary. These remarks open another interesting perspective for a future regulation, as it might be decided to allocate on the operator the liability that users reasonably rely on its acting as a genuine intermediary (agent or distributor) or even as the supplier, if this role is not properly disclosed or its behaviour is confusing and misleading.

Departing from this clear understanding of the two-dimension feature is absolutely critical to properly shape a prospective regulation on platforms. A disregard of this distinctive structural element may lead to focus incorrectly any regulatory action on platform. To a certain extent, the controversy aroused by some regulatory proposals on sharing-economy models is rooted in a misconception of the role of the platform operators and an unfocused analysis of platform architecture. A thorough and deep study of each business model would unveil the real structure of the platform and the genuine functions of the operator. Within the broad and multiform ecosystem of sharing-economy models, different strategical options can be found. Suitable regulatory responses are expected accordingly.

2. Regulatory Options for Delimiting the Scope of Application

The immediate consequence of the two-tiered structure in the outlining of the sphere of application of a prospective regulation appears now evident. Upon defining the regulatory options for a prospective legislative action on platforms, it must be decided whether rules would be covering all types of platforms regardless of the nature of the activities or only certain kinds of platforms instead.

Should regulatory attention be addressed to the role of the operator, the business-activity element is consubstantial, as platform operators do conduct business, either directly remunerated by fees paid by users, or indirectly financed by advertisement, added-value services or other possible revenue strategies. Notwithstanding, the sphere of application might be narrowed depending on the activity carried out by users. From that perspective, regulators may decide to exclude platforms for non-commercial purposes or for B2B transactions or on the basis of any other factor relating to the horizontal dimension of the platform (users’ community). More interestingly, regulation might be articulated on a modular basis providing for sequential layers of rules for the different types of platforms in terms of users’ purposes and activity.

Under the above-described modular approach, for instance, rules on
comparison systems or reputational mechanisms could apply to the whole range of platforms regardless of users’ purposes and activity from social networks to electronic marketplaces that offer these facilities. On the contrary, specific rules relating to non-performance and liability would be applicable solely to those platforms enabling the execution of transactions.

Given the complex, multi-party and two-dimension structure supporting the creation and functioning of the platform, any attempt to develop a legal framework for platforms requires a prior policy decision on the relevant scope. To my mind, possible rules on platforms may adopt three possible policy approaches that may coexist and be combined though.

First, an operator-based approach. This personal approach would align with the EU regulatory option on information society service providers (hereinafter, Internet service providers or ISP). Platform operators would be defined as a service provider within the general concept of ISP, as an intermediary service provider, as per the EU Directive on Electronic Commerce, or as an entirely new category. Accordingly, rules on platforms would be focused on framing a legal regime for these providers through establishing general requirements, obligations and, if so decided, specific liability rules.

Secondly, a service-based approach. Under this approach, the regulatory aim would be to subject services provided by platform operators to a set of rules. At a first stage, ‘platform services’ should be clearly described and duly differentiated from digital services that are already covered by the existing EU legislation on electronic commerce. After the description of the services falling under the scope of application, rules on the provisions of such services (limitations, service conditions, standards) would be laid down.

Thirdly, a platform-based approach. This ‘institutional approach’ is very suggestive in theoretical terms as it achieves to offer an all-embracing understanding to platform as a new institution, a hybrid between markets and hierarchies. Nonetheless, it would for sure complicate the legislative formulation and the drafting exercise, since it might be more difficult to demarcate the scope on an ‘institutional’ basis and outline clear and well-defined rules.

Yet, the three approaches above offer alternative paths for the legislative process to take, with different consequences in terms of drafting and, probably, of legal technique quality. Nevertheless, if policy options are well defined, a wise application of any of the said drafting approaches can result in a clear, predictable,

III. Understanding Platforms as Closed Electronic Environments: An Efficiency Assessment

Electronic platforms, in all their variants (e-marketplaces, sharing-based platforms, business communities, social networks, crowdfunding platforms) are and operate as closed electronic environments. The closed nature of an environment does not depend on a specific technology, the use of certain communication technique or the level of security that may indeed be high as it is in open environments. The difference between an open environment and a closed one is essentially based on a legal factor. As mentioned above, the closed nature of an environment is achieved by the use of a contractual infrastructure that creates a contract-based trustworthy context for users that is self-contained, self-regulated, and, to the maximum possible legal extent, independent from domestic jurisdictions. Hence, an electronic platform, as a closed environment, is built by a set of agreements between the operator and the users’ community. In the absence of specific legal rules, obligations and rights of platform operators are laid down by the contractual terms and conditions entered into by the operator and every user, and, consequently, the role to be actually performed by operators is determined by the set of contracts behind the functioning of the platform.

The ultimate aim of a closed environment is in fact to generate trust in an uncertain playing field. Trust means predictability, reduction of uncertainties, and risk minimization. Electronic platforms have pervaded the digital economy on the assumption of an efficiency hypothesis — ‘Electronic Markets Hypothesis’ —: cost reduction, transparency enhancement, integration and syndication opportunities and trust generation.

Digital economy landscape is today essentially platform-based, as platforms infuse a number of efficiencies in the organization of digital activities compared to open electronic structures. These economic benefits, certainties and advantages may be more visible or intense in certain modalities, mainly for commercial purposes, where platforms exert a powerful attracting force over commercial dealings and retain business value. Certainly, platforms in certain sectors may

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32 Electronic platforms, in all their business variants (e-marketplaces, B2B sharing-based platforms, business communities), exploit the efficiencies that derive from the three main effects described by the ‘Electronic Markets Hypothesis’ (T.W. Malone et al, n 1 above) — electronic communications effect, electronic brokerage effect and electronic integration effect.

be, however, unable to repair all market failures or even generate new malfunctions or imperfections. This uneven distribution of efficiencies could suggest a different regulatory approach on sector-specific basis.

Precisely, any electronic marketplace, either for B2B, B2C, or even P2P transactions, do convincingly illustrate the efficiency assessment. Suppliers and customers register in the platform and start exploiting all efficiencies of a supervised-and-managed self-regulated market. Firstly, joining the platform ensures visibility of own products and availability of prospective counterparties’ offers and interests. Secondly, transaction costs (searching, inspecting, selecting counterparties, monitoring compliance, drafting contracts) reduce dramatically. Thirdly, the platform operator provides a set of added-value services: inspection services, logistic services, payment services or financing options. Out of the platform, suppliers and customers would have to search potential counterparties interested in dealing, assessing accuracy of openly published offers and trustworthiness of players willing to deal, negotiating conditions in each case, checking conformity of goods, implementing measures aimed to counteract risks of non-compliance, monitoring compliance and covering business risks.

On the contrary, dealings in open environments requires facing all uncertainties and challenges arising from the digital scenario: delocalization, virality, identity uncertainty, massive damages, or, among others, irrelevance of connecting factors to determine with the proper jurisdiction or the applicable legislation. Whereas open environments are reasonably suitable for isolated commercial transactions and are still commonplace for many digital activities and transactions, closed environments provide an optimum atmosphere for the building and development of long-term business relationships, social communities of any kind, sharing economy, trust-based relations, or alternative finance methods, on a stable basis.

a) Cost reduction. One of the most visible efficiency resulting from migrating business activities to digital markets is the dramatic reduction of costs. All costs involved in the process of contracting, labelled as transaction costs, are to any extent reduced or even radically minimized by virtues of the operation of an electronic platform: searching costs, negotiating costs, contracting costs, monitoring costs, costs of maverick purchasing, switching costs, communication costs or enforcing costs.

b) Transparency enhancement. In economic terms, transparency denotes the ability of a market to disclose and provide relevant information. In contexts dominated by information asymmetries, higher the transparency factor is, lower the cost to get relevant information market players have to incur in. Electronic platforms centralize, efficiently process and readily disclose information.

34 In relation to sharing-economy platforms, it is argued that market failures as externalities or anticompetitive behaviors may not be satisfactorily addressed by platforms, G. Smorto, Critical assessment of European Agenda for the collaborative economy n 12 above, 22.
among users.

c) **Integration and syndication.** Electronic platforms for business transactions drive both intra-corporate integration projects and multi-corporation integration ones. At the intra-corporation level, upon admission by the platform operator, market users immediately proceed to redesign internal processes aiming to rationalize management and procurement, improve stock control and optimize purchase chain. At the multi-corporation level, the opportunity to design a fully integrated market facilitates the access to new markets, alleviates the need of traditional intermediaries and reduces their additional costs, and promotes ‘customization’. Interestingly, integration projects are meant to enable the implementation of ‘just in time’ and ‘quick response’ strategies as well. In parallel with that, integration opportunities lead to the development of syndication models. Market relationships veer from bilateral-lineal-chained relations between players to more sophisticated multilateral-networked-dynamic schemes within the electronic platform. Despite the emergence of competition risks, syndication fortifies bargaining power of less strong market players and, in particular, benefits small and medium enterprises (SMEs).

d) **Uncertainties minimization/Trust generation.** From a legal point of view, the most fascinating effect of an electronic platform is the creation of a contract-based trusted environment. Precisely, the centralized, supervised and self-regulated market supported by the electronic platform implies a dramatic reduction of uncertainties. In the undertaking of supervising, regulating and monitoring tasks, the platform operator is imbuing the market with trust, certainty and predictability.

The huge contribution of platforms to competitiveness in digital economy, the potential to enhance consumer welfare and create value, and the key role as a driving force for more participative, inclusive, and innovative societies have been clearly perceived and acknowledged by the EU. Accordingly, in the Digital Single Market strategy, setting an environment likely to retain and foster the emergence of electronic platforms in Europe is a crucial challenge and a key opportunity. Therefore, in order to reap the full benefits from the platform economy and stimulate the growth and expansion of platforms market, a prospective regulatory environment should ensure and promote a sustainable development and scaling-up of the platform business model in Europe, a level playing field for a competitive market, and an effective enforcement of rules.

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IV. Inside a Platform: Parties and Contractual Relationships in an Electronic Platform

As previously described, platforms are two-tiered multi-party models organized in two layers. On the one hand, the platform operator who manages the platform. On the other hand, the community of users. These are indeed the two vectors explaining why the existing transaction-oriented approach is neither sufficient nor adequate. Precisely, platform-oriented rules should acknowledge and duly deal with the complexity of the structure, the plurality of users, the sense of community, and the relevant roles of the operator in regulating, supervising, enforcing and generating trust within the platform.

1. The Platform Operator

Electronic platforms are self-regulated communities managed by a platform operator. Despite that, some functions can be designed and implemented to operate on a decentralized basis, as further explained below, platforms are essentially centralized structures. The role of the platform operator is crucial to create and maintain a predictable, reliable and trustworthy playing field. The scope and the extent of operator’s functions are determined in each case by the membership agreement. When joining the platform, every user enters into an agreement with the operator. This is the membership agreement. Subsequently, registered users negotiate and enter into contracts according to the relevant internal policies (platform rules).

Rarely, the operator is an individual (sole trader) or natural person. More frequently, the operator adopts any of the organizational forms, available in the jurisdiction where it is located, to run a business (corporations, incorporate joint-ventures, private companies, but also associations, cooperatives or partnerships). Interestingly, those organizational forms entailing a distinct and separate legal personality are preferred. Likewise, commercial companies and corporations are the most common solution.

Platform’s users can anyhow participate in the operator as members or managers. There is no legal reason to dispute this point. Nevertheless, some concerns on the neutrality of the operator and its ability to perform its functions on an independent basis may arise. As a matter of fact, should some (or all) users become members of the operator (partners or shareholders), the neutrality of its decisions as a regulator or as a supervisor in relation to the same users may be questioned and its attractiveness in the market may be reduced accordingly. Therefore, the structure of the operator has to be very carefully considered.

a) The Platform as an Intermediary: The Theory of the Digital Reintermediation Cycle

According to economic theories on intermediation, electronic platform
operators clearly perform intermediaries’ typical functions. Traditionally, intermediaries aim to solve market failures. Information asymmetries aggravate failures in digital markets. Therefore, intermediaries take on the challenges to facilitate interaction, enable matching, reduce cost, reduce the number and the complexity of relationships (‘Baligh-Richartz effect’),\(^{37}\) and enhance confidence exploiting reputational factors to minimize opportunistische behaviours and externalities.

The economic theory of intermediation introduces a functional perspective in the more formalistic legal concept of intermediary service provider. From a harmonious combination, it is my belief\(^{38}\) that a new understanding of electronic intermediation can be advocated. Far from the initial contention that digital technology would trigger an intense and definitive disintermediation process,\(^{39}\) a growing reintermediation process is actually explaining the state and the evolution of digital society instead. Intermediaries are still needed.\(^{40}\) The intermediation cycle turns then from a disintermediation phase to an appealing reintermediation phase.\(^{41}\)

Whereas disintermediation describes the removal of middlemen from processes, chains and markets, reintermediation entails not only the reversion of such a trend but also the emergence of new areas where intermediation creates value. The reintermediation process is then a complex and multi-faced phenomenon intended to mitigate failures, create value and satisfy social and business needs as presented in the digital environment. As far as electronic relationships are becoming more closely intertwined and products and services more sophisticated, intermediation needs have been evolving in the digital environment and intermediation profiles have been reshaped and framed accordingly. Changes in the management and the structure of the distribution chain are probably rather evident and easily perceptible. Digital technology forces manufacturers and retailers to make innovations in distribution, such as shortening the channel, removing intermediate and unnecessary phases, approaching to clients, customizing strategies. Intermediaries have managed to recover their roles in the chain, moving backwards and forwards along the distribution channel and learning to provide added-value services to users.

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(recommender systems, botshops, comparison tools). Notwithstanding the foregoing, it is our contention that the reintermediation wave overflows the case of electronic intermediation in the distribution channel to provide intermediation services in a range of significant areas, in an appealing process less perceptible but crucial for the functioning of the digital economy.

The proliferation of platform business models decisively illustrates the reintermediation cycle in a variety of sectors and activities. Platforms do functionally act as intermediaries and penetrate the market to reintermediate social and business activities. However, from a legal perspective, this functional profile does lead neither to embed platform operators into the electronic intermediaries’ category nor to include platform operators’ activities within the classical intermediary services (agency, distribution, commission), as previously explained.

b) The Role of Platform Operator: Service Provider, Regulator, Supervisor

In managing the platform, the operator provides added-value services, adopts rules, monitors compliance and applies penalties in case of breach of internal rules by users. In sum, the operator acts as a service provider, a (contractual) regulator, and a (contractual) supervisor. Whereas the provision of services (payment management, insurance, inspection, rating, marketing) has a visible commercial impact, increasing the appeal of the offer in the market, fostering loyalty of users, and providing additional financial support; the tasks of regulating and supervising are key for the creation and preservation of trust.

A) Provision of services. Beyond basic services supporting the electronic trading infrastructure (software, security measures, information exchange), the operator may enhance the commercial appeal of the platform by providing a various range of added-value services: payment services, rating, insurance, search and comparison, reputation system, certification, inspection, or logistic services. The provision of added-value services tends to increase users’ loyalty (raising switching costs), impede full substitutability with competing offer, and favour integration.

B) Adoption of Platform Rules (Rulesbook). Electronic platform are self-regulated environments. As per the membership agreement, the operator is entitled to adopt rules in form of eligibility requirements to access the platform, codes of conduct, negotiation standards, model contracts, performance conditions,

infringements and penalties policies. Business models significantly differ in the structure of the regulatory scheme. Whereas more community-oriented platforms tend to articulate participative regulation models and user-driven penalty policies, business-oriented platforms do normally opt for centralized regulation and supervision models likely to generate a trustworthy and predictable context for transactions.

By accepting the membership agreement, each user takes the commitment to abide by in-force market rules and internal policies. Accordingly, whether the user fails to act in accordance to market rules and policies, the operator is entitled to claim default remedies.

Yet, infringement and penalties policy must be carefully drafted to reflect penalties in terms of contractual remedies in case of non-performance – ie exclusion from the platform as termination of the contract; or, a fine as a penalty clause –.

C) Supervision and monitoring: Infringement and Penalties Policy. As per the membership agreement, the operator is entitled (has the right, not the obligation) to monitor and supervise the compliance with the relevant rules and policies by users and to take reasonable measures accordingly. In practice, the supervision model is frequently based on a decentralized report system where users give notice to the operator when infringements are committed by other users (complaint handling mechanisms, report systems and notice and takedown systems in line with the mechanisms implemented to substantiate the 'actual knowledge' requirement under the 'safe-harbour' regime applying to intermediaries).

Such a contractual infrastructure designs the liability regime and indeed allocates duties and liabilities between operators and platform’s members. Since the 'safe harbour' regime is based on lack of knowledge and lack of control, it can be argued that operators manage to preserve their position by a right (but not an obligation) to monitor and supervise so as to enhance confidence without exposing themselves to liability risks, or, on the contrary, if the deployment of internal monitoring systems increases as a matter of fact their risk exposure, insofar as they prove the capacity to control and prevent illegal activities and content.

Hence, a prospective regulation on platforms should carefully ponder the regulatory options to adopt and implement the policy decisions. Three main

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45 Or even if, as proposed, de lege ferenda a case should be made for a right or a duty of the platforms to monitor, C. Cauffman, ‘The Commission’s European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?’ EuCML Journal of European and Consumer Law, 235-243 (2016). Then, ‘(t)he ‘passive’ nature of the platform, which under the current system leads to the application of the hosting exemption, could as well be regarded as lax behavior justifying liability if things go wrong’. 
policy alternatives can be outlined.

Firstly, a ‘continuist’ approach from the perspective of the electronic commerce rules would equal platform operators to intermediaries with the consequent extension to the former of the liability regime of the latter. No general duty to monitor would be anyway imposed on platforms. Actual knowledge would be still the trigger for the platform to adopt adequate measures. In such a framework, the implementation of supervision mechanisms, report systems, complaint handling schemes and other internal trust-generating techniques within the platform would be deemed as private systems to obtain actual knowledge.

Secondly, a hybrid approach would preserve the no-general-rule-to-monitor principle but could impose on platforms some duties to introduce adequate monitoring mechanisms and implement report and complaint-handling systems in accordance with pre-determined governance standards. Thus, although the operator is not obliged to carry out a general obligation to monitor, it takes a preventive role by fulfilling governance decisions.

Thirdly, a disruptive approach would lead to depart from the path of the ‘safe harbour’ scheme for intermediaries and direct the regulatory option towards the investing of platform operators with an active role in prevention and civil enforcement. Under this policy approach, prospective rules on platforms might impose on operators a duty to protect users in cases of actual and imminent threat, a duty to verify the authenticity or the truthfulness of the information provided by users, or, for instance, liability for misleading information, mistakes, or even non-performance of the relevant services, under certain circumstances to be determined by the law.

2. The Users: Building a Community

The broad term of ‘users’ describes all registered members of the platform irrespective of the specific position (buyer/seller, lessor/lessee, licensor/licensee, investor/promoter, driver/passenger) they may hold in the subsequent transactions to be concluded or the relations or interactions of any nature entered into within the platform.

From a legal viewpoint, every user is the counterpart of the platform operator in the membership agreement and, at the same time, a prospective contracting party in future market transactions in relation to other users. From a technical perspective, upon registration, users are entitled to access the platform and enjoy the services in accordance with the respective user profile. In practice, by logging in with an activation key (password, username, electronic signature), the user is enabled to exercise rights and enjoy services in accordance to the contractual framework (membership agreement and service provision agreements). User account keys serve as contract-based electronic signatures for the purposes of any action to carry out within the electronic platform. It is commonplace that the own platform operator acts to that end as a certification
agency issuing the keys, monitoring the use and managing cancellation, expiration and any further circumstances likely to affect the validity of the contractual electronic signature. Nevertheless, the issuance and the monitoring of the electronic signature could also be entrusted to a third certification agency. In the latter case, the function of controlling user access would be, at least partially, outsourced.

Upon admission, registered users join the business community, strongly agglomerated and compacted by the common compliance with platform policies (internal protocols, rules book, codes of conduct, market rules).

Depending on the structure of the market, users can be admitted to the platform to operate solely in one of the prospective contracting position (as vendor, as licensor, as lessor, as landlord/lady) or in both of them (either vendor or buyer, licensor or licensee, lessor or lessee, sometimes driver or passenger). In some sectors, should the scope of the platform only cover one stage of the production/distribution chain, users are normally expected to operate in the same contracting position in all transactions – ie providers of spare parts, on the one hand, and manufacturers, on the other –. Accordingly, two different membership agreements should be drafted to sign in accordance to the expected contracting position (ie a membership agreement model for sellers and a membership agreement model for buyers).

3. Platform Ownership Models and Conflicts of Interests

As regards the relationship between the operator and the users, it might be worth discussing the possibility for users to be members of the operator or to anyhow participate in the operator’s decision-making and the legal consequences likely to derive therefrom. The constellation of platform-based business models offers a wide variety of modalities as regards the ownership structure: independent platforms, non-independent platforms and mixed platforms. Interestingly, ownership structure is not only an element contributory to the design of the business strategy, but also represents one of the key factors in the assessment of competitive concerns and in the formulating of effective and reliable regulatory/supervisory models.

i) Independent or neutral platforms (neutromediaries). Under an independent model in terms of ownership, the management role in the platform is played by a company (or entity) independent from market participants. Accordingly, platform users cannot participate or have any interest in the operator (ie as shareholders). Overall, such a neutrality feature alleviates competition concerns and apparently strengthens the reliability of a centralized regulatory/supervisory model.

ii) Non-independent platforms (consortium or coalition markets). Under this category, market participants (users) are members of the operator, participate in the decision-making process, carry out management tasks or anyways control
the operator’s activity. Users may hold majority of the operator or simply represent a minority group. Likewise, all users or solely a few of them meeting certain conditions might be eligible to participate in the operator. As a consequence, non-independent platforms can be further classified as supply-biased markets, demand-biased markets or hybrid markets depending on the commercial position held by the users who are entitled to participate.

From a business point of view, the economic rationale behind non-independent platforms is rather obvious. Non-independent models are industry-sponsored marketplaces. Hence, industry features and specific market interests are widely considered in the design of the platform and effectively internalized in market policies.

From an economic perspective, according to the scientific literature, it can be argued that electronic marketplaces favour buyers to the extent that reduce vendors’ market power. As a matter of fact, electronic markets would enhance information distribution and increase price competition. As a consequence, market equilibrium would be rebalanced in favour to buyers. As per such an economic rationale, buyers should arguably be more inclined to promote the creation of electronic platforms. On the contrary, a quick market observation reveals that there are platforms promoted by sellers (offer-biased markets). Very simply, expected profits earned as a platform operator could compensate the loss in purchase price as sellers.

Nevertheless, and despite the above-mentioned strategic reasons, non-independent markets caused several legal concerns. Remarkably, competition issues are likely to arise in the creation of non-independent markets involving leading companies in the relevant sector.

Likewise, an ownership structure revealing lack of independence of the operator in respect of one side of the user community or the existence of relevant financial or corporate ties may serve as indicia or evidence of a business model according to which the operator is a genuine provider of the target activity instead of a mere facilitator of users’ activity. The pertinent legal framework corresponding to such main activity should then apply.

iii) Mixed platforms. In these markets, both sector participants and independent players are members of the platform operator. Synergies between, on the one hand, the neutrality perception favoured by independent markets and, on the other hand, the closeness to the market and the sensitivity to sector

48 Covisint case (IP/01/1155) (38.064) or Volbroker case (IP/00/896) (38.866).
interests permitted by non-independent platforms are triggered. Independent players are usually investors or technology suppliers.\textsuperscript{49}

Assuming the variety of ownership models and accepting the need not to unreasonably restrict competition or to impose unjustified conditionings on the legitimate exploitation of economic efficiencies, regulators may wish to tackle this issue from certain standpoint where interests need protection. Prospective rules might require disclosure of ownership structure or any other financial or corporate ties likely to affect the neutrality of operator in relation to the horizontal dimension, to question the unbiased provision of its services (regulation, supervision, rating, enforcement), or to simply determine in any way the decision-making process. A transparency policy would lead to unveil any possible conflict of interest.

In platforms for social networking or non-commercial activities (social networks, reviews aggregators, user-generated content platforms, recommender systems), the impact of financial or corporate ties between the operator and the user might be less frequent or even less decisive for the users’ activity. However, a transparency policy could be equally relevant. Disclosure duties could be then referred to other factors such as selection criteria, fees paid by eligible users, listing criteria, possible filtering functionalities, platform policy on removing materials, search logic and positioning criteria, reviewer policy, influencer policy, platform-generated or sponsored contents or services, etc.

On the other hand, sector-specific regulations may go further and opt for restrictive or prohibitive measures for the purposes of ensuring the protection of involved interests. Thus, crowdfunding platforms or other platforms running in connection to capital markets and financial services could be subject to stricter control in ownership-related issues or conflicts of interests due to the nature of the activity. As a mere example,\textsuperscript{50} Spanish legislation on Crowdfunding

\textsuperscript{49} In some deals notified to the European Commission for competition scrutiny, platform operators responded to such hybrid ownership schemes: MyAircraft.com, COMP/M.1969 UTC/Honeywell/12/MyAircraft.com, 4.8.2000, IP/00/912; Chemplorer COMP/M.2096 BAYER/Deutsche Telekom/Infraserv/JV, 6.10.2000, IP/00/1131; ec4ec COMP/M.2172 Babcock Borsig/MG Technologies/SAP Markets/JV, 7.11.2000, IP/00/1266; Governet COMP/M.2138, SAP/Siemens/JV, 2.10.2000, IP/00/1102; Date AS by Telenor Bedrift AS, Den Norske Bank ASA, ErgoGroup As and Accenture Technologies Venture BV (IP/01/638).

\textsuperscript{50} The regulatory panorama of crowdfunding looks fragmented and is subject to a regular adaptation. Within the EU, in absence of a common single framework, Member States have designed their own schedules to adopt and modify their domestic rules. The timeline of crowdfunding rules in the EU is long, changing, and still opened to new domestic initiatives. Only in 2016, two new Member States have introduced on investment-based and lending-based crowdfunding: Lithuania on 1 December 2016 and Finland on 1 September 2016. Likewise, other EU jurisdictions have proceeded to amend their legislation to establish a legislative framework for crowdfunding. To that end, Greece has modified, in September 2016, its legislation on the issuance of prospectuses and on provision of financial services. Concurrently, other Member States that had adopted early crowdfunding regulations are currently also reviewing their existing regimes and implementing (or are in the process of introducing) amendments (France in October 2016 and United Kingdom in July 2016).
provides for specific rules aimed at regulating the conflict of interests and limiting the interaction between the operator and the crowdfunding projects published on the platform. On the one hand, Art 62 LFFE2015 requires the operator to elaborate, publish and apply an effective policy on conflicts of interests. On the other hand, Art 63 sets a maximum quantitative threshold and subjects to a disclosure policy those projects promoted by the own platform operator or the operator participated in or contributed to as a creditor or as an investor.

Then, both general transparency standards and conflict-of-interest preventing mechanisms and sector-specific measures are expected in any future regulatory action on platforms.

4. The Membership Agreement

The membership agreement (or functionally-equivalent agreement) is concluded between the platform operator and each of the users meeting the eligibility requirements and successfully admitted to the platform.

In a nutshell, the membership agreement has the following features:

i) It is concluded electronically.

ii) It may be a B2B, or a B2C contract that is then subject to consumer law.

iii) Although it is not fitting into a typified contractual model, it does reasonably qualify as a service provision contract with mixed obligations.

iv) It is a standard term contract. Terms are pre-drafted by the operator and apply to all membership agreements of the same category (vendors, buyers, licensors, licensees). In general, the user is unable to negotiate, does not participate in the drafting and has to adhere to the contract on a ‘take-it-or-leave-it’ basis.

Even if the membership agreement aims to regulate the relationship between the platform operator and each user, its performance casts over the whole community, its terms deal with interaction among users and it contains obligations on the user and the operator to be exerted in relation to other users as well. In sum, the membership agreement is the main building material to pile up and flatten the community ground. Interestingly, by virtue of the agreement, each user commits to comply with in-force internal policies and platform rules.

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51 Business Finance Promotion Act, number 5 of 2015 (hereinafter, LFFE2015), of 27 of April (Ley 5/2015, de 27 de abril, de Fomento de la Financiación Empresarial), as published in the Official Bulletin (BOE) no 101 of 28 of April of 2015. Title V is entirely devoted to crowdfunding platforms legally named ‘Plataformas de Financiación Participativa’.


not only against the operator but also in interacting and dealing with other users. Therefore, in case of breach of rules, the operator is entitled to resort to available remedies on the grounds of breach of contract and, likewise, users who suffered a violation can request the operator to adopt agreed measures against the infringing user (according to infringements and penalties policy) or claim compensation from the operator on grounds of its default.

5. Self-Regulation in Practice: Internal Policies, Rules Book and Codes of Conduct

In exercising the role of regulator, the platform operator adopts rules of various nature to govern the access, the use of services, the negotiation, conclusion and performance of transactions and the exchange information within the platform (internal policies, rules book, code of conducts). As per the membership agreement, users are to abide by the market (platform) rules in force.

The most widely-adopted model is the centralized regulatory one. Under such a model, the operator is empowered by users (as per the membership agreement) to freely adopt, modify or amend rules to be in force in the platform. More exceptionally, however, users’ involvement in the regulatory process may be anyway encouraged. Should the sense of community want to be stimulated, a more participatory model should be designed. If so, users would be informed, consulted or even called to vote in reform projects, amendments or enactment of new policies.

V. Key Issues to Consider for a Platform-Oriented Regulation: A Summary

The above analysis of the structure and the operation of electronic platforms reveal legal disruptive potential. Actually, on the one hand, platforms have legal profiles that are not sufficiently dealt with by transaction-oriented rules to consider in a platform/operator-oriented regulation, and, on the other hand, that platform operators do not smoothly fit into the binomial division of information society service providers. Prospective rules on platforms should essentially start from these frictional elements. A swift of policy options in relation to electronic intermediary liability regime would also accelerate the need for future rules on platform likely to enable the paving of a new path for prevention and civil enforcement in the digital economy.

First, the two-layer structure of a platform (user layer and operator layer) requires to address the question of which obligations the operator may assume in relation to the users, the transactions conducted within the platform and/or

other aspects related to the activity within the platform or of the platform itself in the market (privacy, IP rights, consumer rights protection, money laundering, misrepresentation, authentication, etc).

Such obligations can be accepted and configured by the terms of membership agreement between the operator and the users in the exercise of and within the limits of the private autonomy; or they could be provided for by legal provisions that might prevent the parties from excluding or limiting such duties. To the extent that legal rules impose obligations on the operators, they do also define their possible roles in the digital economy as regulators, supervisors, ‘first-line enforcers’, gatekeepers in different ways, and certainly trust creators.

Those jurisdictions that are exploring the formulation of rules on platforms tend to prescribe duties on platform operators regarding the control of users’ identification, transparency duties, compliance monitoring, duty to verify information, duty to prevent imminent harm to users, or even obligations concerning the performance (liability for users’ non-performance). Local, fragmented, and differing domestic rules are deeply inconsistent with the global nature of digital economy and, besides, happen to be highly inadequate (even inoperative in many cases). Hence, an early harmonization of policy principles on platform responsibility and regulatory options about the role platforms are called to pay would be highly desirable at an international level. Subsequently, specific obligations to ensure transparency, fairness, and users’ protection might be developed therefrom in a more consistent and harmonized way.

Second, liability rules for platform operators should be very carefully discussed. Whether operators are deemed as digital intermediaries, specific ‘safe harbour’ provisions would apply; but whether platform operators may frame their role by agreement, liability exposure is varied and depends upon the accepted degree of involvement and endorsement, if any.

At present, liability rules for intermediaries are not uniform and, more importantly, the debate about the falling of platform operators within the definition of intermediary for the purposes of the ‘safe harbour’ regime is open and lacking of a consensus view. Even more, the implementation of mechanisms proving or presuming actual knowledge and the setting of factors revealing diligent/expeditious adoption of adequate measures by the intermediary upon awareness are likely to exert different impact on the appreciation of the intermediary’s diligent behaviour, and consequently on liability exposure.

Thus, a clear and common formulation of a uniform concept of electronic platform modelling in legal terms the constellation of operating business models, the adoption of a set of uniform criteria under which the platform operator


might be deemed as an intermediary, and the devising of a common liability regime for platforms (actual knowledge, notice and takedown systems, adequate measures, supervision duties, fault liability, objective liability) would be relevant areas to focus regulatory attention.

Third, as the community-based architecture of platforms enable the articulation of decentralized trust-generating mechanisms (reputational feedback systems, recommender systems, rating and listing), it might be pertinent to consider the elaboration of uniform concepts regarding those decentralized reputational systems, reflect on possible common criteria in design and operation (good practices, standards), and clarify eventual liability scenarios.
Constitutional Values and Judge-Made Law

Gino Scaccia*

Abstract

The Author contends that value-oriented constitutionalism marks a shifting of law making function from political bodies to the Courts. In fact judges act as legislators for the concrete case: they have to dispense justice according to law, but law is made up of constitutional values which can be implemented in multiple and, at times, opposite ways. Therefore, if we deeply involve judges in the making-law process, the risk of depriving the judiciary of its constitutional foundation is realised. The Author underlines the need to re-think the organization and the theoretical model of judicial power, according to its new function.

I. Values Based Constitution and Legal Formalism

Non-Euclidean geometries and the theory of relativity undermined formalism in the field of mathematics. Similarly, the express inclusion of ethical values in modern constitutions, which gave them the shape of binding principles prevailing over all other sources of law, destabilized the theoretical basis of formalism in legal science. This powerful comparison, devised by an American scholar,1 helps us to immediately perceive how ethical values expressed in principles of written Constitutions have reshaped the traditional categories of legal positivism. It is in fact well-known in literature – due to fundamental studies such as those of Donald Dworkin,2 Robert Alexy,3 Luigi Mengoni4 – that the principles of Constitutions may be described as ‘open-content rules’. That is to say, the rules lack a deductive content from which can be drawn – through simple textual interpretation – rules fit for being placed as major premises of judicial syllogisms. Unlike rules, whose boundaries can be precisely defined, the principles of the constitution protect rights and values by means of

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Optimierungsgebote/optimization imperatives,\(^5\) which are to be fulfilled as may be best, thus bringing about conflicts with other constitutional rights or values demanding the same degree of accomplishment.

We can assume that constitutional principles express ethical values that differ only in terms of ‘weight’, but all enjoy the same degree of formal tutelage and so claim the most widespread protection. We cannot solve the conflicts between these values only applying the judicial syllogism and merely relying on the conformity/violation dichotomy.

On the contrary, judicial reasoning shall inevitably be open to evaluations and balancing tests which might not be subject to strict logical scrutiny. Therefore, in such cases, we can only verify whether these decisions are persuasive, fair, proportional and reasonable.

The ‘reasonableness style’ – probably the most representative style of legal reasoning today\(^6\) – is hardly a straightforward or deductive one. Quite the contrary: it is problematic, yielding a circular way of reasoning.

The measurement of the degree of judicial discretion, or – rather similarly – the question of whether reasonableness can be qualified as a factual or an axiological judgment, depends on the overall relationship among values, and between values on one hand and the normative function on the other.

As is well-known, cognitive theories assume that values are able to self-reproduce and are independent of factual circumstances. They are based on \(a\ priori\) abstract hierarchies, thereby providing legal theories with the conceptual tools needed for endowing values with greater normative strength and a less erratic implementation. By contrast, non-cognitive theories deny that values have an enduring ability to shape the legal reality and a deductible normative content; they consider that only facts give legal reasoning the keys to infer concrete meanings from abstract values.\(^7\)

\(^5\) R. Alexy, \(n\) 3 above, 100: ‘Prinzipien sind Optimierungsgebote relativ auf die rechtlichen und tatsächlichen Möglichkeiten’.

\(^6\) More evidence is given by the increasing number of works dedicated to reasonableness: as for Italian public-law, see G. Scaccia, \(Gli\ strumenti della ragionevolezza nel giudizio costituzionale\) (Milano: Giuffrè, 2000); A. Morrone, \(Il\ custode della ragionevolezza\) (Milano: Giuffrè, 2001); L. D’Andrea, \(Ragione\ e legittimazione del sistema\) (Milano: Giuffrè, 2003); as for legal philosophy, see L. D’Avack and F. Riccobono, \(Equità e ragionevolezza nell’attuazione dei diritti\) (Napoli: Guida, 2004); S. Zorzetto, \(La\ ragionevolezza dei privati. Saggio di meta giurisprudenza esplicativa\) (Milano: Giuffrè, 2008); as for private law, S. Troiano, \(La “ragionevolezza” nel diritto dei contratti\) (Padova: Cedam, 2005); as for criminal law applications, see V. Manes, \(Il\ principio di offensività nel diritto penale. Canone di politica criminale, criterio ermeneutico, parametro di ragionevolezza\) (Torino: Giappichelli, 2005).

\(^7\) Although I agree with A. Longo, \(I\ valori costituzionali come categoria dogmatica. Problemi e ipotesi\) (Napoli: Jovene, 2007), that accepting only one of the aforementioned theories, and rejecting the other one, is far too complicated, one can consider as cognitivists A. Spadaro, \(Contributo ad una teoria della Costituzione. Fra democrazia relativista e assolutismo etico\) (Milano: Giuffrè, 1994); as non-cognitivists, G. Zagrebelsky, \(Il diritto morale. Legge, diritti, giustizia\) (Torino: Einaudi, 1992) or F. Rimoli, \(Pluralismo e valori costituzionali. I paradossi dell'integrazione democratica\) (Torino: Giappichelli, 1999).
If one depicts the Constitution as an ‘anarchic system of values’, in which arguments all have the same weight and there is little room for a priori hierarchies, a greater emphasis on the interpreter’s voice and on the appreciation of facts is unavoidable. Within these ‘anarchical’ theories, the uncertainty of judicial decisions is not at all unexpected, but the high degree of flexibility of legal interpretation makes it easier for courts to provide the protection of rights required by civil society.

On the other hand, theories seeking to deny the judges’ role in reshaping the hierarchy of values prove to be less adaptable to pluralism, in comparison to those referred to as ‘metaphysically sceptical theories’. Between these two extreme perspectives, some scholars – though from very different positions and political leanings – affirm that values-oriented theories do not allow judges to transform the scale of values recognized by the constitution and believe that the constitution allows only some limited flexibility. In fact these authors assume either that constitutional provisions define clear hierarchies, specific to each subject-matter, or that the criteria for balancing and ordering values have to be found without altering the equilibrium of the democratic State.

So the original intent of constitutional framers makes it possible to place a clear boundary to interpretation of constitutional texts. This gives the constitution a certain degree of adaptability, rather than rendering it a closed off universe of abstract rules.

Moving from the positions described above, I now wish to test the truth of Carl Schmitt’s prophecy, given in his famous Ebrach speech fifty years ago, that the tyranny of constitutional values would eventually cause the State of legislation (Legislationsstaat) to become a State of jurisdiction (Jurisdiktionsstaat). I also wish to verify whether, as he argued, the break of axiological unity in our

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8 J. Luther, ‘Ragionevolezza (delle leggi)’ Digesto delle discipline pubblicitiche (Torino: Utet, 1997), XII, 357.
multicultural democracies actually did bring about an entirely alternative form of legality, arising not from parliamentary Will but from judicial decisions: an apocryphal super-legality, as defined by the famous scholar.\(^\text{14}\)

I shall contend that, although Schmitt’s prophecy has not completely come true, as the apocalyptic effects he feared are still quite far from being achieved, it is indeed true that the value-oriented ‘new’ constitutionalism marks a shift of the law-making function in our civil law systems from political bodies to courts and reduces the gap between law production and law application.

Throughout history, civil law systems have been based on the principle of the primacy of collective public decisions over individual decisions in terms of rationality and moral authority. In the current situation, it is for concrete, individual decisions (both judicial decisions and contracts) to claim a primacy of a completely new kind over collective ones.

II. Crisis of Legislation and Rise of Judge-Made Law

From a general perspective, it is true indeed that when we deem that superior human values shall be constitutionally protected, we implicitly devalue the strength of legislation as a source of rationality and order. Conceiving human rights as eternal postulates of any society, unchangeable principles of any system of government, leads us to postulate a universally recognised ‘meta-legality’ which we might call a ‘cosmopolitan legality’, which appears logically prior to the very exercise of legislative power. Yet it is true that such a tendency\(^\text{15}\) to go beyond the boundaries of political sovereignty leads to undervaluing written law, considered as a cultural and historically rooted product of a provisional political Will.

Furthermore, in multi-level integrated constitutional systems (such as the European Union or the Council of Europe) law must have a more flexible content as it is required to adapt itself to the different cultures, legal traditions and historical heredities of the various nations.\(^\text{16}\) General principles open to broad interpretations by the courts are more likely to be enacted than fully structured pieces of legislation which leave no room for judicial discretion. This is the reason why judges gain considerable law-making powers, as they interpret extremely vague principles.

To sum up, the structural principles of the formal Rechtsstaat (legality, rule of law, separation of powers) were entrusted to legislation and political


\(^{15}\) The ‘universalistic illusion’, as it is called by F. Ciaramelli, Legislazione e giurisdizione (Torino: Giappichelli, 2007), 96.

bodies. On the contrary, the core values of the constitutional State founded upon a multi-level architecture of governance (proportionality of administrative action and legal regulation; subsidiarity as a general rule for the State’s relationships with territorial autonomies; human dignity), are likely to be better implemented by judges and non-political bodies.

In the traditional liberal State, the effectiveness of constitutional implementation matched its legitimacy perfectly, as the State’s main legitimizing objective – the production of certainty – was achieved through written legal rules.

In the contemporary constitutional State, aiming for the more complete protection of individual rights and the full realization of ethical values, this coincidence is no longer obvious. Indeed, such individual rights or values receive their strongest protection at the expense of certainty. Not through, but sometimes against written law, then.

Within this perspective, formal positivistic rationality leaves space to material rationality, which could be better referred to as ‘reasonableness’. Courts take to mean law according to the peculiar circumstances of each case, which may even be bizarre and unpredictable; and law is likely to be considered reasonable only if it is flexible enough to be adapted to any case. Somewhat paradoxically, the ambiguity and vagueness of normative texts become qualities, rather than shortcomings of a juridical rule. This is the reason why the Italian Constitutional Court has struck down, on occasion, certain legal rules as unconstitutional because they needed an automatic, wholly non-discretionary application (eg ‘automatic penalties’). Such provisions would prevent judges from adjusting abstract regulations to the various situations of life, making it impossible for courts to avoid inequities, at least in some circumstances.

While positivists have a formal idea of law and legality, we could state that the supporters of value-oriented theories argue for a more extensive protection of individual rights, beyond, and to some extent against, what is provided in formal written legislation.

The rationality of legislative procedures fails to provide guidance for good practices in politics, whereas rationality in legislative choices becomes more and

17 See for instance Corte Costituzionale 2 February 1990 no 44, Foro italiano, I, 353 (1990), where, in cases of adoption, the Court allows a reduction of the maximum age difference between adoptee and adopting family; such a difference may be less than eighteen years if this is reasonable to ensure the constitutional value of the unity of families. Furthermore, in Corte di Cassazione 24 July 1996 no 303, Giustizia civile Massimario, 59 (1996) on the converse issue of the maximum age between adopter and adoptee, the Court expressly declares that it is not the rule that is questioned, but rather its inflexibility, which would appear to exclude any reasonable exception even when an exception would be in the superior interest of the adoptee and the adopting family, and is the only way of sustaining the adoption. Likewise, see the case law on absolute presumptions, which were deemed unconstitutional (Judgments 144 of 2005; 41. 283 and 401 of 1999; 195 and 239 of 1998; 1 of 1997); and the judgments on rigid mechanisms for determining sanctions, where judges are not allowed to impose a sanction that is adequate to the circumstances (Judgments 367 of 2004; 253 of 2003; 2 of 1999; 220 of 1995; 107 of 1994; and 297 of 1993).
more difficult to achieve, because of the increasing ethical and religious pluralism of our societies. These two phenomena further contribute to increase the production of law by judges.

At this stage, it is worth highlighting that law somehow aspires to a mimetic function: to permeate politics with its rationality. The very same *iter legis* is devised so as to purify proceedings from emotions and irrationality. Today, however, such a function seems to be vanishing: quite to the contrary, it is law that sometimes appears to adapt itself to the logic of politics. Modern political communication snaps events into fragments. Any thoughtful approach is prevented by the preference for the *infotainment* style pursued by media; and facts and reflections hardly go together well. A similar logic appears to be increasingly dominant in legislative processes, too.

A piece of legislation, that is supposed to firmly regulate enduring relationships, often turns into a *slogan*, giving us breaking, quickly-forgotten news instead of durable facts; loud announcements of upcoming regulations, that are meant to be temporary, and revisable. Even at the highest level (in Italy even at the constitutional level, sadly), legislation follows *ad interim* standards, as it does not offer stability and certainty. With endless imagination, techniques aimed to elude the procedural provisions of the constitution have been shaped and perfected, a clear example being the dissolution of the notions of ‘article’ and ‘paragraph’ in recent budget laws, and the open frustration of the principle of genuine parliamentary discussion.19

Legislation does not seek to ‘predict the future’/*Vorgriff zur Zukunft*/.20

On the contrary the entering into force of a single legislative act is only the first step in a more complex and comprehensive process. Law does not emerge in any one moment: there is no single, specific place from which law is born.21 The legislator is often aware of its limits and entrusts courts with a particular delegation, thus recognising that they have the power to selectively protect those interests which, in traditional political-parliamentary circuits, would otherwise be mistreated. As a consequence, Montesquieu’s old formulation needs now to be amended, as judicial discretion is no more a side effect of the imperfection of legal rules, but an indispensable tool to integrate intrinsically defective legislation.

A similar effect comes out in judicial proceedings, where collective interests have come to be represented before courts through public bodies or private


19 I refer to practices such as legislation by means of delegated decrees, and adjusting delegated decrees for wide-ranging reforms; the modification or suppression of law-decrees before their entry into force; the intrinsic lack of homogeneity for articles with hundreds of paragraphs; the use of maxi-amendments coupled with the ‘question of confidence’ that cuts standing committees off from parliamentary work and strongly limits parliamentary discussion.


associations, thus emphasizing the courts’ role as settlers of conflicts.

Nowadays, the crisis of legislation and the rise of judge-made law in many modern democracies, however, are principally due to the loss of cultural homogeneity in understanding ethical values.

According to the rationalist thought that emerged from the Enlightenment philosophy, legislation was able to convey the rational principles of justice through the action of democratically elected assemblies. Political representation was supposed to cover every single sphere of social action and to express the wishes of society as a whole. Legislation was considered fit to formulate a comprehensive synthesis of all relevant values.

Legislation has never been actually a faithful mirror of principles unanimously shared by society, hence ready to be implemented without any judicial involvement, as the prominent scholar Emilio Betti pointed out. On the contrary, interpretation by judges and lawyers has always been (more or less) necessary to fill the gap between ‘law in the books’ and ‘law in action’.

Nevertheless, Betti himself referred to a substantially homogeneous society with a common anthropology in which the most important values were generally shared. Therefore, on the premise of a common cultural background, judicial interpretation ended up consisting of a mere bridging of normal legislative gaps and was far from being a true law-making activity. The high level of social cohesion gave legality peculiar strength and stability.

Today, this has proven to be untrue. Pluralistic societies show broad consensus on the procedural rules of democracy and the formal principles protecting liberties; but there is a persistent clash over the content of the substantive principles to be implemented, even the most important ones.

Axiological unanimity has ceased to be a pre-political postulate in our individualistic societies, deeply fragmented by strong ethical and anthropological disagreement. Collective bargaining cannot produce any steady cultural mediation into which legislation can sink its pre-political root, nor is legislation alone able to achieve this mediation. Nonetheless, constitutional values impose their ‘pedagogical’ power and legal force on politics as they are ‘optimization

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22 E. Betti, Interpretazione della legge e degli atti giuridici: teoria generale e dogmatica (Milano: Giuffrè, 1949); Id, Teoria generale della interpretazione (Milano: Giuffrè, 1955).
imperatives’, constantly claiming the best implementation. They are indeed ‘unsaturated principles’, always requiring implementation which remains, in fact, not fully achievable. Each value thereby fosters an increasing demand for legality (ie for law to be consistent with values) and boosts the need for regulation, while politics is unable to find a generally accepted compromise between the different constitutional values. As a result, that inadequacy raises the level of disappointment and distrust towards legislation.

In more ethically sensitive areas, where stable regulations are needed, legislation often leaves broad room for interpretation. This gives the judges discretion to select the most suitable norm to apply in individual cases, thus adapting law to the changing society. When we move from the ‘must be’ to the ‘must do’ sphere without the political intermediation of legislation, it is up to the judge to choose between two different options, each possibly representing a different Weltanschauung. Different interests and forces, harmoniously coexisting within the same abstract values, claim actual and immediate implementation with reference to said values.

Then the conflict explodes before the court, which is required to arbitrate directly between abstraction and reality.

The experience deriving from that conflict gives foundation to legal reasoning more than dogmatic theories do. The normative force of any value is to be measured case by case by balancing it against other values, and judge-made rules are created by cases, and following the cases.

The process of weighing a value and comparing it with others entails remarkable discretion. This is implied in the very activity of grasping the content of a value. As Nicolai Hartmann points out:

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26 J. Habermas, n 23 above, 516.
27 N. Hartmann, Introduzione all’ontologia critica (Napoli: Guida, 1972), 149, Italian translation by R. Cantoni.
30 A. Longo, n 7 above, 116-128
31 N. Irti, Nichilismo giuridico (Roma-Bari: Laterza, 2004), 5-9, suggests that any chance of a dogmatic order in legal science is lost, due to the lack of a conceptual scale preceding the object of the science itself.
33 N. Hartmann, n 26 above, 149.
‘It is neither a “knowledge” in the proper sense, nor an objective grasping where the grasped object remains far-away from the grasper. It is more like to be grasped. The approach is not contemplative, it is emotional, and what comes from the contact has an emotional explanation. It is to take a stand on something through an emotional move’.

Values are open to the widest interpretative manipulation and, due to the lack of an abstract normative hierarchy in the Constitution, their ranking is the result of emotional intuitions, rather than Cartesian demonstrations.34

Denying an objective hierarchy leads to the need for a subjective one;35 judges, not being able to free themselves from the obligation to decide the case under discussion, act as legislators in individual cases.

The toughest struggle, which Schmitt had envisaged as involving ideologies, interests and lobbies, is now between legislator and judges, both constitutional judges (who have been vested with the legitimacy and the techniques for dealing with these foundational values) as well as ordinary ones.

Then, values can be practical guides for judges in the construction of law, an aim that justifies the circumvention of the literal interpretation of legal texts; a way to achieve a certain level of protection for rights that are not recognized by a written law.

III. Judges Acting as Legislators: The Paradigmatic Example of the Human Dignity

The legal implications of human dignity as a supreme value provide a good example of the above illustrated effects.

The Italian Constitution does not place as much emphasis on the concept

34 J. Finnis et al, ‘Practical Principles, Moral Truth and Ultimate Ends’ 32 The American Journal of Jurisprudence, 99, 110 (1987) contend that supreme values are ‘reasons with no further reasons’, and cannot refer to any other criteria to be measured (dissent is expressed on this specific point by F. Di Blasi, ‘I valori fondamentali nella teoria neoclassica della legge naturale’ Rivista internazionale di filosofia del diritto, 209-245 (1999)).

Although they do not deny that some ‘basic goods’ or values are objective, they also recognize that those goods or values are in some cases incommensurable. For a useful difference between incommensurability and incomparability, see T. Endicott, ‘Proportionality and Incommensurability’, in G. Huscroft et al eds, Proportionality and the Rule of Law (Cambridge: Cambridge University Press, 2014), 321 who defines the former as ‘the impossibility of measuring two considerations in the same scales’; the latter as ‘the impossibility of finding rational grounds for choosing between two alternatives’.


In T. Endicott, n 33 above, 332, ‘the judges’ power to balance the unbalanceable is not arbitrary (in the pejorative sense of arbitrariness that is relevant to the rule of law), where it is necessary, for good legal purposes, that judges should have that power’, so much so that ‘The only viable argument in favour of proportionality reasoning in human rights adjudication is an argument of necessity’.
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as other constitutions (Germany, Spain, Portugal, Switzerland, Sweden, Finland, South Africa), or important international Treaties do. Nonetheless, there is general agreement among scholars that human dignity represents the most fundamental value, the premise of all liberties. The Italian Constitutional Court defined it as the supreme, inviolable value, permeating the legal system as a whole. This value is consistent with both Kantian rationalism and Catholic humanism. In practice, it has given rise to two opposite interpretations, one in favour of the right to a decent death, the other against it.

In the well-known case of a man whose daughter spent seventeen years in a vegetative state due to a car accident, and who asked for authorisation to interrupt her artificial nutrition in his capacity as her legal guardian, two diametrically opposed conceptions of human dignity emerged. The Court of Appeal of Milan maintained an absolute, or objective, idea of dignity as an attribute of the right to life, a predicate of it, and thus inconsistent with the annihilation of life. On the contrary, the Corte di Cassazione (the Supreme Court for civil and criminal matters) upheld a subjective conception of dignity as individual perception, gaining the conclusion that a ‘de-humanized’ life is

36 Art 1, para 1.
37 Art 10, para 1.
38 Art 1.
39 Art 7.
40 Art 2.
41 Art 1, para 2.
42 Art 1.
only a ‘pure biological process’,\(^47\) that can no longer be considered a decent life. Therefore, it can be suppressed in the name of human dignity, by simply withholding the medical assistance required to preserve life.

As we can see, the judicial interpretation of human dignity encompassed the entire range of alternatives, from the protection of the right to live to the right to legal authorisation of a lethal act. This is hardly surprising, actually: judicial application of human dignity in Germany and France as a communitarian (not only individual) value, to be protected even against someone who gave his or her consent to be employed in undignified activities,\(^48\) made it clear that such a fundamental value can alter the balance of powers between constitutional and ordinary courts, and also between legislator and judges.\(^49\)

A case discussed before the Regional Administrative Tribunal (TAR) of Tuscany in 2000 is an example in point. The case concerned a request for an authorization to build a house with special exercise and sanitary facilities to be used by a wholly and permanently disabled person. The authorization was refused by the administrative authority on the grounds that no provision in law, and in municipal building regulations in particular, allowed such construction. When the Court considered the case, it found indeed that no legislative norms allowed such structures. Thus, the motivation given by the administrative municipal authority was (to quote literally) ‘logically perfect’. However, the Court argued, on the basis of a systematic interpretation of the law protecting disabled people (statutory law 5 February 1992 no 104), and in light of its art 1 especially (according to which the Italian Republic warrants full respect of the disabled and their freedom and ‘autonomy’ and acts to remove obstacles that prevent them from achieving the ‘highest level of autonomy’), that it was possible to conclude that the administrative act in question was illegal, though formally perfect. Indeed, it was unable to satisfy the high thresholds of adequacy


\(^{49}\) On that specific point see G. Resta, ‘La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei diritti)’ Rivista di diritto civile, 801, 845, fn 107 (2002).
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and justice applicable in the protection of human dignity. Therefore, the Administrative Court stated that in such a specific case,

‘it appears reasonable and (perhaps even) appropriate to understand all relevant rules in such a way as to not forbid the kind of intervention required by the claimants’.

In the above mentioned case, human dignity plays the role of a corrective criterion for interpretation, similar to equity. The example makes it clear that the implementation of constitutional values, which are nothing more than the translation in written legal rules of principles of natural law, could foster interpretations falling beyond the scope and text of legislative acts (at least apparently). Thus bypassing the judges’ duty to be subjected to written legislation and distorting the proper significance of the Italian constitutional control of legislation, which is reserved to one court alone: the Constitutional Court.

Summing up what has been explored up until now, we can conclude that in ethically pluralistic societies, value-made law finds its rationality in the practice of lawyers and in judicial decisions especially, thus casting into doubt one of the very pillars of any civil law legal system: the commonly accepted supremacy of general and abstract collective deliberations over individual decisions (judgments as well as contracts). Indeed, the practical rationality of the legal system is likely to be increasingly sought in individual cases, rather than in the system considered as a whole. Hence the value of justice, traditionally intended as an objective principle referred to the entire legal system, could become a subjective parameter, which impinges not only on the degree of social acceptance of legal rules, as in the past, but on their very aptitude to bind. Their validity, in a word, as laws are likely to be unfit to strike a reasonable balance between the interests at stake for each possible case – even the most unpredictable and extravagant – and they can be censored before the constitutional Court as ‘unreasonable’ or ‘disproportionate’, and therefore voidable.

IV. How to Reduce the Politicization of the Judiciary Branch?

Judges have a clearly defined mission: doing justice according to law. However, constitutional law gives a normative form to values, which can lead to multiple and even opposite results, when practically implemented. Therefore, the stark alternatives available to judges appear to be the following: either to strictly respect formal legality and apply unjust rules, or to stretch legislative boundaries in light of Constitutional law, European law and European Convention on Human Rights law to prevent the application of rules thought to be unjust.\footnote{Today, courts are bound by the duty to seek a consistent interpretation of the legislation on which they wish to submit a question to the Constitutional Court, in relation to both
Sometimes endorsing interpretations going far beyond the literal wording of the law (*littera legis*).

This dilemma is hardly a hermeneutical one. It asks an ethical question. For constitutional lawyers, a question of legitimacy. For it is clear that if we deeply involve judges in the law-making process, the risk of depriving the judiciary of its constitutional foundation arises, at least in civil law-based legal systems.

On the one hand, Montesquieu’s doctrines of cognitive interpretation and the ethical neutrality of the interpreter are outdated, especially after Hans Kelsen’s fundamental works,⁵¹ and can be considered valuable merely as rhetorical affirmations. The bureaucrat-judge who simply applies legal texts and cannot create legal rules no longer exists. The opposite is often the case, as the judge, instead of acting as ‘bouche de la loi’, acts as a ‘maître à penser’⁵² who interprets with broad discretion the ethical-political meanings of written laws in competition with the legislative Will determined by representatives.

On the other hand, fostering open, case-oriented, creative interpretation to enhance the judicial protection of human rights would also have difficult constitutional implications. Judicial legitimacy in fact would rely on justice, more than on law. This theory⁵³ wouldn’t be in accordance with the Italian Constitution, that presupposes a different role of the judge and the forms of constitutional review of legislation.

As for the former, art 101, para 2, Constitution, states that ‘Judges are subject only to the law’, meaning that they are not subject to (therefore they are independent from) all other constitutional power and, at the same time, that they are not allowed to go beyond the application of written laws by endorsing overly creative interpretations, thus giving birth to legal rules.

As for the latter, Italian judges cannot refuse to apply laws even if they infringe constitutional principles, but may only ask the Constitutional Court to be released from the obligation of applying unlawful laws.

It is fair to say that the ethical neutrality of lawyers and judges is no more than a romantic illusion. Contemporary value-based constitutionalism, in fact,
needs to be rethought, together with a re-definition of the theory of judicial power, in line with the new function that it is called upon to perform. It is indeed doubtful that, as Ernst Forsthoff said,

‘one will succeed in rendering the bureaucrat-judge a prophet only by placing the crown of the creator on his head’.54

How, then, to make it possible for judges to ‘wear the crown’ without their being charged with lacking the legitimacy to compete with the legislator in the rule-making process? How to prevent judges from proposing legal policies in conflict with those of the legislator? How to minimalize, at last, the politicization of the apolitical judiciary branch?

A reasonable way of reducing this permanent tension is more likely to be found by reasoning on the constraints deriving from the multinational integrated system of protection of rights, which Italy is part of, than by proposing constitutional amendments aimed at reducing the independence of the judiciary from political bodies or even at politicizing the judiciary, by means of the popular election of judges.

The legitimacy of the courts (and of judgments) is a form of instrumentally rational legitimacy. A given judgment is correct, Carl Schmitt noted, ‘if it can be assumed that another judge would have decided the same way’, meaning for ‘another judge’ not only courts, but in general ‘the empirical type of the modern, legally learned lawyer’.55 To reduce as much as possible the indeterminacy of judgments, then, decisions must be standardized and interpretations of law homogenized. When the decision is checked and scrutinized by a number of independent legal experts, it proves to be deeply rooted in the legal practice of a given communitarian context, and not be caused by political prejudice and partisanship.

This is precisely the long-term effect of the integration of the Italian courts in the multilevel system of protection of fundamental rights. Thanks to that integration, the time has come to admit frankly that the constitutional principle stating the subjection of judge ‘only to law’ (meaning only to written laws) has been implicitly, though profoundly, redefined. At present, judges are not only subject to written laws drafted by representative legislators, but also to judge-made law coming from the European Court of Human Rights and the European Court of Justice. Pursuant to art 117, para 1, Constitution,56 these legal rules, literally created by those Courts, prevail over internal legislative acts and must be applied and implemented as such by Italian judges, even though with a

56 ‘Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations’.
margin of appreciation in fulfilling their obligations. They have to deal with the legal reasoning and the different interpretations proposed by the named international Courts, if they do not want to see their decisions challenged.

As a result, this very dialogue and confrontation between judges, while freeing Italian judges to some extent from the limit of the written legal rules, allows them to interpret laws in the light of the binding decisions of the 'higher Courts'. At the same time, it restrains the single-judge's creativity in construing the rights at stake, by forcing him to take into account the well-established supranational (European Union (EU) and European Court of Human Rights (ECHR)) case-law. In this way, the rational legitimacy of the judgment is strengthened and protected from charges against the judges of political motivation or bias.
Abstract

This article discusses whether websites criticizing the environmental policies of multinational enterprises are protected by horizontal effects of human rights and develops three theses:

(1) The third-party effect has so far been configured in an individualist perspective only, as balancing individual constitutional rights of private actors against each other. However, in order to deal with massive structural conflicts within society, constitutional rights in private relations have to be reformulated in their collective-institutional dimension. In the digital world, this means that not only individual rights of the users need to be protected but that, much more broadly, there needs to be an institutionalization of a digital public sphere.

(2) Instead of being limited to the protection against power in society, which is equivalent to the power of the state, constitutional rights must reach much further and need to be directed against all communications media with expansive tendencies. In the digital world this means that the dangers for constitutional rights do not stem only from the economic power of Internet intermediaries, such as Google, Facebook and Amazon, or from the Internet governance structures, but from the very digital operations themselves.

(3) Contextualising constitutional rights ought not to be limited to adapting these rights to the particularities of private law. It must go further and take into account the particular normative structures of the autonomous social institutions that are at risk. In the digital world this means that the attention should focus on the specific danger that the digital code itself produces for the public sphere.

I. Introduction

Greenpeace Germany launched a political campaign with comments critical of the environmental policies of the French TotalFinaElf oil company. Greenpeace opened a website with the domain name ‘oil-of-elf.com’. In doing so, it followed a practice of protest websites like ‘Shell.Sucks.com’ or ‘IBM.Sucks.com’, generally ‘CompanyNameSucks.com’, which are used to attack the business policies of corporations. The oil company brought legal action demanding that the domain name be dissolved or transferred to them. It filed...
suit not with a state court in either Germany, France or the US, which would have applied its national law. Instead, as often happens in disputes about worldwide websites, the company brought the case before a private Dispute Resolution Organisation, the World Intellectual Property Organization (WIPO)-Arbitration Center, which is accredited by the Internet Corporation for Assigned Names and Numbers (ICANN), a private association, and which is obliged to adjudicate according to the private rules of the so-called Uniform Dispute Resolution Policy (UDRP).

Under § 4a of the UDRP, TotalFinaElf would need to prove the following elements:²

i. the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;

ii. the respondent has no rights or legitimate interests in the domain name;

and

iii. the domain name has been registered and is being used in bad faith.

The technical legal questions are: (1) Do critical and protest sites fall under the jurisdiction of the UDRP?; and (2) Must ICANN panels pay due regard to fundamental free speech rights? This second question raises the fundamental issue whether constitutional rights that have been developed exclusively in the relation between citizens and nation states can be invoked against private actors on the Internet. More broadly, it raises the issue of the constitutionalization of the Internet, ie, the emergence of a digital constitution.³

Which fundamental rights and which national legal order will the ICANN panel in our case call upon? Although ICANN panels apply UDRP provisions rather than legal norms of the nation states, they often refer to US law. As a consequence, the First Amendment of the US Constitution would be relevant to this case. In other words, the issue would be one of the extraterritorial impacts of the US legal order upon the Internet. Following decades dominated by the real-world cultural imperialism of the ‘American way of life’, are we now witnessing a new expansion of the lex americana into the virtual world?⁴ The horizontal effects of fundamental rights on private actors would then be governed by the ‘state action doctrine’ of the American Constitution.⁵

As an alternative, however, the ICANN panel might apply whichever national

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law it determines to be appropriate in the light of all of the relevant circumstances, as stated in § 15 of the ICANN Rules. In such a case, the question would be one of whether the German constitutional law doctrine of horizontal direct effect would apply. Since French constitutional law does not provide for a horizontal effect of constitutional rights, only French private law would apply.

There is also a third way, which might prove of particular interest with regard to the Internet: Are we seeing the development of an autonomous lex digitalis analogous to the lex mercatoria, with its own autonomous transnational ordre public? Or are we even witnessing the development of an autonomous digital constitution, in line with which courts of arbitration would be required to develop uniform transnational fundamental rights and their horizontal effects within the Internet?

The CompanyNameSucks cases already have a considerable history of case law in the ICANN panels. In some cases, ICANN panels have made explicit recourse to the term ‘free speech’, albeit in vague and, legally speaking, ineffective form, and have declared the management of a domain name in the pursuit of political free speech to be legitimate. In other cases, however, they have nonetheless banned individual critical domains.

The case raises intriguing questions about state sovereignty and transnational societal constitutionalism. Due to the Internet’s global character and its effective regime of electronic regulation, sovereignty as the ability to make and implement norms has been de facto shifted from nation-states to the Internet institutions. What is the impact on constitutional rights when this shift takes place in two dimensions: public/private and national/transnational? And what does it mean that constitutional questions are globalized? Let me sketch three arguments:

1) Sovereignty shift from public to private space: Constitutional rights such as free speech are no longer directed against the state but against private actors (not only Facebook, Google, Amazon and Apple, but also the Internet regime – ICANN and its subsidiaries) within the private space of the Internet. What does ‘indirect’ horizontal effect look like in such a context? I would argue that we are not merely concerned here with the transfer of fundamental rights of public law to private law. Instead, the issue is one of the autonomous reconstruction of constitutional rights within the social system of the Internet.

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6 Available at https://tinyurl.com/y8olypqm (last visited 15 June 2017).
Horizontal Effects of Constitutional Rights in the Internet

(2) Sovereignty transfer from nation-states to transnational regimes, and the protection of fundamental rights within autonomous Internet law. The question of whether the ICANN panels, which are established by private ordering, should also enforce fundamental rights within the realm of the semi-autonomous legal order of ICANN-policy is even more contested. I would argue ICANN panels concretize fundamental rights within cyberspace on the basis of a fiction. They draw upon the fiction of a ‘common core’ of globally applicable principles of law, which include human rights, and with their help actually create Internet-specific fundamental rights within the reaches of an autonomous ‘common law’ of the Internet.

(3) So much for sovereignty. But what about constitutionalism? Our case provokes the question: How is constitutional theory to respond to the challenge arising from three current major trends – digitisation, privatisation and globalisation – for the problem of inclusion/exclusion of whole segments of the population in the processes of global communication? That is how today’s ‘constitutional question’ ought to be formulated, in contrast to the eighteenth and nineteenth century focus on the constitution of nation-states. While the old constitutions were simultaneously liberating the dynamics of democratic politics and disciplining repressive political power by law, the point today is to liberate and to discipline quite different social dynamics. The question is how constitutional theory will manage to generalise its nation-state tradition in contemporary terms and re-specify it. My third argument is that within global society a multiplicity of civil constitutions outside institutionalized politics is emerging. The constitution of world society is coming about not exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution overlying all areas of society, but will emerge incrementally in the constitutionalisation of a multiplicity of autonomous subsystems of world society.11

Of course, our case is limited to the protection of constitutional rights against ICANN, the private Internet governing authority. The constitutional question in the digital world is much larger and concerns as well violations of constitutional rights by private collective actors, especially by private intermediaries like Google, Facebook and Amazon.12 Their quasi-monopoly, their questionable handling of users’ private data and their massive expansionist tendencies into other sectors of the Internet raise not only political but also constitutional questions in the strict sense. However, which constitutional site is actually...
affected by the intermediaries’ market power is not easy to determine. It can be said with certainty that, due to their territorial boundaries, nation state constitutions fall short. However, their digital power is not solely a problem of the global economic constitution. Their information monopoly becomes a problem for the constitution of the new media, which cannot be reduced to economic issues. Their worldwide digital networking activities, which have enabled massive intrusions into the rights to privacy, informational self-determination and freedom of communication, represent typical problems for the constitution of the global Internet which is emerging today. The lack of transparency in their internal governance structures points to constitutional questions of democracy and of public controls.

Can constitutional rights be invoked against private actors on the internet? What is the meaning of their ‘indirect’ horizontal effect in the Internet?

By comparison with the longstanding tradition of constitutional rights, which was based exclusively on the relationship between the individual and the state, the horizontal effect concept represents a significant change. It responds to the emergence of non-state intermediary social forces with the transfer of public law norms into private law relationships. And the Internet is full of these non-state intermediary forces, from the digital intermediaries like Facebook, Google and Amazon to the governance structures of the ICANN, a private association, against which constitutional rights protection is needed. Yet it is precisely in the metaphor of a transfer that the problem lies. The differences between the sender’s context and the recipient’s context are so great as to make any transfer of norms in the strict sense impossible. Instead, what is needed is a separate re-construction of constitutional rights that is dependent on the recipient’s context in the digital world.

The transfer metaphor may still be convincing as a kind of transitional semantic, whereby constitutional rights asserted against the state are ‘transferred’ to private law and acquire ‘third party effect’ vis-à-vis social actors. In the long term, however, constitutional rights within society can only be understood on the basis of their different origin of intra-societal conflicts. The digital world is full of such intra-societal conflicts, which are fundamentally different from state-society conflicts but also different from social conflicts in the real world.

They differ in the factual circumstances of the constitutional right violation and in their appropriate sanctions, so that the simple term ‘third party effect’ of constitutional rights originally asserted against the state is actually misleading.

In the following pages, I will develop three theses:

**Thesis 1.** The third party effect has so far been configured in an individualist perspective only, as balancing individual constitutional rights of private actors against each other. However, in order to deal with massive structural conflicts within society, constitutional rights in private relations have to be reformulated in their collective-institutional dimension. In the digital world, this means that not only individual rights of the users need to be protected but much more broadly it means the institutionalization of a digital public sphere.

**Thesis 2.** Instead of being limited to the protection against power in society, which is equivalent to the power of the state, constitutional rights must reach much further and need to be directed against all communications media with expansive tendencies. In the digital world this means that the dangers for constitutional rights stem not only from the economic power of the Internet intermediaries like Google, Facebook and Amazon or from the Internet governance structures, but from the very digital operations themselves.

**Thesis 3.** Contextualising constitutional rights ought not to be limited to adapting these rights to the particularities of private law only. It must go further and take into account the particular normative structures of the autonomous social institutions that are at risk. In the digital world this means that the attention should focus on the specific danger that the digital code itself produces for the public sphere.

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**II. Thesis 1. Constitutional Rights as Collective Institutions**

The doctrine of horizontal effect, which prevails today, is an exclusively individualistic approach. It is limited to weighing individual constitutional rights against each other. If we see it only as a transfer of constitutional rights from public into private relationships, we turn a blind eye to the most dangerous violations of constitutional rights within society. While it has long been recognized in public law that constitutional rights serve to protect not only individual rights but also fragile social institutions, like art or science, the third-party effect has so far generally focused only on individual protection and has neglected the protection of endangered institutions. The German Federal Constitutional Court

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15 In general H. Dreier, *Dimensionen der Grundrechte* (Hannover: Hennies und Zinkeisen, 1993), 27 et seq.
regards the conflict here as only between individual subjective rights of ‘equal-ranking holders of constitutional rights’, between ‘conflicting constitutional right positions’ ‘in their interdependency’. In so doing, the court ignores the fact that the collective-institutional dimension of constitutional rights becomes viral when they are supposed to have effects within society.

In the conflict between collective institutions within society, however, lies the especially controversial problem of the horizontal effect. The term ‘collective-institutional’ distances itself from Carl Schmitt’s institutionalism and refers explicitly to Helmut Ridder’s theory of ‘non personal constitutional rights’, according to which ‘constitutional rights are aimed at the specific freedom of a social field through the organization of that field’ – freedom of science or freedom of art, for example, and today freedom of the Internet. It should in particular be emphasized in that in contrast to politically conservative preconceptions, ‘institution’ is understood not as a legal guarantee for the permanent existence of social structures against tendencies of political change – in Carl Schmitt’s definition, to preserve ‘what is present, formally and organizationally exists and is at hand’ – but as a socio-legal dynamic process of normativization which is subject to constant change.

Our introductory case raises questions of fundamental rights protection within the Internet. If we stress the institutional dimension also in private law protection of constitutional rights then we are not only dealing with the individual rights of the protesting Internet users. Rather, we are asking how a public sphere can be created within the decentralized realm of the Internet, and how critiques of FinaTotalElf’s company policies can be transmitted to the appropriate audience. The search is on for Internet-specific equivalents to the traditional mass media, on the one hand, and to those local protest movements, on the other, that can enforce fundamental rights protection for their criticisms of a company’s trade practice. In principle, the company’s website is the equivalent of the company’s place of business in the real world, and the domain name, one of the determinative sites for the creation of a public sphere of political debate on the company. This is the primary argument in support of the extension of fundamental rights protection to parodies or critiques of the

16 BVerfGE 89, 214 – Bürgschaft.
company’s trademark.

It needs to be stressed that the collective-institutional dimension plays a part on both sides of the horizontal constitutional rights relationship – perpetrators of rights violations as well as victims. If the victim side includes institutions as well as individuals, then on the perpetrators’ side it is not only persons, but in particular anonymous social processes that must be held responsible for the violation of constitutional rights. This two-sided aspect of the collective-institutional relationship is often overlooked. However, the discussion in criminal law concerning the so-called macro-criminality and the criminality of formal organizations, which has as its background the sociological debate on ‘structural violence’, has developed such a collective-institutional perspective for the perpetrators’ side also.

In such cases, violations of constitutional rights are ultimately attributable to non-personal social processes, which use human actors as their agents. Structural violence assumes an ‘anonymous matrix’, ie, not only ‘collective actors’, which tend to be more visible (states, political parties, commercial companies, groups of companies, associations), but also (with an equal if not greater intensity) anonymous communicative processes (institutions, functional systems, networks), which are difficult to address because they are not personified as collective actors. The hazards that emanate from the digital processes of the Internet are a particularly striking example. There is a clash between irreconcilable rationalities: action that is economically rational has a structurally corrupting effect on the particular rationalities of endangered social institutions. And a particular feature of the clash is its asymmetry. Constitutional rights have to be protected in such asymmetrical situations, in which the expanding economic dynamic weakens the internal structures of fragile institutions.

Treating constitutional rights as a collective institution means, therefore, a two-sided relationship in which social processes receive guarantees of autonomy to prevent them from being overwhelmed by the totalizing tendencies of other social processes. In this collective-institutional dimension, constitutional rights function as conflict-of-laws rules that operate within the conflict between the opposing rationalities of different parts of society. They seek to protect the integrity of art, of the family, and of religion in the face of the totalizing tendencies at work in society, eg, technology, the media and industry. And today, it is


20 For clarity it should be stressed that this does not mean that individual responsibility is eclipsed by collective responsibility, but rather that both exist side by side at all times, although they are subject to different preconditions.

digital totalitarianism that creates new threats to both individual freedom and institutional autonomy.

Instead, the horizontal protection of constitutional rights must be consistently transmuted into organization and process. Institutional protection for areas of social autonomy has been implemented for some time in public law, particularly in media law.\textsuperscript{22} In the field of the mass media, freedom of opinion cannot be effectively protected by means of subjective rights, but only through organization and process.\textsuperscript{23} This insight needs to be applied more generally and implemented and reproduced in regard to the horizontal effect of constitutional rights in different social areas, particularly in the Internet.

III. \textbf{Thesis 2. Expansionary Tendencies of the Communications Media}

A second weak point of traditional horizontal-effect doctrines is that they concentrate exclusively on protection from social power.\textsuperscript{24} This is made particularly clear by the influential state-action doctrine of US constitutional law.\textsuperscript{25} Horizontal effects of constitutional rights are recognized by analogy to the vertical state constitutional rights, if private actors exert socio-economic power equivalent to state power.

Indisputably, legal protection in the face of social power is an important part of the third-party effect, but here again the weakness of the transfer principle is noticeable. For only if the issue were to relate to the transfer of state-directed constitutional rights to intra-societal conflicts would it be plausible to restrict protection of constitutional rights to cases in which private power of an intensity comparable to state power has arisen in society. For this reason the third-party effect has also been uncommonly successful in labour law, since private ownership is transformed here into organisational power of the private government, which has at least as great an impact as the exercise of state power.

Yet if we focus exclusively on social power we fail to see other, subtler causes of collective-institutional constitutional rights violations. While in the sphere of the state it is appropriate for constitutional rights to be aimed against power phenomena, in different spheres of society it is not at all appropriate to limit constitutional rights to the communications media exercising social power. In principle, constitutional rights are put at risk from all communicative media as soon as autonomous subsystems develop expansionary dynamics of their

\textsuperscript{22} BVerfGE 57, 295, 320 – 3. Rundfunkentscheidung.
\textsuperscript{25} Cf \textit{Civil Rights Cases} 109 US 3 (1883).
own. In today’s world, that means primarily the expansionary tendencies of the economy, technology, medicine and (of particular relevance at the present time) of the digital world. Social power is thus only part of the danger to which constitutional rights are exposed within society. The main differences that exist between social and political constitutional rights result from the internal reproduction conditions of the affected sphere of society. In politics, constitutional rights are primarily directed against power. In other social systems constitutional rights are directed against dangers that are created by the specific communications media for the social system in question, e.g., from payment operations in the economy, from cognitive-technical operations in science and technology, and from digital information flows in cyberspace. Often, these risks appear as phenomena of social power which necessitates the protection of constitutional rights against them. But this protection is needed whenever these operations violate constitutional rights, even in cases where no social power is involved at all.

IV. Thesis 3. Contextualising Constitutional Rights in Cyberspace

For any such collective-institutional protection of constitutional rights to be contextually adequate, organization and process must be oriented to the specific contexts on both sides of the violation – the violators as much as the violated. In the case of CompanyNameSucks, the question by which we should be guided is, therefore, under what conditions does the practice of domain-name apportionment violate the core area of free speech on the Internet? The search for criteria must then proceed in two different directions: (1) What constitutes the specific risk potential of processes that violate constitutional rights? (2) How, in this connection, are we to define the core area of free speech? Only when these two questions have been answered with sufficient precision can we determine how organization and process have to be structured so as to be capable of restoring the violated integrity of freedom of opinion in the so-called private sector.

The Internet’s most conspicuous component is the (in)famous ‘code’, the digital incorporation of behavioural norms in the architecture of cyberspace. Digital signals replace regulation by rules of conduct. Initially, the question is one of the specific risks inherent to fundamental rights within the Internet: Which particular dangers do the code’s regulation of conduct pose to individual autonomy? Further, how does the code perceive the autonomy of economic

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27 For the question how constitutional rights should be adapted to the unique features of the Internet, see G. Rona and L. Aarons, n 3 above.

institutions? Then comes the question of how best to reconstruct fundamental rights in a manner appropriate to the Internet: What subject matter and which procedural codes must be read into the code in order to ensure that individual fundamental rights and institutional spheres of autonomy are adequately protected against digital regulation?

What specific dangers does the ‘code’ entail for individual autonomy? How does the code impact the autonomy of social institutions? It is not primarily a matter of abuse of digital power; rather, it concerns the constitutional consequences of the structural differences between the digital ‘code’ and the law of the offline world. Within its reach of application, the ‘code’ transforms fundamentally the normative order of the cyberspace. It is no longer the appellative character of legal rules, but electronic constraints that regulate directly the communication on the Internet. The ‘code’ represents the crucial problem for a digital constitution.

The first relevant issue is the ‘code’s’ self-enforcing character. In the predominantly instrumentalist perspective of Internet lawyers,29 this seems to be the great advantage of the ‘code’; however, in a constitutional perspective it becomes the nightmare for fundamental principles of legality. Traditionally, constitutional law is based on an institutional, procedural and personal separation of law making, law application and law enforcement. This separation is even inscribed for law making in the private sector. The strange effect of digitalisation, however, is a kind of nuclear fusion of these three elements, which means the loss of an important constitutional separation of powers.

A second issue is the triad of regulation of conduct, construction of expectations, and resolution of conflict.30 Traditional law cannot be reduced to one of these aspects but realises them all; however, it realises them within separate institutions, normative cultures and principles of legality. There is a (hidden) constitutional dimension in this separation. Again, the digital embodiment of normativity in the ‘code’ reduces these different aspects to just one: the electronic regulation of conduct. This entails a considerable loss of spaces of autonomy and of a system of checks and balances.

The third issue is calculability of normativity. In traditional law, the degree of formalisation was rather limited. The (in)famous effects of legal formalism have been relatively harmless as compared with the effects of the digital ‘code’, which allows for a hitherto unknown severe formalization of rules. In the real world, the strict binary relation between legal and illegal had been limited to the legal code. Now that binary relationship between legal and illegal had been limited to the legal code. Now that binary relationship is extended in the virtual world to the legal programs, to the whole ensemble of substantive and procedural structures

that condition the application of the binary code. This excludes any space for interpretation. Have you ever tried to discuss with your computer the interpretation of its commands? To click or not to click – that is the question when it comes to accepting the standard contracts in the digital world. Normative expectations, which traditionally could be manipulated, adapted and changed, are now transformed into rigid cognitive expectations of inclusion or exclusion. In its day-to-day application, the Internet code lacks all the subtle learning abilities of law. Any informal micro-variation of rules through new facts and new values is excluded. Arguments do not play any role in the range of code-application. They play their role, of course, in the programming of the code, but lose their power in the permanent activities of rule application, implementation and enforcement. Thus, informality, as an important countervailing force to the formality of law, is reduced to zero. The digital ‘code’ knows of no exception to the rules, no principles of equity, no way to ignore the rules, no informal change from rule-bound communication to political bargaining or everyday life abolition of rules. No wonder that such a loss of ‘reasonable illegality’ in the cyberworld nurtures the myth of the hacker, who with his power to break the code becomes the Robin Hood of cyberspace.

If this is a true impression of the dangers that the code poses to autonomy, then the constitutional character of various legal policy demands made of the code is undeniable. The Open-Source Movement, which demands publication of the source code in software marketing materials so that programme control structures can always be checked, should not simply be dismissed as a bunch of ‘nice’ idealists. Equally, the demand that the code’s digitalised conduct control mechanisms be subject to the principle of ‘narrow tailoring’ entails a parallel demand for intensified application of the principle of constitutional proportionality to the code, in order to bring it in line with legal norms that must also be respected by private actors. In this context, judicial control, as well as other forms of public control over the meta-norms of the code, are far more important than comparable oversight of standard contract terms or the terms used by private associations in the real world. The same holds true for Internet competition law, which not only secures open markets, but also impacts the continued openness of alternative code regulations. Human rights for the Internet has become a powerful political movement. More extensive are calls for an authentic constitution of the Internet, as a central part of societal transnational constitutionalism.

Apart from those political demands, which are translated in national and transnational legislative activities, judicial review of standard contracts with Internet providers as well as with institutions of the private Internet governance are gaining ever greater importance for constitutional rights.\textsuperscript{31} Our case involving

CompanyNameSucks is just one example of a standard contract between Internet users and Internet governance institutions that needs to be governed by principles of constitutional law. Under the guise of contracting, the intermediaries of the cyberworld have developed authoritative private regulations that no longer can be qualified as individual contractual relationships, but have practically all the characteristics of general legislation. There is no genuine contractual consensus any more; instead, enterprises and business associations as well as the ICANN institutions establish norms unilaterally, on the basis of asymmetric power relations, comparable to those between state and citizens. The famous click has become nothing but a demand for entrance into one of myriad digital regimes.

For decades, in the offline world, judge-made law has reacted to standard contracts and their privately imposed norms by taking on a dual constitutional role. And it has begun to do the same in the online world. On the one hand, it legitimates digital standard contracts by downplaying problems of asymmetrical norm production backed by economic power. It labels such norm production ‘contractual’, and uses some secondary rules to regulate it. The political legislature then does no more than incorporate the norms drawn up by judge-made law into the civil code.

On the other hand — and this is the decisive move toward constitutionalisation of the digital world — the courts intervene wholesale with strict judicial review in the digital self-made law, whose intensity is on a par with the constitutional review exercised on political legislation. Shielded by such traditional formulae as ‘good faith’ and ‘boni mores’, judge-made law has pieced together a new constitutional control hierarchy, in which the lower-ranking norms of the digital standard contracts are controlled by higher-ranking constitutional norms. Yet these higher-ranking norms are produced by principles not of the political constitution, but of the emerging transnational digital constitution, which needs to legitimize itself via principles of public responsibility. And it becomes the public responsibility of the courts, national and transnational, ordinary and constitutional, to develop with relentless energy the constitutional rights implicated by the asymmetric forms of private ordering in the digital world. It would be unfortunate if they were to apply one of the many national constitutional laws when they have to establish digital constitutional rights. Doing so would create a bewildering confusion of human rights standards within the worldwide Internet. Via the review of standard contracts, the courts will have to establish digital constitutional rights on a transnational plane. It is the courts that will play the decisive role for the emergence of a transnational digital constitution that deserves its name.
Same-Sex Adoptions: The Italian Case

Marco Farina

Abstract

In the judgment discussed in this paper, the Court of Cassation endorsed a broad interpretation of Art 44, para 1, letter d, legge 4 May 1983 no 184, such as to allow ‘adoption in special cases’ to homosexual couples. The legal recognition of the parental relationship developed between the child and the partner of the biological parent is rooted in a constitutionally-oriented interpretation, which is not hindered by the silence of the legislature on the reform of civil unions (legge 20 May 2016 no 76), thereby ensuring the realisation of the child’s right to have a family, regardless of preliminary assessments of the sexual orientation of the prospective adoptive parents.

I. Corte di Cassazione 22 June 2016 no 12962: The Facts

The judgment under consideration here was delivered by the Court of Cassation following a complex trial and is the first – and highly anticipated – ruling in matters of same-sex adoption.

The case concerns the application for adoption, in accordance with Art 44, para 1, letter d, legge 4 May 1983 no 184, by the social (or non-birth) mother of a minor born to a lesbian couple through medically assisted reproductive technology. Following a thorough examination of the situation (the judgment takes into account the social and psychological inquiry conducted by the local social services, as well as the hearing of the parents and the principal of the child’s school), the juvenile court at first instance pointed out that the child was born from a joint parental project of the two women, who had been living together for ten years, who were recorded in the municipal register of de facto unions and were also married in Spain, where the child was conceived. The designation of one of the two as the biological mother was exclusively based on grounds of age. Raised by the couple, the child – who was five years old at the time of the appeal – fully recognises the two women as her parents, calling them both ‘Mum’. Hence, an investigation of the actual situation demonstrated the development of a solid relationship of maternal love and responsibility,

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unaffected by the biological history and allowing for the child’s mature and peaceful growth.

Based on these facts, the juvenile court determined that the legal recognition of an accomplished parental relationship is in the child’s best interests, and therefore granted the application for adoption, following a broad interpretation of letter d) of Art 44, para 1, legge 4 May 1983 no 184. This finding was confirmed by both the Court of Appeal and Court of Cassation on review. The latter, in particular, offers a constitutionally-oriented interpretation of the so-called ‘adoption in special cases’, which it views as an instrument to protect the ‘right to a family’ which must be pursued regardless of any prejudicial assessment of the sexual orientation of the prospective adopters, but only on the basis of the suitability of the family to look after the child.

Furthermore, the decision is not only significant from a legal perspective but also has great political relevance. Settling a dispute at a time when Italy had no law on homosexual unions, the Court of Cassation issued the ruling just over a month after the promulgation of the so-called Cirinnà reform, which recognised and regulated same-sex ‘civil unions’ for the first time in Italy. As is well-known, following a heated parliamentary battle, the legislature gave up on the regulation of adoption by same-sex couples, leaving a legal vacuum difficult to interpret. The decision of the Court of Cassation thus burst forcefully into the debate that accompanied the enactment of the reform, stimulating reflection on the fate of same-sex adoptions in Italy today.

II. Legal Conditions for the ‘Special Adoption’: On the ‘Impossibility of Pre-Adoptive Placement’

As previously mentioned, the interpretation of the decision under review revolves around the normative parameter represented by Art 44, para 1, letter

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4 The reform is named after the member of the Italian Parliament who proposed it, ie the senator of the Democratic Party, Monica Cirinnà. The law is the legge 20 May 2016 no 76, published in the Gazzetta Ufficiale 21 May 2016. For a commentary, see E. Calò, Le unioni civili in Italia (Napoli: Edizioni Scientifiche Italiane, 2016), passim; G. Casaburi, ‘Convivenze e unioni civili: una prima lettura della nuova legge’, available at https://tinyurl.com/yd3dbphz (last visited 15 June 2017); M.R. Marella, ‘Qualche notazione sugli effetti simbolici e redistributivi della legge Cirinnà’ Rivista critica del diritto privato, 291 (2016); M.C. Venuti, ‘La regolamentazione delle unioni civili tra persone dello stesso sesso e delle convivenze in Italia’ Politica del diritto, 95 (2016).
The provision falls within the institution of adoption in special cases, and enables the adoption of children for whom ‘pre-adoptive placement’ has proved to be impossible, even when the requirements for complete adoption are not met.

In recent years, the exact meaning to be attributed to such a condition has in fact been the subject of a lively jurisprudential debate, which the Court of Cassation sought to resolve.

A more dated orientation views the impossibility referred to in the provision in the same way as a mere de facto impossibility. According to this interpretation, adoption may only be granted to children in a state of abandonment for whom, following the declaration of the child’s adoptability, pre-adoptive placement proved to be impossible. In this view, the institution of incomplete adoption under Art 44, para 1, letter d) would only cover abandoned children (and, therefore, devoid of any emotional bond), whose particularly problematic conditions impede their placement with a family suitable (or willing) to welcome them. It is an interpretation of the norm which, clearly, does not allow for its application to

5 The legal institution was in fact introduced by the legge 4 May 1983 no 184, in order to recognise the child’s right to a family in special circumstances (Arts 44-57), where the conditions for complete adoption (Arts 6-21) are not met and, nevertheless, it is deemed appropriate to proceed with the adoption. The adoption in special cases is characterised not only by the less stringent nature of its requirements, but also by a more streamlined process and limited effects as compared to those arising from complete adoption (ie: the ties with the family of origin are not severed). On this issue, see M. Dogliotti and F. Astiggiano, ‘L’adozione in casi particolari’ Vita Notarile, 19 (2014); G. Ferrando, ‘L’adozione in casi particolari: orientamenti innovativi, problemi, prospettive’ La nuova giurisprudenza civile commentata, II, 679 (2012); G. Collura, ‘L’adozione in casi particolari’, in R. Lenti and M. Mantovani eds, Filiazione, II, in P. Zatti ed, Trattato di diritto di famiglia (Milano: Giuffrè, 2012), 951; E. Urso, ‘L’adozione in casi particolari’, in G. Bonilini and G. Cattaneo eds, Trattato di diritto di famiglia (Torino: UTET, 2007), III, 455; M. Dogliotti, ‘L’adozione in casi particolari’, in M. Bessone ed, Trattato di diritto privato (Torino: Giappichelli, 1999), IV, 397.

the case examined by the Court of Cassation, where the child is already in the care of the biological mother and, therefore, does not need any new family in which to be placed.

However, this orientation is opposed by another one – definitively endorsed by the Court of Cassation on review – in which the ‘impossibility of pre-adoptive placement’ may also have a legal nature. The provision would allow the adoption even in cases where the minor is not in a state of abandonment, as the child is already being taken care of. The absence of the state of abandonment would complement the lack of a legal condition required to initiate the complete adoption procedure, thus preventing pre-adoptive placement on a merely formal level. Clearly, such an interpretation extends the scope of application of this legal institution, thus covering the cases where the minor has a stable and healthy relationship with the biological parent, and formalising the social parental relationship with the parent’s partner is in the child’s best interests.7

The latter solution, supported by the Court of Cassation, is undoubtedly preferable. Not only it is consistent with the literal content of Art 44, para 1, letter d), legge 4 May 1983 no 184, but it also appears to be more compliant with the function of the legal institution of adoption and more attentive to the needs of protection of minors.

First, it must be noted that the term ‘impossibility’ has a general scope, such as to include both the de facto impossibility and the de jure impossibility of pre-adoptive placement.8 However, the literal analysis cannot stop here. The provision contains, in fact, a further, even more significant point. The very first sentence of Art 44, para 1, legge 4 May 1983 no 184 specifies that adoption in special cases may be granted ‘when the conditions established in paragraph 1 of Art 7 are not met’. In para 1, Art 7 identifies as a condition for complete adoption the declaration of the child’s adoptability, allowing the adoption of the child by the social parent, ie different-sex partner of the biological parent, see: Tribunale per i Minorenni di Milano 28 March 2007, Famiglia e minori, 83 (2007); Corte d’Appello di Firenze-Sezione minorenni 4 October 2012, available at http://tinyurl.com/y839zb3b (last visited 15 June 2017). The same broad interpretation, but in favour of the same-sex partner of the biological parent, is supported by: Tribunale per i Minorenni di Roma 30 July 2014 n 1 above, confirmed by Corte d’Appello di Roma 23 December 2015, n 2 above; Tribunale per i Minorenni di Roma 22 October 2015, Foro italiano, I, 359 (2016), with note by G. Casaburi, ‘Omosessuali, unioni civili e filiazione: una questione aperta’; Tribunale per i Minorenni di Roma 23 December 2015 and Tribunale per i Minorenni di Roma 30 December 2015, (both in) La nuova giurisprudenza civile commentata, I, 969 (2016), with note by M. Farina, ‘Adozione in casi particolari, omogenitorialità e superiore interesse del minore’; Corte di Appello di Torino 27 May 2016, Foro italiano, I, 1933 (2016), with note by G. Casaburi, ‘L’Unbirthday secondo il legislatore italiano: la «non» disciplina delle adozioni omogenitoriali nella l. 20 maggio 2016, n. 76’.


8 The general nature of the term ‘impossibility’ has been highlighted most recently by A. Nocco, n 6 above, 205. Also see M. Winkler, ‘Genitori non si nasce: una sentenza del Tribunale dei minorenni di Roma in materia di second-parent adoption all’interno di una realtà omogenitoriale giustiziacivile.com, 13 November 2014, 10.
child’s state of abandonment (referred to in the following Art 8, para 1). It follows that, in general, the adoption in special cases is independent of the ascertainm.

The soundness of this solution is furthermore confirmed by the rationale of the provision and, more generally, the interpretation of the institution of adoption in special cases in light of the whole system of family law. While expanding an exhaustive list, the cases set out in Art 44 are affected by the overall rationale of the legge 4 May 1983 no 184, which is well expressed in Art 57, no 2. The latter provision establishes an obligation for the court to determine whether the adoption is in ‘the best interests of the child’. Of fundamental importance, this assessment is appropriately considered in case law as the ‘interpretative key’ of the institution of adoption in special cases and is confirmed by the very title of the legge 4 May 1983 no 184 (as modified by legge 28 March 2001 no 149), clearly indicating to the interpreter the perspective to adopt for an analysis of the content of the law, ie the ‘right of the child to a family’. 10 Hence, it is the relationship between the parent and the child that plays a fundamental role.

The Court of Cassation appropriately emphasised the importance of the relationship between the child and the social mother for the harmonious and

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9 To support the hypothesis that a state of abandonment is not a necessary condition under Art 44, legge 4 May 1983 no 184, the Court of Cassation also referred to Art 11, para 1 of the same law. The provision establishes that, for a child orphaned of both parents and with no relatives within the fourth degree with whom the child has a meaningful relationship, the juvenile court must declare a state of adoptability, ‘unless the conditions for adoption under Art 44 are fulfilled’. In the same sense, ‘Tribunale per i Minorenni di Roma 23 December 2015 and Tribunale per i Minorenni di Roma 30 December 2015 n 7 above.

10 In the same way, Art 315 bis, para 2, Italian Civil Code similarly addresses the right of the minor ‘to grow up in a family’. The central role of the child’s interests is also evidenced by other legislative measures. Of particular significance is the reform of the regulation of the custody of the child as a result of termination of the marital bond (legge 8 February 2006 no 54), as well as the reform which introduced the unique nature of the state of the child (implemented by the legge 10 December 2012 no 219 and decreto legislativo 28 December 2013 no 154). The former has reversed the perspective in the relationship between parent and child, now regulated in accordance with the right of the minor to maintain a balanced and continuous relationship with each of the parents and receive care, upbringing and education from both parents (on this, see E. Quadri, ‘L’affidamento del minore: profili generali’ Famiglia e diritto, 653 (2001); the latter has removed the difference between legitimate and natural children, thus giving rights to children as such, irrespective of the existence of a family based on marriage (see G. Ferrando, ‘La nuova legge sulla filiazione. Profili sostanziali’ Corriere giuridico, 525 (2013)). In the literature, the evolution of family law is addressed, among others, by G. Recinto, La genitorialità. Dai genitori ai figli e ritorno (Napoli: Edizioni Scientifiche Italiane, 2016), 11-104; R. Pane ed, Nuove frontiere della famiglia. La riforma della filiazione (Napoli: Edizioni Scientifiche Italiane, 2014), 9-28; L. Balestra, ‘L’evoluzione del diritto di famiglia e le molteplici realtà affettive’ Rivista trimestrale di diritto e procedura civile, 1105 (2010).
same-sex adoptions. On this view, a rejection of the application for adoption would have surely resulted in a serious prejudice for the child, thus betraying the spirit of the law. The adoption order appears entirely appropriate because, in formalising an already existing affective situation, it grants the protection of a vulnerable subject – as is the minor – and satisfies interests worthy of protection. Ultimately, the interpretative solution of emancipating the conditions set out in letter d) of Art 44, para 1 from the necessity of a prior assessment of the child’s state of abandonment is surely to be appreciated, since it distances itself from unreasonable and absurd outcomes, which are likely to subordinate the always ‘prominent’ interest of the child to the reasons of legal formalism.

III. Constitutionally Oriented Interpretation and New Family Models

The solution put forward by the Court of Cassation not only complies with the literal content and the overall rationale of the legge 4 May 1983 no 184, but also appears to be in line with constitutional and conventional principles.11 Precisely on adoption in special cases, a judgment of the Constitutional Court identified the *proprium* of Art 44, legge 4 May 1983 no 184 in its being governed by the ‘absence of the conditions’ set out in Art 7, para 1, of the same law, which governs complete adoption.12 A new light is thus cast on the link between complete and special adoption. More specifically, the latter shall not be a container of a series of exceptional circumstances, to be interpreted strictly and not susceptible to more generous applications. By contrast, it constitutes a special institution, which allows for the realisation of the child’s right to a ‘family’ with more limited effects than the complete adoption, but in cases in which the latter is not permitted. As seen above, the considerations identified by the Court of Cassation are entirely consistent with the findings provided by the Constitutional Court, because Art 44, para 1, letter d), legge 4 May 1983 no 184 is applied as an umbrella provision, also covering the case of adoption by the same-sex partner, whenever this is in the child’s best interest.

But that is not all. The solution also appears to be the only one consistent with the principles of non-discrimination and respect for family life, constantly affirmed in constitutional and EU case law.13

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11 In this regard, as it is known, the interpreter must adopt, among the various possible interpretations, one that leads to a decision on the specific case that is most respectful of the constitutional principles and abandon the others. In this sense, see Corte Costituzionale 27 June 1986 no 151, *Foro italiano*, I, 29 (1987).


13 In the literature, the need for a constitutionally-oriented interpretation of adoption in
Having correctly identified the interests to be protected by the adoption order, the court arrives at a sensible and reasonable conclusion only if any discrimination between couples who are admitted or non-admitted to adoption occurs on the ground of their suitability to guarantee the child’s healthy, balanced growth. In other words, the focus here is not on the horizontal relationship of the couple, more or less adhering to a preconceived ‘model’ of familiar union; on the contrary, it must be ignored completely in favour of the vertical relationship between the (social) parent and the child, in the belief that only an investigation of this type can ensure the desirable recognition of mature and virtuous emotional relationships for the child. Consequently, an interpretative solution prohibiting adoption in special cases only by virtue of the absence of a formal marriage, that is by virtue of the sexual orientation of the aspiring adoptive parent, is likely to breach the principle of non-discrimination (under Art 3 Italian Constitution and Art 14 European Convention on Human Rights (ECHR)), as it bases the difference in treatment on criteria irrelevant to the child’s best interest.

As previously mentioned, the solution arrived at by the Court of Cassation complies with the Italian Constitution also with reference to Art 117, para 1, transposing Art 8 ECHR into the national law, on the right to respect for one’s private and family life. In the consolidated interpretation of the law given by the Strasbourg Court, the protection of family ties is entirely independent of the existence of any formal legal relation. Conversely, from a perspective that special cases is supported by N. Cipriani, ‘Appunti in tema di adozioni nelle famiglie omogenitoriali in Italia (in attesa del legislatore)’ giustiziacivile.com, 2 February 2016, 9, who focuses more on letter b) than letter d) of Art 44, para 1, legge 4 May 1983 no 184.

14 Abundant scientific literature has demonstrated that minors raised by same-sex couples do not show different levels of well-being compared with other children, raised by heterosexual couples. On this point, see the studies collected by the Columbia Law School and available at https://tinyurl.com/yavc68xs (last visited 15 June 2017). The idea ‘that it might be detrimental to the balanced development of the child to live in a family centred on a homosexual couple’ as the result of a ‘mere prejudice’ is also recognised in case law. Corte di Cassazione 11 January 2013 no 601, La nuova giurisprudenza civile commentata, I, 434 (2013), with note by C. Murgo, ‘Affidamento del figlio naturale e convivenza omosessuale dell’affidatario: l’interesse del minore come criterio esclusivo’. EU case law also followed the same line. See, particularly, Eur. Court H.R., E.B. v Francia, Judgment of 22 January 2008, La nuova giurisprudenza civile commentata, I, 672 (2008), with note by J. Long, ‘I giudici di Strasburgo socchiudono le porte dell’adozione agli omosessuali’, in which the court deemed it illegal to refuse the assessment of the suitability of the aspiring adoptive parent because of his homosexuality; also in matters of adoption, Eur. Court H.R., X and Others v Austria, Judgment no 19010/07 of 19 February 2013, available at http://tinyurl.com/yc8gubhy (last visited 15 June 2017), which deemed discriminatory and not respectful of the right to a family life the Austrian regulation, allowing the so-called step-child adoption only to cohabiting heterosexual couple and not to same-sex couples; finally, Eur. Court H.R., Salgueiro da Silva Mouta v Portugal, Judgment of 21 December 1999, available at http://tinyurl.com/yayvazz7 (last visited 15 June 2017), which considers contrary to conventional principles the revocation of the child’s joint custody by reason of the discovery of the parent’s homosexuality.

privileges the effectiveness of this protection, the factual situation becomes of primary importance, which alone justifies the duty of both the legislature and the interpreter to recognise as fully legal the emotional ties established between the social parent and the child. EU case law, therefore, recognises the existence of a family pluralism, which also includes homosexual unions, and implores respect for the emotional ties that support the development of the child, as a crucial component of the ‘prominent interest’ of the child.

Art 8 ECHR thus becomes a useful tool not only to ensure equal treatment of both heterosexuals and homosexual persons in the expression of their personality within the couple’s relationship. More significantly, it ensures legal dignity to all those relations, including de facto ones, characterised by the existence of close and established ties; in that light, it provides a foundation for the rights of minors to see those ties legally respected and recognised. Of particular clarity 2017), which grants the protection under Art 8 ECHR of the relationship between a woman and her daughter, absent a male figure and a legal relation with the latter. In the literature, on the incidence of the case law concerning Art 8 ECHR, see F.D. Busnelli and M.C. Vitucci, ‘Frantumi europei di famiglia’ Rivista di diritto civile, 767 (2013).

16 The main focus should, therefore, be placed on the personal and family relationships (worthy of protection pursuant to Art 2 Italian Constitution), rather than on the existence of a traditional family (nonetheless protected by Art 29 Italian Constitution). On this point, see Corte Costituzionale 18 July 1986 no 198, Giurisprudenza italiana, I, 1336 (1987), according to which ‘the most appropriate solution to the particular conditions of the child’ is to be found in ‘concrete terms’, and the court must ‘always assess the strength of the emotional ties that have been established over time between the child and the family that is in fact raising him or her’. In the literature, see V. Roppo, ‘La famiglia senza matrimonio. Diritto e non diritto nella fenomenologia delle libere unioni’ Rivista Trimestrale di Diritto e Procedura Civile, 697 (1980); P. Perlingieri, ‘La famiglia senza matrimonio tra l’irrilevanza giuridica e l’equiparazione alla famiglia legittima’, in A. Falzia et al, Una legislazione per la famiglia di fatto? Atti del Convegno di Roma Tor Vergata, 3 dicembre 1987 (Napoli: Edizioni Scientifiche Italiane, 1988), 238.

in this regard is the warning issued by the Court of Strasbourg to Italy in the seminal case Paradiso,\(^{18}\) where the effective respect of the ‘prominent interest of the child’ requires the State to ‘act in such a way so as to allow for the development of this relationship’, whenever the existence of a familial relationship is ascertained.

The decision in question looks inspired exactly by these principles: at the centre of its reasoning, the Court of Cassation correctly considers the development of the child’s personality within a peaceful and nurturing emotional context and promotes a modern and functional conception of the family, in which the protection of the vulnerable subject always prevails.

IV. Same-Sex Adoptions After Legge 20 May 2016 no 76: Has Nothing Changed?

What has changed in same-sex adoption after the entry into force of legge 20 May 2016 no 76, providing a new discipline of ‘civil unions between same-sex persons’ and ‘cohabitations’?\(^{19}\) In the judgment in question, the Court of Cassation is silent on this point, merely stating that the reform ‘shall not apply, ratione temporis and absent transitional provisions, to cases such as that in question’.\(^{20}\)

Therefore, at the moment the interpreter is left with the delicate task of investigating the possible impact of the recent legislative innovations on the case law analysed thus far. As briefly mentioned above, following a heated

\(^{18}\) See Eur. Court H.R., Paradiso and Campanelli v Italia, Judgment no 25358/12 of 27 January 2015, La nuova giurisprudenza civile commentata, I, 834 (2015), with note by A. Schuster, ‘Gestazione per altri e Conv. eur. dir. uomo: l’interesse del minore non deve mai essere un mezzo, ma sempre solo il fine del diritto’, which censors, in a case of surrogacy, the choice of removing the child from the couple taking care of him (because it would be contrary to his best interest), even without a biological link between the child and the social parents. This first decision has been recently overruled by Eur. Court H.R. (GC), Paradiso and Campanelli v Italia, Judgment no 25358/12 of 24 January 2017, available at http://tinyurl.com/y8fyck7x (last visited 15 June 2017).

\(^{19}\) See n 4 above.

\(^{20}\) Corte di Cassazione 22 June 2016 no 12962 n 3 above, point 4.2.5. See G. Ferrando, ‘Il problema’ n 3 above, 1217.
political debate, the Cirinnà draft law has seen the ‘removal’ of the original Art 5, which would have amended Art 44, para 1, letter b), legge 4 May 1983 no 184, also allowing incomplete adoption to civil partners. Needless to say, had the amendment resisted the stormy parliamentary process, the grounds for the case law dispute discussed above would have been swept away (at least with regard to civil unions). Conversely, the legislative silence – which conceals a clear political intention, rather than an oversight, ultimately to avoid addressing the issue of homosexual parenting – paves the way to the suggestion that the advent of the Cirinnà reform marks the sunset of the now-consolidated progressive orientation in case law. In other words, the absence of an explicit introduction of step-child adoption seems to show the opposition of the Italian legislature to such an institution and, therefore, prevents interpretive solutions surreptitiously taking into account the (intentionally) wasted opportunity of the reform.

On a more careful reading of the text of the law, though, the issue of same-sex adoption turns out not to be entirely neglected, but it rather receives some consideration.

The reference is found in para 20 of the single art of legge no 76/2016. The first sentence of the provision, in order to ensure ‘effectiveness’ to the protection afforded to same-sex couples in a civil union and dispel any doubts of the law’s unconstitutionality, reads as follows:

‘The provisions relating to marriage and the provisions containing the words “spouse”, “spouses” or similar terms, wherever found in the laws, in the acts having the force of law, regulations and administrative measures and collective agreements, shall also apply to both parties of a civil union between persons of the same sex’.

The norm thus establishes a rule of terminological equivalence, seeking to prevent the risk that, in matters not specifically addressed by the reform, the partners of civil unions be subject to a less favourable treatment than that accorded to persons united by marriage.

So read Art 5: ‘In Art 44, para 1, letter b), legge 4 May 1983, no 184, after the word “spouse”, the following shall be added: “or the partner of the same-sex civil union”; and after the words “and of the other spouse” the following shall be added: “or of the other partner of the same-sex civil union”’.

In this respect, the legge no 76 of 2016 marks a step forward, as compared to both constitutional case-law and the trend of the judgments of the Court of Cassation. Corte Costituzionale 15 April 2010 no 138, Famiglia, persone e successioni, 179 (2011), with note by F.R. Fantetti, ‘Il principio di non discriminazione ed il riconoscimento giuridico del matrimonio tra persone dello stesso sesso’, made it clear that homosexual marriage is a social union pursuant to Art 2 Italian Constitution, entitled to ‘the fundamental right to live freely as a couple, and obtaining – in the time, manner and within the limits established by law – legal recognition and the related rights and duties’. Further, this right should not necessarily be achieved through equivalence of homosexual unions with marriage, as it is the task of the legislator to ‘identify the types of guarantees and recognition for these unions, the Constitutional Court reserving the opportunity
The commendable anti-discrimination ambition is however diluted in the following sentence, which creates two exceptions to the equivalence rule: it shall not apply ‘to the provisions of the Civil Code not expressly referred to in this law, nor to the requirements of legge 4 May 1983 no 184’. Focusing exclusively on the last part, the exception it contains clearly aims to prevent the provisions of the law on adoptions, where the existence of a formal marriage is the condition for application, from being applied extensively to civil unions.

The stubborn closure of the second sentence is mitigated by a third, concluding clause, which ‘preserves the provisions and permissions in matters of adoption in current regulations’.

The assessment of the impact of legge no 76/2016 on the debated issue of the access by same-sex couples to adoption clearly relates to the interpretation of para 20 above and its three constituent parts. In particular, the combined provisions of the first and second sentences prevent civil union partners from obtaining both complete adoption pursuant to Art 6, and incomplete adoption, within the limits of letter b), Art 44, para 1, legge 4 May 1983 no 184 (as both provisions contain the fateful word ‘spouse’). As to the first effect, while the choice made can be certainly criticised, it must be admitted that nothing changes as compared to the past: the clear wording of Art 6, legge 4 May 1983 no 184, in fact, has clearly prevented – not just recently – the access of homosexual couples to joint adoption. The same cannot be said with reference to Art 44, para 1, letter b), the interpretation of which is seemingly affected by the reform. It must be noted that part of the literature has in fact relied on a ‘progressive’ and constitutionally-oriented interpretation of the provision, so as to allow incomplete adoption also to same-sex families. The recent innovation of sanctioning the non-equivalence between ‘civil union’ and ‘marriage’ for adoption purposes seems to be aimed at excluding (definitively) a similar interpretive solution, thus leaving open only the possibility of referring the matter to the Constitutional Court.

On the other hand, the third, conclusive sentence of para 20 examined above is of the utmost relevance, as it clearly refers to the provisions of the legge
4 May 1983 no 184, which applies notwithstanding the existence of a marital relationship. As we have seen previously, this is the case of Art 44, para 1, letter d), examined by the Court of Cassation, whose prerequisite consists in the sole ‘impossibility of pre-adoptive placement’ and applies, by express provision of Art 44, para 3 of the same law, ‘not only to spouses, but also to those who are not married’. The exception which concludes Art 1, para 20, legge no 76 of 2016 thus does not leave any doubt about the possibility that the extensive interpretation of Art 44, para 1, letter d), legge 4 May 1983 no 184 endorsed in the judgment can be fully welcomed in the new normative environment, thus remaining the only instrument available also to same-sex couples (even those that are not in a civil union) to obtain the legal recognition of their social parenthood in favour of the other partner’s child.

Yet, there is more. The provision of the reform may provide input for further reflection. Particularly, in preserving the ‘provisions’ and ‘permissions’ in matters of adoption, it appears that the legislature intended to mention the provisions in which the word ‘spouse’ is absent, not only and not so much for their literal wording – as such specification would be redundant – but especially for their normative scope, as it results from the continuous hermeneutic efforts of the most recent case-law.25 Indeed, the juxtaposition of the nouns ‘provisions’ and ‘permissions’ does not appear to result in hendiadys (both bizarre and unnecessary). Rather, it has the specific purpose of preventing the exclusion of the provisions in matters of adoption from the rule of equivalence from having a negative effect on the interpretive paths that led to the formation of the current law in action, which is more careful than the jus posитum to both the needs of protection of children and non-discriminatory treatment of same-sex couples.26

Therefore, it seems possible to argue that the silence of the legge no 76 of 2016 not only fails to affect a progressive interpretation of Art 44, para 1, letter d), legge 4 May 1983 no 184, that guarantees access to incomplete adoption (also) to the homosexual partner, but also legitimises in a definitive manner the interpretive solution endorsed by the Court of Cassation. It being understood that, in doing so, the case-law orientation analysed here can (and must) apply to

25 See A. Schillaci, ‘Un buco nel cuore. L’adozione coparentale dopo il voto del Senato’, available at https://tinyurl.com/y7lhgx8n (last visited 15 June 2017); G. Casaburi, ‘Convivenze’ n 4 above, which defines the severability clause under Art 1, para 20, third sentence, legge no 76 of 2016 as a ‘non-closure’, which reappraises the exclusion of the provisions in matters of adoption from the rule of equivalence in the previous sentence.

26 M. Bianca, ‘Le unioni civili e il matrimonio: due modelli a confronto’ 2 giudicedonna.it, 9 (2016), is very critical of the wording of this provision, which she considers ‘incomprehensible’ and ‘contrary to the previous sentence’, even assuming that the severability of the third sentence of para 20 conceals ‘the intention of the legislator (…) to preserve the judicial practice allowing adoption in special cases’ to homosexual couples. G. Casaburi, ‘L’adozione omogenitoriale’ n 3 above, 2360 sees the provision as ‘alluring’, in that it ‘invites (or, at least, does not forbid) the case law to follow a road already travelled by the Tribunale per i Minorenni di Roma (…) in recognising special adoption in favour of the homosexual partner of the child’s parent’. 
the homosexual partner, regardless of the existence of a formal civil union,\textsuperscript{27} and only based on an accurate assessment of the adoptive order being compliant with the best interests of the child.

In conclusion, it is thus reasonable to hope that the interests of children raised by homosexual couples will be increasingly recognised formally by the courts. Given the failure of the legislature to define a responsible position, the courts – particularly the Court of Cassation – are inevitably left with the task of selecting the interests to protect and ensure the compliance of the system with constitutional and conventional principles.

\textsuperscript{27} Otherwise, the formalistic approach, inconsiderate of the needs of protection of children and dangerously prone to feed hateful discrimination between first- and second-rank homosexual couples, would once again return.
The Child’s Surname in the Light of Italian Constitutional Legality

Loredana Tullio*

Abstract

The Italian Constitutional Court declared unconstitutional the legal rule that every child must be attributed the father’s surname at birth or adoption or in case of recognition by both parents (joint recognition), and cannot also be attributed the mother’s surname, even if requested by both parents.

This article examines the legal arguments raised by the Court, especially the finding that the provision for automatic and absolute priority to the father’s surname sacrifices the child’s right to identity and violates the principles of equality and equal dignity between parents, guaranteed by the Italian Constitution and the European legislation. The right to a name, within a family, can be fully guaranteed by allowing the mother to attribute her surname, or by securing the right of the child to the acquisition of identification marks from both parents.

The article emphasizes several themes: the analysis of previous Italian and European jurisprudence on the matter; the radical changes following the implementation of the Lisbon Treaty; the problems arising from the double surname attributed to a recognized child, or to a dual citizenship child; and the future scenarios arising from the important and historical pronunciation of unconstitutionality, given the dynamism of the legal system.


Constitutional Court 21 December 2016 no 286: The Case

With a historic decision, the Italian Constitutional Court1 declared...
unconstitutional the ‘rule’ that provided for the automatic attribution of the father’s surname to a child, even against the wishes of the parents.

This ruling is the result of a slow but unremitting transformation that has affected Italian family law in recent years.² Lawmakers and judges, operating in different roles, have begun to reconsider the relationship between parents and children, through a series of reforms and several pronouncements, in the light of changes in the system of the source of law. The doctrine itself has contributed to this evolutionary trend. Through multiple debates on the matter, it has critically and continuously sought to re-design a new family model,³ no longer necessarily based on a conjugal bond and refraining from re-propagating the archaic concept of the ‘patriarchal family’. This new model can be described as a ‘social formation’⁴ consistent with the constitutional principles and abiding by supranational legislation.

The case before the Court concerned the prohibition on a married couple attributing to their child, who has dual citizenship (Italian and Brazilian), the maternal surname in addition to the paternal one. The minor was thus registered with different surnames in the two countries: this choice sacrificed the right to identity and constituted an obvious injury to that ‘essential trait of personality’⁵

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² In recent years, several innovations have been implemented in Italy: the law Revisione delle disposizioni vigenti in materia di filiazione (legge 10 December 2012 no 219; decreto legge 28 December 2013 no 154), implementing the uniqueness of the child status, recognizing the equality between children born of a married couple, born out of the wedlock and adopted children; the Law Disciplina sui modelli alternativi di risoluzione delle controversie (legge 10 November 2014 no 162, especially Arts 6 and 12) that, through ‘assisted negotiation’ and ‘agreements reached before the registrar’ allowed the friendly and out-of-court settlement of marital separation; the law Disposizioni in materia di scioglimento o di cessazione degli effetti civili del matrimonio (legge 6 May 2015 no 55), allowing the so-called ‘express divorce’; finally, the law Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze (legge 20 May 2016 no 76), that recognized for same-sex couples the same rights of married couples, allowing the registered same-sex couples to enter into common-law marriage agreements.


⁴ P. Perlingieri, ‘Sulla famiglia come formazione sociale’ Diritto e giurisprudenza, 775-778 (1979) discusses the family as “social formation” in its constitutionally significant function and in the peculiar solidarity that characterizes its internal affairs, inspired by the equal moral and legal dignity of its members; see also G.B. Ferri, ‘Persona umana e formazioni sociali’, in Id, Saggi di diritto civile (Rimini: Maggioli, 1993), 26.

which benefits from autonomous constitutional protection as a distinctive sign of the person. It should be noted that this ‘verbal sign’ is suitable not only as a ‘concise individual emblem’, but also ‘to summarize with great simplicity the personality of the individual’, projecting it into the social context.

The Constitutional Court recalls that

‘the value of the identity of the person, in the fullness and complexity of its expression, and the awareness of the public and private value of the right to the name as an emergence of the belonging of the individual to a family group, identify the criteria for the attribution of the surname of the minor as profiles determining his personal identity, which is projected into his social personality’.

This double dimension of the surname (personal and social) strengthens its importance and justifies, especially for dual citizens, a fortified protection not only within the country, but in the wider ‘legal place’. Moreover, the decision to attribute to the child only the father’s surname created an unreasonable disparity in treatment between parents, a disparity that could not be justified in the name of safeguarding family unity. On the contrary, as previously mentioned by the Constitutional Court itself, family unity ‘is strengthened when mutual


6 P. Perlingieri, La personalità umana nell’ordinamento giuridico (Napoli: Edizioni Scientifiche Italiane, 1972); Id, La persona umana e i suoi diritti. Problemi del diritto civile (Napoli: Edizioni Scientifiche Italiane, 2006).


8 Corte Costituzionale 21 December 2016 no 286 n 1 above, para 3.4.1.


11 The paradigm stating that the unity of the name is functional to the unity of the family is overcome by the ruling of the Eur. Court H.R., Ünal Tekeli v Turkey, Judgment of 16 September 2005, available at http://tinyurl.com/y8tsr38o (last visited 15 June 2017). It should be noted that, following this decision, the Turkish Constitutional Court declared unconstitutional Art 187 of the Turkish Civil Code obliging the woman to change her surname after the marriage. About this, see B. Çali, Third Time Lucky? The Dynamics of the Internationalization of Domestic Courts, the Turkish Constitutional Court and Women’s Right to Identity in International Law ejiltalk.org, 10 February 2014. See also: P. Perlingieri, ‘ Riflessioni sull’unità della famiglia’, in Id, Rapporti personali nella famiglia (Napoli: Edizioni Scientifiche Italiane, 1982), 38; G. Ferrando, ‘I rapporti personali tra coniugi: principio di eguaglianza e garanzia dell’unità della famiglia’, in P. Perlingieri and M. Sesta eds, I rapporti civilistici nell’interpretazione della Corte costituzionale (Napoli: Edizioni Scientifiche Italiane, 2007), 317-332.
relations between spouses are governed by solidarity and equality'.

In short, the impossibility of enrolling the child in public registries with the surname of both parents (the double surname, which had already been attributed in Brazil) was contrary both to Art 2 of the Constitution, since the right to personal identity was compromised, and also to Arts 3 and 29, with respect to the principles of equality and equal dignity of spouses; it was also in contravention of international law barring any form of discrimination against women and any inequality between spouses in choosing the family name, as well as treaties seeking to safeguard the rights of the child and, more generally, civil and political rights. Art 117, para 1 of the Constitution, which was drafted to accommodate 'European values', allows compliance with fundamental principles to be a connection between various normative sources and the foundation of the unity of the regulation system.

The Constitutional Court therefore recognized with this interpretative ruling the 'full and effective implementation of the right to personal identity, which finds its first and immediate confirmation in the name', affirming the 'equal importance of both parental figures in the process of building the personal identity' of the child. As an immediate consequence of the unconstitutionality ruling, the Ministry of the Interior implemented the Circular 19 January 2017 no 1, which obliged registrars to accept the requests of parents who, by mutual agreement, intend to assign to a child a double surname, paternal and maternal, at the time of birth, adoption or in the case of joint recognition.

To better understand the matter, this article will examine four issues: first, the absence of a specific 'rule' designed to provide for the automatic attribution

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12 Corte Costituzionale 13 July 1970 no 133, Giurisprudenza costituzionale, 1605-1611 (1970), S. Rodotà, Solidarietà. Un’utopia necessaria (Roma-Bari: Laterza, 2016), 52: he discusses 'family as a sanctuary (…) where it is possible to fully exercise the virtue of solidarity'.

13 Recognized by Italian law, ex Art 117, para 1, Constitution.

14 Art 16, para 1, letter g, Convention on the Elimination of all forms of Discrimination against Women (CEDAW), implemented on 18 December 1979 by the United Nations General Assembly (UNGA), ratified and into force with legge 14 March 1985 no 12.


20 Corte costituzionale 21 December 2016 no 286 n 1 above, para 3.4.1.

21 Register 19 January 2017 no 97.
of the paternal surname and the solutions adopted by Italian and European case-law; second, the obvious urgency of a constitutional intervention following the profound changes in regulations; third, the pre-existing presence of a double surname for recognized children and for dual citizenship children; and finally, the issues arising from the pronouncement of unconstitutionality in light of the dynamism of the legal system.

II. The ‘Rule’ About the Attribution of the Surname in Italian and European Jurisprudence

This was not the first time the Constitutional Court had addressed the matter of the prevalence of the paternal surname. On several occasions it had pointed out how the transmission of the father’s surname to descendants was the legacy of a patriarchal conception of family, whose roots were firmly tied to Roman law: at that time, it seemed logical, building the gens system, to choose the progenitor’s nomen to designate the familia, on the basis of the legality of the bond of submission. The patronymic constraint later on, though not mentioned in the Code civil des français, nor in the Italian Civil Code of 1865, continued to find justification in the presence of the ‘marital authority’ and the ‘patria potestas’, raised under the veil of a ‘presumed’ égalité.

The judges stated that this way of attributing the surname is no longer consistent with the values expressed by modern regulations. However, in previous

22 Corte Costituzionale 11 February 1988 no 176, with a note by C. De Cicco, ‘Disciplina del cognome e principi costituzionali’ Rassegna di diritto civile, 190 (1991); Corte Costituzionale 19 May 1988 no 586, Giurisprudenza costituzionale, 2726-2729 (1988); Corte Costituzionale 16 February 2006 no 61, Foro italiano, I, 1673-1677 (2006), with notes by: E. Palici di Suni, ‘Il nome di famiglia: la Corte Costituzionale si tira ancora una volta indietro, ma non convince’ Giurisprudenza costituzionale, I, 552-558 (2006); G. Dosi, ‘Doppio cognome, no alla via giudiziaria’ Diritto e giustizia, 10 (2006); L. Gavazzi, ‘Sull’attribuzione del cognome materno ai figli legittimi’ Famiglia persone e successioni, 902-906 (2006). In particular, on judgment no 61, the parents wanted to give the mother’s surname to their child: the Corte di Cassazione 17 July 2004 no 13298, Famiglia e diritto, 457-460 (2004), asked for Constitutional Court to declare unconstitutional the rule of automatic attribution of father’s surname (and not – as in the case discussed – to declare unconstitutional the legal rule that every child must be attributed the father’s surname at birth and cannot also be attributed the mother’s surname, even if requested by both parents). But the Constitutional Court abstained from ‘manipulative’ action, outside its powers, referring the matter to the ‘area reserved to the legislator’: only the law can give clarity (not creating confusion) and would not give up the unity of the family by overcoming an ancient legacy.

23 R. Sacco discusses the ‘patrilineal system’.


cases, the Court limited itself to ‘ascertaining’ the invalidity of the rule without ever ‘declaring’ the rule unconstitutional.\textsuperscript{26} The established incompatibility of the rule with the constitutional values\textsuperscript{27} was therefore limited, through ‘sentenza monito’\textsuperscript{28} (‘warning judgments’), by the need to wait for a direct intervention that could address, in a coherent and careful manner, all the possible consequences arising from the ‘fall’ of the ancient and automatic attribution of the father’s surname. Moreover, there was also the related issue of the husband’s surname\textsuperscript{29} (discriminatory – in this case – against the husband). In other words, until 2016, the Constitutional Court had always abstained from ‘destructive’ or ‘manipulative’ action, outside its powers, referring the matter to the ‘area reserved to the legislator’.\textsuperscript{30} The Court awaited the opportunity to regulate the matter ex novo, replacing the ‘rule’ in force with regard to the imposition of the so-called nomen familiae with a different criterion, more respectful of the autonomy of spouses and of the principles of equal dignity and equality.

However, despite widespread certainty regarding the patronymic rule, there was actually an absence of a clearly-defined provision regarding the matter: the

\textsuperscript{26} Although the Court highlighted traits of unconstitutionality in the opinion, its ruling rejected the claim. For further details, see P. Perlingieri, Funzione giurisdizionale e Costituzione italiana (Napoli: Edizioni Scientifiche italiane, 2010), 315; A. Rapposelli, ‘Illegittimità costituzionale dichiara ma non rimossa: un “nuovo” tipo di sentenze additive?’ Rivista AIC, 21 January 2015, 1-12.

\textsuperscript{27} C. De Cicco, ‘Cognome e principi costituzionali’, in P. Perlingieri and M. Sesta eds, I rapporti civilistici nell’interpretazione della Corte costituzionale n 11 above, 333-348.

\textsuperscript{28} Amongst the possible pronouncements of the Italian Constitutional Court there is the so-called ‘sentenza monito’. It issues a warning to the legislator, urging it to intervene on a rule of dubious constitutionality: T. Martines, Diritto costituzionale (Milano: Giuffrè, 13th ed, 2013), 504; M.R. Morelli, ‘Sentenza monito, inerzia del legislatore e successiva declaratoria di incostituzionalità sopravvenuta: nuove tipologie di decisioni costituzionali di accoglimento al di là del dogma della efficacia retroattiva Giustizia civile, 509 (1989); M.C. Grisolia, ‘Alcune osservazioni sulle “sentenze comandamento” ovvero sul “potere monitorio” della Corte costituzionale’ Giurisprudenza costituzionale, 826-842 (1982).

\textsuperscript{29} Arts 143-bis Civil Code and 5, paras 2-4, legge 1 December 1970 no 898. Italian jurisprudence has reduced for a long time the significance of the rule, pointing out that it is a mere right, and not an obligation (Corte di Cassazione 13 July 1961 no 1692, Foro italiano, I, 1065-1067 (1961) and Corte di Cassazione 14 April 1970 no 1020, Repertorio Foro italiano, ‘Matrimonio’, 92 (1970)). However, a reform on the rule, towards conformity with Constitutional and European principles, is hoped for: S. Niccolai, ‘Il cognome familiare tra marito e moglie. Com’è difficile pensare le relazioni tra i sessi fuori dallo schema dell’eguaglianza’ Giurisprudenza costituzionale, I, 558-575 (2006); E. Bellisario, ‘Sub Art. 143 bis’, in G. Perlingieri ed, Codice civile annotato con la dottrina e la giurisprudenza. Delle persone e della famiglia (Napoli: Edizioni Scientifiche italiane, 2010), I, 639-641; E. Al Mureden, ‘Il persistente utilizzo del cognome maritale, tra tutela dell’identità personale della ex moglie e diritto dell’ex marito a formare una seconda famiglia’ Famiglia e diritto, 122-128 (2016); G. Rossolillo, ‘La Convenzione di Monaco del 1980 e la continuità del cognome’ La nuova giurisprudenza civile commentata, 533-541 (2016); an example about civil unions can be found in: M.N. Bugetti, ‘Il cognome comune delle coppie unite civilmente’ Famiglia e diritto, 911-918 (2016); A. Panichella, ‘Unioni civili e convivenze: aspetti positivi e dubbi interpretativi alla luce della nuova legge n. 76 del 2016 Rivista giuridica del Molise e del Sannio, 205-207 (2017).

\textsuperscript{30} Corte Costituzionale 16 February 2006 no 61 n 22 above.
rule appears to be taken for granted, but it is actually not clearly identifiable.\textsuperscript{31} In fact it is sometimes called a ‘customary norm’,\textsuperscript{32} sometimes it is deemed as an implied ‘rule inferable from the system’.\textsuperscript{33} The European Court of Human Rights (ECtHR), in the well-known \textit{Cusan Fazzo} case, warns of the necessity of a reform ‘\textit{dans la législation et/ou la pratique italienn}e’\textsuperscript{34} (in Italian ‘legislation and/or practice’), using a wording that highlights the understandable uncertainty about the genesis of this rule. Such indecision also fueled debates about its eligibility for constitutional review.\textsuperscript{35}

There is no a specific rule requiring the automatic attribution of the father’s surname. It is inferred from an indirect interpretation of several articles of the Civil Code and from other specific laws. An example of a more explicit rule is Art 237 of the Civil Code, which supports the use of the father’s surname by including among the constituent elements of status ownership the circumstance that ‘the person carries the surname of the father whom he/she claims to have’. The following articles similarly support the automatic attribution of the father’s surname: Art 262 of the Civil Code, about child recognition; Art 299 of the Civil Code, on adoption; Art 72, para 1, of the regio decreto 9 July 1939 no 1238, Art 72, para 1, of the regio decreto 9 July 1939 no 1238, 1239, 1240, 1241.


which provides for the prohibition of imposing on the child the same first name of the living father, as they have the same surname; and Arts 33 and 34 of the decreto del Presidente della Repubblica 3 November 2000 no 396.\textsuperscript{36}

It is on the basis of these provisions that the Constitutional Court found grounds to rule on the constitutionality of the practice. Such a ruling had been repeatedly called for not only by the judges,\textsuperscript{37} but also by numerous appeals presented over the last thirty years, and by the ECtHR, which was the main driving force of this reforming effort.\textsuperscript{38} The ECtHR, intervening in this ‘framework’,\textsuperscript{39} pointed out that in Italy, in determining the surname to be attributed to the child, the father and the mother were ‘in similar situations’, yet ‘treated in a different way’. Therefore, ‘the registration of newborns in family status registries is excessively rigid and discriminatory against women’.\textsuperscript{40} The right to the ‘name’ is found under the protection provided by Arts 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR). As a result, ‘the impossibility for a married couple to attribute to their children, at birth, the mother’s surname’\textsuperscript{41} constitutes an infringement of European laws and international obligations.

III. The Changed Italian-European System of Sources and Compliance with International Obligations

The possibility of giving a child the surname of the mother or a double

\textsuperscript{36} The decreto del Presidente della Repubblica repealed the previous Regulation of Civil Status (regio decreto 9 July 1939 no 1238); see P. Stanzione, \textit{Il nuovo ordinamento di stato civile} (Milano: Giuffrè, 2001).


\textsuperscript{39} Corte Costituzionale 21 December 2016 no 286 n 1 above, para 3.4.1; E. Malfatti, ‘Illegittimità dell’automaticismo nell’attribuzione del cognome paterno’ n 1 above.

\textsuperscript{40} Eur. Court H.R., \textit{Cusan and Fazzo v Italy} n 34 above, paras 63 and 67.

surname, as is already the case in many European countries,\(^{42}\) clearly became an issue after Italy’s ratification of the Treaty of Lisbon (resulting in the new text of Art 6 of the Treaty on European Union, TEU, coming into force). This ratification gave new force to the need to adopt solutions compatible with European dictates, including the jurisprudence of the ECHR.\(^{43}\)

These circumstances require greater attention to compatibility with constitutional precepts.\(^{44}\) The relevance of the ECHR is not limited to the adaptation of national laws. Rather, the ECHR contributes to the underlying unitary values of our legal system.\(^{45}\) Consequently, the contravention of Arts 8 and 14 of the ECHR by national legislation does not raise a problem of ‘hierarchical placement of conflicting rules, but rather issues of constitutional legitimacy’, given the breach of Art 117, para 1 of the Constitution.\(^{46}\) The Constitutional Court states that the question is ‘absorbed’ in that article and emphasizes the centrality of the Cusan Fazzo judgement finding Italy to be in violation of the ECHR. Such a finding and the violation of ECHR rules render it

\(^{42}\) German courts ruled that the spouses choose the common family name, carrying the surname they have chosen. (§§ 1616 and 1618 BGB). This reform arose from the unconstitutionality judgement Bundesverfassungsgericht 5 March 1991, with a note by O. Kimminich (translated by B. Pozzo, ‘Alcune novità in tema di cognome della famiglia nel diritto tedesco’ Quadrimestre, II, 887-895 (1991)); U. Diederichsen, ‘Die Neuordnung des Familienamensrechts’ Neue juristische Wochenschrift, 1089 (1994); R. Favale retraces the evolution of German legislation in ‘Il cognome dei figli e il lungo sonno del legislatore’ n 1 above, 819-823. In France, the Loi 4 March 2002 no 304, relative au nom de famille (and 18 June 2003 no 516), states that the child can be attributed the surname of the father or the mother’s one, or both, separated by a hyphen, provided that the choice is agreed by both parents. (F. Bellivier, ‘Dévolution du nom de famille’ Revue trimestrielle de droit civil, 554 (2003); T. Garé, ‘La réforme de la filiation – à propos de l’ordonnance du 4 juillet’ La Semaine juridique, 1491 (2005); G. Raoul-Cormeil, ‘Le nom de l’enfant mineur’ CRDF, 45-58 (2006)). Austrian Civil Code provides for gender equality between men and women, within family, since 1811 (§ 139). In Spain, Art 109 of the código civil (formulated in 1999) provides for a ‘double surname’ of children; the order of the surnames is chosen by both parents. (J.J. Forner Delaygua, Nombres y apellidos. Normativa interna e internacional (Barcelona: Bosch Edición, 1994); M.P. Sánchez González, ‘Régimen Jurídico de los apellidos en Derecho español y su incidencia sobre el principio de no discriminación por razón de sexo’ Revista General de Derecho, 8855 (1998)). In the Netherlands, new regulations passed with the Law 19 November 1997, in force also for registered partners, provides for a joint choice by both parents, to be communicated at the time of the notification of birth or even before birth.


\(^{45}\) P. Perlingieri, Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale (Napoli: Edizioni Scientifiche Italiane, 2008), 63.

inevitable that the Constitutional Court would review the matter.\textsuperscript{47} The Constitutional Court intervened to review its previous stance, showing itself to be fully aware of the fact that the proper protection of the ‘right to name’ requires a fair balancing of the interests involved in the light of the complex and changed regulation framework.

### IV. The Double Surname of the Child

Concessions in the attribution of the father’s and the mother’s surname were previously granted only in two cases: 1. double (but not contemporary) recognition of the child; and 2. for European dual citizens.

1. The recognition of a child born outside of wedlock was subject to a particular discipline. The child received the surname of the parent who had first recognized him (Art 262, para 1, Civil Code): the surname of the mother, if she was the only one to be judicially recognized (Art 269 Civil Code), or of the father if he had declared his paternity together with the female parent (Art 262, para 1, Civil Code). Only if the father joined the family after the mother had already recognized the child, the child could adopt the father’s surname by adding it, putting it before the mother’s surname or completely replacing the latter (Art 262, para 2).\textsuperscript{48}

Such a change, although intended to ensure equal treatment of children born out of wedlock and children born of a married couple, could, in some cases, be detrimental both to the woman, who could face discrimination if her surname was replaced by the paternal one, and to the children, deprived suddenly of the ‘right to be themselves’.\textsuperscript{49} In fact, the child could suffer an injury to personal identity, in a certain social context, due someone else’s decision. The Constitutional Court granted the child the right to refuse to change its surname, instead of the automatic assumption of the paternal one, if the existing surname had become an autonomous sign of the child’s personality.\textsuperscript{50} This way, a key


\textsuperscript{48} Without prejudices to the need to refer the decision to a judge, if the child is under age; under those circumstances, it is possible to schedule hearings of the child (Art 262, para 4, Civil Code). Cf G. Arieta, ‘Attribuzione del cognome al figlio naturale e giudicato rebus sic stantibus’ Famiglia e diritto, 1137-1141 (2012); R. Villani, ‘L’attribuzione del doppio cognome ai figli (naturali, nel caso di specie, ma, in realtà, anche legittimi), quale strumento per salvaguardare la relazione tra i nati ed i rami familiari di ciascun genitore? La nuova giurisprudenza civile commentata, I, 680-686 (2011).

\textsuperscript{49} Corte Costituzionale 3 February 1994 no 13, Foro italiano, I, 1668-1671 (1994), para 5.1: the ‘right to be oneself, understood as respect for the image of a person participating to associate life, acquiring ideas and experiences, ideological, religious, moral and social opinions and beliefs that differentiate and at the same time qualify the individual’. About this matter, see M. Dogliotti, ‘Persone fisiche. Capacità, status, diritti’, in M. Bessone ed, Trattato di diritto privato (Torino: Giappichelli, 2014), II, 407.

\textsuperscript{50} Corte Costituzionale 27 July 1996 no 297, Giurisprudenza costituzionale, 2475-2478
priority is assigned to the name as a ‘symbol of the child’s identity’, rather than the concept of a name as a ‘sign of belonging to a family or to a parent’s lineage’. This is especially clear in the event of conflict between parents, who might be motivated not by providing the child with the best education or assistance needed, but to reach (thanks to a favorable ruling for one parent) a ‘summit’ to place the flag of his, or her, own last name.51

It should be noted that sometimes unmarried parents choose to assign the surname through manipulation of late recognition: the mother recognizes her child immediately after the birth, while the father deliberately delays recognition.52 This way, the child is given a ‘double surname’ is secured, escaping from the automatic preference for the father’s last name.

2. The intention to maintain a relationship between the child and the lineage of both parents is patent in the case of a minor already registered with a double surname53 in another country. In Europe, the issue has been addressed and resolved for more than a decade. The European Court of Justice (EUCJ) handed down several rulings54 ensuring respect for personal identity, requiring each

(1996), with notes by V. Carbone, ‘La conservazione del vecchio cognome come diritto all’identità personale’ Famiglia e diritto, 413-418 (1996); G. Ferrando, ‘Diritto all’identità personale e cognome del figlio’ Giurisprudenza costituzionale, 2479-2482 (1996); G. Cassano, ‘Status famigliare e conservazione del “proprio” cognome (la Consulta legittima nuovamente il diritto all’identità personale’ Il diritto di famiglia e delle persone, I, 476-484 (1996). Cf also Corte Costituzionale 3 February 1994 no 13 n 49 above, 1668-1671, stating the constitutional illegitimacy of parts of Art 165 Civil Status Regulations, namely those barring the individual whose Civil Status registration has been rectified from asking the court the recognition of the right to keep the former surname, if it is deemed as a distinctive sign of personal identity. The same goes for disclaimer of paternity of a child of age: D. Berloco, ‘Il cognome del figlio disconosciuto’ Lo Stato civile italiano, 14 (2006).

51 In this respect, Corte di Cassazione 15 December 2011 no 27069, with notes by V. Carbone, ‘Conflitto sul cognome del minore che vive con la madre tra il patronimico e il doppio cognome’ Famiglia e diritto, 134-142 (2012); F.R. Fantetti, ‘Nessuna automaticità o privilegio al patronimico’ Famiglia persone e successioni, 181 (2012).

52 G. Berloco, ‘I figli legittimi continueranno ad avere il cognome del papà; i figli naturali, invece, potranno avere il cognome della mamma se il padre tarda nel riconoscimento’ Lo Stato civile italiano, 660 (2006).


member State to include in the civil status registries a child, who is a citizen of that State, with the surname which the child was identified and registered with in the member State of birth, and where the parents resided – even though the surname could be attributed according to criteria other than those provided by the laws of the State of which the child has citizenship. The EUCJ does not express the rule to be preferred for the attribution of the surname; its concern is that the different national systems of surname attribution shall not discriminate, depending on nationality, against dual citizens, and that States shall not impose their ‘internal’ legislation against conflicting legislation of another nation against the will of the person concerned.

The person concerned, therefore, has the right to be registered in the second country with the surname given in the first one; otherwise the freedom of movement and residence in the territories of the EU member States would be limited.\textsuperscript{55} Therefore, the registrar who receives the birth certificate for a citizen born abroad must register the correct surname at the time of registration, in order to safeguard the fundamental right to personal identity.\textsuperscript{56} The EU jurisprudence in the matter of surnames is thus that European citizens, thanks to their status, are entitled to encounter no discrimination on the grounds of nationality in two different member states, one of whom intends to impose its internal legislation over the rules of the other one.\textsuperscript{57}

This ruling has been extended, in some cases, to persons possessing the citizenship of a non-EU country,\textsuperscript{58} besides an EU member State citizenship. However, in the instant case, the Constitutional Court did not reference discrimination based on nationality or limitations to freedom of movement and residence (already guaranteed all over Europe in accordance with current Arts 18 and 20, Treaty on the Functioning of the European Union, TFEU). Rather,


the Court focused on the infringement of the fundamental right to the identification of the person and the principles of equality and equal dignity of the parents. It is important to note that the choice of the Italian system of attributing the father’s surname as family surname does not constitute discrimination itself; but it could turn into discrimination, as the ECtHR noted several times, if the attribution is drawn rigidly and absolutely⁵⁹ (as it actually was), in other words, if it does not accept any derogation, not even with the consent of both parents.

V. Between ‘Missed Opportunities’ and ‘Forced Occasions’: The Opening of New Scenarios

After years of conflict between tradition and innovation,⁶⁰ and a growing mass of decisions by the Supreme Court of Cassation, the Constitutional Court, the Court of Justice, and finally the ECtHR, the affirmation of the ‘right to the maternal surname’ seems to be implemented in Italy by means of a historical ruling by Constitutional judges.

Changing the rules on a front which has been exclusively masculine for thousands of years was a difficult task, especially considering that rapid social change often finds harsh hurdles in overcoming the many preconceptions still intertwined in the legacy of past generations. This is demonstrated by the legislature’s ‘missed opportunity’⁶¹ to act on this issue: the recent reform of 2012, which strengthened the kinship ties of both parental branches while underlining the unique status of the child and celebrating the possibility of different affectivities⁶² within a couple, together with the decline of the protections offered to a child for the mere fact of being born within wedlock.

The ruling analyzed in this article, therefore, represents a forced occasion to bridge a gap or, better, to urge timely legislative action to revise the law in a manner consistent with legislative values, granting the father and the mother full freedom of choice of the surname to be attributed to the child, fully respecting gender equality. However, the issue can only be considered partially solved. This

⁵⁹ Eur. Court H.R., Cusan and Fazzo v Italy n 34 above, para 67; Eur. Court H.R., Losonci Rose e Rose v Switzerland n 38 above, para 49.


is because to the Court did not explicitly declare the unconstitutionality of automatic attribution of the paternal surname, but more specifically required the registrar to add the maternal surname, provided that both parents agree.

This decision, therefore, reduces, without eliminating, the elements in contravention of fundamental principles and rights, since the old patronymic rule remains in force in the absence of agreement between parents, either because they do not express an opinion or because they disagree. It is therefore up to the legislature to intervene quickly to clarify a number of issues.

It will be necessary to regulate cases where the parents do not indicate a preference or where they disagree, and to evaluate also the priority of the surnames, stating which one comes first (the paternal, the maternal, or in alphabetical order). It will be necessary to ask what the limits may be in case of an agreement: whether it is possible to assign a single surname (so-called common), chosen without a hierarchical relationship between man and woman, but in fact tending to undermine the equal dignity of the parents; or assert that the motive pointing to the need for gender equality shall not turn into an imposition on the child, passive recipient of a decision taken by someone else. In other words, it will be necessary to ask whether the need to transmit a surname should not be balanced with the best interests of the child, offered as a carrier of an alleged family heritage, leaving the child, once having come of age, to choose on the matter of social identification. Moreover, the legislature should develop exact regulations, especially for cases where a social or biological parent appears at a different time (for example, in the case of adoption or non-contemporaneous recognition of the child).

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63 Cf Corte Costituzionale 16 February 2006 no 61 n 22 above.
64 C. Favilli, ‘Il cognome tra parità dei genitori e identità dei figli’ n 1 above, 823.
65 A bill (disegno di legge no 1628) about surname is stuck in the Senate for more than two years, after having been passed by the lower chamber (Camera dei Deputati) on 24 September 2014. For a summary on the various proposals see A.O. Cozzi, T.D.D.L. sul cognome dei coniuge e dei figli tra eguaglianza e unità familiare ‘La nuova giurisprudenza civile commentata, II, 449–466 (2010).
67 This happened, for example, on the matter of non-contextual recognition of the child: Corte Costituzionale 27 July 1996 no 297 n 50 above. About the matter, see E. Lamarque, Prima i bambini. Il principio del best interests of the child nella prospettiva costituzionale (Milano: Giuffrè, 2016); about the necessary balance between opposite interests, see B. Randazzo, ‘Diritto ad avere un genitore v. diritto a divenire un genitore alla luce della giurisprudenza della Corte Edu: le trasformazioni degli istituti dell’adozione e della filiazione “sorrette” da un’ambigua invocazione del preminente interesse del minore’ Rivista AIC, 5 March 2017, 9.
68 F. Giardina notes that the desire to accomplish a ‘form of ownership’ of the child and a ‘landlord attitude and projection of oneself on the future generations’ could be concealed under the ‘noble’ pretension of achieving an equal treatment in ‘Interesse del minore: gli aspetti identitari’ La nuova giurisprudenza civile commentata, 160 (2016).
69 This happens in Spain, where the child, after coming of age, can submit a petition to change the order of its surnames. About this, V. Carbone, ‘Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d’accordo’ n 1 above, 169.
The choice of the double surname will then involve the need to address the issue of proliferation or multiplication of surnames through generations: the surname of the family could be composed of the first surname of each of the parents or of one of the two. The new law will then have to address the issue of the retroactivity of the rule with respect to parents/adult children who in the past have been denied the attribution of their maternal surname.

Finally, it is also necessary to consider the ‘obligation’ to attribute the same surname to all the children of the couple, or the ‘right’ to allow the choice of different surnames for siblings born by the same parents. The ECtHR preferred to avoid taking a stand on the latter issue, deciding to ignore a situation in which, in a family of siblings born to the same parents, some of them carried one surname and others had a different one.\(^{70}\) It should be emphasized, in this respect, that for children born after the re-establishment of a new family\(^{71}\) (the so-called ‘step family’), including the so-called ‘uterine siblings’, ie having the same mother but different fathers and ‘consanguineous siblings’, ie having the same father but different mothers, the effect of the double surname would allow men and women to be placed on an equal footing, since it would be possible to reveal the kinship relationships arising from the establishment of a new family by the mother.\(^{72}\) This way, highlighting the shared parent for ‘uterine siblings’ thanks to the same distinctive ‘sign’, the ‘visibility’ and ‘predictability’ of possible incestuous relationship would be enhanced.\(^{73}\)

VI. Conclusions

Hopefully legislative reforms will quickly be enacted to dissolve the many


\(^{71}\) D. Buzzelli, La famiglia «composita». Un’indagine sistematica sulla famiglia ricomposta: i neo coniugi o conviventi, i figli nati da precedenti relazioni e i loro rapporti (Napoli: Jovene, 2012); E. Al Mureden, ‘Le famiglie ricomposte tra matrimonio, unioni civili e convivenze’ Famiglia e diritto, 966-979 (2016).

\(^{72}\) It should be noted that, under the current practice, consanguineous siblings carry the same surname, while uterine siblings have different surnames: E. Al Mureden, ‘L’attribuzione del cognome tra parità dei genitori e identità personale del figlio’ n 1 above, 222; C. Ingenito, ‘L’epilogo dell’automatica attribuzione del cognome paterno del figlio (nota a Corte costituzionale n. 286/2016)’ n 1 above, 12.

doubts discussed here, assuaging the fierce criticisms of the nostalgic supporters of a ‘more rational and more convenient criterion, merely practical, for reconstructing family lineages’ (that is, the attribution of paternal surname) who keep wondering how is it possible to be stuck discussing discrimination in the courtrooms, taking ‘very harsh doctrinal stands concerning a matter (...) which is a mere formal question.’

In ‘this age of many transformations the appeal to fundamental rights comes back, spreading through the world in unprecedented forms’ bringing not the need for (what is simplistically described as) ‘a bureaucratic and standardized approach to equality’, but rather the need to enliven the human dimension through the implementation of the principle of equal social dignity.

The path traced by the Constitutional Court marks the fate of the automatic attribution of the paternal surname, momentarily ‘attenuated’ by this partial decision of unconstitutionality, which reasonably balances on the one hand the mother’s right to transmit, with her own surname, part of her origins to her child, and, on the other hand, the child’s right to witness the continuity of the family history also with reference to the maternal line.

This is just the beginning of a direct change which will allow such ‘fundamental rights to be not only granted, but also (fully) implemented’. ‘Sometimes even a partial invalidity leads to actual innovations (...), and this is a fatal consequence of any judgment of unconstitutionality’; this does happen when the equal dignity of the parents is revealed in the dual attribution of the matronymic.

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74 S. Scaglarini, ‘Dubbie certezze e secure incertezze in tema di cognome dei figli’ n 1 above, 5 and 12.
77 S. Rodotà, Il diritto di avere diritti n 75 above, 179-199.
78 ibid 310.
The Italian Constitutional Court has recently shown an intensifying tendency to establish ongoing relations with various European and non-European constitutional courts, certain that such a dialogue will contribute to a proficient cross-fertilization in the realm of constitutional law. In historical times such as these, during which obtuse and close-minded legal nationalism poses several threats, a better technical and cultural awareness necessarily presupposes the knowledge of a variety of case laws.

With this in mind, I cannot but express a wholehearted support for the idea to include, within the ‘Italian Law Journal’, a section seeking to provide adequate information on the most significant judgments handed down by the Italian Court in the previous year.

Their publication in English, which is the most common language, will facilitate familiarity with a body of decisions that fully deserves being used and valued.

This will make it easier to compare the styles and traditions of different national courts, which is a first step in the difficult road towards a future case law aiming to harmonize differences.

I would like to express, also on behalf of the whole panel of constitutional justices, sincere gratitude to the Section’s Founders and Editors, along with best wishes for their successful work.

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Methods and Purposes of the Constitutional Court Watch

Paolo Passaglia*

1. The Italian Constitutional Court is the fundamental guardian of the 1947 Constitution. Its case law gives expression to the Constitution as it lives, not only because of the position of the Court as its most qualified interpreter, but also because ordinary courts – as well as political bodies – refer to the Court and to its case law to find solutions to any legal issue related to the Constitution. The impact of the Court’s judgments, therefore, goes far beyond the specific cases decided. This is uncontestable with regard to judgments declaring the unconstitutionality of the challenged legislation, since the declaration results in the annulment of such legislation. However, other judgments also have general impact, precisely because of the authority that all Italian courts and political bodies recognize to the Constitutional Court and to its interpretation of the Constitution.

2. The Constitutional Court wields two kinds of power: the power to decide special constitutional controversies, and the power to perform constitutional review of legislation. The special controversies are those that arise from the distribution of power among the supreme bodies of the State, or between the central State and the Regions (Art 134, para 2, of the Constitution). The Constitutional Court also has the power to decide whether a referendum can be held, depending on whether its object falls within the domain determined by Art 75 of the Constitution. Finally, the Court decides on charges of high treason or attack on the Constitution brought against the President of the Republic (Art 90 of the Constitution).

The most important power is, however, that to review legislation, which can be carried out in an abstract or in a concrete form.

Abstract review addresses either appeals from the national government against a Regional legislative act or appeals lodged by a Region against a national legislative act. In this direct review of constitutionality, complaints must be filed within sixty days following the publication of the challenged act(s).

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When concrete review is performed, ordinary courts are empowered to refer a question to the Constitutional Court when there are doubts as to the constitutionality of a legislative provision that should be applied in proceedings before them. Thus, the Constitutional Court reviews the provisions' constitutionality on the basis of the case in which the issue arose and the concrete review takes the form of an incidental review of constitutionality.

Established in 1956, the Court delivers an average of three to four hundred judgments and orders each year. As a result, over six decades, an extremely rich body of case law was created, concerning all of the most significant issues arising in law and society, especially thanks to the incidental review of constitutionality.

Despite the quality of the judgments, their importance from a legal point of view, and their impact on society, knowledge of the activity of the Constitutional Court rarely crosses national borders, such that with only a few exceptions, the Court does not appear to play the role that it deserves in global judicial dialogue – the importance of which is underscored by President Grossi in his Presentation – and in the implementation of cross-fertilization processes that follows.

Several reasons explain why the transnational impact of the Constitutional Court’s case law is not comparable with the longstanding tradition of the Court itself. Among these reasons, it is fair to include the relatively restricted knowledge of Italian among foreign scholars and the difficulties relating to a highly technical and complex style in drafting judgments.

3. The main purpose of this new section relates precisely to these two reasons. Indeed, the Italian Law Journal aims to contribute to spreading knowledge of and stimulating interest in Italian constitutional case law among foreign scholars.

Rather than providing a translation of entire judgments, brief presentations of salient decisions are provided, to highlight the main legal issues dealt with by the Court. Readers who are interested in examining such issues in further detail may access the link, provided wherever available, to the Constitutional Court’s English translation of the relevant Conclusions on points of law.

This first issue concerns the case law of 2016. Among the two hundred ninety-two judgments and orders delivered last year, a selection was made taking into account the significance of the legal reasoning, the impact of the Court’s statements, and the interest of the subject from a comparative point of view. Indeed, given the purpose of the section, the idea was to feature those judgments that, in our view, are more capable than others to give the Court a chance to have a say in legal issues that are common to different systems. In this regard, the selection focused mostly on fundamental rights, although some crucial aspects of government and of the lawmaking process were also considered.

4. The judgments selected dealt with a wide range of subjects.
Some judgments fell within the scope of family law, because they related to stepchild adoption (Judgment no 76), the relationship between a child and the same-sex partner of its biological parent (Judgment no 225) and the choice of a child’s surname (Judgment no 286).

The bioethical issues arising were the fate of supernumerary embryos in medically assisted reproduction (Judgment no 84) and the regulation of advance directives (Judgment no 262).

Freedom of religion was taken into account with regard to agreements between the State and religious denominations (Judgment no 52) and to the establishment of places of worship (Judgment no 63).

The welfare State and social security is another field in which the Court rendered significant judgments, concerning the social contribution for out-of-work persons (Judgment no 173), survivors’ pensions (Judgment no 174), assistance to persons with disabilities (Judgment no 213) and the right to education of disabled persons (Judgment no 275). The protection of workers was examined with specific regard to the staff of public schools employed on the basis of fixed-term contracts (Judgment no 187).

One of the most significant issues relating to free competition dealt with public transportation (Judgment no 265), while the freedom to use illicit substances was considered with reference to the cultivation of cannabis plants for personal consumption (Judgment no 109). The law on illegal substances was also examined in Judgment no 94; in that case, however, the key issue was the relationship between the contents of a decree-law and the provisions of the law that converted it into a law itself.

The judicial protection of rights was involved in judgments relating to the excessive length of legal proceedings (Judgment no 36), the limits of the exclusive jurisdiction conferred to administrative courts (Judgment no 179) and the protection against double jeopardy (Judgment no 200).

The public administration was also dealt with. In particular, the cases concerned a provision that introduced a special position in the civil service but that was subsequently abolished (Judgment no 214) and the impact, on the powers of the Regions, of a national reform concerning several aspects of the public administration (Judgment no 251).
Italian Constitutional Court’s Selected Judgments of 2016

Judgment 13 January – 19 February 2016 no 36∗
(Incidental Review of Constitutionality)


1. The issue raised before the Constitutional Court by the Court of Appeal of Florence concerned the validity of Art 2, paras 2-bis and 2-ter, of Law 24 March 2001 no 89 (just satisfaction in case of violation of the reasonable length of judicial proceedings), as amended by the Decree-Law 22 June 2012 no 83 (converted by Art 1, para 1, Law 7 August 2012), which defines as ‘reasonable’ a period of three years in the first instance, of two years in the second instance, and of one year for proceedings before the Court of Cassation. The entire judicial proceedings must not exceed, in any case, six years.

2. To address the multitude of breaches found due to the excessive length of judicial proceedings inflicted by the European Court of Human Rights (or ECtHR, according to which this was a ‘practice incompatible with the Convention’: Eur. Court H.R., Bottazzi v Italy, Judgment of 27 July 1999), Parliament passed Law no 89 of 2001 (also known as the ‘Pinto Law’), which established a compensatory mechanism for those who suffered damages due to the infringement of the reasonable length of proceedings required by Art 6, para 1, of the European Convention on Human Rights (ECHR). However, the law only shifted the dispute to the national level, and ‘(did not change) the substantive problem, namely, the fact that the length of the proceedings in Italy continue to be excessive’ (Eur. Court H.R., Scordino v Italy, Judgment of 29 March 2006). Although the law had a limited purpose, the ECtHR held that the mechanism it established was acceptable, provided that the compensatory judgment was handed down in a short period of time. This principle was implemented by the Court of Cassation, the case law of which imposed a maximum length of one year for first-degree proceedings for just satisfaction; the same limit applied for proceedings before the Court of Cassation, such that the maximum length of the proceedings for just satisfaction could not exceed two years.

3. In 2012, with the entry into force of amendments to Law no 89 of 2001 to introduce Art 2, paras 2-bis and 2-ter, the time limits established by the new provisions were applied to all types of proceedings, and also, therefore, to just satisfaction proceedings, as no exception was provided. As a result, the maximum length

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of just satisfaction proceedings was extended with respect to the two-year period required by previous case law.

The question of constitutionality raised by the Court of Appeal of Florence focused on this very extension. In this regard, the ECtHR requires that just satisfaction for damages deriving from the excessive length of previous proceedings be granted in a shorter period of time compared to that required for ordinary proceedings, which are generally more complex.

4. Taking this principle into account, when defining the reasonable length of judicial proceedings, the national law could not apply the time limits established for ordinary proceedings to proceedings initiated to decide the issue of just satisfaction. The contested provisions were therefore held to be unconstitutional due to their breach of Arts 111, para 2, and 117, para 1, of the Constitution, as a result of the infringement of Art 6, para 1, ECHR, as interpreted by the ECtHR.

In particular, the Constitutional Court declared that the provisions of Law no 89 of 2001 were unconstitutional, insofar as they considered reasonable the three-year period for first-instance proceedings concerning just satisfaction.

5. On the contrary, the Constitutional Court declared the unfoundedness of the question of constitutionality concerning the application of the general time limits to proceedings for just satisfaction before the Court of Cassation: the maximum length of one year was deemed consistent with the rules established by the ECtHR.

**Judgment 27 January – 10 March 2016 no 52**

*(Conflict of Attribution Between Branches of the State)*

**KEYWORDS:** Religions other than Catholicism – Agreement Between Religious Denominations and State – Government's Refusal to Launch Negotiations – Governmental Discretion – Non-Justiciability.

1. The Constitutional Court was called to rule upon the constitutional dispute between the President of the Council of Ministers and the Court of Cassation with regard to Judgment no 16305 delivered by the Joint Civil Divisions of the same Court of Cassation on 28 June 2013.

The Council of Ministers had decided to refrain from launching negotiations aiming to reach an agreement (*intesa*) with the Union of Atheists and Rationalist Agnostics (Unione di Atei e Agnostici Razionalisti, hereafter, UAAR) pursuant to Art 8, para 3, of the Constitution. According to this provision, relations between the State and religions other than Catholicism 'are regulated by law on the basis of an agreement concluded between their respective representatives'. The Government asserted that the practice of atheism could not be considered equivalent to a religious faith. The UAAR filed a lawsuit to challenge this refusal and the Court of Cassation, in its aforementioned Judgment, concluded that the Government is under a legal obligation to engage in negotiations pursuant to Art 8 of the Constitution due to the sole fact that an association has made such a request.

2. In articulating objections to the Court of Cassation’s ruling, the President

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of the Council of Ministers argued that it encroached upon the function of policymaking in the area of religious matters, which the Constitution vests in the Government (Arts 7, 8, para 3, 92 and 95 of the Constitution). This function is ‘absolutely free as regards its ends’ and thus ‘not subject to review by the ordinary courts’.

The Government’s refusal to accept an association’s request to launch negotiations cannot be subjected to judicial review. It is a discretionary matter for the Executive, on the grounds of Arts 8, para 3, and 95 of the Constitution. Moreover, the actionability of the legal entitlement to launch negotiations was stated to be a corollary of the equal freedoms guaranteed to all religions under Art 8, para 1, of the Constitution. It would prevent the exercise of absolute governmental discretion in this area from giving rise to arbitrary discrimination.

3. Before the Constitutional Court, the President of the Council of Ministers argued that it was not for the Court of Cassation to assert that the ordinary courts were empowered to review the Council of Ministers’ refusal to launch negotiations for an agreement pursuant to Art 8, para 3. The Court overturned the Cassation’s ruling for the following reasons.

The Italian legal system is characterized by the principles of secularism, impartiality and equidistance with regard to each religion. Thus, agreements are not a requirement imposed by the public authorities to enable religions to enjoy freedom of organization and action, or to benefit from the application of the legal provisions addressed to them.

Notwithstanding the conclusion of agreements, equal freedom of organization and action is guaranteed to all religions by the first two paragraphs of Art 8 and by Art 19 of the Constitution. Furthermore, it is incorrect to assert that Art 8, para 3, of the Constitution, which provides for the extension of the ‘bilateral method’ to non-Catholic beliefs, is a procedural provision that merely serves the first two paragraphs. The third paragraph has the self-standing meaning of enabling the extension of the bilateral method to relations between the State and non-Catholic beliefs. The reference to that method reflects the common intention of both parties, and applies from the very moment of the decision to launch negotiations.

To establish a legally enforceable claim to launch negotiations, ordinary courts cannot review the Government’s refusal of a request submitted by an association, alleging that it is religious in nature (on this point, see Judgment no 346 of 2002). Thus, the reservation to the Council of Ministers of the competence to decide whether or not to launch negotiations has the effect of establishing the possibility of an effective control by Parliament, from the preliminary stage to the actual launching of negotiations. Considering a reasonable balancing of the interests protected by Arts 8 and 95 of the Constitution, there is no judicially enforceable claim – for any association that so requests, asserting that it is a religion – to the launching of negotiations pursuant to Art 8, para 3, of the Constitution.

In any case, the refusal at issue cannot produce additional negative effects for the applicant association. It is one matter to identify, on an abstract level, the characteristics that distinguish a social group pursuing religious purposes as a faith; the Government’s decision to launch negotiations pursuant to Art 8, para 3, is quite another. Indeed, this choice depends on delicate assessments of appropriateness,
which Arts 8, para 3, and 95 of the Constitution place under the responsibility of the Government. Within this limited context, and only within it, the Council of Ministers is thus vested with political discretion, under any possible control of Parliament, which cannot be brought before the courts for review.

4. For these reasons, the Constitutional Court ruled that it was not for the Court of Cassation to decide that the resolution by which the Council of Ministers refused to initiate negotiations with the Union of Atheists and Rationalist Agnostics, concerning the conclusion of an agreement pursuant to Art 8, para 3, of the Constitution, was subject to judicial review. Therefore, the Court annulled Judgment no 16305 of the Joint Civil Divisions of the Court of Cassation of 28 June 2013.


Judgment 23 February – 24 March 2016 no 63

(Direct Review of Constitutionality)


1. The President of the Council of Ministers raised a question of constitutionality concerning Arts 70 and 72 of Lombardy’s Regional Law 11 March 2005 no 12, establishing principles governing the planning of facilities for religious services. The claimant argued that the contested provisions infringed freedom of religion, which is protected by the Constitution as well as by international and supranational law, and that they exceeded the Region’s legislative competences.

2. Longstanding constitutional case law has construed the principle of secularism not as disregard for religious experience, but rather as a safeguard of religious freedom in a context of confessional and cultural diversity (Judgments nos 508 of 2000, 329 of 1997, 440 of 1995, and 203 of 1989). The Constitution grants freedom of practice to all religions, regardless of the existence of an agreement (intesa) with the State (Judgment no 52 of 2016). On the contrary, these bilateral agreements are designed either to meet specific needs of the religious denominations (Judgment no 235 of 1997), to grant them advantages and impose restrictions (Judgment no 59 of 1958), or to recognize their actions within the legal system (Judgment no 52 of 2016). To this end, the number of adherents to the religion in question is of no importance (Judgment no 329 of 1997).

To establish new places of worship, the authorities cannot demand prior agreements, which are required only if and to the extent that religious bodies seek to attach legal consequences to their acts (Judgment no 59 of 1958). This is not to say that all denominations must enjoy equal access to public funding and available spaces. For this purpose, all relevant public interests must be weighed,

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and due consideration must be given to the religion’s presence on the territory, its social impact and local religious needs.

The Court examined Art 70, as amended by Regional Law 3 February 2015 no 2, which divides religions into three categories for the purposes of building places of worship and religious facilities: the Catholic Church (para 1); religions that have signed agreements with the State (para 2); and all other religions (para 2-bis). The latter are subject to the provisions set forth in said Arts 70-73, provided that they are present throughout the territory and comply with the principles and values enshrined in the Constitution. A regional authority must verify that all requirements have been fulfilled and issue a non-binding opinion (para 2-quater).

The provisions at issue fall within the concurrent competence of ‘land-use planning’, under Art 117, para 3, of the Constitution. Such competence is restricted to ensuring the balanced and cohesive development of residential areas and improving public services, including religious facilities (Judgment no 195 of 1993). However, when exercising this competence, regional lawmakers are not entitled to obstacle or compromise freedom of religion, thus overstepping into an area in which the need to maintain equality applies. For instance, they cannot impose stricter requirements for the allocation of places of worship to religions that have not signed agreements with the State. For these reasons, Arts 70, paras 2-bis and 2-quater, were held unconstitutional.

3. The claimant challenged, inter alia, Art 70, para 2-ter, that states that religious bodies other than the Catholic Church must enter a town-planning agreement with the Municipality containing a termination clause in the event that activities were conducted but not provided for in such agreement.

The question was declared to be unfounded. The provision complies with the principle of proportionality, which requires that the least restrictive individual right be chosen among equally effective means, and forbids exceeding that which is necessary to attain a balance between conflicting interests. In any case, recourse to the termination clause shall be limited only to cases in which no viable alternatives are available.

4. The claimant also contested Art 72, para 4 and para 7, letter e), which require that, during the development of a construction plan for religious facilities, the opinions of law enforcement and citizens’ committees be obtained for security purposes, and surveillance cameras be installed outside religious buildings such that these may be monitored by police officers.

The Court found the provisions to be unconstitutional and considered that freedom of worship must be balanced with issues of security, public policy and peaceful coexistence. However, in these matters, the Constitution confers exclusive competence upon the State (Art 117, para 2, letter h), while the Regions may only cooperate, enacting measures that fall within their competences (Judgment no 35 of 2012).

5. The question raised with regard to Art 72, para 4, second sentence, was found to be inadmissible. The provision allows Municipalities to hold referenda on construction plans for religious facilities. Nevertheless, it does not amend the procedure to approve the plan, and therefore does not affect the rules governing referenda: it simply refers to and confirms the provisions set out in the applicable local and national regulations.
6. Last, the claimant challenged Art 72, para 7, letter g), which stipulates that the construction plan for religious facilities must ensure the architectural and dimensional congruity of religious buildings with the general and specific characteristics of the landscape of Lombardy, as laid down in the Regional Territorial Plan.

The Court ruled the question to be unfounded. The challenged provision does not loosely require that religious buildings meet certain unspecified characteristics of the landscape of Lombardy; rather, it refers to the characteristics set out in the Regional Territorial Plan. Considering the provision at issue in its entirety, the assessment of conformity relies not on general reasons that could lead to arbitrariness and discrimination, but on standards established in the relevant provisions of the Regional Territorial Plan.


Judgment 24 February – 7 April 2016 no 76*
(Incidental Review of Constitutionality)

KEYWORDS: Stepchild Adoption – Same-Sex Couple – Italian Recognition of Foreign Judgments – Breach of the Public Order – Inadmissible Questions of Constitutionality.

1. The issue raised before the Constitutional Court concerns the constitutionality of Arts 35 and 36 of Law 4 May 1983 no 184, and was brought by means of an incidental review.

2. In 2004, after a long period of cohabitation, a same-sex couple composed of two American women wished to become parents and, to this end, decided to resort to artificial insemination. After their children thus conceived were born, each of the women adopted the other’s child.

In 2013, the two women were married in New York State and moved to Bologna, Italy, with their children. As one of them was a dual US and Italian citizen, she appealed to the referring court, the Juvenile Court of Bologna to seek the recognition of adoption decree obtained in Oregon, to enable her wife’s biological daughter to obtain Italian citizenship.

First, given that the petitioner was an Italian citizen, the referring court qualified the adoption as an international one and held that Art 41 of Law 31 May 1995 no 218 (concerning private international law) and Art 36, para 4, of Law no 184 of 1983 applied.

To decide upon the recognition of the foreign decree in Italy, therefore, the referring court gave preeminent importance to the fact that the adoption had taken place within a family in which the parents were of the same sex, and therefore the principle of compliance with public order had to be addressed. In this vein, it raised a question on the constitutionality of Arts 35 and 36 of Law no 184 of 1983 with regard to Arts 2, 3, 30, 31, and 117 of the Constitution – the latter in relation to Arts 8 and 14 European Convention on Human Rights (ECHR) (on the child’s right to a family). The question concerned the fact that those provisions did not allow the judge to actually assess whether recog-

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nizing the foreign adoption decree issued in favour of a biological mother’s homosexual partner met the interests of the adopted minor.

3. The Constitutional Court did not address the merits of the case, because it found that the provisions claimed to be unconstitutional did not apply. In the Constitutional Court’s opinion, the referring court did not give a correct and complete interpretation of Art 41 of Law no 218 of 1995. Art 41 consists of two distinct provisions. The first provides for the automatic recognition of foreign decrees and recognizes the Registrar General as the competent officer for registration of such decrees. The second, which deals with international adoption, refers to the special law on adoption (Arts 35 et seq of Law no 184 of 1983), and recognizes the judge who addresses the merits of the case as possessing the requisite competence to decide upon the admissibility of a foreign decree in Italy.

The difference is appreciable if it is related to specific situations regarding same-sex couples. According to the Court, such cases should be considered as adoptions ‘internal to a foreign State’ rather than as ‘international adoptions’. As a result, what ought to be enforced is Art 41, para 1 of Law no 218 of 1995, which refers to Arts 64 et seq of the same measure (which aim to promote the continuity of a legal situation that was validly established in foreign jurisdictions) instead of special provisions, such as Arts 35 et seq of Law no 184 of 1983.

4. Although the Court did not explicitly address the issue of the compatibility of a foreign decree of adoption granted to same-sex parents with the Italian legal system and with the principle of public order, the issue nevertheless underlies the entire Judgment.

International public order, considered as a limitation upon the validity of foreign laws and judgments, constitutes the core of a fundamental principle that characterizes the very essence of a legal system.

A deeper examination of the issue is also recommended in light of the evolving trends in case law, which appears to move towards recognition of the fact that the international public order cannot pose an obstacle to the registration of foreign decrees concerning adoptions made by same-sex couples. In addition, above all, it is necessary in order to protect the capacity to rely upon the preservation and continuation of private family life.

Judicial preceedents include the decisions of the Courts of Appeal of Milan (16 October 2015) and Naples (5 April 2016), which established the validity of a foreign decree’s registration that allows the one to adopt the biological child of one’s same-sex partner, thus holding that adoptions by same-sex couples granted in a foreign country do not breach the public order.

The cases concerned the registration of two foreign orders of ‘national’ adoption, such that the Court enforced the provisions of Law no 218 of 1995 instead of those of Law no 184 of 1983, which address the registration of foreign decrees of international adoption.

Despite the legislator’s failure to act, judicial decisions are increasingly admit the possibility of maternity and paternity by same-sex couples; first among such decisions are those handed down by the Supreme Court (Court of Cassation) and the civil courts. In particular, the Juvenile Court of Rome, since its well-known Judgment of 30 July 2004, has allowed special adoption by same-sex couples under Art 44, letter d), of Law no 184 of 1983, thus placing a greater emphasis on
de facto families.

The Supreme Court of Cassation’s Judgment no 601 of 2013 is also important, because it denied that sexual orientation could be sufficient to exclude one’s ability to become a parent: ‘to believe that living in a family based on a same-

sex couple could impede a child’s healthy growth is nothing but a prejudice’.

5. Due to the improper choice of the provisions to be applied in the case at hand, the questions of constitutionality concerning Arts 35 and 36 of Law no 184 of 1983 were thus declared inadmissible.

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**Judgment 22 March – 13 April 2016 no 84**

*(Incidental Review of Constitutionality)*

**KEYWORDS:** Medically Assisted Reproduction – Supernumerary Embryos – Scientific Research – Legislative Discretion – Inadmissible Questions of Constitutionality.

1. The question raised before the Constitutional Court concerned Art 13 of Law 19 February 2004 no 40 (provisions on medically assisted reproduction), which provides for the absolute prohibition on experimental research on supernumerary embryos, although these may not be implantable.

2. The possibility to create embryos that will not be born – embryos which commonly defined as excess or residual – was established on a legal basis by the Constitutional Court’s Judgment no 151 of 2009, which declared the unconstitutionality of Art 14, para 2, of Law no 40 of 2004 insofar as it prohibited the production of more than three embryos while in any case requiring that they be destined to a single and simultaneous implantation. Consequently, the Court departed from the prohibition on cryopreservation generally enshrined in para 1 of the same provision.

The number of supernumerary embryos that are not transferred, in particular on the grounds that they are diseased, was virtually expanded as a result of the subsequent Judgment no 96 of 2015, which declared the unconstitutionality of Art 1, paras 1 and 2, and Art 4, para 1, of Law no 40 of 2004 insofar as they did not permit resort to medically assisted reproduction (MAR) techniques on part of fertile couples who are carriers of inheritable genetic diseases that are classified as serious.

Finally, in Judgment no 229 of 2015, the Court held the unfoundedness of a question concerning the constitutionality of Art 14, paras 1 and 6, of the same Law, which imposed a criminal prohibition on the destruction of embryos, including those affected by a genetic disease.

The prohibition on experimentation with embryos enshrined in Art 13 of Law no 40 of 2004 was challenged in parallel before the Strasbourg Court, which decided the case (*Parrillo v Italy*) with the Grand Chamber’s Judgment of 27 August 2015. The Judgment stated that Art 8 European Convention on Human Rights (ECHR) had not been violated, on the grounds that the right invoked by the applicant to donate the embryos (produced from her gametes) for the purposes of scientific research was not covered by that provision, as ‘it does not concern a particularly important aspect of the ap-

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plicant’s existence and identity.’

3. The question before the Constitutional Court addressed highly sensitive issues and required balancing conflicting principles, such as – for instance – the implementation of scientific research that can save human lives, on the one hand, and the protection of human dignity by preventing the use and manipulation of human embryos, on the other.

The Court was confronted with what was defined as ‘a tragic choice’: respecting the principle of life (which embraces the embryo, albeit affected by disease) or the requirements of scientific research – a choice that has created deep divisions on ethical and scientific levels, and for which significantly uniform solutions have not been found, not even within European legislation. Accordingly, the Court recognized that the reconciliation between opposing interests that may be perceived within the contested provisions pertains to the sphere of legislation within which the legislator, acting as the interpreter of the general will, is required to strike a balance. Such balance should be achieved between the conflicting fundamental values applicable, taking into account the views and calls for action that it considers to be most deeply entrenched at any given moment in time within the social conscience.

Thus, the choice made by the contested legislation is one of such considerable discretion – due to the axiological issues surrounding it – that it is not amenable for review by the Constitutional Court.

Furthermore, a different weighing of the conflicting values, involving a greater openness to the requirements of society at large as associated with the prospects of scientific research, could not in any case be introduced into the legislative framework through an expansive ruling by the Court (as was requested by the referring court), given that such a ruling would not have been mandatorily required.

In fact, the striking of any other balance between the conflicting values, which the constitutional review seeks to achieve by replacing the balance enshrined in the legislation under review, could not fail to consider (and to engage with) a range of multiple intermediate options, which would also inevitably be reserved to the legislator.

Indeed, it is the legislator that must assess the appropriateness (also on the basis of ‘scientific evidence’ and the extent of endorsement on a supranational level) of, inter alia: whether use may be made, for the purposes of research, only of embryos affected by disease – and which diseases –, or also of those that cannot be discovered through a biopsy; the selection of the specific research objectives and goals capable of justifying the ‘sacrifice’ of the embryo; the possibility, and if so the duration, of a prior period of cryopreservation; whether it is appropriate (after such a period) to discuss the matter subsequently with the couple or with the woman, to confirm the intention to abandon the embryo and donate it for experimentation; and the most suitable precautions to avoid the ‘commercialization’ of residual embryos.

4. The question concerning the constitutionality of Art 13 was thus declared inadmissible.

The full text of the English translation of the Conclusions on points of law is available at www.corteconstituzionale.it/documenti/download/doc/recent_judgments/S84_2016_EN.doc.
Judgment 20 April – 6 May 2016 no 94
(Incidental Review of Constitutionality)

Keywords: Drug Law – Decree-Law – Conversion into Law – New Provisions Lacking Links with the Others – Unconstitutionality.

1. The question raised before the Constitutional Court concerned the alleged violation of Art 77, para 2, of the Constitution by Art 4-quarter of the Decree-Law 30 December 2005 no 272, as converted, with amendments by Art 1, para 1, of the Law 21 February 2006 no 49, which added Art 75-bis to the Presidential Decree 9 October 1990 no 309. The controversial issue was that Art 75-bis introduced a criminal offence for non-compliance with preventive measures against drug users, an offence that was not envisaged in the original text of the decree-law.

2. The main issue concerned the validity of a provision introduced by the Parliament when converting into law a decree-law (a temporary legislative measure adopted by the Government in cases of exceptional necessity and urgency), as required by Art 77, para 2, of the Constitution.

The provisions introduced in the converting law must comply with the principle of homogeneity with respect to the decree-law's existing provisions. The Constitutional Court identified the conditions under which a decree-law can be amended when it is converted into law, emphasizing that the converting law should not have heterogeneous contents or purposes with respect to the converted measure itself. The reason for this assumption lies in the functional interaction between a decree-law, as envisaged by the Government and issued by the President of the Republic, and the converting law, characterized by a specific, rather than an ordinary, process of approval.

In Judgment no 32 of 2014, the Court stated that the existence of a link between the contents of a decree-law and the ensuing converting law should be assessed on a case-by-case, examining their inner coherence, as well as the decree-law's primary purposes. As a result, if the provisions are heterogeneous but share the same policy framework (for example, in the case of an economic crisis, there may be the same necessity and urgency, but also the need for objectively heterogeneous interventions), the homogeneity of the purpose is constitutionally consistent with Art 77, para 2, of the Constitution.

In particular, the Court noted that the purpose of Art 4 of Decree-Law 30 December 2005 no 272, supported by the requirements of necessity and urgency, was to ensure the continuity of recovery programs for certain categories of drug offenders through a procedural rule. On the contrary, the provisions introduced by the converting law (Arts 4-bis and 4-vicies ter) exceed that purpose for two main reasons: (1) they concerned drugs, and not drug users; and (2) they dealt with the terms of the indictments and penalties. This assessment of criminal policy would require a proper parliamentary debate under Art 25 of the Constitution, following the ordinary legislative procedure in accordance with Art 72 of the Constitution and within the constitutional checks and balances governing relations between the Government, Parliament and the President of the Republic in the exercise of legislative power. The two measures therefore showed heterogeneous standards with regard to contents and purposes.

3. The Constitutional Court confirmed
the most recent line of its case law, holding that the challenged Art 4-quarter, as amended upon conversion, was inconsistent 'with the formal content and overall purpose of the original Decree-Law'.

This provision did not even share the same purpose as Art 4, which aimed to prevent the interruption of the program to rescue drug-addicted criminals and thus ensure the continuity of the ongoing therapeutic program, through the introduction of rules related to the execution of sentences. According to the Court, only provisions pursuing that purpose would have satisfied the requirements of necessity and urgency under Art 77, para 2, of the Constitution. Conversely, Art 4-quarter, as introduced by the converting law, establishes new provisions to protect public safety; it has nothing to do with recovery.

4. Because of their lack of homogeneity and of the absence of functional link with the purposes of the Decree-Law, the provisions introduced by the Parliament in the converting law violate Art 77, para 2, of the Constitution.

**Judgment 9 March – 20 May 2016 no 109**

*(Incidental Review of Constitutionality)*

**KEYWORDS:** Drugs and Psychotropic Substances – Cultivation of Cannabis Plants – Purpose of Personal Consumption – Criminal Offence – Unfounded Questions of Constitutionality.

1. The Constitutional Court decided the merits of two orders issued by the Court of Appeal of Brescia, which raised the question of the constitutionality of Art 75 of Presidential Decree 9 October 1990 no 309, on the grounds that – according to the well-established case-law of the Court of Cassation – it does not include, among the courses of conduct subject to mere administrative sanctions, the cultivation of cannabis plants, even if aimed exclusively at the personal use of the drug.

2. The Court illustrated the main policy features concerning drugs and psychotropic substances, characterized by a clear distinction – with significant consequences in terms of the applicable sanctions – between the consumer’s position on the one hand, and the producer’s and the dealer’s positions on the other. Indeed, criminal penalties are only imposed upon the producer and the dealer.

Accordingly, as mere consumption of the substances does not amount to a crime, the legislator differentiated the sanctions regime by refraining from punishing conduct preparatory to consumption, while punishing conduct aiming to market drugs.

The implementation of this two-fold policy produced three different classes of conduct:

– sale and transfer, which were inherently incompatible with the consumption of the substance on part of the agent;
– the ‘neutral’ courses of conduct of production and cultivation (which were compatible with both the purpose of personal use and that of transfer to third parties), which results in the capacity to increase the amount of banned substances in circulation; and
– ‘neutral’ conduct (compatible with both the purpose of personal use and that
of transfer to third parties) that has no impact on the total amount of drugs in circulation, such as mere possession.

Unlike the first two classes of conduct, which are subject to harsher penalties, for the third class the law provides either administrative sanctions or penalties, depending on whether the conduct is aimed at personal use. Initially limited to purchase and possession, the third class was later extended to include the import, export and receipt of drugs for any reason. Therefore, if aimed at personal consumption, also the import and export of drugs are subject to the administrative sanctions regime, and not to a criminal penalty.

3. On the basis of the abovementioned legal framework, the Court declared the questions raised to be unfounded, and in particular the alleged unreasonable unequal treatment – in accordance with Art 3 of the Constitution – given to the person who cultivates the drug, according to whether he or she does so for personal consumption or, rather, holds the product of his own cultivation for consumption.

It is reasonable that the prior course of conduct consisting in cultivation, which is a criminal offence, be absorbed by the subsequent possession for personal use, which is a mere administrative offence. Therefore, no compelling grounds could be found for the disparity in treatment between the holder of the drug ‘harvested’ for the purpose of personal consumption and the cultivator ‘in progress’, as they are both subject to a criminal penalty for their respective courses of conduct.

The Court then analyzed the reasons why cultivation is a crime *tout court*, regardless of the aim pursued. Although cultivation is a neutral act, being logically compatible with the purpose of personal use (*inter alia*), neutrality cannot conceal the fact that the conduct is in any case capable of increasing the amount of drugs in existence and in circulation, thus indirectly facilitating its spread. Precisely this is the peculiarity that distinguishes mere possession from cultivation, endowing the latter with greater dangerousness, irrespective of whether the purpose was personal consumption.

4. With regard to the complaint concerning the principle of offensiveness of the conduct, the Constitutional Court confirmed that this is a twofold principle. It is indeed a criminal policy rule that the legislator should observe (offensiveness in abstract terms) and, at the same time, a hermeneutic criterion for judges to follow (offensiveness in practice).

The judge must therefore establish whether the individual conduct of unauthorized cultivation, with which the agent is charged in this case, results in the breach of any interests and values protected by the law, as no criminal liability could be established.

5. In Judgment no 148 of 2016, the Court again ruled upon the illegal production, trafficking and possession of drugs, with specific regard to the minimum penalty established by the law. The question of constitutionality was declared inadmissible, due to the fact that the referring court had merely asked for the contested penalty to be declared unconstitutional, without specifying which penalty would be consistent with the Constitution. Consequently, the Court was asked to decide which penalty should be imposed: unless such a decision flows directly on the basis of the Constitution (eg by extending the penalty provided for an equivalent conduct), it falls within the powers reserved to the legislator.
Judgment 5 July – 13 July 2016 no 173*

(Incidental Review of Constitutionality)


1. The questions of constitutionality raised before the Constitutional Court concerned Art 1, paras 483, 486, 487, of Law 27 December 2013 no 147 (the 2014 Finance Act).

The challenged provisions withdrew a solidarity contribution drawn for three years (2014-2016) from all compulsory pensions which exceeded certain pecuniary limits, which were established proportionally to the minimum INPS (Istituto Nazionale di Previdenza Sociale – National Social Security Institute) pensions. The limits were as follows: six per cent for pensions with a gross annual amount at least fourteen times higher than the minimum INPS annual pension; twelve per cent for the part of the total amount exceeding by twenty times the minimum annual INPS pension; and eighteen per cent for the part of the total amount exceeding the minimum annual INPS pension by thirty times. The contributions, acquired by deductions from the payments made by the bodies managing compulsory social security benefits, sought to financially support pension protection provisions in favour of those workers who were out of work but were not yet able to access any pension or other social security benefits (the so-called esodati).

2. Several regional sections of the national Court of Auditors raised questions of constitutionality with reference to Arts 136, 2, 3, 36, 38 and 53 of the Constitution. The Constitutional Court declared all of these questions to be unfounded, because no constitutional provision was infringed.

Art 136 was not breached, because no contrast was found with previous constitutional judgments. The challenged provisions did not affect pensions paid in 2011 and 2012, which were affected by the previous equalizing contribution provided for by Art 18, para 22-bis of Decree-Law 6 July 2011 no 98 (converted into Law 15 July 2011 no 111), which was declared unconstitutional in Judgment no 116 of 2013.

The solidarity contribution is not a tax, because it is not acquired by the State, nor is it assigned to the general taxation system. On the contrary, it is directly withdrawn by INPS as well as by the other social security bodies involved. These entities are freed from paying a sum to the Treasury as withholding agents; nevertheless, they withhold the sums for their own internal management, with specific social security and solidarity aims (and, in this case, in particular for payments to workers who are out of work but are not yet able to access any pension or other social security benefits).

The solidarity contribution is, therefore, a withdrawal pertaining to property obligations imposed by the law, under Art 23 of the Constitution, which breached neither Art 53 nor Art 3.

Therefore, the solidarity contribution is a measure that the legislator is empowered to issue, as long as it complies with the principles of proportionality and reasonableness. In specific case, according to the Court, the need to financially support the esodati should be balanced with the

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principle of legitimate expectation enjoyed by those pensioners subjected to the withdrawal.

Indeed, although these pensions are considered high, the withdrawal must be limited, in any case, and, pursuant to the principle of sustainability, must not exceed a reasonable level under Arts 3, 38 and 36 of the Constitution.

The need to financially support the esodati must fall within the limit of an acceptable sacrifice on part of those who receive so-called ‘golden pensions’ (ie pensions which are considered to be very high).

3. Indeed, the contribution is justified in the context of intergenerational solidarity, which is necessary to face the crisis afflicting the pension system due to a combination of several factors, including the international financial crisis, its impact on the national economy, unemployment and the scarcity of social security benefits. Therefore, it implements the principle of solidarity, which operates within the social security context as a remedy to refine the social security system and to provide social security support even to the weakest individuals.

4. The measure in question passes the test of constitutionality because it is an extraordinary, contingent and temporary provision. Indeed, its operation was limited to the years 2014, 2015 and 2016.

Furthermore, a similar instrument had already been issued by the legislator, by means of Art 37 of Law 23 December 1999 no 488 (the 2000 Finance Act), which provided for a solidarity contribution for three years to be drawn from the social security benefits, issued by the bodies managing the compulsory social security system, exceeding the maximum annual amount stipulated under Art 2, para 18, of Law 8 August 1995 no 335, which the Court itself deemed to not be inconsistent with the Constitution (see Orders no 22 of 2003 and no 160 of 2007).

5. However, the Court’s judgment appears to direct a warning to the legislator. While declaring that the eligibility requirements for the solidarity contribution were met, the Court noted that the legislator had brushed with unconstitutionality. In this vein, the Court noted that the legislator should establish remedies that: (1) operate within the social security system; (2) are impellent due to a serious and contingent crisis; (3) affect the highest pensions; (4) can be considered as sustainable withdrawals; (5) observe the principle of proportionality; and (6) are temporary. Remedies that fail to meet these requirements would seriously risk being declared unconstitutional.

Judgment 15 June – 14 July 2016 no 174* (Incidental Review of Constitutionality)

KEYWORDS: Social Security – Survivor’s Pension – Reduction Based on the Age of the Spouses – Unreasonableness – Unconstitutionality.

1. The Constitutional Court declared the unconstitutionality of Art 18, para 5, of Decree-Law 6 July 2011 no 98, converted into Law 15 July 2011 no 111, which provides for a reduction of a

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spouse’s survivor’s pension when the insured person was older than seventy years of age at the time the wedding was celebrated and the age difference between the spouses exceeded twenty years.

2. The challenged provision, akin to many others seeking to reform the pensions and social security system, introduced a further limit upon pension payments: the selective parameter of the spouses’ respective ages.

The purpose of the provision, which was generically linked to a specific international economic situation, consisted in the legislator’s intent to discourage and prevent fraudulent marriages. Such fraudulent intent would lie in the short duration of the marriage bond, the young age of the surviving spouse, and the lack of children who were minors, disabled or still studying (the existence of whom would disallow the reduction of the pension).

The legislator thus created an absolute presumption – without the possibility to admit any evidence to the contrary – that marriages contracted between a person of over seventy years of age and another person twenty years his or her junior sought to defraud the Treasury, unless the family included children who were minor, disabled or still studying.

3. The Constitutional Court considered that constraints on pension benefits related to natural facts, such as the age of the surviving spouse or the length of the marriage, were unreasonable.

Limitations of social security rights are viable only when they comply with the principles of equality and reasonableness, and cannot affect an individual’s life choices (at any moment of their lives, even in old age), because they are the expression of their fundamental rights.

The challenged provision, as noted by the referring judge and by the Court itself, violated Art 3 of the Constitution, because it linked the amount of the survivor’s pension to future, uncertain and accidental factors, thus breaching the principle of equal treatment between spouses. Moreover, the reduction of benefits resulted in the infringement of the survivor’s right to continuous family support even after the death of the spouse, a right that has been recognized by the Constitutional Court on several occasions (see Judgment no 286 of 1987).

4. The Court also found a breach of Arts 36, para 1, and 38 of the Constitution, since the reduction of pension benefits constituted a violation of workers’ rights to social protection. In particular, the challenged Art 18, para 5, was inconsistent with the principle of proportionality between pension benefits and the nature and the amount of work, and – even more seriously – failed to take into account the need to grant workers and their families a free and dignified existence.

The purpose of survivor’s pensions, granted to surviving spouses, is linked to a specific reason of solidarity: indeed, the survivor’s pension is a symbol of the continuity and strength of marital solidarity, which remains even after the death of the other spouse (see Judgments nos 18 of 1998 and 419 of 1999). This bond cannot be compressed due to extrinsic and naturalistic elements, such as the age of the spouses or the short duration of the marriage between them due to the death of the older spouse.

Although the legislator may have to balance several relevant factors to guarantee a cohesive structure to the social security system, it cannot interfere with individual choices, since individuals have the right to fully and freely develop the affective and emotional spheres of their lives.

5. The Constitutional Court also noted
that the challenged provision was unreasonable because it undermined the purpose of the survivor’s pension and led to the limitation of the rights of the youngest surviving spouse; such a limitation was not justified by a significant necessity, especially taking into account the fact that life expectations are constantly increasing.

**Judgment 15 June – 15 July 2016 no 179**

*(Incidental Review of Constitutionality)*


1. The issue raised before the Constitutional Court concerned the validity of Art 133, para 1, letter a), number 2), and letter f), of Legislative Decree 2 July 2010 no 104 (Code of Administrative Procedure), which delegates legislative power to the Government, providing that any dispute relating to ‘acts and provisions adopted by the public administration in the areas of city planning and development’ fall under the exclusive jurisdiction of the system of administrative justice.

2. Usually, in disputes involving the public administration, civil courts have jurisdiction concerning subjective rights, while it is for administrative courts to adjudicate cases based upon legitimate interests. The difficulty in establishing a clear-cut distinction between subjective rights and legitimate interests led the Legislature to define a number of specific areas of exclusive jurisdiction in which cases concerning subjective rights may fall within the jurisdiction of administrative courts.

The Constitution provides legal grounds for this distinction at Arts 103 and 113. Pursuant to Art 103, ‘(t)he Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid out by law, also of subjective rights’; Art 113 stated that ‘(t)he judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration’.

3. Among the areas of exclusive jurisdiction, Art 133 of Legislative Decree no 104 of 2010 includes disputes over agreements between private parties and the public administration. According to the case law, these agreements (and particularly ‘urban development agreements’) cannot be defined as ‘purely civil agreements’: they can only be used to replace or supplement an administrative measure based on a discretionary power of the public administration, and are therefore supposed to be public in nature.

The public nature of these agreements formed the basis of the exclusive jurisdiction of administrative courts. Indeed, exclusive jurisdiction is connected with the exercise – albeit indirect or mediated – of public power.

4. According to the referring court, the challenged provision was inconsistent with Arts 103 and 113 of the Constitution, which appear to limit access to administrative courts only to actions brought by private parties who suffer harm due to a
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5. The Constitutional Court declared the question of constitutionality to be unfounded, because although the administration is usually the respondent in administrative justice proceedings, it could also be the applicant when it seeks to enforce performance of agreements signed with private entities. Arts 103 and 113 of the Constitution do not imply that only private entities may resort to administrative courts, nor that administrative justice proceedings cannot be initiated by the public administration. This is all the more true if one considers that administrative justice was conceived not only to protect legitimate private interests, but also to care for public interests. The legal system does not allow for ‘split jurisdiction’ cases, namely cases which fall within the jurisdiction of either civil or administrative courts depending on the different nature of the litigants. Therefore, the main factor relates to the objectively public nature of the matters assigned to the administrative courts, and not the private or public nature of the litigant. Any other solution would have unreasonable effects: if, concerning matters of exclusive jurisdiction, appeals either to ordinary courts or to administrative courts were prevented, the public administrative body affected by a breach of an agreement by a private party could react only by means of administrative self-protection, such that judicial protection would depend only on the decision of the private party.

6. The Constitutional Court emphasized the need for coherence within the framework of judicial protection: protecting private parties against acts of the public administration and the establishment of exclusive jurisdiction cannot deprive said administration of judicial protection against private parties’ conducts.


Judgment 15 June – 20 July 2016 no 187

(Incidental Review of Constitutionality)

**KEYWORDS:** Public School Staff – Fixed-Term Contracts – Abuse – Breach of EU Law – Partial Unconstitutionality.

1. The issue raised before the Constitutional Court concerned the abuse of fixed-term contracts in filling school staff positions.

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deemed inconsistent with Art 117, para 1, of the Constitution, which compels the State to comply with international obligations, due to the breach of Clause 5, point 1, of the European Union (EU) Framework Agreement concerning fixed-term jobs, under which the EU Member States must provide appropriate measures to avoid any abuses deriving from the use of a sequence of fixed-term contracts or work relationships.

2. The Court’s judgment was the consequence of the fact that the EU provision lacked direct effect, due to which Italian courts could not disapply inconsistent national legislation, and had no choice but to raise the question of constitutionality. Indeed, the declaration of partial unconstitutionality was the final step of a long process that had also involved the Court of Justice of the European Union (CJEU).

The Constitutional Court itself referred to the CJEU for a preliminary ruling on the interpretation of the abovementioned provision of the EU Framework Agreement.

On 26 November 2014, the CJEU issued judgment in Mascolo and Others, according to which Clause 5, point 1, of the Framework Agreement concerning fixed-term work must be interpreted as precluding national legislation such as that at issue in the main proceedings, which, pending the completion of competitive selection procedures for the recruitment of tenured staff of schools administered by the State, authorizes the renewal of fixed-term employment contracts to fill posts of teachers and administrative, technical and auxiliary staff that are vacant and unfilled without stating a definite period for the completion of those procedures and while excluding any possibility, for those teachers and staff, of obtaining compensation for any damage suffered on account of such a renewal.

The declaration of unconstitutionality of Art 4, para 1, of Law no 124 of 1999, was the direct result of the CJEU’s judgment.

3. By recognizing the autonomy and discretionary powers of Member States in issuing appropriate, powerful and dissuasive sanctions to punish abuses arising from the use of successive fixed-term employment contracts or relationships, the CJEU emphasized the total absence of provisions of this nature in the Italian legal system. Therefore, before the Constitutional Court delivered its judgment, the Italian legislator filled the gap in legal protection noted by the Court of Justice. Indeed, Law 13 July 2015 no 107, in fact, provided for appropriate compensation to be paid for the damages caused to the people suffering said abuse.

The Constitutional Court thus had to take this legal occurrence into account, as it addresses past abuses at least in part.

Pursuant to Art 1, para 131, of Law no 107 of 2015, from 1 January 2016, fixed-term contracts for teaching, educational, administrative, technical and auxiliary personnel at public schools concluded to fill vacancies cannot exceed a duration of thirty-six months. A fund was established to pay the compensation for damages deriving from the renewal of fixed-term contracts that, overall, were of a longer duration than the term now fixed by law.

Moreover, Art 1, para 95, allows the Ministry of Education, Universities and Research to set up an extraordinary plan for the recruitment of permanent teachers for state schools, to fill all the common and support staff positions established by law that are vacant and available after permanent personnel for the same school year have been recruited.
4. The legislator chose to provide different remedies for different categories of workers. For teachers, a stabilizing measure was introduced as the result of an extraordinary plan to 'cover all common and staff-supporting posts established by law'. This plan aimed to guarantee to all fixed-term contract teachers the chance of gaining privileged access to public employment until the end of the list of qualified candidates, thus allowing them to access the abovementioned stabilization by means of an automatic mechanism (the lists) or public competitions. They were therefore granted significant chances to obtain permanent positions, which was indeed one of the alternatives explicitly taken into account by the CJEU.

On the contrary, for administrative, technical and auxiliary personnel (ATA), no extraordinary recruitment plan was provided, which resulted in the application of the ordinary measures governing monetary compensation.

5. Considering the progress made by the legislator, while recognizing, for the past, the Italian State's responsibility for the breach of EU law, as declared by the CJEU, the Constitutional Court considered, for the future, the position of school workers to be protected and the abuses remedied.


Judgment 31 May – 21 July 2016 no 200* (Incidental Review of Constitutionality)


1. The question raised before the Constitutional Court concerned Art 649 of the Code of Criminal Procedure, which forbids trial of a defendant on the same charges on the same facts after his or her legitimate acquittal or conviction (protection against double jeopardy).

The principle applies under two conditions. First, a final judgment is required; second, there must be the identity of parties, such that the defendant who has already been tried must be the person who is now charged with the 'new' crime and facts. To the latter purpose, various criteria have been defined. On one hand, the identity of facts was interpreted to mean the existence of a coincidence between the different constitutive elements of the legal provisions concerned (idem legale), while, on the other, it has also been taken to indicate the possibility to overlap facts on a historical-naturalistic ground (idem factum). The issue has been very controversial.

2. At the European level, the rule against double jeopardy is embodied in Art 4, Protocol VII of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECHR) adopted the historical-naturalistic approach exclusively. In Serguei Zolotukhine v Russia (Judgment of 10 February 2009),

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the Court stated that the trial should focus on those factual circumstances which are inextricably linked to each other in time and space, the existence of which is decisive to secure a conviction or, at least, to institute a criminal proceeding. Indeed, the Court further noted that the consideration of the legal characterization of the offences results in an excessive limitation of the rights of the individual, because, if the Court was satisfied that the person had been prosecuted for offences having a different legal classification, it would risk undermining the protection accorded.

In the case brought before the Constitutional Court, the judge of pre-trial examinations received the request of committal for trial of a defendant charged with the murder of two hundred fifty-eight people, who died from asbestos-related diseases. The same conduct had already been the subject of a trial in relation to intentional disaster (Art 434, para 2, of the Criminal Code) and intentional omission of precautions to prevent accidents at work (Art 437, para 2, of the Criminal Code). The previous proceedings resulted in an acquittal because the time specified in the statute of limitation had elapsed. In the new proceedings, the judge of pre-trial examinations considered the facts to be identical. Indeed, from an historical-naturalistic point of view, the course of conduct in question was the same, because only the legal qualification of the courses of conduct had changed. As a result, the commencement of a new trial appeared to be incompatible with Art 649 of the Code of Criminal Procedure and its interpretation provided by the ECtHR. Nonetheless, the judge of pre-trial examinations raised the question of constitutionality before the Constitutional Court, because the Court of Cassation’s case law clearly established a different doctrine, according to which the rule against double jeopardy did not operate if the same fact was related to different legal provisions and no final judgment had been handed down.

3. The Constitutional Court was first asked to establish whether Art 649 of the Code of Criminal Procedure was consistent with Art 4 of Protocol VII ECHR with regard to the identity of facts criterion. According to the referring judge, the European and the national provisions imposed different tests: the European provision simply required consideration of the action or omission by the agent, whereas the national provision should be interpreted as also taking into account the chain of causation between the course of conduct and the event.

The Constitutional Court adopted an extensive notion of the *idem factum* approach. It specified that there is no reason to consider that the relevant factual circumstances must be limited to the actor’s course of conduct. Indeed, according to the ECtHR’s historic-naturalistic approach, the inquiry should also include the event and the chain of causation, which should always considered in empirical terms. To this extent, there is no conflict between Art 649 of the Code of Criminal Procedure and Art 4 of Protocol VII ECHR.

The choice of the *idem factum* approach led the Constitutional Court to identify a contrast between these articles on a different ground, in particular in relation to situations in which the identity of facts is excluded for one course of conduct that gives rise to several offences (*concours idéal d'infractions*), which may be tried in separate proceedings. As a matter of fact, in the ECtHR’s view, Art 4 of Protocol VII of the ECHR must be interpreted as impeding the holding of a new trial for facts which are essentially
the same as those forming the subject matter of the first trial, notwithstanding their different qualifications from a legal point of view. The rule applies not only to the right to not be punished twice for the same offence, but also to the right to not be prosecuted twice for the same offence. However, the 'living law' (the settled interpretation of a legal provision) adopted by the Italian courts was based on the *idem legale* approach; therefore, the double jeopardy clause was not triggered in case of *concours idéal d'infractions*, because an acquittal or conviction on one charge would not prevent the holding of a new trial on the different offences that had arisen from the same actions. The Constitutional Court considered this approach to be unacceptable. Indeed, for the purposes of double jeopardy, only the identity of facts is relevant, as resulting from the three elements of the course of conduct, the chain of causation and the naturalistic event. As a result, the principle of double jeopardy is not breached whenever a charge concerns another offence arisen from a course of conduct that has already been tried, since other elements must be taken into account.

4. In conclusion, the Constitutional Court declared Art 649 of the Code of Criminal Procedure to be unconstitutional insofar as it provided that a fact should not be deemed to be the same solely on the basis of a different legal qualification (*concours idéal d'infractions*).


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**Judgment 5 July – 23 September 2016 no 213**

*(Incidental Review of Constitutionality)*


1. The question raised by the Court of Livorno before the Constitutional Court concerned Art 33, para 3, of Law 5 February 1992 no 104, concerning the assistance, social integration and rights of disabled persons, as modified by Law 4 November 2010 no 183, insofar as the provisions excluded cohabiting partners from the category of eligible beneficiaries of monthly paid work leave for assisting persons with serious disabilities.

2. The language of Art 33 was the result of a series of reforms.

In its original version, it recognized, on one hand, the right to three days of work leave per month of mothers or fathers assisting seriously disabled underage children and, on the other, the same right of persons (employees) who were living with and, at the same time, assisting relatives or relatives-in-law within the third degree.

Law 8 March 2010 no 53 modified Art 33 in a way that was interpreted by administrative courts as no longer requiring cohabitation, but as introducing the new requirement of continuous and exclusive assistance to be provided to disabled per-
sons by their relatives or relatives-in-law for the latter to be eligible for the leave.

With a further reform, introduced by Law no 183 of 2010, the eligible beneficiaries of the leave were only the spouses and the relatives or relatives-in-law within the second degree of the persons to be assisted (the same benefit was also granted to relatives or relatives-in-law within the third degree only under particular circumstances). Law no 183 also abolished the requirement of continuity and exclusivity; however, it introduced the principle of the ‘sole referent’, according to which only one person assisting another person with serious disabilities would be eligible to benefit from paid work leave.

3. In raising the question before the Constitutional Court, the Court of Livorno challenged the constitutionality of Art 33, para 3, as resulting from the above-mentioned reforms.

In particular, the Court of Livorno challenged the exclusion of cohabiting partners from the category of beneficiaries of the leave, which invoked several provisions of the Constitution: Art 32 (protection of health), Art 2 (protection of the inviolable rights of the person) and Art 3 (principle of equality).

The Constitutional Court preliminarily sought to ascertain the rationale behind the legal framework governing the monthly paid leave. Such rationale was identified as consisting in the need, for the seriously disabled, to be assisted within his/her family. According to the definition provided by Art 3, para 3, of Law no 104 of 1992, a person is to be considered seriously disabled when s/he requires permanent, continuous and comprehensive assistance in his or her individual and relational life. Taking this definition into account, the provisions of Art 33, para 3, align perfectly with the general purposes inspiring Law no 104 of 1992, especially as far as the protection of the health of the disabled is concerned.

This specific purpose corresponds, in the opinion of the Court, to a fundamental right that is protected under Art 32 of the Constitution, which is also to be included among the inviolable rights of the person enshrined in Art 2, both as an individual and as a part of communities in which his or her personality may develop. Indeed, providing assistance to persons and the fulfillment of their need for socialization (in relation to any form of community, whether simple or complex) are fundamental aspects of such development and are adequate means to protect health. The notion of health is to be understood in the broader sense of mental and physical health (Judgments no 158 of 2007 and no 350 of 2003).

Against this backdrop, the exclusion of cohabiting partners from the category of eligible beneficiaries of the leave was found to be unreasonable under Art 3 of the Constitution.

The Court did not refer to Art 3 in its ‘equalizing’ dimension, but insofar as it prohibits logical contradictions. Indeed, although cohabitation cannot be considered equal to marriage from the constitutional perspective, both situations share elements that can be taken into account when it comes to apply the reasonableness test under Art 3 (Judgments nos 8 and 416 of 1996, Order no 121 of 2004).

In the case at hand, the element unifying the two situations could be found, according to the Court, in the need to protect the disabled person’s mental and physical health, which would otherwise be compromised as a result of mere legislative choice and not of the absence of a personal relationship.

4. In view of these considerations, ac-
According to the Court, the contested provision violated Art 3, because it unreasonably excluded the cohabiting partner from the category of eligible beneficiaries of the leave for assisting a seriously disabled person, and Arts 2 and 32, in so far as the mental and physical health of a person with serious disabilities is concerned, both as individual and as part of communities where her/his personality develops.

Judgment 6 July – 3 October 2016 no 214*
(Incidental Review of Constitutionality)


1. The Council of State raised, before the Constitutional Court, questions concerning the constitutionality of Art 5, para 13, of Decree-Law 6 July 2012 no 95, providing for urgent measures to review public spending, converted with amendments into Art 1, para 1, of Law 7 August 2012 no 135.

The contested provision repealed Art 17-bis of Legislative Decree 30 March 2001 no 165, according to which collective bargaining arrangements concerning the ministerial sector should govern the establishment of a separate position of deputy director to include university graduates employed in staff grades C2 and C3 and who had acquired a total of five years of service in those positions, on the basis of guidelines issued by the Ministry for the Civil Service to the Representative Agency for the Public Administrations within Bargaining Procedures (ARAN).

Opposing the Public Administration’s failure to act in issuing such indications, several civil servants affected took the case to the Regional Administrative Court of Lazio, which rendered a judgment that later became final and that ordered the competent bodies within the Public Administration to undertake the actions attributed to its competence.

During the enforcement proceedings, after the nomination of a special commissioner by the Court to address the delay, the legislator intervened and, issuing Art 5, para 13, of Decree-Law 95 of 2012, repealed the provision setting up the deputy director.

In this context, the Council of State was required to rule on the appeal against the judgment declaring that the continuation of the enforcement proceedings was procedurally barred due to the supervening lack of interest deriving from the abolition of the position of deputy director. The Council of State declared that the real objective of the legislator was to prevent the implementation of the judgment favouring the civil servants.

Given this premise, the Council of State questioned the constitutionality of the contested provision, alleging that it breached Arts 3, 24, 97, 101, 102, para 1, 103, para 1, 111, paras 1 and 2, 113 and 117, para 1, of the Constitution, the latter in relation to Art 6 of the European Conven-

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tion for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Art 1 of the Additional Protocol thereto.

2. The Constitutional Court declared unfounded all the questions of constitutionality.

First, the Court found no violation of the right to a fair trial. Art 6 of the ECHR does guarantee the right to the execution of a final judgment; however, the European Court of Human Rights’ (ECtHR) case law admits that non-execution may be justified under certain circumstances, as in the case at hand.

The non-execution of the judgment that obliged the Public Administration to provide indications to ARAN was fully justified by the fact that the law applied to a setting that was not covered by the judgment, and that regulated a matter that fell entirely within the competence of the legislator (public employment).

Besides, contrary to the arguments put forth by the Council of State, the challenged provision originated from the need for a spending review, due to the serious financial crisis that affected Italy at the end of 2011 and at the beginning of 2012; it was not intended to influence the outcome of a specific judicial dispute to be settled.

In light of these findings, the non-execution of the judgment was not considered to infringe the right to a fair trial, guaranteed by Art 6 of ECHR.

3. The Court also denied that the challenged provision violated Art 1 of the Additional Protocol of ECHR, that protects property. The judgement did not at-tribute ownership of a protected good under Art 1 of the Additional Protocol of the ECHR. It did not recognize that the claimants held the qualification of deputy director; rather, it simply confirmed a legally protected expectation that the indications given to ARAN would be adopted.

4. Nor did the Court accept as well-founded a second group of questions, regarding Arts 3, 24, 97, 101 and 113 of the Constitution. These questions challenged the law because it allegedly had the nature of an individual measure, with the purpose of preventing the implementation of the Administrative Court’s final ruling. However, held the Constitutional Court, the challenged provision was not addressed to specific individuals; moreover, with regard to its object, it did not have concrete and special contents, but rather provided for an abstract rule under which deputy directors are no longer to be envisaged in the organization of public employment contracts.

5. Finally, the Court declared unfounded the questions raised referring to Arts 102, para 1, and 103, para 1, of the Constitution, because the rule established by the challenged provision operated exclusively on the level of general and abstract sources, without any effect on the powers reserved to the judicial branch.

6. With this judgment, the Constitutional Court appears to have stated its final word on the issue of the survival of the position of deputy director, declaring its abolition to be lawful. The position thus disappeared before it even saw the light: although it was established in 2002, the establishing provision was never implemented, because the indications required to set up the positions of deputy director were never drafted.

Judgment 5 October – 20 October 2016 no 225*
(Incidental Review of Constitutionality)

KEYWORDS: Same-Sex Partnership – Termination of Partnership – Relationship Between the Minor Child and the Former Partner of the Biological Mother – Alleged Lack of Protection against Interruption – Unfounded Question of Constitutionality.

1. The question raised before the Constitutional Court concerned Art 337-ter, para 2, of the Civil Code, a provision introduced by Art 55 of the Legislative Decree 28 December 2013 no 154 (reform of the existing legislative framework on filiation), aiming to regulate the exercise of parental responsibility after the termination of the marriage between the parents. The rule at issue introduced the right of minor children to ‘maintain significant relationships with ascendants and relatives of each parental branch’, thereby conferring upon the judge the power to adopt measures for the purpose ‘with exclusive concern to the moral and material interest’ of the child.

2. The petitioner, a former same-sex partner of the biological mother of two children, asked the judge to be authorized to associate with the children on a continuous basis, against the will of the biological mother. The children considered the petitioner as a ‘second mother’, due to the relationship of affection and material care that developed during the relationship with the biological mother. The Court of Appeal of Palermo, hearing the appeal filed against the decision of the court of first instance, submitted the question of constitutionality to the Constitutional Court, challenging Art 337-ter of the Civil Code insofar as it does not include the former partner of the biological parent among the beneficiaries of the right ‘to maintain significant relationships’ with the minor child.

3. For the third time in its history, the Constitutional Court scrutinized the reasonableness of the norms applying to the legal regulation of same-sex relationships, after Judgements nos 138 of 2010 and 170 of 2014. In those rulings, the Court had examined the constitutionality of the provisions that, respectively, excluded the right of same-sex couples to marry and that regulated the effect of sex changes on an existing marriage.

4. The case at hand was related to the new concept of ‘social parent’, a notion that does not explicitly appear in case law but was developed by legal scholars to identify an individual who entertains, with the minor child, a significant, parent-like relationship, although said individual does not belong to the parental branch. In this regard, the fact that Art 337-ter of the Civil Code grants the right to ‘maintain significant relationships’ with the minor child only to ‘ascendants and relatives’ and not to the former partner of the child’s biological parent raised questions of constitutionality on two different grounds. On one hand, the provision was challenged due to an alleged infringement of Arts 2, 3, 30 and 31 of the Constitution. According to the referring Court, a literal interpretation of the provision would result in a discrimination between children depending on whether they were born within a heterosexual relationship or a same-sex relationship, because the latter could never fall within the scope of Art 337-ter. This interpretation, in particular, was assumed to violate the principles of reasonableness and equality before the

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law. On the other hand, Art 337-ter of the Civil Code was allegedly inconsistent with Art 117, para 1, of the Constitution, in relation to Art 8 European Convention on Human Rights (ECHR), which protects the right to family life and requires judges, when interpreting the law, to prioritize the best interest of the child. In this regard, it is noteworthy that in the Oliari case (Oliari and Others v Italy – Application nos 18766/11 and 36030/11), the European Court of Human Rights (ECtHR) had decided against Italy for failing to implement the measures established by Art 8 ECHR to ‘secure respect for private or family life even in the sphere of the relations of individuals between themselves’.

The referring Court shared the view that the contested provision of the Civil Code applies only to individuals who were kin of the minor child, thereby requiring the Constitutional Court to deliver an ‘additive declaration of unconstitutionality’, ie a declaration to introduce new content into the legislative provision. Due to said new content, the position of the ‘social parent’ was equalized to that of the ‘relatives’, thus guaranteeing that the relationship of affection and protection would be maintained, in the best interest of the child.

5. The Constitutional Court did not find any ‘legal gap’ to fill in the pertinent legislation. As a matter of fact, the referring Court did not consider that the interruption of ‘significant relationships’ between the minor child and individuals other than relatives is deemed as parent’s conduct which causes ‘prejudice to the child’, thus falling within Art 333 of the Civil Code. This provision, which has a residual scope of application, confers upon judges the power to adopt all ‘appropriate measures’ in relation to the case, on the basis of the appeal filed by the prosecutor (pubblico ministero). According to Art 336 of the Civil Code, the prosecutor may also act upon request by the adult (the non-biological parent) involved in the relationship that was allegedly interrupted. Therefore, in the case at hand, although the former same-sex partner of the biological parent did not have standing to sue, she could obtain protection by means of the appeal filed by the prosecutor. Thanks to this appeal, the interest of the child was properly protected; consequently, the question of constitutionality was declared unfounded.

Judgment 9 November – 25 November 2016 no 251*

(Direct Review of Constitutionality)

Keywords: Public Administration – Legislative Reform Concerning Various Aspects – Impact on Regional Legislative Powers – Cooperation Required between National Government and Regions in the Law-

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Making Process – Partial Unconstitutionality.

1. The question raised before the Constitutional Court by the Veneto Region concerned certain provisions of Law 7 August 2015 no 124, which enabled the Government to adopt legislative decrees to reform the public administration, at national and at regional and local levels, under several aspects: digitalization, the
work of civil servants, public shareholdings and local public services.

2. The Region complained that Law no 124 of 2015 did not provide appropriate avenues through which the Regions could participate in the decision-making process resulting in the adoption of legislative decrees, although they were supposed to regulate matters which fell also under their concurring and residual legislative competence, pursuant to Art 117, paras 3 and 4, of the Constitution.

3. The constitutional framework governing the allocation of legislative competences – Art 117, paras 2, 3, and 4 – empowers the State to regulate exclusively certain matters, which are listed in Art 117, para 2. The matters noted in para 3 of Art 117 are defined as matters of concurring competence: in these cases, it is for the central State to establish the relevant principles, while it is for the Regions to provide for more detailed rules. Finally, according to the residual clause of para 4, all matters that are not listed in paras 2 and 3 fall within the competence of the Regions.

All of the Constitutional Court’s case law on the field concerned cases in which the subject matter of a law did not concern one single matter; such that the legislative competences of the State and of the Regions coexisted. In these cases, the Constitutional Court had applied the so-called ‘doctrine of prevalence’: if a legislative provision may fall within different subject matters – some of which belong to the State’s legislative power and some to the Regions’ concurring or residual competence – and one of these matters prevails over the other, then that prevailing matter applies. On the contrary, when it is not possible to establish any such prevalence, then the cooperation between the central and the regional governments must be ensured, mainly within the framework of the ‘system of the Conferences’ (the State-Region Conference, the State-Municipalities-Local Autonomies Conference and the Unified Conference), in which representatives of the central, regional and local Executives discuss the measures to be adopted and examine the measures proposed by the State.

The instruments drawn up to carry out this collaboration are opinions (paretti) and understandings (intese), which allow the Regions to have a say in the decision-making process and thus shape, to some extent, the State’s legislation. The national Government is required to call either opinions or understandings, depending on how the prospective legislative measure affects regional attributions. The difference between opinions and understandings lies in the potential impact of the Regions’ point of view on the final decision. With opinions, the Regions may express their views on the measure before its adoption, but the Government is not bound by them. On the contrary, with an understanding, the national Government and the Regions must agree on the contents of the measure; if an agreement is not reached, the national Government can nonetheless adopt the measure, but must provide the reasons why the measure is being adopted despite the failure to reach an agreement.

4. Law no 124 of 2015, challenged before the Constitutional Court, was declared partially unconstitutional, because almost all the questions were declared to be well-founded.

The only exception was the question concerning the provisions which delegated the Government the power to adopt a legislative decree on the digitalization of the public administration: in this regard, the Court found a close connection to a
matter listed in Art 117, para 2. As a matter of fact, the provisions aiming to introduce a common digital language for public offices all over the country, as well as to enable communicability between the IT systems of the public administration, were predominantly an expression of the State’s legislative power. Thus, no infringement of the Regions’ competence was found.

All the other provisions, which required the Government to obtain an opinion by Regions on the legislative decrees to be enacted, were found unconstitutional.

Because of their connection to the subjects listed in Art 117, para 3, or falling within the residual clause of para 4, and because of their impact on the Regions’ autonomy, the national legislator should have required the Government to ask for understandings, rather than opinions, which were deemed inadequate to protect the legislative prerogatives of the Regions in those matters.

Furthermore, the contested provisions had required the Government to obtain the opinion in the Unified Conference, a body that represents both Regions and local authorities. The Constitutional Court declared that the right context within which to obtain the understanding would be the State-Region Conference, because all of the decrees – concerning the work of civil servants, public shareholdings, and local economic public services – have no effect on the competences and the interests of local autonomies.

Finally, the Court made some comments on the impact of its declaration of unconstitutionality on the decrees that had already been adopted on the basis of the provisions declared unconstitutional. Since the decrees were not challenged before the Court, they could not be considered as having been declared unconstitutional. In any case, if the decrees are challenged before the Court, their review will also take into account measures adopted by the Government to ensure consistency with the principle of ‘fair cooperation’ between the State and the Regions.

Judgment 18 October – 14 December 2016 no 262*

(Direct Review of Constitutionality)

Keywords: Advance Directives – Organ and Tissue Donation – Regional Laws Regulating the Subjects – Infringement of the State’s Competences and of the Principle of Equality – Unconstitutionality.

1. The President of the Council of Ministers raised questions of the constitutionality of the Regional Laws of Friuli-Venezia Giulia 13 March 2015 no 4 and 10 July 2015 no 16. The former established a regional register of advance directives and regulated the donation of organs and tissue; the latter subsequently amended and supplemented Law no 4 of 2015. The claimant alleged that the impugned laws violated Arts 3 and 117, para 2, letter l), and para 3, Constitution, inasmuch as they fell within the State’s exclusive legislative competence (‘civil law’ and ‘criminal law’) and impinged upon fundamental principles in matters of

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health protection (including informed consent), which are vested in the State. The regional legislation allegedly also infringed the principle of equality, by establishing different rules on the exercise of fundamental rights throughout the national territory.

2. The contested laws were adopted to implement Arts 2, 3, 13 and 32 of the Constitution, Art 9 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, signed in Oviedo on 4 April 1997 (ratified by Italy with Law 28 March 2001 no 145), and Art 3 of the Charter of Fundamental Rights of the European Union.

They established a regional register of advance directives, which was accessible through the regional services card. These directives applied to citizens having their place of residence or domicile in the Region Friuli-Venezia Giulia, although they remained valid if the patient changed his or her residence or domicile, even to a location outside the Region.

The directives also laid down specific provisions concerning the form, content and recipients of the advance directives. Art 2 stipulated that the directives had to be made in writing, on a certain date, and bear a handwritten signature; they could be registered on the regional services card and the personal health card; they had to contain express provision as to whether the patient accepted or refused medical treatments in the event of persistent or irreversible unconsciousness caused by illness or brain damage; the directives could contain a list of people to whom the same could be disclosed; and the patient could appoint ‘fiduciaries’, to be consulted by the Regional Health Service when the directives were to be executed.

Art 4 provided for the validity of the directives over time and the powers to amend or revoke them. The directives did not need to be confirmed once they had been validly created.

While patients could determine which treatments they would or would not undergo, they could also consent to organ or tissue donation upon their death (Art 1, para 3).

The local health authorities were responsible for collecting and retaining such information in a specific database (Art 6), which could be accessed by authorised personnel only.

3. The Court ruled the questions raised with regard to Art 117, para 2, letter l), Constitution, to be founded.

The laws of Friuli-Venezia Giulia were clearly intended to fill the current gaps in the legal framework, thereby anticipating the national Parliament. According to the original wording of Law no 4 of 2015, the regional law was supposed to harmonise, on the regional territory, the rules on advance directives, pending the adoption of national rules on the subject (Art 1, para 4). While a final clause allowed for amendments to be introduced at a later date, depending on the rules enacted by the State, the intent of the Regional lawmaker was obviously to fill the legal gap.

The Court dismissed the Region’s contention that the regional rules did not change the legal system, for they were intended merely to encourage or educate citizens to make a choice in the eventuality that they would fall into a state of unconsciousness due to disease or a sudden injury. Nor did the Court uphold the Region’s argument that the regional legislation provided for a service that was supposed to be ‘merely ancillary to the healthcare services provided by the regional health service ordinarily’, thereby being of an administrative nature and
falling within the Regional competence in health protection.

Indeed, the regional legislation at issue contained a comprehensive and articulated framework for advance directives, reflecting the principle of freedom of medical care (Judgments nos 438 of 2008, 282 of 2002, 185 of 1998, 307 of 1990) and requiring a complex body of rules. It diverted the advance directives from the private to the public domain, by establishing rules on their form and their mention and registration in a public database. While the Region assigned public relevance to the advance directives, it had overstepped into an area – that of ‘civil law’ – which Art 117, para 2, letter I), of the Constitution confers to the State’s exclusive legislative competence.

4. The question raised with regard to Art 3, Constitution, was also ruled to be founded.

**Judgment 8 November – 15 December 2016 no 265**

*(Direct Review of Constitutionality)*


1. The President of the Council of Ministers challenged, before the Constitutional Court, Art 1 of Piedmont’s Regional Law 6 July 2015 no 14, concerning non-scheduled public transportation services.

The provision amended the general regulation on these services (Regional Law 23 February 1995 no 24), and introduced a new Article regarding the ‘Exclusive- ness of transport service’, according to which public transportation by reservation of a vehicle through any means in exchange for payment could only be exercised by licensed taxi drivers or by individuals or companies that offered limousine services.

The President of the Council of Ministers questioned the provision, alleging an infringement of exclusive State legislative competences. As a matter of fact, the provision limited the supply of transport services by introducing a ban on all new economic operators other than taxi and limousine drivers, and thus regulated competition, an area that was exclusively reserved to the State’s legislative compe-
tence (Art 117, para 2, of the Constitution). Moreover, with regard to its contents, the provision breached the principle of competition under European Union (EU) law, which allows limitations upon the free market only if strictly necessary and in ways that are concretely tailored to the pursuit of legitimate public interest goals.

To support its challenge, the applicant highlighted that the new regulation obstructed the development of the market because it prevented new kinds of transportation and public mobility making use of technological innovation from developing. Also taking into account the growth of new services offered by non-professional drivers, such as ‘car sharing’ and ‘Uber’, which were available with the ‘UberPop’ smartphone application, the prohibition established by the challenged provision was disproportionate in light of public social needs and interests, also because their development through technological evolution was thus precluded.

2. The Region claimed – in response – that the real effect of the contested provision was not to limit market development and innovation in any way, but simply to limit and prevent unauthorized drivers from entering the regulated transport market. In this regard, the regional law solely reproduced and emphasized the pre-existing general regulations regarding public transport (national Law 15 January 1992 no 21): to guarantee public security and safety, public transport services were allowed only if they were carried out by licensed drivers and other operators with an ad hoc authorization issued by the State.

Specific reference was made to Uber International Holding and Raiser Operations. These companies had developed a ‘radio-taxi’ service using Global Positioning Systems that made booking through smartphones readily accessible. This system resulted in the growth of a taxi-like service without any official license or authorization and, consequently, in the spread of abusive marketing techniques. The regional provision aimed to prevent violations of the rights and the work of authorized and licensed traditional taxi drivers, and protected the safety of private citizens.

3. The Constitutional Court issued a declaration of unconstitutionality.

Regional Law no 14 of 2015, establishing a rigorous definition of the economic operators who were allowed to offer public transport services, limited the initiative of all other economic operators and prevented them from competing in the market.

Thus, it fell entirely under the broad notion of competition (the regulation of which is reserved to the State according to Art 117, para 2, letter e), of the Constitution), that includes (as the Court itself ruled in Judgment no 125 of 2014) both negative and affirmative legislative measures. The first ones are actions and practices that are capable of damaging the competitive structure of markets, while the second aim to enlarge the market by reducing the obligations connected with the economic activities, such as barriers to entry and obstacles preventing freedom of expression of entrepreneurial ability and competition.

Furthermore, with specific regard to non-scheduled public transportation services (involving buses), the power to protect open competition, and to define a balance between free exercise of economic activities and the public interests that interfere with them, falls under the exclusive legislative competence of the State (Judgment no 30 of 2016).

As clear from ongoing debates in the
European Union, many Member States and other countries throughout the world, new needs for market regulation require satisfactory responses. The Court, therefore, called for a prompt legislative intervention.

In view of those considerations, the Court ruled that, although the new regulation was consistent with the national legislative framework, it prevented market development by banning new operators from offering their transport services. It also constituted an obstacle to the entrance of new and innovative technologies into the market and therefore had a negative impact on free competition among economic operators. This area, according to Art 117, para 2, letter e), of Constitution, is reserved to the State’s competence and cannot be regulated by the Regions.


Judgment 19 October – 16 December 2016 no 275 *
(Incidental Review of Constitutionality)

KEYWORDS: Persons with Disabilities – Right to Education – School Transportation – Allowances Subject to Discretionary Decisions – Unconstitutionality.

1. The issue raised before the Constitutional Court by the Regional Administrative Court of Abruzzo concerned Art 6, para 2-bis, of Regional Law 15 December 1978 no 78, as modified by Art 88, para 4, of Regional Law 26 April 2004 no 15. The challenged provision concerned the possibility of limiting regional financial grants to Provinces intended to cover allowances to implement the right to education. The limitation affected Art 5-bis of Regional Law no 78, according to which the Regional Government guarantees the coverage of half the costs borne by Provinces for school transportation services granted to students with disabilities.

2. The referring Court argued that Art 6, para 2-bis, breached Art 10 of the Constitution (in relation to Art 24 of the Convention on the Rights of Persons with Disabilities ratified and executed by Law 3 March 2009 no 18), which incorporates international law in the national system, and Art 38 of the Constitution, which guarantees the right to education for persons with disabilities. The provision was challenged because it subordinated the funding of school transportation for students with disabilities to decisions merely concerning the allocation of resources, namely to discretionary decisions that had a direct impact on the protection of the right to education for disabled persons. In the Court’s view, the importance of the right is incompatible with a protection depending on mere budget provisions.

Contesting this conclusion, the Abruzzo Region claimed that the right to education of disabled persons must be balanced with the requirement of budgetary equilibrium expressed in Art 81 of the Constitution.

3. The issue before the Constitutional Court concerned the need to balance two
conflicting principles: the fundamental right to education for persons with disabilities, on the one hand, and the need to ensure budgetary stability, on the other. The Court emphasized that legislative discretion cannot be exercised in such a way as to compromise the essential and irreducible core of a fundamental right, as is the right to education for persons with disabilities (this principle was established in Judgment no 80 of 2010).

According to the Court, the contested provision violated Art 38 of the Constitution, since it unlawfully affected the actual provision of the transportation service to persons with disabilities -- which lies at the core of their fundamental right to education. As a matter of fact, by subordinating the allocation of resources to decisions taken when drawing up the annual budget, the provision made the very transportation funding discretionary and hence uncertain.

The reference to Art 81 of the Constitution was unjustified: the essential core of the right to education for persons with disabilities should not be compromised by budgetary concerns.

In any case, the Court found that allowances concerning school transportation appeared unlikely to affect budgetary equilibrium, as its costs were already covered in previous years. The real issue was not the lack of resources, but their use: in this regard, the Court recently confirmed the principle according to which decisions on resource allocation lie within the scope of judicial review (Judgment no 10 of 2016).

The Constitutional Court also rejected the Region's arguments according to which the possibility to limit financial grants was linked to financial support that could be asked of those beneficiaries who were able to pay for the service, so that the law could allow for a prior consideration for the real need for funding in the school year. These arguments were not persuasive: it was precisely the scant attention to its impact in practice that had negatively affected the law. As a matter of fact, according to available data of the period 2006-2012, the Regional Government had not complied with the obligation to cover half of the costs for school transportation: against this backdrop, the challenged provision, by strengthening the discretion available in decision-making, further undermined the right to education of persons with disabilities.

For all these reasons, the Court declared Art 6, para 2-bis, of the Abruzzo Regional Law no 78 of 1978 unconstitutional.
